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Minnesota v. Mille Lacs Band of Chippewa Indians

Karl Krogseng

As natural resources become scarcer, conflicts often arise between Indian treaty rights and state conservation management policies. The Supreme Court resolved one such conflict in Minnesota v. Mille Lacs Band of Chippewa Indians, where the Court upheld treaty rights to hunt and fish to the extent allowed by a "conservation necessity" standard. This Note argues that federal agencies, not the judiciary, should be more active in enabling cooperative co-management of natural resources by states and Indian governments. Increased federal involvement, while potentially intrusive into Indian and state autonomy, mitigates the need for federal courts to serve as micromanaging "fish masters", and decreases the danger that the courts will create ad hoc conservation policies.

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INTRODUCTION

Minnesota v. Mille Lacs Band of Chippewa Indians\(^1\) reaffirms Indian usufructuary (use of property) treaty rights as opposed to complete state regulation of Indian hunting and fishing on public lands off the reservations. The Supreme Court's decision continues a string of federal cases favoring an Indian-friendly approach to treaty interpretation; however, it also allows states some power to enforce state regulations, if necessary for conservation purposes according to a "conservation necessity" standard.\(^2\) The case is significant because it is indicative of longstanding legal controversy, plaguing Indian relations across the nation, concerning the extent of Indian treaty rights to hunt and fish. It is especially relevant in light of recent treaty disputes in the Northwestern United States and in Wisconsin. Mille Lacs also illustrates how Indian treaty rights interact with state sovereignty rights in resolving the allocation of finite natural resources.

In order to ease the often hostile and ugly conflicts that arise when Indians assert their treaty rights to hunt and fish in the face of state conservation regulations,\(^3\) increased federal regulation of Indian usufructuary treaty rights should serve to diffuse tensions between Indians, non-Indian hunters and fishermen, and state officials beholden to local interests. Increased federal agency authority and visibility could also help

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2. See infra Part I.C.3. (discussing the Mille Lacs Court's application of the "conservation necessity" doctrine).
ensure that conservation goals are met without allowing state regulation of federal treaties in violation of the Constitution's Supremacy Clause. In this way, the federal government could also decrease the amount of litigation and federal court involvement in treaty rights issues by facilitating cooperative co-management agreements between states and tribes, utilizing regulations already promulgated by the Bureau of Indian Affairs. Although some may argue that federal regulation of Indian tribes usurps Indian autonomy and may result in similar conflicts between the federal government and Indian tribes, there is still significant reason to believe that federal regulation is a better alternative to continuous state and judicial interference with Indian treaty rights.

1

CASE BACKGROUND

A. Historical Background

In 1837, the Mille Lacs Band of Chippewa Indians4 and the United States concluded a treaty in which the Mille Lacs Band ceded land to the United States in return for twenty annual payments of both money and goods.5 The Fifth Article of the treaty contained the following clause: "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States."6 This clause granted the Band usufructuary rights for as long as the President allowed them.

President Taylor, exercising the latter part of this clause, issued an Executive Order in 1850 revoking the Band's privileges of hunting, fishing, and gathering wild rice, and requiring the Band's removal from the ceded lands.7 The government intended this Order to encourage the Mille Lacs Band to move from Wisconsin and Michigan to the Band's unceded land in west-central Minnesota.8 Ultimately, however, this effort to remove the Band to new lands was unsuccessful; there is evidence that the

4. The Chippewa Indians are also known as the Ojibwe, Ojibwa, and the Anishinabe.
5. See 1837 Treaty with the Chippewa, 7 Stat. 537.
7. See id. at 178 (citing App. to Pet. for Cert. 565).
8. See id.
removal order was effectively abandoned by the end of the next year.\textsuperscript{9}

In 1855, the Mille Lacs Band and the United States negotiated another treaty, in which several bands of Chippewa agreed to:

\begin{quote}
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] 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.\textsuperscript{10}
\end{quote}

In exchange for the Chippewas' concessions, the 1855 Treaty effectively established the Mille Lacs Lake Reservation as it stands today. This treaty appears to supersede the 1837 Treaty because the language extinguishing Indian property rights was so broad. However, the treaty's language could also be seen as ambiguous, as no specific mention was made of hunting or fishing rights, or of the 1837 Treaty.\textsuperscript{11} As the Court points out, there was also no provision for an exchange of money for the Band's usufructuary rights—a telling point given the 1855 Treaty drafters' sophistication and experience abrogating Indian treaty rights.\textsuperscript{12}

Minnesota entered the Union in 1858 and the state's Enabling Act is silent as to Indian treaty rights.\textsuperscript{13} Thus, there is no record of the status of the Mille Lacs Band's treaty rights at the time Minnesota became a state, nor is there any legislative history pertaining to the Act's effect on those rights.\textsuperscript{14}

Throughout the next century, the poverty-stricken Mille Lacs Band of Chippewa continued to hunt and fish in the Mille Lacs Lake area\textsuperscript{15} despite the encroachment on their lands by white settlers and the federal government.\textsuperscript{16} The Band endured

\begin{itemize}
\item \textsuperscript{9} See id. at 180 (stating that "[federal] efforts to remove the Lake Superior Chippewa to the Mississippi River effectively ended in the summer of 1851") (citations omitted).
\item \textsuperscript{10} Id. at 184 (quoting 10 Stat. 1165-66).
\item \textsuperscript{11} See id.
\item \textsuperscript{12} See id. at 195 (Justice O'Connor notes that U.S. negotiator, Commissioner Manypenny, expressly revoked the fishing rights of another Band of Chippewa in a Treaty negotiated a few months after the 1855 Treaty).
\item \textsuperscript{13} See id. at 185 (citing Act of May 11, 1858, 11 Stat. 285).
\item \textsuperscript{14} See id. at 203.
\end{itemize}
increasing state regulation of its actions throughout the twentieth century, especially as a result of the large tourism industry built up around the sportfishing season in Minnesota.\textsuperscript{17} Despite the Band's repeated claims of treaty rights to hunt and fish, its members were often cited for violating state regulations or arrested by state officials as local courts had no clear definition of Indian treaty rights.\textsuperscript{18} In order to evade state scrutiny, the Band netted fish at night or in the early morning and hunted deer at night using car headlights.\textsuperscript{19}

In 1991 and 1992, the Mille Lacs Band opened two casinos on its reservation.\textsuperscript{20} The casinos have been hugely successful: the former Chief Executive of the Band, Marge Anderson, has said, "Every cent of Indian gaming revenue goes right back into services for tribal people. Two years ago, unemployment for my 2,400 member tribe in Minnesota was 45 percent and is now zero."\textsuperscript{21} In fact, the Band became a leading employer in central Minnesota. Indian gaming, in which the Mille Lacs Band is a major participant, is the seventh-largest industry in Minnesota; it has created over 10,000 jobs directly and 20,000 jobs indirectly.\textsuperscript{22}

Ironically, the recent success of the Mille Lacs Band's casino business may have increased the amount of tourism and sport fishing in the region, which directly competes with the Band's exercise of its fishing rights.\textsuperscript{23} Moreover, the casino has increased the Band's wealth and power as well as its visibility, which has caused resentment among local non-Indian resort owners and fishing guides. On the other side of the coin, this new wealth may have allowed the Band to pursue this case to its conclusion.

In the past few decades, there has been a movement among Chippewa Bands and Indian tribes across the nation to assert their treaty rights through symbolic protests and in litigation

\textsuperscript{17} See BUFFALOHEAD, supra note 15, at 102.
\textsuperscript{18} See id. at 90.
\textsuperscript{19} See id. at 89-90.
\textsuperscript{20} See The Mille Lacs Band of Ojibwe, supra note 16.
\textsuperscript{22} See id.; Kathryn R.L. Rand & Steven A. Light, Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity, 4 VA. J. SOC. POLY & L. 381, 403 (1997).
\textsuperscript{23} See Larry Oakes, A Lake Cherished by Many Lies at the Heart of Treaty Case, MINNEAPOLIS STAR TRIB., December 2, 1998, at 1B.
before federal courts. The Mille Lacs Band joined the
movement, bringing the issue of the exercise of its usufructuary
rights to the courts for validation and enforcement, even as the
Band continued to exercise its fishing rights.

B. Procedural History

In the late 1980s, the Mille Lacs Band attempted to resolve
issues surrounding state regulation of its fishing rights with the
Minnesota Department of Natural Resources (DNR). These issues
included the amount of fish that its members harvested in the
Mille Lacs Lake area, as well as the Band’s use of spears and
nets during the spawning season. When negotiations failed in
1990, the Band and its members filed suit in federal district
court against the state of Minnesota, the Minnesota DNR, and
various state officers seeking to prevent the enforcement of state
regulations that impaired the Band members’ ability to exercise
their treaty rights. The Band sought a declaratory judgment
stating that they retained usufructuary rights under the 1837
Treaty and an injunction preventing interference with those
rights. In order to stave off litigation, the two parties agreed to a
compromise that, among other things, created an exclusive tribal
fishing zone in Lake Mille Lacs. However, this agreement
required the approval of the Minnesota legislature, and the bill
containing the settlement was defeated twice in the legislature.
Subsequently, the United States intervened on the side of the
tribe, seeking to protect the Indians’ federal treaty rights under
its federal trust obligation. Several counties and private

24. See infra Part II.A. – II.B. (regarding the Leech Lake and Great Lakes Bands of Chippewa) & Part I.C.3 for cases involving treaties in other parts of the nation. Seventh Circuit litigation involving Wisconsin’s Lac Oreilles Band of Chippewa is especially notable in that it involved the same 1837 Treaty as that in Mille Lacs, and because the Band’s assertion of their rights resulted in great racial tension between the Band, a very hostile Governor Tommy Thompson, other state officials, and Wisconsin non-Indian sport fisherman. See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341, 344-45 (7th Cir. 1983); RONALD N. SATZ, CHIPPEWA TREATY RIGHTS: THE RESERVED RIGHTS OF WISCONSIN’S CHIPPEWA INDIANS IN HISTORICAL PERSPECTIVE 101-24 (1991).
25. See Mille Lacs, 526 U.S. at 185.
26. See id.
28. See id. at 199-200.
29. See Mille Lacs, 526 U.S. at 185.
landowners intervened on the side of the state,\textsuperscript{30} attempting to protect non-Indian sportfishing and the area's tourism industry.

The district court split the case into two parts. In the first phase of the case, the district court, ruling against the state on the three main issues presented, held that the Mille Lacs Band retained its usufructuary rights as guaranteed by the 1837 Treaty.\textsuperscript{31} First, it found that the 1850 Executive Order was unlawful because the President had not been granted authority by Congress to remove the Band.\textsuperscript{32} Second, the district court looked to the historical record to determine that the 1855 Treaty was not intended to abrogate the rights guaranteed by the 1837 Treaty.\textsuperscript{33} Finally, the court rejected the defendants' argument that the usufructuary rights were extinguished upon Minnesota's admission to the Union in 1858.\textsuperscript{34}

In 1996 and 1997, the district court resolved the second phase of the case, which concerned resource allocation and regulation issues. This decision resulted in an agreement between the parties to implement a conservation code and a management plan to regulate hunting, fishing, and gathering.\textsuperscript{35} The conservation code provides for the issuance of hunting and fishing permits to Mille Lacs Band members, requires band members to present band-member identification cards upon the request of enforcement officials, and allows regulation enforcement by both the Minnesota DNR and the Band's conservation commissioner and tribal courts.\textsuperscript{36}

Also in 1997, the Court of Appeals for the Eighth Circuit affirmed the district court's rulings on all counts.\textsuperscript{37} Thereafter, the Supreme Court granted certiorari to the state of Minnesota, which appealed the Court of Appeals' decision on the three main issues decided in the first half of the case.\textsuperscript{38}

\textsuperscript{30} See id.
\textsuperscript{32} See id. at 823-26.
\textsuperscript{33} See id. at 830-35.
\textsuperscript{34} See Mille Lacs, 526 U.S. at 186 (citing Mille Lacs Band of Chippewa v. Minnesota, No. 3-94-1226 (D. Minn. Mar. 29, 1996) (the state asserted this defense for the first time in 1996)).
\textsuperscript{35} See id. at 187 (citing 952 F. Supp. 1362, 1366 (D. Minn. 1997)).
\textsuperscript{37} See Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 934 (8th Cir. 1997).
\textsuperscript{38} See Mille Lacs, 526 U.S. at 188, cert. granted 524 U.S. 915 (1998).
C. The Supreme Court's Decision

In a five-to-four decision, the Court decided the three issues central to the case in favor of the Mille Lacs Band of Chippewa. Justice O'Connor, joined by Justices Stevens, Souter, Breyer, and Ginsburg, delivered the opinion of the Court. Chief Justice Rehnquist filed a dissenting opinion, joined by Justices Scalia, Kennedy, and Thomas. The Court held that: (1) the 1850 Executive Order removing the Mille Lacs Band from its ceded lands did not terminate its usufructuary rights under the 1837 Treaty; (2) the Band did not relinquish its usufructuary rights under the 1855 Treaty; and (3) the Band did not lose its usufructuary rights when Minnesota entered the Union in 1858.

In approaching the third issue, the Court considered questions of state sovereignty over its natural resources and how Indian treaty rights interact with state rights to determine the conservation of natural resources. The Court found that the treaty rights still stood, but held they must accommodate state interests in conservation. Thus, by recognizing a "conservation necessity" standard, the Court allowed the state of Minnesota some power over the Mille Lacs Band's federally supported usufructuary rights.

Nevertheless, as the dissenting opinion pointed out, recent precedent may require a more simplistic and limiting treaty language interpretation, which would preclude consideration of the "conservation necessity" standard. Chief Justice Rehnquist argued that a literal reading of the treaties extinguished the Band's treaty rights, and that the Court distorted the canons of Indian treaty interpretation in order to reach a result favoring treaty rights.

1. President Taylor's Executive Order of 1850 Terminating the Mille Lacs Band of Chippewa's Rights Granted under the 1837 Treaty Was Invalid

The Court held that, because President Taylor did not have Congressional authority, the 1850 Executive Order requiring the
removal of the Band from the ceded lands was unlawful.45 The Court stated that along with "announcing a removal policy, the portion of the order revoking Chippewa usufructuary rights is seen to perform an integral function in this policy."46 Thus, the order was not severable and the entire order was held invalid.47

In analyzing the issue, Justice O'Connor first looked at the precedent on Presidential power. Youngstown Sheet & Tube Co. v. Sawyer48 established that Presidential power must stem from a Congressional act, but here the Removal Act of 1830 only authorized the removal of Indians who had consented.49 The Removal Act allowed the President to convey land to Indian tribes that chose to exchange the lands they lived on for lands west of the Mississippi.50 Because the Mille Lacs Band had not consented to the removal, there was no Congressional authority for the Executive Order.51

The Court also found that Congress did not intend the 1837 Treaty to effectuate the removal of the Chippewa Bands and so found the removal was unauthorized.52 According to the Court's analysis of the legislative intent behind the 1837 Treaty, the Treaty did not mention removal of the Chippewa and so was also not a valid basis for the Presidential exercise of power.53

In the second half of the analysis, Justice O'Connor focused on determining whether the invalid removal order was severable from the order revoking the Mille Lacs Band's usufructuary rights. The Court stated that whether a statute is severable depends on legislative intent.54 First, the Court assumed that the standard governing statutes also applied to Executive Orders and then determined that President Taylor intended the 1850 Removal Order to "stand or fall as a whole."55 Then the Court applied the traditional test for the severability for statutes, as stated in Champlin Refining Co. v. Corporation Commission of Oklahoma: "Unless it is evident that the legislature would not have enacted those provisions which are within its power,

45. See id. at 190-91.
46. Id. at 192.
47. See id. at 191-92.
48. 343 U.S. 579, 585 (1952) (holding the Presidential seizure of the steel industry during the Korean War was invalid because Congress had not authorized it).
49. See Mille Lacs, 526 U.S. at 189.
50. See id. (citing 1830 Removal Act, 4 Stat. 411, 412).
51. See id.
52. See id. at 188-91.
53. See id.
54. See id. at 191 (citing Regan v. Time, Inc., 468 U.S. 641, 653 (1984)).
55. Id.
independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." The Court ultimately determined that the 1850 Executive Order failed to terminate the usufructuary rights because it was not fully operable apart from the invalid removal order.

In contrast, Chief Justice Rehnquist’s dissent cited *Dames & Moore v. Regan*, in which the Court held that treaties can authorize executive actions just as statutes can, to argue that the Removal Order could be interpreted as the President’s valid implementation of the 1837 Treaty. Justice Rehnquist argued that the Executive Order "was issued pursuant to a Treaty ratified by the advice and consent of the Senate, and thus became the supreme law of the land." As such, Rehnquist asserted, the President was acting within his rightful power as delegated by Congress in the 1837 Treaty.

Similarly, since the treaty allowed the termination of hunting and fishing rights at the pleasure of the President, the Rehnquist dissent claimed the Removal Order could be considered necessary to implement that “pleasure.” The dissent argued that the Executive Order was primarily concerned with extinguishing the Band’s hunting and fishing privileges, since it addressed the removal of the Chippewa in only the last five words of the order. Thus, Justice Rehnquist reasoned, the primary intent behind the order was not so much a removal of the Chippewa as it was “a revocation of the privilege to hunt during the President’s pleasure.”

As to the severability of the Executive Order, Justice Rehnquist again applied *Dames & Moore* to propound a deferential standard for Presidential actions: that the action “would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.” Justice Rehnquist questioned the majority’s standard of judicial

56. 286 U.S. 210, 234 (1932).
57. *See Mille Lacs*, 526 U.S. at 192-95.
59. *See Mille Lacs*, 526 U.S. at 211.
60. Id. at 211-12.
61. Id. at 211-14.
62. Id. at 211-17.
63. Id. at 212.
64. Id. at 215 (citing *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637)).
review, contending that the majority inverted and misinterpreted the meaning of the Order.  

2. The 1855 Treaty between the United States and the Mille Lacs Band of Chippewa Did Not Extinguish the Band's Usufructuary Privileges

As the Court noted in its decision, case law regarding treaty interpretation includes three canons of interpretation unique to Indian treaties. These canons are sympathetic rules of construction that look at the intentions of the parties and the historical record surrounding the negotiation and signing of the treaty, ultimately requiring that treaty ambiguities be interpreted in favor of Indians. These canons arose in response to the problems inherent in many Indian treaty negotiations, including the unequal bargaining power of the Indians and language and cultural barriers between the parties.

The first canon of Indian treaty interpretation is that a court must look at the history surrounding the treaty in order to interpret it. The Court found that the 1855 Treaty did not specifically mention hunting and fishing rights and so did not abrogate the Mille Lacs Band's usufructuary rights. Likewise, the Court determined that the historical record showed the intent of the treaty was to transfer land, not to terminate usufructuary rights.

The second canon is that the treaty must be interpreted as the Indians signing it would have understood it. Stating that courts must "interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them," the Court found that the treaty negotiations showed the Band

65. See id.
68. See Mille Lacs, 526 U.S. at 198.
69. For example, the majority noted that both federal and Indian leaders discussed the Treaty in terms solely related to the federal government's desire for land. Justice O'Connor found it unlikely that the Mille Lacs Band would have failed to discuss their usufructuary rights in the negotiations if they considered them in jeopardy. See id.
71. Mille Lacs, 526 U.S. at 196.
understood the treaty to involve the buying and selling of land, rather than the extinguishing of their usufructuary rights.72

The final canon is that the treaty language should be interpreted liberally, in favor of Indians, as they were usually the less sophisticated bargainers in treaty negotiations.73 As hunting, fishing, and gathering were not expressly mentioned in the 1855 Treaty, the Court reasoned that neither the Indians nor the federal government intended those rights to be extinguished.74 The Court thus decided that the Band's hunting and fishing rights remained intact despite apparently contradictory treaty language eradicating "all" property rights held by the Chippewa at that time.75

In his dissent, Chief Justice Rehnquist interpreted the 1855 Treaty literally, concluding its provisions required a relinquishment of "all" rights to the land.76 He also used the legal definition of usufructuary rights (a usufruct is defined as "a real right of limited duration on the property of another")77 to argue that the Treaty language included the relinquishment of all usufructuary rights.78 Finally, Justice Rehnquist reasoned that there was no need to expressly mention the cessation of the usufructuary rights in the Treaty because the United States considered them already terminated by the 1850 Executive Order.79 In its analysis, the dissent appears to have disregarded the historical events surrounding the Order, such as Minnesota's lack of effort to restrict Indian hunting and fishing rights after the 1850 Order,80 and focused only on the literal interpretation of the Treaty and Order.

3. Minnesota's Entrance into the Union Did Not Extinguish the Mille Lacs Band of Chippewa's Usufructuary Rights, so the Court Applied the "Conservation Necessity" Doctrine

Supreme Court case law states that Congress may abrogate Indian treaty rights, but only if it clearly expresses intent to do

72. See id. at 197-200 (citing 1855 Treaty Journal at 304, 309, 297-356); see also discussion, supra note 69.
73. See Mille Lacs, 526 U.S. at 200; Choctaw Nation, 318 U.S. at 432; Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 675-76.
74. See Mille Lacs, 526 U.S. at 199-200.
75. See id. at 184-85; text accompanying supra note 10.
76. See Mille Lacs, 526 U.S. at 217-18.
78. See Mille Lacs, 526 U.S. at 218.
79. See id.
80. See id. at 192-93.
The majority decided that Minnesota's Enabling Act did not extinguish any Indian treaty rights despite language putting the state "on an equal footing with the original States in all respects whatever." Because there was no clearly expressed legislative intent to terminate the Mille Lacs Band's hunting and fishing rights in the state's Enabling Act—in fact, there was no mention of the treaty rights in the Act whatsoever—the Court determined that those rights were not abrogated when Minnesota entered the Union.

With this decision, the Court rejected precedent set in *Ward v. Race Horse*. In *Race Horse*, the Court found that tribal-reserved treaty rights to hunt elk were invalid and terminated when Wyoming became a state because Indian hunting and fishing rights conflicted irreconcilably with state regulation of natural resources. This decision was based on the equal footing doctrine, that "prevents the Federal Government from impairing fundamental attributes of state sovereignty when it admits new States into the Union." The *Race Horse* Court held that earlier federal Indian treaties infringed on state sovereignty, and thus, they were terminated when Wyoming obtained statehood. The *Mille Lacs* decision marks a departure from this reasoning.

Although the *Mille Lacs* Court found that state "authority is shared with the federal government when the federal government exercises one of its enumerated constitutional powers, such as treaty making," the Court also recognized that treaty usufructuary rights do not guarantee Indians "absolute freedom" from state regulation. The Court then reaffirmed the "conservation necessity" standard set forth in the following cases in order to accommodate "both the State's interest in management of its natural resources and the Chippewa's federally guaranteed treaty rights." Thus, the Court also reaffirmed the negotiation process initiated in the lower courts,

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81. See id. at 202-03.
82. Id. at 203 (citing Act of May 11, 1858, 11 Stat. 285 (1858)).
83. 163 U.S. 504 (1896).
84. Id. at 514-16.
85. *Mille Lacs*, 526 U.S. at 203-04 (citing Coyle v. Smith, 221 U.S. 559, 573 (1911)).
86. *Race Horse*, 163 U.S. at 514.
89. *Mille Lacs*, 526 U.S. at 205.
which required both the state and the Band to settle the issue abiding by the "conservation necessity" doctrine.

The Court cited its precedent-setting decision in Puyallup Tribe v. Department of Game of Washington90 that allowed the state of Washington to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.91 The Court noted that the seminal cases, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n92 and Antoine v. Washington,93 also applied this "conservation necessity" standard to balance state and tribal rights.94 Further, Antoine and Puyallup required that the regulation meet an "appropriate standards" requirement.95 This standard was interpreted in Antoine to mean "that the State must demonstrate that its regulation is a reasonable and necessary conservation measure . . . and that its application to the Indians is necessary in the interests of conservation."96

Although not discussed by the Mille Lacs Court, the "conservation necessity" standard often boils down to a "moderate living" standard. Washington State Commercial Passenger Fishing Vessel Ass'n set forth this standard, setting a 50 percent ceiling on Indian catches in common areas, or allowing a catch-up to what would afford the Indians a "moderate living."97 The "moderate living" standard further elaborates the guidelines by which states and tribes must negotiate conservation regulations under the "conservation necessity" doctrine.

Chief Justice Rehnquist's dissent on this issue focused on the precedent set forth in Race Horse, emphasizing that Race Horse found that treaty rights that were "temporary and precarious" do not survive admission of a state to the Union.98 In Race Horse, the treaty granted the right to hunt "so long as game may be found thereon, and so long as peace subsists among the

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91. See Mille Lacs, 526 U.S. at 205.
94. See Mille Lacs, 526 U.S. at 205.
95. Puyallup, 391 U.S. at 398; Antoine, 420 U.S. at 207.
96. Antoine, 420 U.S. at 207.
98. Mille Lacs, 526 U.S. at 219 (quoting Race Horse, 163 U.S. at 515).
whites and the Indians;" the Court found this right to be temporary and precarious. Following this line of reasoning, the dissent found that since the treaty in question made it clear to the Chippewa that their usufructuary rights were subject to the pleasure of the President, they were on notice that such rights might end in the future. The dissent again noted that the very definition of usufructuary rights, as being of limited duration, made it a temporary right.

D. Result of the Supreme Court Decision

Upon the Court's affirmation of the Eighth Circuit's decision, Minnesota and the Mille Lacs Band negotiated the implementation of a Conservation Code, allowing both the Band and the Minnesota DNR to enforce conservation regulations of tribal quotas. In the summer following the Court's decision, non-Indian sport fishermen, as usual, took the vast majority of fish in Mille Lacs Lake. Meanwhile, a small number of Band members harvested fish for commercial, subsistence, and cultural purposes. By mid-July 1999, non-Chippewa anglers had harvested 470,000 pounds of walleye from Mille Lacs Lake, while the Band had harvested only 42,284 pounds of walleye. However, the allocation agreement between the DNR and the Mille Lacs Band fostered by the litigation...

99. Race Horse, 163 U.S. at 507 (quoting 15 Stat. 178 (1868)).
100. See id. 163 U.S. at 515.
101. See Mille Lacs, 526 U.S. at 220.
102. See id. Justice Thomas filed a separate dissent on this issue, stating that "any limitations that the Federal Treaty may impose upon Minnesota's sovereign authority over its natural resources exact serious federalism costs." Id. Thomas expressed doubt that the "conservation necessity" standard applied where the Indians simply reserved a "privilege" to hunt, fish, and gather, when compared to the State's regulatory authority. Id. He also cited New York ex rel. Kennedy v. Becker, 241 U.S. 556, 563-64 (1916), in which the Seneca's "privilege" of fishing and hunting was subject to state regulation, in common with all persons who the state allowed such privileges, to downgrade the Chippewa's "right" as simply a "privilege." Mille Lacs, 526 U.S. at 224.
104. See id.
105. See Susan Hogan-Albach, Fish Have Been Biting on Mille Lacs, But Hard Feelings Remain, MINNEAPOLIS STAR TRIB., July 25, 1999, at 1A. In fact, the DNR estimates that non-Indians had met the Chippewa's maximum amount in the first two days of the walleye season in May 1999, with over 50,000 pounds harvested. See id.
106. See id.
described in this case increases the Band's total yearly take to 100,000 pounds over three years.\textsuperscript{107}

\textbf{II}

\textbf{ANALYSIS}

As wildlife resources grow more scarce, the use of those resources in hunting and fishing requires concerted efforts at regulating and policing for conservation purposes. \textit{Mille Lacs} illustrates the difficult compromise forced upon both state and Indian governments when their varied interests conflict in response to the need to conserve those wildlife resources. Thus, the \textit{Mille Lacs} decision and other precedent involving the interpretation of Indian usufructuary rights, "represent a continual adjustment of the tension between the state's broad regulatory powers and the overriding authority of the federal government to ensure fulfillment of covenants in Indian treaties."\textsuperscript{108} Constitutional law emphasizes the importance of state police power in regulating its resources,\textsuperscript{109} but the law also demands that state power yield to an overriding federal authority in practices such as treaty making or regulating interstate commerce.\textsuperscript{110}

This dichotomy leads to a tripartite of federal, state, and tribal authority; these authorities overlap and conflict, especially in the exercise of usufructuary treaty rights. The "conservation necessity" doctrine is an uneasy and messy compromise between state power and federally-backed Indian treaty rights over increasingly limited natural resources. For instance, this standard legitimates the Indian's different and special rights to hunt and fish under federal treaties. But, those rights are diluted when states are allowed to dictate tribal actions. Additionally, the \textit{Mille Lacs} decision recognizes a state's right to govern its natural resources, but then ties the state's hands by not allowing it to make autonomous decisions regarding the allocation of those resources.

In order to ease this tension and enable the resolution of conflicts between states and tribes over natural resources, the

\begin{footnotes}
\item[107] See id.
\item[109] See, \textit{e.g.}, Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 386-88 (1978) (holding a state may charge a higher elk hunting license fee for out-of-state residents).
\item[110] See, \textit{e.g.}, Toomer v. Witsell, 334 U.S. 385, 402 (1948) (holding that a state cannot set a higher fee for out-of-state shrimpers to protect its shellfish supply).
\end{footnotes}
federal government should play a more active role in protecting Indian treaty rights. Federal agencies should ensure that treaties are properly respected and encourage natural resource management agreements between state and tribal governments. First, the federal government should increase its involvement in such situations because of its trust responsibility towards Native American tribes, and what should be a strong interest in seeing its treaties respected by state governments. Second, the federal government should facilitate cooperative co-management of resources between the state and tribe, which could then decrease litigation and the power of federal courts to create ad hoc natural resources management policy.

Although the courts are necessary to determine if the treaties in fact exist, judicial application of the "conservation necessity" doctrine, as seen in *Mille Lacs*, is perhaps not appropriate in light of "balance of power" concerns. Court orders regarding the "conservation necessity" doctrine veer too close to the province of Congressional policymaking and Executive action. The interests of conservation would be better served by utilizing cooperative models among states, tribes, and government agencies—like the Bureau of Indian Affairs or Department of the Interior—instead of using coercive models that rely upon federal court intervention.

As of yet, despite some flirtation with the idea, Congress and federal agencies have been unwilling to involve themselves in usufructuary treaty rights disputes. As *Mille Lacs* illustrated, the U.S. Attorney may step in once litigation has started, or even bring suit against a state itself on behalf of the tribe asserting a treaty right. But this type of federal involvement is not a particularly proactive or comprehensive approach to solving the problem, especially when there are already federal statutes and Bureau of Indian Affairs regulations allowing increased federal activity. In addition, in at least one instance, the federal government has preempted state power and regulated Indian fishing rights itself.111 Although there are many problems associated with increased federal agency involvement, this solution should be considered as an alternative to acrimonious and costly litigation and subsequent court-enforced negotiation.

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111. See United States v. Michigan, 653 F.2d 277, 278-79 (6th Cir. 1981); discussion infra p. 790.
A. Basis for Federal Power

Under the Supremacy Clause, state regulations must yield when they conflict or interfere with express federal law governing the same issue. For example, the Migratory Bird Treaty Act, a federal treaty with Canada, Mexico, Japan, and Russia prohibiting the taking, killing, or possessing of migratory birds in common to the signing countries, preempts any Tenth Amendment state regulation of its natural resources. Just as federal foreign treaties usurp traditional state power, so should federal Indian treaties. Therefore, treaties guaranteeing Indian usufructuary rights should preempt state laws regarding the exercise of those rights. This principle is illustrated by several federal court decisions involving Indian treaty rights and the "conservation necessity" standard.

The federal government has plenary power to regulate Indian use of natural resources under its constitutional power over tribal affairs. Congress has the right to abrogate or modify treaties; thus, it has superior regulatory power over treaty rights as compared to state or Indian governments. For instance, in United States v. Dion, the Supreme Court found that the Bald Eagle Protection Act abrogated Indian treaty rights when it specifically made provisions for Indians taking eagle feathers, implying Indians no longer have treaty rights to hunt eagles without restraint. The federal intent expressed in the Bald Eagle Protection Act preempts not only Indian interests, but state law as well, demonstrating its plenary power. Although the Court in Dion declined to determine whether Congress intended to abrogate the treaty rights in the Endangered Species Act (ESA)

112. See U.S. CONST., art. VI, cl. 2.
114. See Missouri v. Holland, 252 U.S. 416, 433-34 (1920); see also Hughes v. Oklahoma, 441 U.S. 322, 335 (1979) (holding that the Commerce Clause may apply regardless of state sovereignty or ownership over wildlife).
120. See 476 U.S. at 745.
as well, a federal district court has found that the ESA also abrogates Indian hunting treaty rights.

As noted above, the federal government has a special trust responsibility towards Native Americans, a legal and moral duty to protect Indians' property and rights. This duty has been developed by federal treaties, executive agreements, statutes, and court decisions, including that of Cherokee Nation v. Georgia, which first discussed the federal government's special obligation to Indian tribes as "domestic dependent nations." Along with the requirement that the federal government act with good faith towards tribes under its protection, some believe the trust doctrine implies a federal duty to protect Indian natural resources, encourage tribal self-governance, raise Indian standards of living, and improve Indian social well-being. Although this trust relationship has been abused in the past, there is at least a policy of protection in place on the federal level, as opposed to the state level, where the states are simply in competition with tribes for resources.

This trust obligation was met somewhat in Mille Lacs, in that the U.S. Attorney's Office intervened on the side of the Band in order to protect the threatened treaty rights. However, the trust obligation could have been expanded even further and come to mean that federal agencies have a duty to involve themselves in the entire process in order to ensure that states respect treaty rights. This level of federal involvement would include preempting state regulation of usufructuary treaty rights in order to more comprehensively fulfill the trust obligation to protect Indian property rights.

121. See id. at 745-46.
126. See HALL, supra note 123, at 2.
127. See Mille Lacs, 526 U.S. at 185.
128. Actual federal policy towards Indian treaty rights exercised on federal lands is documented in Secretarial Orders issued by the Department of Interior. For instance, the Secretaries of the Interior and Commerce issued Secretarial Order No. 3206, regarding "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" in 1997. See U.S. DEPT OF THE INTERIOR, 1993-1998 FEDERAL INDIAN POLICIES 21-30 (1998). This Order recognized the federal trust responsibility towards Indian tribes, along with the importance of tribal self-governance in managing natural resources and ecosystems. See id. at 23. It very clearly recognizes tribal sovereignty and the need for government-to-
In the past, federal agencies have stepped in to regulate Indian fishing rights facing state opposition. For example, a Sixth Circuit Court held that the Bay Mills Indian Community retained treaty rights, subject to necessary conservation measures, to engage in gill net fishing in the Great Lakes.\textsuperscript{129} Meanwhile, the Secretary of the Interior issued detailed regulations concerning Indian treaty fishing in the Great Lakes—closing or restricting certain areas for Indian fishing, prohibiting the netting of some species of fish, and regulating the mass size of Indian gill nets.\textsuperscript{130} Unfortunately, the Secretary of the Interior allowed the regulations to expire, believing that he and the Bureau of Indian Affairs should defer to states in the regulation of treaty fishing.\textsuperscript{131} As a result, it is unknown whether such a regulation would have been effective, or whether it would have survived legal challenges. The Sixth Circuit, for one, did not approve of the expiration of the regulations, saying:

\begin{quote}

The protection of [treaty] rights is the solemn obligation of the federal government, and no principle of federalism requires the federal government to defer to the states in connection with the protection of those rights. The responsibility of the federal government to protect Indian treaty rights from encroachment by state and local governments is an ancient and well-established responsibility of the national government.\textsuperscript{132}
\end{quote}

Although it would be ideal to allow tribes the autonomy to struggle against the states on their own, in many instances it would be more beneficial and efficient for the federal government to protect Indian treaties from such encroachment by the state.

\begin{thebibliography}{9}
\item \textsuperscript{130} See WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 439 (3rd ed. 1998).
\item \textsuperscript{131} See Michigan, 653 F.2d at 278.
\item \textsuperscript{132} Id. at 278-79.
\end{thebibliography}
B. Cooperative Management and Negotiation

There is a long history of distrust between state and tribal authorities because they often must compete for the same resources and must co-exist, especially in the realm of criminal and civil adjudication. Indians may not have allegiance to the states and thus might not consider states to represent their interests. As such, tribes are often forced to make a Hobson's choice between seeking federal plenary power over tribal affairs or allowing increased interference from the states.\(^3\) When tribes assert their autonomy by dealing directly with the states and forgoing federal assistance, they face a very difficult negotiation process.

Because of the sometimes tense relationship between state and tribal governments, state regulation of Indian treaty rights requires intense cooperation and negotiation between tribes and states. In addition, continuous administration of issues like the amount and manner of fishing is necessary in order to ensure that court-enforced agreements are equitably carried out.\(^3\) This type of ideal cooperation between the parties is often the end result of protracted litigation, and negotiators may subsequently return to the federal courts for clarification or enforcement. As a result, the courts expend much energy and many resources monitoring these agreements after the primary decision. There is also a danger that Indian tribes enter these negotiations with unequal bargaining power.\(^3\) Thus, it is advisable that federal agencies act to provide a check on state actions.\(^3\)

Nevertheless, there is at least one example of the resolution of state-tribe treaty negotiations without protracted federal litigation. In the 1970s, the Leech Lake Band of Chippewa

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133. See Jimenez & Song, supra note 125, at 1641.
136. Granted, the cooperative management model, in which tribes, state agencies, and private entities work together to manage and regulate natural resources has worked fairly well in Washington State, after many court battles brought the two parties to the table. See Satz, supra note 24, at 121. For a discussion of Alaska's comanagement model, see Eric Smith, Some Thoughts on Comanagement, 4 HASTINGS W.-N.W. J. ENVTL. L. & POLY 1 (1997). Smith identifies four types of interrelated management functions (research, regulation, allocation, and enforcement) whose division must be agreed upon by the various parties. See id. at 3-4.
negotiated an agreement with the state of Minnesota without the impetus of comparably extensive litigation. The agreement exempted the tribe from state regulation of hunting, fishing, trapping, or gathering wild rice on the reservation, and the state adopted a licensing program for non-Indians who hunt or fish on the reservation with resulting fees going to the tribe. In exchange, the agreement required that the tribe enact a conservation code and prohibit commercial fishing by its members. This agreement was entered as a consent judgment in federal court and later ratified by the Minnesota legislature.

This novel agreement inspired Congress to consider the Tribal-State Compact Act of 1978 that promoted mutually voidable agreements between states and tribes that would be approved by the Department of Interior. Unfortunately, this Compact was not enacted and the federal government has not yet taken a more proactive role in implementing Indian treaty rights. Although the Mille Lacs Band also attempted negotiations with Minnesota over treaty rights, they failed to reach an accord. Initial federal government involvement could have reduced litigation in this matter.

C. Increased Federal Agency Involvement Decreases Federal Court's Participation

The federal court system has been heavily involved in enforcing treaty agreements similar to the one in Mille Lacs. Washington State's openly defiant refusal to follow U.S. District Court Judge Boldt's decision regarding the implementation of the "conservation necessity" standard in United States v. Washington resulted in hundreds of post-judgment orders.
and eventually resulted in the Supreme Court's decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*. A decision involving Wisconsin's Lac Court Oreilles Band of Chippewa's treaty rights required thirteen further court decisions "to resolve procedural questions, define the scope of the treaty rights, and the scope of state regulation." Likewise, years of litigation surrounding *United States v. Michigan* because of state delays led a district court judge to note, "While not wanting to become a 'perpetual fish master,' this court must continue its role in this dispute, if the need arises."

Although the canons of interpretation are already well established for Indian treaties, federal courts still have a vital role to play in determining whether the treaty rights exist. But since such interpretation is very fact-intensive and must be done on a case-by-case basis, the courts have not yet produced a coherent policy regarding conservation management—especially in light of the pragmatic compromise effectuated by the "conservation necessity" standard. The rationale for such over-involvement probably arises from the strong history of violent protests involving this issue and from state reluctance to abide by the courts' decisions.

Court activism regarding Indian treaty rights mirrors the Court's public law activism exhibited in civil rights cases like *Brown v. Board of Education*, where the Court ordered federal courts to enforce its school desegregation order. Just as...
federal courts may have lacked the legitimacy or expertise necessary to run a public school district in *Brown*, they may lack the understanding of the mechanics and philosophy behind conservation management required by the decision in *Mille Lacs*. Although court regulation may appear less political than agency regulation of this sensitive issue, the federal courts' active roles in negotiating settlements (such as in the Washington and Wisconsin management agreements) with various Indian tribes may push their judicial duties too far. When the federal courts must develop a system of ongoing negotiations, monitoring, and treaty enforcement, their actions cease to be adjudicatory and become more legislative. Despite the reluctance to involve federal agencies in Indian affairs, federal administrative agencies are in a better position to effectuate change and propagate environmental policy than are the courts.

**D. Bureau of Indian Affairs Already Has Regulations Pertaining to This Issue**

The federal government would not have to start from scratch to increase agency involvement because the Bureau of Indian Affairs (BIA) has rules in place to effect such a policy. In 1967, the BIA promulgated a regulation specifically regarding Indian off-reservation hunting and fishing under the authority of 25 U.S.C. Sections 2 and 9. Among the regulation's purposes are to: (1) protect Indian treaty rights; (2) promote fishery conservation; (3) determine the restriction of the treaty rights as necessary for conservation of fisheries resources; (4) assist in the orderly administration of Indian Affairs; (5) "encourage consultation and cooperation between the states and Indian tribes in the management and improvement of fisheries resources affected by such treaties;" and (6) assist states in regulating their resources compatibly with the treaty rights. The regulations allow the Secretary of the Interior to govern the exercise of treaty rights upon the request of an Indian tribe, a state governor, or his or her own initiative. The regulations also provide for the issuance of identification cards by the Commissioner of Indian

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Fliss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979); Charles Lawrence, "One More River to Cross": Recognizing the Real Injury in *Brown*: A Prerequisite to Shaping New Remedies, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 48 (Derrick Bell, ed. 1980).

150. Id. § 249.1(a)(1)-(6) (emphasis added).
151. See id. § 249.2(a), (b).
Affairs to Indians who are entitled to exercise treaty rights, as well as to allow for the identification of Indian fishing gear and equipment.\textsuperscript{152}

Another advantage to the Bureau of Indian Affairs' regulations is that they allow tribal court jurisdiction over violations,\textsuperscript{153} encouraging tribal self-governance. Thus, the regulations specifically allow tribal authority over its members' exercise of a communal right off the reservation, a power generally not recognized unless by consent judgment entered by a court.\textsuperscript{154} Although the tribe would gain enforcement power under these regulations, it is true that such an authority would simply be handed to the tribe, instead of negotiated for and won on its own. The downside is that this policy may actually diminish tribal autonomy because federal assignation of tribal authority may be construed as merely federal paternalism.

\textbf{E. Arguments Against Increased Federal Involvement}

As discussed above, when the federal government steps into the fray, its interference may lessen tribal autonomy and seem paternalistic. Requiring more instead of less federal involvement would surely seem to be a step backwards for many who view the federal government as a fickle and untrustworthy advocate for Indian affairs. Since current federal Indian policy emphasizes tribal autonomy, there may be a good policy argument for allowing Indian tribes to deal one-on-one with state agencies in order to promote such autonomy.\textsuperscript{155} Tribal self-governance may be most effectively encouraged when the tribe deals with a state as an equal, instead of as the ward of the federal government. However, even if wealthy tribes like the Mille Lacs Band are able to stand on their own against states, less wealthy tribes face the possibility of unequal bargaining power in their negotiations with state governments. If they had control over the negotiations, as the federal courts do today, federal agencies would at least be better able to control a state's self-interested dealings with tribes less powerful than the state.

One of the greatest hurdles to increased federal agency

\textsuperscript{152} See id. §§ 249.3(a), 249.4.
\textsuperscript{153} See id. § 249.6.
\textsuperscript{154} See \textit{AMERICAN INDIAN LAW DESKBOOK}, supra note 115, at 272.
\textsuperscript{155} One commentator has noted that "benevolence and paternalism weaken the Mille Lacs Band's autonomy and negotiating strength." Nyquist, supra note 135, at 547 (arguing that negotiations between the state and tribe are disrupted by the federal trust responsibility).
involvement is the feared disturbance of well-recognized state police power over natural resources. But, as discussed earlier, the federal government has supreme power in enforcing its treaties, including those that involve natural resources.\textsuperscript{156} In theory, Indian treaties carry the same weight as those made with foreign governments, so the states should have no grounds to contest the provisions of valid, court-upheld Indian treaties. The growth of environmental law, built upon federal regulations, also shows that federal interference with the states' environmental concerns is increasingly common and accepted.\textsuperscript{157}

It is also questionable whether involving the federal government in conservation agreements is the best solution for conserving natural resources. First, too many agencies may be involved, thus inhibiting the communication and cooperation necessary for conservation efforts. Second, federal bureaucracy may decrease efficiency in regulating resources. Third, federal agencies like the Bureau of Indian Affairs or the Environmental Protection Agency are already overworked and may not be able to shoulder the additional burden. So, there is an argument that federal involvement in this arena is a misuse of federal resources when state and tribes are able to muddle along and foot the bill instead. However, this argument is weakened by the fact that federal agencies are already firmly entrenched in many tribal-state issues involving federal policies for natural resources management, Indian gambling, and so on.

CONCLUSION

The \textit{Mille Lacs} decision is very specific to the treaty involved; Indian treaty interpretation must be decided on a case-by-case basis, taking into account the particular wording of the treaty as well as the historical circumstances. Whether or not its liberal interpretation of the 1837 and 1855 Treaties stretched the principles of Indian treaty interpretation too far, the Court reached a good result. A ruling in favor of the state of Minnesota could have jeopardized many treaty rights previously settled in precedent-setting cases like \textit{Puyallup} and \textit{Washington State Commercial Passenger Fishing Vessels}. In \textit{Mille Lacs}, the Court allowed the Band to pursue legitimate treaty rights while still

\textsuperscript{156} See discussion supra p. 788. The Migratory Bird Treaty with Canada is one example of the federal government's primacy in determining natural resource management in connection with treaties. 16 U.S.C. § 703 (1994).

allowing Minnesota to protect not only its natural resources but also a very crucial tourism industry.

Nevertheless, the expensive and acrimonious litigation process required to bring the parties to this point could possibly have been avoided if a federal system had already been in place to facilitate the implementation of federal Indian treaty rights. While this Note does not advocate the construction of completely new federal structures designed to regulate conservation in the states, it does point out the need for a more active federal presence in the resolution of these disputes. The federal government should take this opportunity to think more strategically and holistically in addressing the protection of Indian treaty rights and the relationship of such rights to the states. The federal government should intercede not only to protect treaties it signed a century and a half ago, but also to ensure that natural resources are allocated fairly among the states' Indian and non-Indian residents.