Minnesota v. Mille Lacs: Gateway to Tribal/State Resource Management

Mark J. Gonzalez
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GATEWAY TO TRIBAL/STATE RESOURCE MANAGEMENT

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MINNESOTA V. MILLE LACS:
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RESOURCE MANAGEMENT

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INTRODUCTION

Minnesota v. Mille Lacs Band of Chippewa Indians\(^1\) is the United States Supreme Court’s most recent decision to focus on the continued existence of tribal off-reservation hunting, fishing, and gathering rights (usufructuary rights) as guaranteed by 19th century treaties entered into between the Lake Superior Chippewa and the federal government. This article addresses three issues.

First, a fundamental flaw with the Petitioner’s position is a misconceptualization of the legal theory that governs Indian treaty interpretation and Indian sovereignty. The Petitioner proceeds on the mistaken premise that the Respondent’s usufructuary interests are granted privileges rather than reserved rights. This misconceptualization resulted in the Petitioner constructing its arguments upon unsound legal theory. Furthermore, this conceptual problem also exists in the Court’s opinion as illustrated by its failure to address the problem of the theoretic inconsistency between treaty language and the rights and powers of tribes and the federal government.

Second, in finding that the Respondents still possessed usufructuary rights in the territory ceded in the Treaty of 1837 we can conclude, based on the Court’s interpretation and application of federal Indian jurisprudence, that the Respondent, as well as the other signatories to the Treaty of 1855, still possesses usufructuary rights in the 1855 ceded territory despite the lack of explicit treaty language reserving that right.

Third, the Court’s response to the Petitioner’s Equal Footing argument supports the conclusion that the tribes have a shared interest with the state in wildlife and natural resource regulation. No longer are tribes in the passive position of merely being not subject to state hunting and fishing regulations. Rather they are in an equal, “shared” position with the state in actively developing wildlife and fisheries policy in the ceded territories where tribes still retain usufructuary rights.

\(^1\) 526 U.S. 172 (1999). At the time of this writing only the Lexus-Nexus version of the case was available. The United States Reporter had not yet published this case. Page references to this case are to Lexus-Nexus pagination. Lexus-Nexus makes the disclaimer that, “pagination of this document is subject to change pending release of the final published version.”
This is not a traditional review of a Supreme Court decision. This is a radical reading of the opinion. I examine this opinion not just as a statement of law but rather as both a vehicle for, and an obstacle to be distinguished, the expanded exercise of tribal sovereignty by tribal governments and communities who are inclined to do so. This is an interpretation and advocacy of a case for the purpose of expanding tribal sovereignty. This is an Indian critique of the decision. This is not a case that will allow tribes to be free from compacting with states for casinos. It will however, allow them to more aggressively and proactively engage in natural resource management for the purpose of pursuing a traditional lifestyle—to hunt, fish, and gather as Indians traditionally have, and as they continued to do even after states came into existence and illegally began enforcing state laws in this area on them. Not only is it the case that Indians now can engage freely, subject to tribal regulation, in traditional activities, we also have a seat at the policy table when states decide, for example, how much toxins they will allow into the water and how that affects those Native people who may choose to fish for subsistence rather than recreation as the overwhelming number of non-Indian people do. It is our right to be Indian, to be the original inhabitants and care takers of this continent. It is our right to live a traditional lifestyle if we so choose, a lifestyle that respects the earth and her harmony and which has sustained us for tens of thousands of years. I believe this case can be helpful in the pursuit of such ends.

A THEORETICAL PROBLEM

The first issue is a theoretical problem in treaty drafting and interpretation that not even the Court avoided in its decision. It is a problem that ultimately was the state’s Achilles’ Heel. The problem is literal treaty interpretation. What is at play here are two competing legal theories. The first, the Plain Meaning Doctrine, (which the state advocated) says that we should look at a treaty, the actual written document, as representing the total agreement of the parties. In the absence of ambiguities we must read and interpret treaties as the language on their face suggests. The second, the Canons of Construction, require, among other things, courts to resolve ambiguities in favor of the Indians and to conduct a contextual analysis of the treaty and its negotiations to ferret out the intent of the Indians and what they believed they were negotiating for. As the state of Minnesota discovered, it is the literal interpretation of treaty language that is problematic. Two of Minnesota’s challenges to the tribes’ assertions that they still possessed usufructuary rights were based on an advocacy of a literal reading of treaty language. Minnesota argued the semantics of the treaty document rather than the intent of the parties. This is especially true in the Treaty of 1855 argument. The availability of the treaty journals (which recorded the intent of the parties) raises the issue that the state’s decision to pursue this appeal might be considered frivolous if not bad faith.

In the Court’s review of the state’s argument that the Treaty of 1855 extinguished the Mille Lacs Band’s usufructuary rights in the 1837 ceded territory, we see that the state’s failure on this issue lies in its misinterpretation of the treaty and, as stated by the Court, a fundamental

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misunderstanding of treaty construction. The state’s arguments are so poorly thought out and constructed that the Court is compelled to note that one of the state’s arguments evidences, “a fundamental misunderstanding of the basic principles of treaty construction.” The state relies on a Plain Meaning Doctrine argument to advance its position that the tribe, by reason of the literal language of the Treaty of 1855, relinquished its usufructuary rights in the 1837 ceded territory. Reliance on this theory regarding a treaty that was negotiated with a people whose first language was not English and did not yet know how to read and write was doomed to failure. A cursive review of the Canons of Construction could have foretold the future of that argument. Indeed, treaties will be interpreted as they were understood by the Indians. As the Court points out, relying on the treaty journal, it was never the intent of the Indians to discuss usufructuary rights regarding any area of land in the 1855 treaty negotiations and, even more damning to the state’s case, it was never the intent of the federal government to negotiate for anything more than land with the Indians. Previously retained, or currently held, usufructuary rights were never part of treaty negotiations.

This problem of focusing on literal treaty language is not confined to the state. Rather, we see it as a systemic problem that even the Court fails to avoid. The problem is that the verbatim language of the treaty does not reflect the corpus of the agreement. The written document does not reflect the agreement that was the meeting of the minds. This is not a rare event. Often, final versions of treaties ratified by the Senate either omitted or added provisions that Indians had not agreed to. Such is the case with the Treaty of 1855 where the literal language would have one reasonably conclude that the tribes alienated the previously retained usufructuary rights they held in the 1837 ceded territory. Yet, that was not the case.

Perhaps a more glaring example of an inaccurate reliance on literal treaty language is with the verbatim language of the Treaty of 1837 itself. The language of the 1837 treaty paints a picture of a legal relationship that just does not exist. In particular I refer to treaty language that states that the tribes’ “privilege” to exercise usufructuary rights will continue at the “pleasure” of the President. This gives the appearance, if one reads this document literally, that tribal usufructuary rights were a discretionary grant from the President to the Indians. Nothing could be more conceptually wrong. This is an important theoretical distinction to note in addressing the President’s ability under the 1850 Removal and Revocation Order to revoke the tribe’s

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3 Mille Lacs, p. 28.
4 “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.” “[S]aid 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. Treaty of 1855 between the United States and the Mississippi, Lake Winnibigoshish, and Pillager Bands of Chippewa Indians.
5 I refer you to article V of the treaty which states, “The privilege [sic] of hunting, fishing, and gathering wild rice, upon the lands, rivers and the lakes...is guaranteed to the Indians, during the pleasure [sic] of the President.”
6 “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 wild rice, upon the lands, rivers and the lakes included in the territory ceded by treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the treaty with them of October 4th 1842, of hunting on the territory which they ceded by treaty, with the other usual privileges of occupancy until required to remove by the President of the United States, are hereby revoked and all of the said Indians remaining on the lands ceded as aforesaid are required to remove to their unceded lands.”
usufructuary rights. The distinction that the tribe’s usufructuary interests were privileges granted to them by the President rather than rights they possessed preceding and independently of any presidential grant certainly served as the foundation for the state’s challenge to those rights based on the 1850 Order. When applying the Canons of Construction, and looking at the total context in which the treaty was negotiated, we know that the Indians did not agree to a treaty wherein their usufructuary rights (and for all intents and purposes their ability to survive in a physically demanding natural environment) were bargained away to the President’s discretion. It was never their intent to place their ability to feed and clothe themselves in the discretion of someone else. Yet, the literal language of the Treaty of 1837 would have us believe that they agreed to such a stipulation. However, at a more fundamental level, what is more troubling is the Court’s perpetuation of the theoretical misconception that these usufructuary rights were something the President could, theoretically, revoke. Certainly the President and Congress have the political power and ability to revoke treaty rights if they so choose via bills of abrogation or termination. Ultimately the federal government’s possession of plenary power gives them this ability. From a political standpoint, Congress can do as it pleases with tribes with the Court inclined to see such action as a “political question.” See Cherokee Nation v. Georgia, 30 U.S. 1 (1831) and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

However, from a legal standpoint, in terms of federal Indian jurisprudence and property law theory, the revocation of such usufructuary rights is not anything the President could do. The real issue regarding the Court’s treatment of the state’s 1850 Removal and Revocation Order argument is not the constitutionality of the Order or the severability of its removal and revocation clauses. From a theoretical perspective there is no Presidential (or federal for that matter) ability to revoke usufructuary rights since these rights are retained, not granted rights. It is this same theoretical underpinning (that the right, at its onset, is situated with the tribes and has never been explicitly granted away) that invalidates the state’s Treaty of 1855 argument. The issue is not whether the President had the constitutional power or Congressional leave to issue the Order. It is not a severability issue. There is no legal basis for any Presidential power to revoke. How can he revoke a right or privilege that was never his? President Taylor could not theoretically revoke these rights because he had no jurisdiction over them. He was theoretically incapable of revoking usufructuary rights because they were never his, under either a theory of tribal sovereignty (under which the rights would be the property of the tribe since time immemorial) or as an indispensable element of the tribes “right of occupancy” which Chief Justice John Marshall so graciously granted to the tribes in Johnson v. Macintosh, 21 U.S. 543 (1823). Under either theory, the right is situated with the tribes from either time immemorial or from a time superior to the perfecting of title by Europeans and, later, Americans. The point is that the tribe never explicitly alienated those usufructuary rights to anybody. Because these usufructuary rights were never his to grant, they were never his to revoke. Despite the verbatim language of the Treaty of 1837 and the 1850 Removal and Revocation Order usufructuary privileges were not granted to the Indians. Thus, the language “at the pleasure of the president” has no effect. It is, jurisprudentially, a conceptual impossibility. Because usufructuary rights are

The Petitioner, State of Minnesota, argued that the Respondent, Mille Lacs Band, no longer possessed usufructuary rights in the 1837 ceded territory by reason of the above Removal and Revocation Order.

7 In the alternative the state argued that even if the removal part of the order was invalid, from lack of Presidential authority or Congressional delegation of power to the President, that the revocation of usufructuary rights clause was both valid and severable from the defective removal clause of the order.
in fact rights held by the Indians, and not privileges granted to them, and because the Indians have never alienated those rights, to the President or any one else, the President cannot revoke them because he never had possession of them.

The 1837 and 1855 treaties were written in such a way as to lend themselves to an interpretation that describes a factual and legal circumstance that the Indians never intended to negotiate for. And the point? Was it just that the treaties were poorly organized, poorly written, or constructed with heavy doses of legalese? Or, was it an intentional deception, to draft treaties to reflect conditions to which Indians never agreed so as to be able, at a later time, to tell those illiterate people that their predecessors had given away things they really had not? To take from them property rights that had never been negotiated? We only need review *United States v. Winnans*, 198 U.S. 371 (1905), (*Winnans*) to see that in regards to treaties Indians are never the recipients of rights but rather the grantors of them. The use of the term, “privilege” in the Treaty of 1837 is conceptually inaccurate. This illustrates the problem with simply giving a prima facie reading of treaties as the state of Minnesota sought to do. We must dig deeper with treaties given the language and cultural differences between the two original contracting parties. We must conduct a contextual analysis of them when engaged in their interpretation as *Mille Lacs* mandates because as we see from just the treaties of 1837 and 1855 the language of the documents in no way reflects the nature of the agreement.

**The Treaty of 1855**

As did the Court of Appeals, the Supreme Court found that the Mille Lacs Band did not cede away its 1837 ceded territory usufructuary rights in the Treaty of 1855 despite the state’s argument that the Plain Meaning Doctrine required such a holding. The state bases its argument on Treaty of 1855 language which states that the signatory tribes give up “any and all right, title, and interest, of whatsoever nature ... in and to any other lands in the territory of Minnesota or elsewhere.” The state argues that the Plain Meaning Doctrine requires us to read and apply this treaty as the language on its face requires, i.e. that the signatories gave up all interests, including usufructuary rights, in the territory which was about to be ceded and in other lands in Minnesota. The tribe however, correctly, argues that despite the verbatim language of the treaty, the agreement that the Bands entered into with the federal government was one wherein all that was at issue at the bargaining table was the cession of land. Indeed the federal enabling act which authorized this treaty negotiation spoke only of land cessions. There was no Congressional authorization to negotiate for the extinguishment of previously retained usufructuary rights. Thus, *even if alienation of usufructuary rights had been a part of the negotiations with the tribes, such an extinguishment would have been invalid for lack of Congressional authorization.* The

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8 *Mille Lacs*, p. 22, “we look beyond the written words to the larger context that frames the treaty.”

9 Indeed, Minnesota also argued that the Mille Lacs Band’s usufructuary rights were extinguished by the language and operation of the Treaty of 1854. This is an incredibly poor, or bad faith, argument. The Mille Lacs Band was not even a signatory to the Treaty of 1854. How could any of the language of that treaty bind or affect them?

10 Treaty of 1855, Article I. Of all the bands that signed the Treaty of 1837, Mille Lacs is the only one of them that was a signatory to the Treaty of 1855. This raises the unlikely result, in 1855, of the federal government extinguishing the usufructuary rights of only one of seven bands who held such rights in that territory.

11 *Mille Lacs*, p. 23.
Plain Meaning Doctrine is inapplicable here because the treaty language is such a substantial departure from what the Indians believed they were negotiating for and even from what government agents bargained for as can be evidenced by the contents of the treaty journals. In its place the Court refers to the Canons of Construction as the guide to treaty interpretation. Indeed, the Court re-affirms the Canons of Construction as the standard for treaty interpretation. We must go beyond the literal, verbatim terms of the treaty and look at collateral evidence (treaty journals) and “the larger context that frames the treaty.”\textsuperscript{13} “We interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.”\textsuperscript{14} “We have held that Indian treaties are to be interpreted liberally in favor of the Indians...and that any ambiguities are to be resolved in their favor.”\textsuperscript{15} The Court concludes by stating that, “This review of the history and the negotiations of the agreements is central to the interpretation of treaties.”\textsuperscript{16}

\textit{Mille Lacs} reaffirms the Canons of Construction. The Court interpreted and applied the Canons in a very simple and non-technical manner. Because the Canons were applied so simply, their application done in such a straight forward manner, we can regard \textit{Mille Lacs} as not being seen by the Court as having any complex legal issues but rather a case which one can easily resolve by simply applying a fundamental and simple doctrine of federal Indian law: the Canons of Construction. Thus, one message that the Court sends out in this decision is a strong affirmation of treaty based usufructuary rights. If \textit{Mille Lacs} stands for anything it is that the concept of retained usufructuary rights are alive and well on the verge of the 21st century and that their exercise is not in conflict with state sovereignty.

The problem \textit{Mille Lacs} illustrates is that we have a treaty (more specifically, treaty language) which the state relies on that does not reflect the agreement to which the tribes believed they were bound. This is an issue similar to the theoretical problem presented in Part I. So, while on its face, the Treaty of 1855 may appear to be one in which the Mille Lacs Band ceded the usufructuary rights they previously retained in the 1837 territory, the tribe contends that a review of the treaty negotiations makes it clear that the extinguishment of hunting and fishing rights were not issues that were ever negotiated. On this point it would not be unfair to characterize the state’s appeal as being frivolous and in bad faith. Indeed, unless the state was going to ask the Court to expunge the Canons of Construction from federal Indian jurisprudence, they knew the standard for treaty interpretation and that the treaty journals and Congressional record show no evidence that usufructuary rights extinguishment was either authorized by Congress or even the subject of negotiation. The entire focus of the 1855 treaty is the transfer of land, real property rights, not hunting and fishing rights in the 1837 territory and, perhaps more devastatingly for the state’s case, \textit{not usufructuary rights in the 1855 territory}. Indeed, it is beyond a doubt that it was the intent of the Lake Superior Chippewa to reserve a usufructuary easement to the property they ceded to the federal government in 1837, 1842, 1854, and, 1855. Since then, it has never been their contractual or sovereign intention to alienate those reserved rights, contrary to the state of Minnesota’s attempts at sleight of hand, backdoor arguments. The

\textsuperscript{12} Was this a possible case of government deception as discussed above?
\textsuperscript{13} \textit{Mille Lacs}, p.23.
\textsuperscript{14} \textit{Mille Lacs}, p. 23.
\textsuperscript{15} \textit{Mille Lacs}, p. 27.
\textsuperscript{16} \textit{Mille Lacs}, p. 29.
Court held that the Treaty of 1855 was solely about the transfer of land and nothing more. Thus, the argument I make here is that the Chippewa possess hunting and fishing rights in the 1855 ceded territory under the same rationale that they do in the 1837, 1842, and 1854 ceded territories.

What Pandora’s Box did the state open in arguing the Treaty of 1855? The Court’s most recent re-affirmation of the Canons of Construction has more clearly defined the separateness, the severability, and the distinction between land and usufructuary rights. The Court’s opinion, now as a matter of law, defines land and usufructuary rights as two distinct legal commodities and that the simple cession of land without an explicit reservation of usufructuary rights does not also carry with it an implied cession of those rights. There must be an explicit surrender. Since treaty rights are rights and property interests retained by Indians, not grants of rights to them (see Winnans), and given the severability of land and usufructuary rights, unless there is specific treaty language which extinguishes usufructuary rights, those rights were, and still are, retained by the tribe. If the state’s Plain Meaning Doctrine was not a convincing argument to the Court with language as seemingly unambiguous as that contained in Article I of the Treaty of 1855, then indeed tribes should be looking at all the treaties they signed to find whether a review of the historical record reveals any discussion of surrendering usufructuary rights. If the treaty journals reveal no such discussion or negotiations then in fact those rights are still retained by the tribe. It might be time for every tribe that ever signed a treaty with the United States to reread, review, and research those treaties to see whether or not they have retained rights which they have been prevented from exercising by states since the treaty was signed. Specific to Minnesota though we are looking at a new legal and political reality in the 1855 ceded territory in the north central part of the state which at the least will mirror the legal/political environment which emerged in northern Wisconsin as a result of Voigt.\(^\text{17}\) Despite the seventeen years since the Court of Appeals decision in Voigt, tribes have still not developed the institutions of government, or, raised the level of sophistication of those institutions of government, or developed policy initiatives, to fully exercise the sovereignty that the Voigt decision found them to have. Tribes in Minnesota in the 1837, 1854, and now, 1855 ceded territories, bolstered by the Mille Lacs decision, have a historic opportunity to take this legal foundation and undertake much more aggressive assertions of sovereignty than that shown by the Wisconsin tribes.

An explicit reservation of usufructuary rights is unnecessary for their retention. Indeed, one of the points that O’Connor brings out was that in 1855 the United States had the intellectual ability to draft a treaty that explicitly extinguished hunting and fishing rights. When it was in the interest of the United States, or their desire, to extinguish tribal usufructuary rights, the historical record shows that they did so explicitly. “[T]he United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights. In fact, just a few months [six months] after Commissioner Manypenny completed the 1855 treaty, he negotiated a treaty with the Chippewa of Sault Ste. Marie that expressly revoked fishing rights that had been reserved in an earlier treaty.”\(^\text{18}\) The Treaty of 1855 was about neither the abrogating of usufructuary rights in the 1837 ceded territory or the abrogating of usufructuary

\^\text{17} Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d. 341 (1983) 7th Cir., Cert denied.
\^\text{18} Mille Lacs, p. 22. The 1855 Treaty with the Chippewa of Sault Ste. Marie, Article I, explicitly extinguished fishing rights that had been retained in the Treaty of 1820.
rights in the soon to be 1855 ceded territory. The focus of the Treaty of 1855 was for nothing more than access to the timber and mineral resources of the territory and its opening up to white settlement. It was the same governmental intent and policy that had been incorporated into the negotiating of the treaties of 1837, 1842, and 1854. That was the intent of Congress and that was what the Indians understood to be the purpose of the treaty negotiations. The Indians never alienated usufructuary rights in the 1855 ceded territory. What *Mille Lacs* stands for is that, without an explicit surrendering of usufructuary rights along with the ceding of land, the tribe still possesses those hunting and fishing rights. What is needed is not an explicit reservation of rights in order for the tribes to retain usufructuary rights; rather, an explicit alienation of those rights would have to occur before they no longer possess them.

Certainly we can anticipate the contrary argument that what distinguishes previous upholdings of tribally retained usufructuary rights is clear treaty language wherein those rights are explicitly reserved. Thus, because there is no such reservation in the Treaty of 1855, usufructuary rights, along with the land, were ceded to the federal government. However, the presence, and necessity, of explicit retention language in the earlier treaties is an irrelevant distinction. The court in *Voigt* indirectly touched on this issue.

In *Voigt* the court engages in a discussion of the distinction between “Aboriginal Title” and “Treaty Recognized Title.”

Aboriginal title is the right of native people to occupy and use their native area. Indeed this idea is first developed as early as *Johnson v. McIntosh*. This title could be extinguished by the United States at any time without compensating the Indians for the taking. Treaty Recognized Title on the other hand comes about as a result of Congressional recognition, i.e. an explicit recognition by the federal government of the tribe’s right to occupy land. Because of the explicit recognition of the right it would take an explicit extinguishment of the right, with compensation, in order for the tribe to be dispossessed of the right. This rationale also applies to usufructuary rights. Since there was an explicit Congressional recognition of usufructuary rights in the 1837, 1842, and 1854 treaties, those rights could not be extinguished absent an explicit act of Congress. The rights could not be extinguished by implication, as the state of Wisconsin argued in *Voigt*, by reason of the creation of reservations in the Treaty of 1854. Wisconsin’s logic was that since the Treaty of 1854 created reservations in the 1837 and 1842 ceded territories, it was implied that the off-reservation usufructuary rights in those territories were voided. But what about off-reservation usufructuary rights in the 1855 ceded territory where, in the Treaty of 1855, there was no explicit reservation of rights? A state might potentially argue that, in the absence of an explicit reservation of rights, those rights along with the land were ceded to the federal government. A state may even rely on *Voigt* for support of this proposition in that the *Voigt* court cites *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941), (*Santa Fe*) as supporting the proposition that if no explicit mention is made of a tribe retaining any rights on non-reservation lands then those rights are, by implication, extinguished. Such reliance, however, would be misplaced.

*Santa Fe* can be read to support the existence of off-reservation usufructuary rights in the 1855 ceded territory. Implicit in *Santa Fe* is that all off-reservation rights were ceded with the establishment of the reservation because of the factual circumstances of that reservation’s establishment. In *Santa Fe*, the Hualapi Indians petitioned the federal government for a reservation because of the overwhelming number of white settlers that were streaming into their

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19 See *Voigt* generally, pp. 351-354.
The Hualapi wanted to maintain at least a small area from which they would not be driven off. The understanding of the Hualapi in 1883 when the reservation was created was that their off-reservation rights were extinguished. Thus the rule of *Santa Fe* is not that in the absence of an explicit reservation rights are implicitly lost but rather, much like a form of the Canons of Construction, that in the absence of an explicit reservation of rights we must look to the totality of the context and historical circumstances to see whether the off-reservation rights were retained or extinguished. In the creation of the Hualapi’s reservation in 1883 it was clear to them that their rights to all land but the reservation would be extinguished. In viewing the context in which the Treaty of 1855 was negotiated we see that the totality of the circumstances since 1837 was that the federal government’s only concern or interest in the land was for timber and minerals and that the Chippewa had consistently insisted on, and retained, the right to occupy, hunt, fish, and gather on the lands they otherwise ceded. A review of the Treaty of 1855 journals shows that the only intent of the federal government was to acquire title to land. No mention of usufructuary rights were ever made. It was assumed by the tribes in 1855, just as they had in the previous three treaties in this area, that they would remain on the land and continue to hunt and fish. Thus, if we apply *Santa Fe*, the implication was that the tribes would continue to hunt and fish on the land ceded in the Treaty of 1855 despite the fact that there was no explicit reservation. *Santa Fe* supports the continued existence of usufructuary rights in the 1855 ceded territory.

It is well established that treaties are grants of rights from Indians not to them (*Winnans*). Regardless of whether Indians are possessed of usufructuary rights by reason of sovereignty or the right of occupancy, they hold these rights from time immemorial and continue to hold them until extinguished or transferred. We cannot assume that those rights are granted away by implication. “Congressional intent to extinguish Indian title must be plain and unambiguous and will not be lightly implied” *County of Oneida v. Oneida Nation of Indians*, 470 U.S. 226, 245-246 (1985). Rather, much like the law regarding treaty rights abrogation, the intent to do so must be specific (see *United States v. Dion*, 476 U.S. 734 [1986]). Given the Court’s language in *Mille Lacs*, which re-affirms the distinction between land and usufructuary rights, we are barred from making the assumption that because the tribe ceded land that the usufructuary rights were also ceded by implication. Given the Court’s language that illustrates that land and usufructuary rights are distinctive pieces of property and severable from each other, one not being indispensable to the other, there is no requirement that usufructuary rights be explicitly reserved in order to be retained. The reserved rights clauses of the 1837, 1842, and 1854 treaties were not theoretically necessary in order for the tribes to retain those rights. Rather, the correct conceptual approach is that the usufructuary rights must be explicitly alienated in order to not still be within the tribe’s possession. Combine this with an application of the Canons of Construction and we have the proper framework of analysis for deciding whether usufructuary rights are still in existence. O’Connor’s opinion provides the rationale that the rights are retained unless explicitly granted away. The burden is not on the tribe to show retention. The burden is on the state to show alienation. The *Mille Lacs* opinion specifically states, by utilizing the Canons of Construction, that the alienation of hunting and fishing rights was never the subject of the 1855 treaty negotiations. It is for that reason that the Anishinabe signatories to the Treaty of 1855 still retain their usufructuary rights in the 1855 ceded territory, because in that treaty there was no explicit alienation of usufructuary rights.

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20 Consider the court’s views in *Voigt*, p. 352 wherein they hold that occupancy is not necessary for the retention or possession of usufructuary rights.
A NEW TWIST TO THE EQUAL FOOTING DOCTRINE

The state of Minnesota engaged in a great many errors in its appeal to the Court. The state is informed of its having a less than fundamental understanding of the law of treaty interpretation, of misuse of case law, and the use of case law that has essentially been overturned. In the state’s argument that the Equal Footing Doctrine requires the Court to find that tribal usufructuary rights were extinguished when Minnesota entered the union it relies on Ward v. Racehorse. Racehorse however was, in effect, overturned in Winnans. “[T]he Racehorse Court’s reliance on the equal footing doctrine to terminate Indians treaty rights rested on foundations that were rejected by the Court within nine years of that decision.” It is this last mistake, and the issue upon which it focuses, the Equal Footing Doctrine, which may in the long run cause the state more consternation than the simple existence of tribal usufructuary rights in a relatively small part of the state.

The Court, in its decision, informs the state that since its ruling in Antoine v. Washington, 420 U.S. 194 (1975) and Washington v. Washington State Commercial Passenger Fishing Vessel Ass’ n, 443 U.S. 658 (1979), that there is no conflict between state sovereignty and Indian treaty rights. The latter is not, as a matter of law, an encumbrance on the sovereignty of the former. However, in dealing with this issue O’Connor expands, or opens the door for expansion, the rights of tribes to engage in natural resource management. No longer is it only the case that tribes, in the exercise of treaty, based usufructuary rights, are not subject to state regulation except for conservation and public safety matters. Mille Lacs can be read to grant tribes who retain usufructuary rights (by reason of the federal presence that continues to exist as the result of still-viable treaty rights and an ongoing trust responsibility) the right to not only be subject to state regulation but to be policy developers for resources that are shared by both the state and the tribes. The former is merely a passive right while the latter places a tribe in a more proactive, affirmative position. No longer can the state, unilaterally, make natural resource policy decisions for those parts of the state where usufructuary rights were never granted away. With Mille Lacs, one can now make the argument that the tribes sit in a position of equal authority in the promulgation of natural resource policy decisions. They are now active policy initiators.

Certainly tribes, as a result of retained usufructuary interests, have a compensatable property interest in the natural resources, and the ecosystems which support them, in the ceded territories. If indeed the tribes had a right of occupancy in the land, if they had that sort of

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21 Generally, see the Court’s discussion of the state’s Equal Footing Doctrine argument on pages 29-35.
22 “The Equal Footing Doctrine is the constitutional principle that all states are admitted to the union with the same attributes of sovereignty as the original 13 states.” Mille Lacs, p. 30.
23 163 U.S. 504 (1896).
24 Mille Lacs, p. 32.
25 Mille Lacs, p. 31.
26 If, at a minimum, there has been a explicitly recognized treaty right, (See Voigt, p. 352) then that right cannot be taken without compensation. Similarly, compensation, if not injunctive relief, would be due a tribe if the ecosystem which supports the resources that they have a retained interest in are damaged as a result of state action or licensing to private parties.
proprietary interest, then they would also have a proprietary interest in the necessities of life. But where would the tribes get the power to be on an equal footing with the state to manage natural resources in the ceded territories? Justice O’Connor states as follows, “Although states have important interests in regulating wildlife and natural resources within their borders, this authority is shared [emphasis added] with the federal government when the federal government exercises one of its enumerated constitutional powers, such as treaty making.”27 “Shared,” here, means equal ownership or equal rights to. While the regulation of wildlife and natural resources on non-federal land is usually not considered a federal concern, O’Connor nonetheless states that there is a shared authority between the federal and state government in this area when there is a federal presence in a state as a result of it being engaged in a constitutionally prescribed activity (in this case, treaty-making) and, obviously, that activity involves or is affected by natural resource issues. *Mille Lacs* stands for the proposition that the federal government shares, with the state, the authority of natural resource management when such an activity is related to its exercise of a constitutional power or prerogative. In *Mille Lacs* that constitutional power is treaty-making. Another related federal power or prerogative is the federal government’s fulfillment of the trust responsibility to Indian tribes. Thus, in Minnesota, we have a continuing federal presence in the state, specifically in the ceded territories, by reason of the fact that it is maintaining an ongoing trust relationship with Indian tribes and, more relevantly, because those Indian tribes still possess and exercise usufructuary rights in those ceded territories. Thus, the federal government fulfilling its trust responsibility includes its interaction with issues relating to natural resources.

Historically, one of the purposes of the trust responsibility is for the federal government to serve as a buffer between tribes exercising their sovereign functions of self government and state encroachments on tribal sovereignty and jurisdiction. Indeed, “the people of the States where they [Indians] are found are often their deadliest enemies” *United States v. Kagama*, 118 U.S. 375 (1886). Also consider *Worcester v. Georgia*. Some would say not much has changed. In our present case a specific application of the trust responsibility would be to provide that buffer so that tribes can exercise sovereign functions in the area of usufructuary rights exercise in the ceded territories. The fulfillment of the trust responsibility would include facilitating the tribe’s exercise of off-reservation usufructuary rights. Such exercises of sovereignty in the area of usufructuary rights would legitimately include natural resource management. Management of resources in which the Court held the federal government has a “share.” The exercise of those rights is a major sovereign function. So while there may be a continuing federal presence in Minnesota as a result of treaty-making and an ongoing trust responsibility, how is it that the state has to share jurisdiction with the tribes and not the federal government? This shared authority is transferable to the tribes from the federal government because of the trust responsibility. Since the passage of the Indian Self Determination and Education Assistance Act of 1975, the policy of self-determination has been a standard feature of federal Indian policy. Rather than the federal government caretaking the tribes, the policy has been to delegate much of the trust responsibility to the tribes themselves. Because the federal government and the state share the authority to regulate natural resources during the former’s exercise of a constitutional power, (and fulfillment of the trust responsibility is such a power or prerogative), the federal Indian policy of self-determination mandates that the federal “share” of the authority to regulate natural resources be delegated to the tribes because this natural resource regulation is such a core function of tribes in Minnesota who have retained usufructuary rights. Tribes should move to have that “shared”

27 *Mille Lacs*, p. 31.
authority over natural resources delegated to them so that they may more effectively govern themselves. The federal interest can and should be administered by the tribe because the federal interest is based in the trust responsibility and the trust responsibility is as often as possible delegated to the tribes themselves. For the federal government, rather than the tribes, to manage that share would be a return to the paternalistic policies of the past.

In any event, O'Connor’s mandate of the state “sharing” authority with the federal government means that, at a minimum, in the ceded territories where there is still an ongoing federal presence (and an attribute of tribal sovereignty is retained usufructuary rights) that the state is not the sole and singular authority in wildlife and natural resource management. Whether it is the federal government or the tribes with whom the state shares that authority may be debated. However, what is beyond debate is that because of the federal presence, the state will share. State departments of natural resources are no longer the undisputed rulers of resource management in ceded territories where tribal usufructuary right are still in existence.

This decision opens the door for a more active role for Indian tribes with retained usufructuary interests in the area of natural resource regulation and management. We have taken a step beyond the rationales of Passenger Fishing Vessel and Voigt which freed Indians from state regulation in exercising treaty rights. Mille Lacs stands for the proposition that in those ceded territories where tribes have retained usufructuary rights, the tribes are an equal natural resources management partner with the state due to their “shared” interest. Instead of tribal members just not being subject to state regulation, instead of just being in a passive, non-active role, tribes are now entitled to sit at the table with state departments of natural resources as equals, as proactive developers of policy in the ceded territories.

One thing that is almost assured is that the tribes will bring a different cultural, and therefore different management, paradigm to resource management. How will the state respond to joint managing of a fisheries resource with a tribe, or consortium of tribes, whose primary economic concerns regarding that resource is subsistence rather than recreation? How will the state respond to a tribal cultural/moral paradigm as the basis of resource management that would prohibit “catch and release” fishing or the hunting of wolves? There now exists the potential for greater protection of the environment than what is currently being offered by state departments of natural resources who are consistently linked in organizational/cultural relationships with agricultural, logging, mining, paper and other environmentally degrading industries as well as the tourist industry. State departments of natural resources have for years seen these special interests as unchallengingly legitimate and economically indispensable. What challenges will tribes make to the current state prerogative of setting conservation standards? Why should the state be the sole determiner of what constitutes adequate conservation standards? What if the tribes find that state standards are too low to adequately protect the resource so that they may be utilized by tribes? For example, current state conservation standards are low enough so to not allow fish from many lakes and rivers to be used as a food source. The tribal right in the fish is to have them as a food source, not a means of economic development or as part of an infrastructure for a tourism industry. Tribes may bring a wholly different point of view of how we view, interact with, utilize, and manage natural resources. Compromises must now be reached between state and tribal governments in how to manage what truly are shared resources in ceded territories.