

1837 Litigation in Minnesota

By Don Wedll

The 1837 treaty territory extends from Wisconsin into east central Minnesota. It is bordered on the east by the Mississippi River from about Brainerd to St. Cloud. The northern boundary crosses the north end of Mille Lacs Lake and the southern boundary is a little north of Taylor Falls. It encompasses all of the Mille Lacs Reservation that was created in 1855. Over the years, Mille Lacs Band members had had numerous discussions over what treaty rights it retained and what the treaties had done. Though younger Band members had limited information about treaty rights, there was a general understanding that there were rights Band members had through treaty.

One example of this was that George Bedausky had an original copy of Charles Kappler "Indian Affairs: Laws and Treaties". This was published in 1904 and every treaty that dealt with the Mille Lacs Band was marked with a bookmark; this included Executive Orders and Congressional Resolutions. Before Mr. Bedausky passed on, he gave me this copy and which is presently kept in the Mille Lacs Band's archives. Because of a variety of issues, the Band was unable to enforce the provisions of many of its treaty rights. It was stated that Mr. Bedausky's father exercised treaty rights to harvest deer off-reservation and did so without interference of the State of Minnesota enforcement officers. But he was that last person able to exercise these rights without the State of Minnesota asserting its laws over tribal members.

Under the leadership of Arthur Gahbow, who was elected tribal chairperson in 1972, there was a significant effort to secure the Band's rights held by treaty. The initial litigation of Leech Lake on reservation treaty rights which was completed in 1972, caused the Mille Lacs Band to gather information about its treaty rights and seek support in resolving its on-reservation treaty rights. Though the state acknowledged the need to resolve these rights on the White Earth and Mille Lacs Reservations, it was never able to finalize these, the issue either at White Earth or Mille Lacs.

This led to additional conflicts between the State of Minnesota Department of Natural Resources and the Mille Lacs Band of Chippewa. In the spring of 1979, state officers came onto the Reservation trust lands to deal with a shot fired at night on Mille Lacs Lake when state conservation officers tried to take a net set by Band members. They arrested a Band member and convicted him. He served 5 years in prison but another individual at the scene later admitted that he had been the one who had shot the gun.

Another example of this ongoing conflict involved Arthur Gahbow. When he speared a sucker on Mille Lacs Lake and was cited by a state Conservation officer, there was a Band effort to make it a test case. The Conservation officer had taken Art's spear and fish. Later, the State Commissioner of Natural Resources Joe Alexander, had the case dismissed because he felt it was a poor case for the State to litigate. He later had the sucker mounted on a board, cut the head off the spear, and returned it to Arthur Gahbow.

In 1984, the Band, through its Commissioner of Natural Resources, determined that the wild rice at Dean Lake was being harmed by early ricing and as such closed the road access to the lake. This created another conflict and a lawsuit was filed against the Band, but it was dismissed in federal court. It was this type of 'cat and mouse' game that continued at Mille Lacs.

In 1982, Chairman Gahbow directed me to conduct a review of the Band's treaties and make a determination of what treaties would provide the Band members with the most useful implementation of its rights. He also wanted the Minnesota Chippewa Tribe to submit an amicus brief on the off-reservation case that was up on appeal in the State of Wisconsin. This has become known as the *Voigt* Case. The attorneys for the Minnesota Chippewa Tribe felt it was not a good case and could bind the Minnesota tribes by its ruling. When the Appeals Court ruled affirming the rights in Wisconsin, Chairman Gahbow began communicating directly with the Wisconsin Chippewa tribes about this case. In the first meeting of the tribes, after the ruling, which was held in Cable, Wisconsin, Arthur and I attended representing Mille Lacs. He asked the leaders directly if Mille Lacs was to be allowed to be included in the exercise of the rights and then appointed me to represent the Band in these discussions and developments. There were numerous discussions of whether the Mille Lacs Band should intervene in the *Voigt* case or move ahead with another case in Minnesota.

The Band felt that with the position established by the 7th Circuit Court of Appeals that the State of Minnesota would have to resolve the treaty rights issues with Mille Lacs. Because the State of Minnesota was in the 8th Circuit and not the 7th Circuit, it was not bound by the ruling. The State proceeded to inform the Band it would not acknowledge the 1837 treaty rights and that the Band would have to litigate the issue in Minnesota. This raised a legal issue of whether the Band should file to intervene in the *Voigt* case and then litigate in Minnesota or litigate first in Minnesota.

To answer that question, the Band, in 1982, sought a legal firm that would be able to deal with the litigation of its treaty rights. Chairman Gahbow asked staff to find the best legal firm in the country to handle this issue. Based upon a review we determined that it was the law firm of Ziontz, Pirtle, Morriset, Ernstoff and Chestnut (later, Ziontz, Chestnut, Varnell, Berley & Slonim) and we proceeded to contact them. They agreed to look at the cases and provide the Band with a report about the treaties that involved the Band.

The Ziontz law firm had hired a new young attorney Marc Slonim and had him start reviewing the legal and historical information around the treaties that the Mille Lacs Band had been involved with. He submitted a report explaining and developing the legal issues associated with these treaties. The report showed that the 1837 treaty was the best treaty to litigate and would provide the Band with the most useable treaty right.

The biggest issue facing the Band was having sufficient funds to carry out this litigation. The Band had applied to the Bureau of Indian Affairs for litigation funds but was told that the Fond du Lac Band had a stronger case and the Band would have to wait until Fond du Lac completed its case. This was difficult for the Band to understand and required the Band to raise funds independent of the Bureau to proceed with the case. As Commissioner of Natural Resources, part of my job was to secure these funds. Each year at the annual State of the Band Chairman Gahbow would direct me to file the lawsuit. This was very difficult to do when the Band had significant financial problems. Salaries were small and every available dollar was saved to build this fund of an estimated \$500,000.00.

In participation of filing this case, we knew that negotiation would play a significant role in the outcome of this issue. It was also clear that negotiation I was involved with in Wisconsin, that our skills on how well we negotiated would play an

important role. To assist us, we looked for who could provide the best negotiation training. It was determined to contract with Harvard's Kennedy School of Government "Getting to Yes" and it would provide us with the best results.

By August of 1990, we had raised the funds and the Band filed the lawsuit in Federal court. The complaint that started this case was called: *Mille Lacs Band of Chippewa Indians, Arthur Gahbow, Walter Sutton, Carleen Benjamin, Joseph Dunckley versus State of Minnesota, Minnesota Department of Natural Resources and Joseph Alexander Commissioner of Natural Resources*. The complaint stated that these four Band members "engage in hunting, fishing, and gathering activities for ceremonial and subsistence purposes and to provide income to support their families. In violation of the 1837 treaty, the defendants and their agents have cited, prosecuted and fined them for engaging in such activities. They sue on their own behalf and on behalf of other Band members similarly situated," (from the complaint filed in federal district court, see attachment). The case was based on restricting the State of Minnesota from enforcing its laws against Mille Lacs members as they hunted, fished and gather natural resources for subsistence and cultural uses.

Within a couple of days, the State of Minnesota Attorney General's Office and Minnesota Department of Natural Resources called and wanted to talk about settlement. It had been informally discussed that once the Band filed the case there would be an effort to reach a settlement since neither side was sure of victory in court. The Band also had kept the Wisconsin Tribes informed on the filing of the case and there were discussions on how they would deal with this new case. The Wisconsin tribes determined that Mille Lacs should proceed to settle their case, but wanted assurance that it would not affect their rights in Minnesota.

Within two weeks both the Band and the State of Minnesota had established negotiation teams and set a schedule for the negotiations. The Band negotiation team consisted of Marc Slonim, Leonard Sam, and Don Wedll, and the State's negotiation team consisted of Roger Holmes, Gail Llewellyn, Bill Szotkowski, and Steve Matson. An attorney representing Mille Lacs and other counties, Jeff Chaffee, began participating when the counties moved to intervene in the case. The first discussion included the acknowledgement of the right, the areas covered by right, and types of hunting, fishing, and gathering rights to be included. For approximately two years the negotiation continued. The Band had three principles: One; nothing in the settlement would affect the rights of any other tribe, two; acknowledgement of the right, and three; meaningful implementation of the right.

The negotiations continued and, in December 1993, the final unresolved issue was that of the commercial right to use the resources. This was a very difficult issue for the state and a magistrate was assigned to try to resolve it. Elected officials of the Band and officials of the State met at the federal courthouse, and for most of the day negotiations went back and forth over the issue. The final compromise was that the State would give the Band \$8.6 million and transfer certain lands amounting to 10,000 acres to the Band in exchange for the Band's agreement not to commercialize game, fish or deer.

With that issue resolved, the Band and State reached a settlement on the lawsuit. The settlement provided only for resolution of the Mille Lacs Band's Minnesota 1837 treaty rights and did not affect any other Band or Tribe. The Band would have had exclusive use of about 6,000 acres of Mille Lacs Lake for fishing, including gill netting

and spearing. The Band would also have had general hunting and fishing rights throughout the Minnesota 1837 territory, similar to the rights Wisconsin tribes had in Wisconsin, but without the right to sell game fish or deer, and would have received land and money from the State. These and avoiding the risk of going to litigation were the main advantages to a settlement.

There were a number of groups that worried about the agreement. Wisconsin tribes worried that they would be affected and their rights might be limited. Sport groups worried that they would not get as many fish as they had in the past. County governments worried they would be affected in some way. Property owners worried they would not be able to hunt and their property values might go down. Band members worried that they were giving up something. But, at that time, it was a good solution to a complex issue.

Once the settlement was finalized, it was printed and community meetings were held to inform community members what the settlement would do and not do. The State Department of Natural Resources and the Band's Department of Natural Resources attended the meeting and answered questions. Many of these meetings were very confrontational with sport fisherman or hunters expressing their anger.

Like Wisconsin, anti-treaty organizations developed and were fueled in part by leaders in Wisconsin hoping to end treaty rights in the 1837 treaty area. The groups included Save Mille Lacs Lake Association, the Hunting and Angling Club, the Tea Party, PERM (Proper Economic Resource Management) and others. The Hunting and Angling Club divided into PERM and Tea Party. PERM got the former Viking football coach Bud Grant to be a lead person on the issue. PERM had a multiphase approach to the issue. They got members elected to towns and village councils, township boards, lake associations, the state legislature, and county boards of commissioners. They also used tax exempt status to give businesses and individuals the ability to donate and get tax deductions. This gave them funds to support candidates and promote their agenda. All these efforts were directed first to stopping the settlement and then to forcing litigation of the issue.

On the tribal government side, individual tribal members who were against the tribal government or thought that the Band was giving up too much in the agreement, worked to stop the settlement and force litigation. As Commissioner of Natural Resources, I had worked on the settlement which gave the Band different options than a litigation solution. My biggest fear was that Band members would reject the settlement. Should the Band reject the settlement, it would have had an impact on how the judges would have thought about the case. So, it was important to have the Band approve the settlement.

It was determined that the Band would conduct a referendum vote on the settlement. Marge Anderson was now the Chairperson of the Band and she used her political base to get members out to vote and understand the settlement. The Band scheduled the vote for March of 1994. Within the Band, families were split on what to do about the settlement. The Band elders were very concerned that if they agreed to the settlement before the State did that, the State would change the agreement and it would end up a very different deal. As Commissioner of Natural Resources, I promised I would not agree to any change in the agreement if it was passed by the membership. This later became a very difficult promise to keep because of the pressure State Legislators put on me to change something they thought would make in a better settlement. We were able to

prevent changes because of the promise made and because it would have taken a new referendum vote by the Band. It would have been very difficult to pass a change in the settlement. This may have also changed the litigation results.

Band member opposed to the settlement joined the anti-treaty groups to try and stop State approval of the settlement. The Band's elected officials and Band elders testified in the state legislature in support of the settlement but were treated very poorly and some Legislators tried to discredit them. Finally, in April of 1994, the State Senate voted down the settlement although it did pass in the House of Representatives. This ended the settlement and the Band moved ahead to litigate the case in Federal District court. This also provided an opportunity to request the United States Department of Justice to intervene on behalf of the Mille Lacs Band.

The Bureau of Indian Affairs, at different points of time, did provide support for different aspects of the litigation. The process for having the United States intervene on behalf of an Indian tribe is somewhat complex and difficult to get done. This was particularly true at that time because Edwin Meese III, the Attorney General for the United States, issued a letter to the Department that he believed there could be a conflict for the United States to represent tribes in litigation. This had the effect of the Justice Department almost stopping its involvement with tribal treaty rights.

Over the years, the Band had continued its effort to get the United States involved with the 1837 treaty rights issue. The process goes something like this. The tribe has to request the Bureau of Indian Affairs to ask the Department of the Interior's Solicitor's Office to review the tribe's claim of a violation of its treaty right. The Field Solicitor's Office reviews this and writes an opinion. This opinion then gets reviewed by the Regional Solicitor's Office in this case in Portland, Oregon. The final review is in the Department of the Interior Solicitor's Office in Washington D.C.

Should all these reviews meet approval the local Field Solicitor signs the opinion agreeing that there is a violation. Then, the Bureau of Indian Affairs notifies the tribe that they occur with the tribal position. The tribe then has to request the Bureau of Indian Affairs to ask the Department of Justice to litigate this violation. This again starts at the Agency or Regional Office and goes to the Central Office. Should all the staff people agree the Assistant Secretary for the Bureau of Indian Affairs request the Solicitor's Office to ask the Department of Justice to file an action on behalf of the Bureau of Indian Affairs. The Department of Justice has its own review process which is a three tiered process. Should everything go well in the review process it would move up to the Assistant Attorney General for Natural Resources and Environment for final approval. After this, the United States would then start developing the legal action. This process can take a long time.

In the Mille Lacs Band's case, we started the process in 1984 and in 1994 the United States agreed to intervene in the case. As Commissioner of Natural Resources, I spent hundreds, if not thousands, of hours working on and keeping track of the progress of the request over this period of time. Even with all facts in place, there was also political support that was needed to move this issue ahead. The United States intervention in the *Mille Lacs* case was one of the first to get done after the Attorney General's letter raising concerns that United States involvement in treaty right cases could create a conflict.

The Band had its case ready for trial and had told the state that it would move ahead if the settlement failed. The case was divided into two parts: first; “Does the right exist?” and second; “How will it be implemented?” The trial was started in June of 1994 and dealt only with the question “Does the right exist?” It lasted three weeks and Marc Slonim and John Arum who was also from the law firm argued the case before Federal Judge Diana Murphy. The expert witnesses provide their testimony and reports. Issues were addressed and facts were settled. One of our witnesses got one issue wrong and we all recognized it. John Arum told me, later, not to worry because it would not have much impact. He was right. There were five different parties in the case: the State of Minnesota which represented the state, a group of county governments led by Mille Lacs County, landowners who argued they were being affected (funded by anti-treaty groups), the United States through the Department of Justice, and the Mille Lacs Band. In late August, Judge Diana Murphy’s ruling came out and confirmed that the right existed.

There was talk of appeals and protests about the ruling. There was an attempt to discredit the Band’s Commissioner of Natural Resources by having him charged civilly and arrested criminally for illegally taking game fish. These were fraudulent charges developed within the state’s natural resources law enforcement officers to create pressure against the Band and its rights. During these times, there was no shortage of issues that had to be addressed by the Band and its members.

With the second phase pending trial, the Band’s position was that there should be no appeals until the second phase of the case was completed (the second phase being to determine how to implement the right). Appeals were made and the court of appeals ruled that all appeals should wait until the case was completed. The Band began to prepare for the second phase of the trial and had discussions on implementing some aspects of the right. There was also discussion with the Wisconsin tribes as to what they were going to do now that the right was affirmed in Minnesota. The Wisconsin tribes made the determination that they would intervene in the case and Fond du Lac who had a case claiming 1854 and 1837 treaty rights was consolidated with the Mille Lacs case to address 1837 implementation issues. This made the litigation more complicated but also brought in more resources and support.

Great Lakes Indian Fish & Wildlife Commission staff were very helpful in consolidating resources and organizing experts needed for the second phase of the case. This includes amounts of resources available, types of resources, allowable methods of harvest, enforcement authority, uses of the resources and conservation issues. Most of these issues were negotiated and followed the resolutions outlined in the Wisconsin implementation. There were some differences. In Minnesota, shining for deer was allowed under limited conditions, harvestable amounts were based on tribal needs and not on a quota system per lake as established in Wisconsin spearing rulings. The recognition of the 1855 Mille Lacs Reservation as an area where only Mille Lacs Band members could exercise treaty rights was implemented in the regulations. The final court ruling provides the Band members a variety of resources and methods of harvest that would allow them a meaningful use of the 1837 treaty rights.

The litigated solution was a different solution than what the settlement provided for and a brief explanation of these differences should be included. Through litigation, the Band has a wider range of rights but it also had more risk. Had one of five supreme court justices ruled the other way, the Band would not be enjoying these rights. The

settlement provided only for resolution of the Mille Lacs Band's Minnesota 1837 treaty rights and did not have an effect on any other Band or Tribe. The litigation ultimately upheld the rights of Wisconsin and Fond du Lac bands as well as Mille Lacs. Under the settlement, the Band would have had exclusive use of about 6,000 acres of Mille Lacs Lake for fishing, including gill netting and spearing, and would have received 10,000 acres of additional land that would be taken into trust; under the litigation, there are no exclusive areas; although Mille Lacs members are the only Band members who can exercise treaty rights in the part of the lake that is within the 1855 Reservation, non-Indians can also fish in the same area. Under the settlement, the Band had general hunting and fishing rights throughout the Minnesota 1837 territory similar to the rights Wisconsin tribes had in Wisconsin, but gave up the commercial right to sell game fish or deer and would have received land and 8.6 million dollars. Under the ruling, the Band has retained the right to commercially sell game fish and deer, though the Band has not implemented any aspect of that right. The Band did not receive any land from the State in the litigation, but did receive a large award to cover its attorneys' fees.

With the second phase of the trial starting in 1997, the case was re-assigned to a new Federal Court Judge, Michael Davis. The Bands (Bad River, Fond du Lac, Lac du Flambeau, LCO, Mille Lacs, Mole Lake, Red Cliff and St. Croix) and the State of Minnesota negotiated a wide range of issues about how the rights would be implemented. Neither the counties, the property owners (anti-treaty group) nor the United States did much to participate in how the rights would be exercised. The second phase trial was short and most of the parameters were stipulated to by all parties. As the second phase was moving ahead, Mille Lacs Band members were able to start to exercise these rights and there was a continuing effort to work through these issues.

There was a large effort set to avoid the protests that had occurred in Wisconsin. This included meetings with U.S. Attorney and his office, the State Conservation Enforcement Supervisors, and County Sheriffs' Departments. It was clear that tribal wardens would oversee tribal members' activities and the State and County would take care of the rest. The first test of how this was going to work was at Green Lake in Isanti County. Tribal members had designated that lake to be speared and enforcement was there to insure peace and safety. The Sheriff from Isanti County was a "no nonsense" guy. When spearkers headed down to the lake and a car of individuals pulled up and started yelling remarks, the Sheriff told his deputy to go and tell the car to move along. The deputy went and talked with them and came to tell the Sheriff that they would not go and that they were exercising their right of freedom of speech. The Sheriff told the Deputy to go back and tell them to move along and if they did not, to have them arrested. He said he would argue about freedom of speech after they got out of jail in June or sometime later. They moved on and that pretty much ended the name calling at the boat landings. Spring fishing was the most controversial issue faced in the implementation of the treaty right. For the most part, there were not many problems with the implementation of the rights in Minnesota.

While members were implementing their rights, the court decisions were being appealed. The 8th Circuit Court of Appeal put a temporary halt to implementation of the right until it decided the case, but it expedited its review and ruled in favor of the Bands. This was then appealed to the full court and again it was upheld. Finally, it was appealed to the U.S. Supreme Court. We did not believe that the Supreme Court would hear the

case for two reasons: first, there was a limited number cases heard by the Supreme Court each year, and second the 1837 treaty right had been considered in two different Circuits (the 7th and the 8th) and both upheld the right, so there did not seem to be any reason to for the Supreme Court to hear the case. To our surprise, they granted the appeal to hear the case. We were, for the most part, in shock as to what this would mean.

The Bands all worked to gather to deal with this issue and a cultural component was included in dealing with the Supreme Court's appeal. It was agreed that Marc Slonim would argue the case for the Bands in front of the Supreme Court and the State brought in one of its experienced appellate attorneys to argue its side of the case. At the end of the argument, an official from the Justice Department pulled me aside and stated that we had to settle the case with the state before the Supreme Court ruled. I told her that it was too late for that and it could not happen. We all left wondering what would happen. In March of 1999, the ruling came out in a 5 to 4 decision that upheld the Band's right under the 1837 treaty.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MILLE LACS BAND OF CHIPPEWA)
INDIANS, ARTHUR GAHBOW, WALTER)
SUTTON, CARLEEN BENJAMIN, and)
JOSEPH DUNKLEY,)

COMPLAINT

Plaintiffs,)

No. _____)

v.)

STATE OF MINNESOTA, MINNESOTA)
DEPARTMENT OF NATURAL RESOURCES,)
and JOSEPH ALEXANDER, COMMISSIONER)
OF NATURAL RESOURCES,)

Defendants.)

1. Parties.

1.1 Plaintiffs.

1.1.1 The Mille Lacs Band of Chippewa Indians (the "Band") is a federally recognized band of Indians possessing powers of self-government over its members and its territory. The Band was a party to the 1837 Treaty of the United States with the Chippewa, 7 Stat. 536 (July 29, 1837) (the "1837 Treaty") (see paragraph 4.2 below). The Band sues on its own behalf and on behalf of its members.

1.1.2 Arthur Gahbow, Walter Sutton, Carleen Benjamin and Joseph Dunkley are enrolled members of the Band. They engage

in hunting, fishing and gathering activities for ceremonial and subsistence purposes and to provide income to support their families. In violation of the 1837 Treaty, defendants and their agents have cited, prosecuted and fined them for engaging in such activities. They sue on their own behalf and on behalf of other Band members similarly situated.

1.2 Defendants.

1.2.1 The State of Minnesota (the "State") has within its boundaries lands that were ceded by the Mille Lacs and other Chippewa Bands in the 1837 Treaty. It has promulgated laws regulating or prohibiting hunting, fishing and gathering on such lands, and purported to make them applicable to Band members, notwithstanding the provisions of the 1837 Treaty. See generally Chapters 97A, 97B and 97C, Minn. Stat. Ann. (West 1987).

1.2.2 The Minnesota Department of Natural Resources (the "Department") is an agency of the State, organized pursuant to Chapter 84 Minn. Stat. Ann. The Department employs conservation officers and other persons who enforce the State's game and fish laws.

1.2.3 Joseph Alexander, Commissioner of Natural Resources (the "Commissioner") is the administrative and executive head of the Department. Minn. Stat. Ann. § 84.027, subd. 1. He is charged to "execute and enforce the [State's] laws relating to wild animals," id., § 97A.201, subd. 1, and has "direct control and supervision" over the all conservation officers (previously, game wardens), id., § 84.028, subd.3. He has the following additional

powers regarding hunting and fishing, among others:

- to make special provisions for the management of fish and wildlife to insure recreational opportunities for anglers and hunters;
- to limit or close seasons or areas of the state in which a species of wild animal may be harvested; and
- to prescribe the form of permits, licenses, and tags issued under the State's game and fish laws.

Id., § 97A.045, subds. 1, 2, 5.

2. Jurisdiction. The Court has jurisdiction under:

2.1 28 U.S.C. § 1331, since this action arises under the Constitution, laws and treaties of the United States;

2.2 28 U.S.C. § 1343(a)(3) and (4), since this is an action to redress the deprivation, under color of State law, of rights and privileges secured by the Constitution of the United States, and to secure equitable and other relief under an Act of Congress (42 U.S.C. § 1983) providing for the protection of civil rights; and

2.3 28 U.S.C. § 1362, since this is an action brought by an Indian band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws and treaties of the United States.

3. Venue. Venue lies here under 28 U.S.C. § 1391(b), since all defendants reside and plaintiffs' claims arose in this district.

4. Factual Background and Law Violations.

4.1 For centuries Band members have subsisted by hunting, fishing, trapping, gathering, ricing and making maple sugar from

lands and waters within the current boundaries of Minnesota and Wisconsin. Band members harvested and made use of all of the flora and fauna in their environment, whether for food, clothing, shelter, religious, commercial, or other purposes. Band members engaged in hunting, fishing and gathering for personal consumption, ceremonial and cultural uses, and for barter, trade and commerce.

4.2 In 1837, a treaty was concluded between the Mille Lacs and other Chippewa bands in the territories of Minnesota and Wisconsin and the United States. In consideration for the Chippewas' cession of a large tract of land in Minnesota and Wisconsin, the treaty provided, inter alia:

The privilege of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians during the pleasure of the President of the United States. [1837 Treaty, Article 5.]

The Indians understood this provision to guarantee to them the right to hunt, fish and gather on the lands and in the waters in and abutting the ceded territory, and to use the fruits of such hunting, fishing and gathering for personal consumption, ceremonial or cultural purposes, and barter, trade or commerce. This guarantee was understood to be permanent; the presence of non-Indian settlers would not require Band members to forego in any degree the rights to hunt, fish and gather secured by the treaty.

4.3 After the 1837 Treaty was concluded and in reliance thereon Band members continued to hunt, fish and gather for subsistence, ceremonial and commercial purposes throughout the ceded territory. Such activities provided and still provide an

important part of their subsistence and livelihood. For conservation and other purposes the Band has enacted regulations governing such activities, including restrictions as to the time, place and manner of hunting, fishing and gathering.

4.4 The hunting, fishing and gathering rights secured by the 1837 Treaty to the Band and its members have never lawfully been terminated and remain fully operative today. The Band understood no subsequent treaty or agreement to abrogate or diminish in any respect the hunting, fishing and gathering rights secured by the 1837 Treaty.

4.5 The continued existence and the nature and scope of the hunting, fishing and gathering rights secured by the 1837 Treaty have been adjudicated in federal court litigation in Wisconsin (hereafter, the "Voigt litigation").

4.6 As determined in the Voigt litigation, the hunting, fishing and gathering rights secured by the 1837 Treaty are subject to regulation by defendants only to the extent such regulation: (1) is reasonable and necessary to the conservation of a particular species or resource in a particular area, and does not discriminate against plaintiffs; or (2) is reasonable and necessary to prevent or ameliorate a substantial risk to the public health or safety, and does not discriminate against plaintiffs. Neither condition is satisfied where, as here, Band regulation responsibly insures that conservation and public health and safety goals are met.

4.7 In interim seasonal agreements with the Voigt plaintiffs, in regulations (e.g., Wis. Admin. Code NR § 13.02(3) & (11)), and

in other actions, the State of Wisconsin and its Department of Natural Resources have recognized the rights of the Mille Lacs Band and its members to hunt, fish and gather pursuant to the 1837 Treaty. Accordingly, since at least 1983 enrolled members of the Mille Lacs Band have exercised treaty hunting, fishing and gathering rights on the 1837 ceded lands in Wisconsin with the approval of the State of Wisconsin.

4.8 In regulations applicable to migratory bird hunting in Minnesota and in other actions, the United States Fish & Wildlife Service has also recognized the rights of the Mille Lacs Band and its members to hunt, fish and gather pursuant to the 1837 Treaty. See, e.g., 53 Fed. Reg. 27728, 27731 (July 22, 1988); 52 Fed. Reg. 32770, 32770-71 (Aug. 28, 1987).

4.9 In contrast to the positions and actions of the State of Wisconsin and the United States, the defendants -- the State of Minnesota, its Department of Natural Resources and its Commissioner of Natural Resources -- and their agents have refused to recognize the rights of the Band and its members under the 1837 Treaty. Instead, defendants and their agents have prevented or interfered with the exercise of such rights, in violation of the 1837 Treaty, the due process clause of the Fourteenth Amendment of the United States Constitution, and the supremacy clause of the Constitution.

4.10 Defendants and their agents have adopted and enforced natural resource laws and regulations that regulate hunting, fishing and gathering by Band members in the ceded territory, but which are not reasonable and necessary to the conservation of a

particular species or resource in a particular area, or to prevent or ameliorate a substantial risk to the public health and safety, and which discriminate against members of the Band.

4.11 As a result of the enforcement of defendants' natural resource laws and regulations against Band members attempting to exercise their rights under the 1837 Treaty, Band members have suffered the following injuries, among others: confiscation of personal property; fines and other monetary penalties; incarceration; and imposition of state license fees as a condition for the exercise of rights secured by the 1837 Treaty.

4.12 As a result of the enforcement of defendants' natural resource laws and regulations, and threats of arrest, seizure and confiscation, the Band and its members have been prevented from or deterred in the exercise of their rights to harvest fish, game and other resources for subsistence, ceremonial and cultural uses, and commerce, as secured by the 1837 Treaty. As a result, the Band has been deprived of an important source of subsistence resources and personal income, at a time when per capita income among Band members residing on or near the Mille Lacs Reservation is about \$2,100 per year, unemployment is approximately 50 percent, and most Band households are in poverty.

4.13 Notwithstanding the decisions in the Voigt litigation and the actions of the State of Wisconsin and the United States, defendants and their agents continue to assert the right to control, regulate and license the exercise by Band members of hunting, fishing and gathering activities despite the 1837 Treaty.

These assertions include, but are not limited to, the following:

4.13.1 On December 30, 1983, a Minnesota Special Assistant Attorney General wrote to the Band's attorney:

I have discussed your inquiry with the Commissioner of the Minnesota Department of Natural Resources, the agency which has the responsibility for enforcement of state game and fish laws. I have also discussed the matter with Attorney General Humphrey.

The Department of Natural Resources has reviewed with our office the Voight [sic] decision. As you know, Voight [sic] took place in the court of appeals for the seventh circuit. Minnesota was not a party to that litigation and is not within the seventh circuit. Therefore, the Department of Natural Resources does not feel itself legally bound by the determination or analysis of the Voight [sic] court. Furthermore, the Department is of the opinion that the Voight [sic] court was in error in its analysis of the meaning of the 1837 treaty with the Chippewas and the President's authority thereunder.

In light of this, the Minnesota Department of Natural Resources has taken the position that it will continue to enforce state game and fish laws against Indians within the 1837 treaty area except on parcels of Indian country within that area.

4.13.2 On April 30, 1987, the Minnesota Commissioner of Natural Resources wrote to the United States Fish and Wildlife Service:

The Department of Natural Resources for the State of Minnesota formally opposes extension of the Voigt Inter-Tribal Migratory Bird Season in the portion of the 1837 treaty area that is within Minnesota. There is no authority for expanding the holding in Lac Courte Oreilles v. Voigt, 700 F.2d 341 (7th Cir. 1983) to include Minnesota.

The Department of Natural Resources has consistently maintained that it will not recognize hunting and fishing rights within the 1837 treaty area until a court with jurisdiction over Minnesota acknowledges and defines the extent of the rights involved. The Voigt decision took place in the court of appeals for the seventh circuit. Minnesota was not a party to that litigation and is not within the seventh circuit. Therefore, the Department is not legally bound by the determination or analysis in the Voigt case.

In light of this, the Minnesota Department of Natural Resources will continue to enforce state game and fish laws against Indians within the 1837 area except on parcels of Indian country. Allowing the expansion of the Voigt ruling into Minnesota through extension of the Inter-Tribal season at this time is unwarranted and unjustified.

4.13.3 On June 23, 1988, the Chief of the Section of Wildlife within the Department wrote to the Fish and Wildlife Service. He reiterated the position taken by the Commissioner on April 30, 1987:

The proposed rulemaking on migratory bird hunting in the 1837 Treaty area in east central Minnesota that would allow migratory waterfowl hunting outside the federal framework is opposed by the State of Minnesota. . . .

It is recognized that the Minnesota Chippewa Tribe has established in court the right to hunt on certain reservations free of State regulations. This right does not, however, extend to ceded lands.

4.14 Plaintiffs have no adequate remedy at law because:

4.14.1 the damages that have been and will be sustained are not susceptible of monetary determination;

4.14.2 the rights of plaintiffs to hunt, fish and gather under the 1837 Treaty are unique and should be specifically protected; and

4.14.3 in the case of criminal arrests and prosecutions threatened by defendants and their agents, plaintiffs have no remedy at all except at the risk of suffering fines, imprisonment and confiscation of property, involving a multiplicity of legal proceedings.

5. Claims for Relief. Plaintiffs seek the following relief:

5.1 A declaratory judgment pursuant to 28 U.S.C. §§ 2201-02

and other applicable law:

5.1.1 stating that plaintiffs possess rights to hunt, fish and gather under the 1837 Treaty, which rights have never been abrogated, and which have continuing force and effect on lands in the State of Minnesota that were ceded in the 1837 Treaty;

5.1.2 defining the nature and scope of those rights;
and

5.1.3 delineating the restraints that the 1837 Treaty and other applicable law impose on regulation of those rights by defendants.

5.2 An injunction pursuant to the court's equity jurisdiction, 28 U.S.C. § 1641, 42 U.S.C. § 1983 and other applicable law barring defendants, their officers, agents, servants, employees and attorneys, and anyone acting in concert with them, from any actions or inactions which would prevent or interfere with the exercise of plaintiffs' rights to hunt, fish and gather under the 1837 Treaty, except as authorized by the declaratory judgment sought in paragraph 5.1.3 above.

5.3 Reasonable attorneys fees, expert witness fees, and other costs and expenses incurred in this litigation pursuant to applicable law.

5.4 Other just relief.

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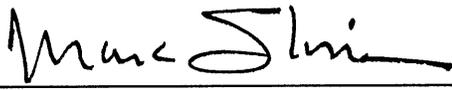
6. Continuing Jurisdiction. Plaintiffs request that the Court retain jurisdiction for the purpose of enforcing its judgment.

Dated: August ____, 1990.

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