

## **Next Steps in 1855 Treaty rights expansion effort**

### **Tribal activists seek citations for another Mille Lacs-style lawsuit**

Brainerd      September 1, 2015      Tribal activists from the White Earth and Fond du Lac Bands last Thursday tried using the illegal harvesting of wild rice to assert off-reservation harvest rights. They claim such rights were preserved for Native peoples in the 1855 Treaty between the United States and the Chippewa.

It is a reprise of a 2010 effort by tribal members to trigger a court battle, via illegal gill netting, that could affirm heretofore "undiscovered" or "undeveloped" treaty rights. That effort died after no charges were brought.

The DNR initially tried to de-escalate the situation by allowing permits for "educational purposes." The permits were intended to honor Chief Hole-in-the-Day's memory and bring attention to clean water issues. That effort was to be followed by normal law enforcement.

On Friday tribal members launched a second day of illegal wild rice harvest. After getting no response from the DNR, some tribal members set gill nets in Gull Lake to catch walleye, thinking it would be more provocative than harvesting wild rice.

It was. Tribal members from both the White Earth and Fond du Lac Bands were cited by the DNR for taking fish by an illegal method. Then two more Indians from the Mille Lacs Band were each to be cited by the DNR for harvesting wild rice without a license, but the most the DNR could do was to write them up and send reports to Crow Wing County Attorney Donald Ryan, who gets to decide if he wants to press charges. In the past, tribal members have been cited for gathering wild rice, or fishing out of season or without a permit off-reservation. But county attorneys have never prosecuted these cases

Some Band members are saying they would like to have expanded treaty harvest rights without a drawn-out lawsuit. The narrative coming from these tribal activists is all about truth and motherhood, including the right to "God-given gifts of food," whether it's the fish, wild rice or "clear, clean drinking water." Added to that are preserving aspects of "Native culture" and "the solitude or the greatness of the great outdoors."

Other tribal activists are anxious to get charged with violations that could be contested, and open the door to another Mille Lacs-style lawsuit. These activists' claim their off-reservation hunting, fishing and gathering rights actually spring from the 1999 U.S. Supreme Court decision establishing those rights on Mille Lacs.

But the State and the DNR are not buying it. The state's position is that Bands covered by the 1855 Treaty have no hunting, fishing and gathering rights off reservation in the 1855 ceded territory. They appear not to be backing away from the threat of a test case. At the same time, they acknowledge it would be very costly and the outcome a toss-up.

An 1855 Treaty lawsuit would be even more decisive than the one over the Mille Lacs 1837 Treaty case.

### **Property Rights**

That's because behind the public demonstrations is a much larger concept, that of "usufructuary property rights." This treaty rights expansion effort springs from attorney Peter Erlinder's analysis of treaties going back to 1795. As he puts it, these treaties, "are likely to be sources of as yet unrecognized Anishinabe usufructuary property rights in the 21st Century." [State of Minnesota v. Mille Lacs Band of Chippewa Indians, Ten Years On](#)

Protection of these usufructuary property rights will require "environmental protection to maintain the long-term value" of such rights. According to Erlinder, this "will have land-use management implications far beyond wildlife harvest" In fact, he says, it "promises a broadened role for tribal governments in land use decisions that might impact the harvest of wild game, fishing or gathering."

That's why Arthur LaRose, chairman of the "1855 Treaty Authority," an informal ad hoc advocacy group without any ties to state or federal governments, is being much more forthright. He says his group's concerns go beyond ricing, fishing and hunting. "If the group can establish off-reservation rights in those areas, it can more forcefully assert management or regulatory rights on larger environmental issues such as the burying of oil pipelines or the relaxation of mining-related sulfate standards for wild rice."

Besides pipelines and mining, "environmental issues" could easily include water usage policies, agriculture, sanitation, as well as protected flora and fauna.

### **No basis for these claims**

Before getting caught up in the activists' narrative, Minnesotans should consider the plain language of the 1855 Treaty. The 1855 Treaty did say, right at the beginning, "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, ... (description.) "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.

"... entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature..."

The Supreme Court's ruling in the Mille Lacs 1837 Treaty case concluded the Chippewa did not give up their 1837 rights under the 1855 treaty. But the 1855 treaty doesn't specifically mention hunting, fishing and gathering as retained rights.

### **Timeline making the case for NOT FABRICATING new 1855 Treaty rights**

**1855** Several Chippewa Bands including the Mille Lacs Band negotiate the treaty of 1855. In this treaty the Chippewa agree to relinquish "all right, title and interest in and to" all lands outside their reservations. This language included any special hunting and fishing privileges.

**1858** Minnesota enters the Union. The State begins to enact laws including fish and game regulations.

**1896** U.S Supreme Court rules in Ward v. Racehorse that when a State enters the Union, preexisting treaty rights are subject to state law.

**1924** All American Indians granted citizenship.

**1938** President Franklin Roosevelt affirms Taylor's 1850 Presidential Order in a letter to the Chippewa.

**1946** Congress creates a tribunal, the Indian Claims Commission (ICC), to hear and resolve all types of Indian claims, including treaty rights claims by Indians against the United States.

The Indian Claims Commission Act (ICCA) was designed to correct any mistakes made by the U.S. in any treaties and agreements with the tribes. The ICCA is unusual in that Congress gave the Commission authority to also hear claims that were moral in nature. Therefore, tribes could bring cases claiming that the federal government had coerced them into signing treaties, or misrepresented agreements, or acted in other ways that could be seen as violating fair and honorable dealings that were not recognized by any existing laws. [50 years past the deadline: Why are Indian tribes still suing over ancient treaties?](#)

Also important was Congress' understanding that no one should be allowed to litigate a claim forever. In return for the elimination of any statute of limitations on claims filed under the Act, tribes understood that the ICCA would provide complete, final closure to their complaints.

**1965** ICC awards the Chippewa, including the Mille Lacs Band, \$3.93 million for insufficient payment under the 1855 Treaty. As with all ICC cases, the Chippewa, by accepting payment, were forever barred from future claims under the 1855 Treaty.

**1973** ICC awards the Chippewa, Including the Mille Lacs Band, \$9.02 million for claims under the 1837 treaty, including claims for lost hunting and fishing rights. The ICC payments were based on the maximum value of the land, which was the timber, and acquired "recognized title," the most complete form of ownership.

**1980** U.S. District Court rules in a Red Lake case that clear language like that in the 1855 Treaty extinguishes all off reservation hunting and fishing claims. This ruling is later upheld by the 8th Circuit Court of Appeals.

**1985** U.S. Supreme Court rules in a Klamath Indian case in Oregon, that similar language to that in the 1855 Treaty as well as ICC payments, extinguish any hunting and fishing rights.

### **Time to act**

Minnesotans have the opportunity to become informed at the beginning of this unwarranted attempt to expand treaty rights--and especially the creation of "tribal property rights" never imagined, mentioned, and far beyond anything authorized by treaties!

If ignored, expanded treaty rights would open the Brainerd lakes and Gull Lake area, and most of northern Minnesota, to hunting and gathering outside state law. That

would just be in addition to asserting management or regulatory rights "related" to environmental issues over the entire 1855 Treat area.

Stay involved. Monitor the process. Let your legislators know you want them involved and showing leadership in ensuring equal protection of the law for all Minnesotans.

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