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Implications for the Mille Lacs Lake Fishery with Continued Enforcement of the 1837 Treaty of St. Peters

*Matthew Steffes*¹

I. INTRODUCTION

Mille Lacs Lake, which spans three counties in central Minnesota, has a long tradition of being one of the best lakes in Minnesota for catching walleye.² Mille Lacs Lake has gained national recognition for being a fishing destination for the large quantity and size of walleye the lake produces.³ Yet recent reports from the Minnesota Department of Natural Resources (DNR) show that even with current conservation efforts, the present fishery is in a dire condition.⁴ One of the potential, and likely most

¹ Matthew Steffes, Juris Doctorate Expected May 2015, Hamline University School of law. The author would like to thank his family, especially Phil and Nancy Steffes for their unending support and Debra Steffes for her encouragement and love. And to Jim Steffes for setting an example of dedication to excellence, pride, and loyalty to those he loves, Jim has truly been an inspiration to the author.

Finally, the author would like to dedicate this article to his grandfather Wilbur “Bill” Reding for sharing his love of fishing, and teaching the author how to tell a proper fish story.

² Fishery typically refers to either ocean locations where fish are caught or a business that catches and sells fish. In this article the term “fishery” is used to describe a lake where fish are caught as well as the ecosystem and habitat of those fish.

³ See Will Brantley, *Best Places to Catch Walleyes This Season*, FLW OUTDOORS (Jan. 30, 2008), <http://www.flwoutdoors.com/fishing-articles/146865/best-places-to-catch-quality-walleyes-this-season/> (discussing top fishing locations throughout the United States).

⁴ See Doug Smith and Dennis Anderson, *Walleye Numbers Fall to Lowest Level in 40 Years on Mille Lacs*, STARTRIBUNE (Oct. 23, 2012), <http://www.startribune.com/sports/outdoors/175269061.html> (“The disappointing results further complicate the lake’s walleye management. DNR officials already were

controversial, explanations for the extreme decline in the walleye population in Mille Lacs Lake⁵ centers on Native American walleye harvesting based on treaty rights established in 1837.⁶⁷

For decades, there has been tension between Native American fishermen and non-native fishermen over fishing rights on Mille Lacs Lake.⁸ This tension has increased over the past decade, particularly regarding the sustainability and quality of Mille Lacs Lake, following the Supreme Court's ruling in *Minnesota v.*

worried about declining numbers of male walleyes..."). See also *Mille Lacs Lake Information Report*, MNDNR.ORG, <http://www.dnr.state.mn.us/lakefind/showreport.html?downum=48000200> (last updated Sept. 1, 2012) [hereinafter 2012 Mille Lacs Report].

⁵ When used throughout this article Mille Lacs Lake shall mean the lake itself, whereas Mille Lacs shall include the area surrounding the lake.

⁶ Smith & Anderson, *supra* note 4 (referencing a Jun. 15, 2012 letter to the Great Lakes Indian Fish & Wildlife Commission (GLIFWC) from the Department of Natural Resources (DNR) which states that the shortage of walleye in Mille Lacs is "worrisome, and 'continued harvest management under the [current management system] may not be possible'"). For the purposes of this article, the terms "Indian" and "native" will be used interchangeably, both will refer to Native Americans, or a member of any of the indigenous peoples of the Americas.

⁷ The author has chosen to use the term "Native American" when referring to the indigenous peoples of the Americas throughout this article. However, the term "Indian" is used when referring to treaties, cases, scholarly work, and other legal doctrines that use the term. The author understands the negative connotation placed on the term "Indian" when used to refer to the indigenous people of the Americas and does not intend to attach the negative connotation when using the term "Indian," but rather is following the use of the term as provided for in the referenced sources.

⁸ See generally, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); Dick Sternberg, *Why the DNR is Wrong About Mille Lacs*, PROPER ECONOMIC RESOURCE MANAGEMENT (PERM), available at, <http://www.perm.org/pdfs/LetterNR.pdf> (last visited Jan. 15, 2014) [hereinafter Sternberg I]; MINN. DEP'T OF NATURAL RES., *Review of: THE TREATY FISHERIES MANAGEMENT PLAN FOR THE 1837 MINNESOTA CEDED TERRITORY FOR THE YEARS 2013-2017*, 1 (2012) [hereinafter Management Plan]; *The Problem*, SAVE MILLE LACS SPORT FISHING, <http://www.savemillelacssportfishing.org/the-problem>.

Mille Lacs Band of Chippewa Indians.⁹ The Court held that the Chippewa Indians retained their usufructuary rights to hunt and fish on ceded lands as established by the 1837 Treaty of St. Peters.¹⁰ Usufructuary rights are rights of enjoyment to another's property allowing the holder to generate income off of the property without obtaining ownership.¹¹ This right to hunt and fish on ceded lands is further protected from state regulation by the 1837 Treaty of St. Peters.¹² The Court did not go so far as to completely bar Minnesota, and other states, from regulating Native American treaty-based usufructuary rights, but instead relied on prior holdings to significantly restrict a state's ability to limit regulation for only conservation reasons.¹³

The DNR cannot wholly attribute the significant decline of the Mille Lacs Lake fishery to Native Americans; however several aspects of tribal fishing can be attributed to this decline.¹⁴ For example, tribal harvesting of walleye during vulnerable times of the

⁹ See Generally The Problem, *supra* note 8. See *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 201.

¹⁰ *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 205.

¹¹ Black's Law Dictionary 1685 (9th ed. 2009).

¹² *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 204 (holding "the 1837 Treaty gave the Chippewa the right to hunt, fish and gather in the ceded territory free of territorial, and later state, regulation, a privilege that others did not enjoy. Today, this freedom from state regulation curtails the State's ability to regulate hunting, fishing and gathering by the Chippewa in ceded lands." Though, the court did recognize that.).

¹³ See *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 204 (stating that a state may impose "reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation"). See also *Puyallup Tribe v. Dep't of Game of Wash. (Puyallup I)*, 391 U.S. 392, 399 (1968) (citing *Tulee v. Washington*, 315 U.S. 681, "The 'right' to fish outside the reservation was a treaty 'right' that could not be qualified or conditioned by the State. But 'the time and manner of fishing . . . necessary for the conservation of fish' not being defined or established by the treaty [are] within the reach of state power"); *Dep't of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. at 49 ("Rights can be controlled by the need to conserve a species.").

¹⁴ See generally Sternberg, *supra* note 8, at 4-6 (Mr. Sternberg explains in his letter that the DNR's calculations for safe harvest levels by tribe members are miscalculated, allowing for tribal harvests to exceed safe harvest levels).

year may be one major cause of the decline.¹⁵ The DNR and the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) have been working together on conservation planning for Mille Lacs Lake over the past decade. Unfortunately, the recent fishery reports indicate that increasingly stringent regulations must be established to save the fishery.¹⁶ One of the toughest issues present for creating and enforcing stricter regulatory conditions is balancing the need for conservation, while preserving native treaty rights.¹⁷ Further, any changes in regulations and agreements with the Native American population would pose additional challenges, as historical inequalities make it difficult to separate racial, legal, and political motivations from those which are fundamentally conservation-based.¹⁸

¹⁵ Management Plan, *supra* note 8. *See also* Sternberg, *supra* note 8.

¹⁶ *See* Smith & Anderson, *supra* note 4; 2012 Mille Lacs Report, *supra* note 4; *Mille Lacs Lake Regulations Changed to Boost Walleye Population*, MINN. DEP'T OF NATURAL RES. (Mar. 19, 2013), <http://news.dnr.state.mn.us/2013/03/19/mille-lacs-lake-regulations-changed-to-boost-walleye-population> (explaining that the Mille Lacs fishery is in need of strict management “a state and tribal harvest management strategy focused largely on walleyes in the 14- to 18-inch range, [has] contributed to a declining walleye population”); Bill Keller, *Walleye Harvest Quota for Mille Lacs to be Halved*, MYFOXTWINCITIES, <http://www.myfoxtwincities.com/story/20757112/walleye-harvest-fDrom-mille-lacs-lake-to-be-slashed> (last visited Jan. 15, 2014); Dennis Anderson, *DNR to Bands: Mille Lacs has Problem*, STARTRIBUNE (Jun. 16, 2012), <http://www.startribune.com/sports/159309635.html>.

¹⁷ *See* Marren Sanders, *Ecosystem Co-management Agreements: A Study of Nation Building or a Lesson on Erosion of Tribal Sovereignty?*, 15 BUFF. ENVT'L L.J. 97 (2007-2008) (citing Sandi B. Zellmer) (“there are different levels of power sharing in the co-management approach.”).

¹⁸ Catherine M. Ovsak, *Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-Reservation in Minnesota*, 20 WM. MITCHELL L. REV. 1177, 1191 (1994) (“[A] state’s broad powers to regulate hunting and fishing are limited by the obligation to recognize treaty rights. State regulation resulting in non-Indian hunting and fishing that infringes on reserved treaty rights by making the exercise of these rights constitutes an invalid infringement on a federal right.”). *See also* Michael R. Newhouse, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: the Mille Lacs Case*, 21 PUB. LAND & RESOURCES L. REV. 169 (2000) (“the cornerstones of most treaties were retention

In Section II, this article will first discuss native treaty formation and interpretation with a focus on the 1837 Treaty of St. Peters and the Supreme Court's holding in *Minnesota v. Mille Lacs Band of Chippewa Indians*. Next, in Section III the article will discuss the conservation methods for the Mille Lacs Lake that are already in place, and relate the significant decline of the Mille Lacs Lake fishery in the recent decade. The article will then focus on potential causes, looking specifically at native harvesting techniques as one source of the decline. Finally, in Section IV this article will argue that through the use of the state's police power, restrictions upon the usufructuary fishing rights of native tribes is within constitutional limitations on a state's power and should be implemented to protect the future of the Mille Lacs Lake fishery.

II. BACKGROUND

A. Treaty Development and Interpretation

Treaty agreements entered into by the federal government and Native American tribes are contracts between two sovereign nations.¹⁹ When treaties are formed, each nation negotiates with motives specific to their future plans, cultural goals, and historical uses of land. While these motives typically revolve around land, they are unique to each party and are not often fully understood by the opposing side.²⁰ Treaties between Native American tribes and the federal government usually consist of a forfeiture of rights by native tribes to large quantities of land, with retention of fishing and

of usufructuary hunting, fishing, and gathering rights that were ventral to tribal economies, cultures and religions.”).

¹⁹ Ovsak, *supra* note 18, at 1179 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 63 (1831)).

²⁰ *Id.* at 1180 (“[T]he United States entered into treaties . . . to end wars and acquire land [while] tribal governments used treaties to confirm and retain rights such as . . . fishing and hunting rights, and jurisdictional rights over their own land.”) See VINE DELORIA, JR., *BEHIND THE TRIAL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* (1985); KIRKE KICKINGBIRD ET AL., *INDIAN TREATIES* (1980).

hunting rights and confinement to reservations, in exchange for goods and money.²¹

Courts have created special rules for construction and interpretation of Indian treaties, which tend to favor the Native American tribes.²² These canons of interpretation focus on the reality that at the time of creation the tribes were at a significant disadvantage²³, thus Native American treaties are “[(1)] resolved in the tribe’s favor with regard to ambiguous expressions. . . , [(2)] interpreted as the [Native Americans] themselves would have understood them. . . , and [(3)] liberally construed in favor of the tribes.”²⁴ One issue courts must determine when interpreting Native American Treaties is whether the tribes were granted rights from the federal government, or if they simply reserved those rights for future use.²⁵ While ambiguities are to be liberally construed in favor

²¹ Bradley I. Nye, *Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 WASH. L. REV. 175, 177-78 (1992).

²² Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 557 (1991). *See generally*, *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973)

²³ *See Choctaw Nation v. United States*, 119 U.S. 1, 31 (1886) (noting that Native Americans suffered a disparity in bargaining power); *Jones v. Meehan*, 175 U.S. 1, 11 (1899) (explaining that during treaty negotiations, Native Americans depended upon government translators because of their unfamiliarity with the spoken and written language used by the government). *See generally* *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

²⁴ Ovsak, *supra* note 18 at 1182. *See also* Newhouse, *supra* note 18. “The canons of Indian treaty interpretation require courts to interpret ambiguous treaty provisions in favor of the natives as the natives understood them at the time the treaty was signed.” *Id.*

²⁵ Tracy A. Diekemper, *Abrogating Treaty Rights Under the Dion Test: Upholding Traditional Notions That Indian Treaties Are the Supreme Law of the Land*, 10 J. ENVTL. L. & LITIG. 473 (1995).

of the tribes, this canon of interpretation does not allow for a creation of ambiguity where ambiguity does not exist.²⁶

Although the Supreme Court has held that Native American tribes who have entered into treaties have reserved hunting and fishing rights, these rights are still subject to abrogation through a congressional unilateral act.²⁷ For a court to uphold abrogation of treaty rights through congressional actions, the Supreme Court held in *United States v. Dion* that there must be clear intent on the part of Congress to abrogate those rights.²⁸ In certain circumstances, the Court will look beyond definite intent on the part of Congress to abrogate treaty rights to maintain flexibility in determining whether abrogation is appropriate.²⁹ Finally, the Court in *Dion* created a new test for finding abrogation by Congress: “[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Native American treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”³⁰

Indian treaty interpretation centers on maintaining and ensuring that the treaty rights which Native Americans believed to

²⁶ *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 508 (1913). “Indians, no less than the United States, are bound by the plain import of the language of the act and the agreement.” *Id.* See also Jason Ravensborg, *Minnesota v. Mille Lacs Band of Chippewa Indians: The Court Goes on its Own Hunting and Fishing Expedition*, 4 GREAT PLAINS NAT. RES. J. 312, 321 (2000).

²⁷ See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903):

When . . . treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate [said treaties] existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. *Id.*

See also Diekemper, *supra* note 25, at 476; *United States v. Dion*, 476 U.S. 734 (1986).

²⁸ *Dion*, 476 U.S. at 739-40. See also Diekemper, *supra* note 25 at 476; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202-03.

²⁹ Diekemper, *supra* note 25, at 477 (listing the face of the statute, legislative history, and surrounding circumstances as three considerations the Court will take into account when evaluating congressional intent for abrogation of treaty rights).

³⁰ *Dion*, 476 U.S. at 739-40; Diekemper, *supra* note 25 (“This test is labeled the ‘actual consideration and choice’ test.”).

be contained in the treaties at the time of agreement, are maintained.³¹ While protection of Native American rights is the key concern of treaty interpretation, states and the federal government are able to modify these rights when appropriate.³² Notably, there are instances when modification, whether through Congress' unilateral act, or through legitimate state conservation, is appropriate.³³ Specifically, when tribal hunting and fishing rights threaten the sustainability of non-reservation natural resources, either the state or Congress must step in.³⁴

B. Tribal Sovereignty over Hunting and Fishing Rights

Tribal sovereignty exists, but only "at the sufferance of Congress, . . . subject to complete defeasance."³⁵ Congress, since the 1960s, has encouraged tribal self-governance and self-sufficiency.³⁶ While tribes have complete autonomy to control hunting and fishing procedures in on-reservation lands, they must comply with treaty terms and government sanctions when hunting

³¹ Ovsak, *supra* note 18, at 1183.

³² *Id.*

³³ See generally Diekemper, *supra* note 25 (noting the Endangered Species Act, water district trespass actions, and tax stamp enforcement as areas where Congressional or state actions have abrogated treaty rights).

³⁴ See *United States v. State of Wash.*, 520 F.2d 676, 685 (9th Cir. 1975) (holding that the state was allowed to abrogate Native American fishing rights "when necessary to prevent the destruction of a run of a particular species in a particular stream"); *Dep't of Game v. Puyallup Tribe, Inc.*, 422 P.2d 754, 763 (1967) *aff'd sub nom.* *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 88 S. Ct. 1725, 20 L. Ed. 2d 689 (1968) (holding that when continued Native American fishing would destroy an entire run, prohibition of netting by the Puyallup Tribe was "necessary for the preservation of the fishery" and was a valid abrogation of the Puyallup Tribe's treaty rights).

³⁵ Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743, 756 (1984).

³⁶ *Id.*

and fishing off-reservation, and are required to use only those usufructuary rights that were granted under each treaty.³⁷

Regulations over usufructuary native hunting and fishing on ceded, non-reservation land are construed narrowly by the courts and are only allowed for conservational reasons.³⁸ States are able to effectuate regulations over tribes through the use of the state's police power.³⁹ A state's use of its police power must not discriminate against Native Americans, and must be "reasonably necessary" in improving a public health or safety risk.⁴⁰ For a state regulation to be considered "reasonably necessary" a state must satisfy a three part test by showing that: (1) "there is a public health or safety need to regulate a particular resource in a particular area;" (2) the regulation sought is "necessary to the prevention or amelioration of the public health or safety hazard;" and (3) regulation of "the tribes is necessary to effectuate the particular public health or safety interest."⁴¹ Ultimately accommodation of

³⁷ Sanders, *supra* note 17, at 99.

³⁸ See *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 205 (stating that a state may "impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing and gathering rights in the interests of conservation"). See also *Puyallup I*, 391 U.S. at 398 ("the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory'"); *Puyallup II* 414 U.S. at 49 ("rights can be controlled by the need to conserve a species").

³⁹ *Puyallup II*, 414 U.S. at 49 (citing *Tulee v. Washington*, 315 U.S. 681 (1942) ("The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved.")).

⁴⁰ *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F. Supp. 1362, 1370 (D. Minn. 1997) (quoting *Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233, 1241-42 (W.D. Wis. 1987)). See also, *Puyallup II*, 414 U.S. at 49.

⁴¹ *Mille Lacs Band of Chippewa Indians v. Minnesota* 952 F. Supp. 1362 (D. Minn. 1997) (quoting *Lac Courte Oreilles Band v. Wisconsin*, 688 F. Supp. 1233 at 1241-42). See also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 223 (1999) (quoting *Tulee v. Washington*, 315 U.S. 681, 686 (1942) (the Court held that Washington State had the "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish*," (emphasis added) but that the Treaty "forecloses the state from charging the Indians a fee of the kind in question")).

Native American treaty rights while keeping other non-natives interest in mind is the goal of the courts in applying the reasonable and necessary test.⁴²

As this article posits, the State of Minnesota is in a position to implement regulations on Mille Lacs Lake. While modification of non-reservation usufructuary hunting and fishing rights are closely monitored and narrowly construed, in cases where conservation is the only motive, a state is within its power to effectuate regulations over Native American tribes.⁴³ The State is within its right to limit the 1837 Treaty of St. Peter usufructuary fishing and hunting rights through regulations that are reasonably necessary for conservation.⁴⁴

C. 1837 Treaty of St. Peters and Subsequent Revelations (Understanding the Tension between the Tribes and Non-natives)

The suit in *Minnesota v. Mille Lacs Band of Chippewa Indians* centers on the Mille Lacs Band of Chippewa's challenge to Minnesota's "authority to enforce state hunting and fishing laws against band members within the 1837 ceded territory."⁴⁵ Among other provisions, the 1837 Treaty of St. Peters granted the Chippewa Nation of Indians "[t]he privilege of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes

⁴² Puyallup II, 414 U.S. at 49.

⁴³ *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 205 (stating that a state may "impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing and gathering rights in the interests of conservation.").

⁴⁴ See generally *Mille Lacs Band of Chippewa Indians v. Minnesota* 952 F. Supp. 1362 (D. Minn. 1997); Puyallup II, 414 U.S. 44; *Tulee v. Washington*, 315 U.S. 681, 86 (1942).

⁴⁵ Brief for Petitioners at 8, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (No. 97-1337). The Mille Lacs cases were separated into two phases. In Phase I the court was to determine if Native American hunting and fishing privileges on ceded territory still existed, and in Phase II the court was to determine if state regulations were valid, and what the proper allocation of fish and game resources would be if the regulations were not valid. Ravensborg, *supra* note 26, at 323.

included in the territory ceded.”⁴⁶ Article 5 of the treaty provided for termination of hunting and fishing rights upon presidential order.⁴⁷

The Mille Lacs cases were separated into two phases.⁴⁸ In Phase I, the court determined if Indian hunting and fishing privileges on ceded territories still existed.⁴⁹ In Phase II, the court determined if state regulations were valid and what the proper allocation of fish and game resources would be if the regulations were held invalid.⁵⁰ In *Mille Lacs Band of Chippewa Indians v. Minnesota*, part of Phase I, the district court held that the Chippewa’s rights to hunt and fish in ceded territory continue to exist.⁵¹ In a later case, the district court in *Mille Lacs Band of Chippewa Indians v. Minnesota Dep’t of Natural Resources* held that the Bands had not consented to their removal in the 1837 Treaty, and the rights given up were unclear.⁵²

One issue the State raised in *Minnesota v. Mille Lacs Band of Chippewa Indians* was whether an 1855 treaty with the Chippewa Indians, nullified the 1837 Treaty of St. Peters.⁵³ The 1855 Treaty only addressed land issues, specifically reserving land for the Mille Lacs band.⁵⁴ The Court held that because the 1855 treaty was void of any language addressing the usufructuary rights

⁴⁶ Treaty with the Chippewa, 1837, 2 KAP491; 7 Stat. 537.

⁴⁷ Treaty with the Chippewa, 1837, 2 KAP491; 7 Stat. 537 (“[t]he privilege of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, *during the pleasure of the President of the United States*” (emphasis added)).

⁴⁸ Ravensborg, *supra* note 26, at 323.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Mille Lacs Band of Chippewa Indians v. Minnesota Dep’t of Natural Resources*, 861 F. Supp. 784, 841 (D. Minn. 1994).

⁵² *Id.* at 798 (holding “The court finds that the Chippewa did not consent to removal in the 1837 Treaty and that the Chippewa did not understand that the treaty gave the President unfettered discretion to extinguish their privilege.”). The court reasoned that even if the Chippewa may have contemplated their removal, contemplation did not place removal within the 1837 Treaty.

⁵³ *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 184.

⁵⁴ *Id.*

granted by the 1837 Treaty of St. Peters, it did not abolish those rights.⁵⁵

The Court in *Minnesota v. Mille Lacs Band of Chippewa Indians* affirmed the district court's ruling.⁵⁶ According to the majority, the President's 1850 Executive Order was insufficient to revoke the Indian rights of the 1837 Treaty because it was not severable from the invalid removal order.⁵⁷ The Court reasoned that because President Taylor only mentioned the word "removal" once in his order, his intent was not to effectuate removal of the Tribe's hunting and fishing rights, but was an act entirely on its own, and thus was not severable from the 1830 Executive Order.⁵⁸ Further, the majority followed precedent and held that the 1837 Treaty was a valid and irrevocable reservation of hunting and fishing rights within the Chippewa Tribe.⁵⁹ The majority's opinion does show that the right to enter onto ceded land granted to the Mille Lacs Chippewa in the 1837 Treaty of St. Peters was not without qualifications.⁶⁰ It was clear at the time of treaty formation that the right to enter ceded land was contingent on continuing consent by the government, which could be revoked.⁶¹

⁵⁵ *Id.*

⁵⁶ *Id.* at 193-94 (reasoning that the 1830 Removal Act "did not forbid the President's removal order, but . . . it did not authorize that order.").

⁵⁷ *Id.* (noting that the removal order was invalid due to a lack of statutory or constitutional authority).

⁵⁸ See Ravensborg, *supra* note 26, at 319; *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 172.

⁵⁹ *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 223 (citing *Tulee v. Washington*, 315 U.S. 681 (1942)) (reasoning that prior court decisions show that interpretation of treaty rights must be made using the understanding the tribes would have possessed at the time of agreement). See also *Puyallup II*, 414 U.S. 44.

⁶⁰ *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 176 (quoting the Journal of Treaty Negotiations, July 29, 1837, at 78 "make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, *during his pleasure*, to hunt and fish on them" (emphasis added)); see also *id.*

⁶¹ *Id.*

The dissent in *Minnesota v. Mille Lacs Band of Chippewa Indians*, on the other hand, criticized the majority, focusing on the express language of the executive order.⁶² The dissent noted that although President Taylor only used “removal” one time, it was within the last five words of the order and was used with purpose.⁶³ The dissent continued by stating that although Native American Treaty interpretation on ambiguous terms of the treaty are to be read in favor of the tribes, Presidential acts are to be given “the strongest of presumptions and the widest latitude of judicial interpretation.”⁶⁴ In *New York ex rel. Kennedy v. Becker*, the Supreme Court looked at the Big Tree Treaty of 1797 between the State of New York and the Seneca Indians.⁶⁵ The Court in *Kennedy* held that the Big Tree Treaty only reserved a hunting and fishing privilege on the land that was ceded, and because it was only a

⁶² *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 208 (Rehnquist, C. J., dissenting). *See id.* at 179 (quoting the 1850 executive order):

The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837, ‘of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded’ by that treaty to the United states; 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 that treaty, ‘with the other usual privileges of occupancy until required to remove by the President of the United States,’ *are hereby revoked*; (emphasis added).

⁶³ *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 215 (Rehnquist, C. J., dissenting) (noting “the order *first* extinguishes the hunting privilege and only then—in its last five words—orders removal” (emphasis added)).

⁶⁴ *Id.* (quoting *Dames & Moore v. Regan*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 637 (Jackson, J., concurring)). *See also Mille Lacs Band of Chippewa Indians*, 526 U.S. at 215 (Rehnquist continues on by stating that the burden of persuasion would rest heavily upon any who might attack it).

⁶⁵ *People of State of New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 559 (1916).

reservation of a privilege it was “subject nevertheless to [the] necessary power of appropriate regulation.”⁶⁶

The dissent in *Minnesota v. Mille Lacs Band of Chippewa Indians* analyzed the difference in language between the 1837 Treaty and those treaties which the majority focuses on, noting that because of similarities between the 1837 Treaty and the Big Tree Treaty at issue in *Kennedy*, regulatory authority should be explored as they could affect the decision of the Court.⁶⁷ As the dissent properly points out, the majority’s failure to correctly interpret the 1837 Treaty of St. Peters as a privilege creates a right in the Mille Lacs Band of Chippewa Indians which was not originally contemplated by the parties during treaty negotiations.⁶⁸ If the treaty had been properly interpreted, the Mille Lacs Band of Chippewa Indians’ commercial fishing would more easily regulated by the DNR.

Although the Court was divided in *Minnesota v. Mille Lacs Band of Chippewa Indians*, the ruling did not dispose of Minnesota’s rights to regulate tribe usufructuary fishing rights on Mille Lacs Lake.⁶⁹ Instead, the majority, through holding that neither the Executive Order of 1850 nor the 1855 Treaty was sufficient to invalidate the 1837 Treaty of St. Peters, only guaranteed the continuance of tribal fishing rights.⁷⁰ As the dissent noted, the language of the 1837 Treaty granted a privilege to the Chippewa.⁷¹ Because the 1837 Treaty was a granting of a privilege, and not a guarantee of a right to take fish, Minnesota should be allowed to more closely regulate and tailor future regulations for the

⁶⁶ *Id.* at 564. See *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 226 (Thomas J., dissenting) (noting Chief Justice Rehnquist’s interpretation that the 1837 Treaty of St. Peters was for a limited duration).

⁶⁷ *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 226 (noting that the treaty language in the cases cited by the majority state “the right of taking fish” while both the 1837 Treaty and the Big Tree Treaty use the language “the privilege of hunting.”).

⁶⁸ See *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 224-26 (Thomas, J., dissenting).

⁶⁹ See generally *id.*

⁷⁰ See generally *id.*

⁷¹ *Id.* at 215 (Rehnquist, C. J., dissenting).

tribe. The current condition of the walleye population in Mille Lacs Lake calls for Minnesota to revisit the tribal regulatory process. In doing so, Minnesota must stay within the Court's ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians*, which stated that the Chippewa retained their usufructuary rights, as well as comporting with "necessary regulations" of Native American tribes in implementing more stringent regulations.

III. SPECIFIC CONCERNS FOR MILLE LACS LAKE

A. Status of the Mille Lacs Fishery

The Minnesota DNR is responsible for implementing conservation and regulatory rules regarding the care, condition, and sustainability of Minnesota's public land, water and animals.⁷² According to the Minnesota DNR, Mille Lacs Lake is undergoing "unprecedented change."⁷³ The Minnesota DNR Status of the Fishery, which was last reported on September 1, 2012, shows that the walleye population is at its lowest number in over 40 years.⁷⁴ One of the main concerns regarding the health of the fishery is in the poor representation of prior class years of walleye.⁷⁵ A large lake

⁷² See MINN. STAT. § 84.027 (2013).

⁷³ *New DNR Plan Aims to Get Mille Lacs Lake Back on Track*, MINN. DEP'T OF NATURAL RES. (Jan. 21, 2014), <http://news.dnr.state.mn.us/2014/01/21/new-dnr-plan-aims-to-get-mille-lacs-lake-back-on-track/> [hereinafter *New DNR Plan*].

⁷⁴ *2012 Mille Lacs Report*, *supra* note 4 (class year refers to all fish born in the same year).

⁷⁵ See MINNESOTA DEPARTMENT OF NATURAL RESOURCES, 2011 MINNESOTA DEPARTMENT OF NATURAL RESOURCES FISHERIES MANAGEMENT STANDARD LAKE SURVEY REPORT: MILLE LACS 38 (2011) [hereinafter 2011 SURVEY REPORT] ("As observed in recent years, the 2000, 2001, and 2004 year classes were poorly represented in the gillnets, while the 2008 year class appears to be strong.") (Tables 3-4, Figures 3-5) (copy on file with author). See also THOMAS S. JONES & AITKIN AREA FISHERIES, COMPLETION REPORT: LARGE LAKE SAMPLING PROGRAM ASSESSMENT REPORT FOR MILLE LACS LAKE – 2002, at 13 (2012) (copy on file with author) [hereinafter LARGE LAKE SAMPLING REPORT]

sampling assessment report by Thomas Jones and Aitkin Area Fisheries further provides that the “[w]alleye condition was below average at all sizes, the lowest observed size for walleye greater than 20 inches.”⁷⁶ These reports and Lake Fishery sampling assessments clearly indicate that the walleye population is in a severe decline.

DNR management of the Mille Lacs Lake fishery requires extensive research and monitoring, as well as control of harvest levels in order to ensure fishery health.⁷⁷ While the DNR’s responsibilities include conservation and management of Minnesota’s natural resources, Minnesota’s Native Americans are given exemption to many of the regulations imposed by the DNR.⁷⁸ As a result of the 1999 *Minnesota v. Mille Lacs Band of Chippewa Indians* case, the Chippewa are granted some autonomy to create and manage their own conservation efforts while working with the DNR.⁷⁹

The 2000, 2001, 2004, and 2009 year classes were poorly represented in the gillnets (Tables 5-8). The 2008 year class continues to be estimated as moderate to strong in the year class strength index, despite showing up as three year olds in the gillnets at above median levels in 2011, and decreasing to well below median levels as age four fish in 2012 (Tables 5-8, Figures 3-5, Jensen 2012). Early indications from the year class strength index are that the 2010 year class may be relatively weak.

Id.

⁷⁶ 2011 SURVEY REPORT, *supra* note 75, at 35.

⁷⁷ *Id.* The DNR states 7 areas of focus for DNR conservation techniques including (1) biological benchmarks, (2) estimation of abundances of species, (3) determination of target harvest levels, (4) planning techniques to actualize harvest levels, (5) enforcement of regulations, (6) protect critical habitat, and (7) evaluate management actions. *Id.*

⁷⁸ Large Lake Sampling Report, *supra* note 75, at 2.

⁷⁹ *Id.* (“as a result of the 1837 Treaty lawsuit, the Mille Lacs Band and seven other bands of Chippewa Indians are allowed to net and spear fish in Mille Lacs Lake. The bands are regulated by their own Conservation Code (their form of Game and Fish Laws), and are monitored closely by the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) and the Minnesota Department of Natural Resources.”) Seven other bands of Native American Tribes are covered under the Court’s holding in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). *Id.* (This article only concerns the Mille Lacs Band of Chippewa).

In an effort to limit the damage done to Mille Lacs Lake, the Minnesota DNR has implemented restrictive regulations for 2013 on slot limits for walleye caught in Mille Lacs Lake.⁸⁰ These slot limits allow for a sport fisherman to keep only those walleyes caught which are greater than eighteen (18) inches, but smaller than twenty (20) inches, although an angler may keep one walleye greater than twenty-eight (28) inches.⁸¹ In 2012 the slot limit for sport anglers was four walleyes under seventeen (17) inches, and one over twenty-eight (28) inches, which in many cases is nearly impossible to find.⁸²

The majority of regulations which are designed to protect and bolster the walleye population in Mille Lacs Lake concentrate on sport fishing.⁸³ For 2014, the DNR and GLIFWC agreed to slash quotas for both sport anglers, as well as tribal fishermen.⁸⁴ Although this is a step in the right direction, it fails to address the issues relating to early ice-out fishing and netting. Early ice-out fishing and netting occur during the walleye spawn season, and will continue to jeopardize the health of each class year of walleye.⁸⁵

The Mille Lacs Lake walleye population, being at a forty year low itself is cause for concern.⁸⁶ Though both the DNR and the

⁸⁰ *2013-2014 Mille Lacs Regulations*, MINN. DEP'T OF NATURAL RES., available at <http://www.dnr.state.mn.us/fishing/millelacs.html> (last visited Jan. 15, 2014).

⁸¹ *Id.* For the purposes of this article, the terms angler, sport-angler, and sport fisherman are all used interchangeably and refer to any non-native who fishes with a rod and line.

⁸² Dennis Anderson, *Two-Fish Walleye and Bass Limits Obscure Real Issue on Mille Lacs*, STARTRIBUNE (Mar. 29, 2013, 12:13 AM), <http://www.startribune.com/sports/outdoors/200536831.html>.

⁸³ See Large Lake Sampling Report, *supra* note 74, at 13.

⁸⁴ Keller, *supra* note 16, "The quota will be cut in half for both sport and tribal anglers. Sport anglers will be allocated 178,750 pounds while bands with treaty rights will get 72,250 pounds".

⁸⁵ See *New DNR Plan* *supra* note 73

⁸⁶ See generally *2012 Mille Lacs Report*, *supra* note 4; Anderson, *supra* note 82; Dick Sternberg, *The Mille Lacs Fish Management Plan: Threat to Minnesota's Premier Walleye Fishery* [hereinafter Sternberg II], Proper Economic Resource Management (PERM), available at, <http://www.perm.org/pdfs/TreatyManagement.pdf> (last visited Jan. 15, 2014); Tim Spielman, *Major overhaul in management on Lake Mille Lacs?*,

Mille Lacs Lake Walleye Slot Limits By Year

Year	Mid-Year Adjustments	Harvest Slot in Inches	Protective Slot in Inches
1999		14 - 20	
2000		14 - 19	
2001		16 - 20	
	Jun. 5	16 - 18	
	Jun. 30	16 - 18	
	Dec. 1	14 - 18	
2002		14 - 16	
2003			17 - 18
2004			20 - 28
	Jul. 16 - Nov. 30		22 - 28
2005			20 - 28
2006			20 - 28
2007			20 - 28
	Jul. 9	14 - 16	
	Dec. 1		20 - 28
2008			18 - 28
2009			18 - 28
2010			18 - 28
	Jul. 15 - Nov. 30		20 - 28
2011			18 - 28
2012			17 - 28

GLIFWC are attempting to institute regulations in an effort to improve the walleye population, these regulations have proven ineffective.⁸⁷ Since the Courts ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians*, the lake has undergone many changes, most notably tribal over-fishing.⁸⁸ In order to effectuate sustainable growth in the walleye population to better protect the Mille Lacs

OUTDOORNEWS (June 21, 2012), <http://www.outdoornews.com/June-2012/Major-overhaul-in-management-on-Lake-Mille-Lacs>;

⁸⁷ See generally Sternberg II, *supra* note 86.

⁸⁸ *Id.*

Lake fishery, the DNR and GLIFWC need to take the proactive step of placing regulations on tribal fishing privileges because of the negative impact tribal fishing has on the walleye population.

B. Potential Causes

One of the chief concerns facing the DNR is the harvest levels of tribal fishermen.⁸⁹ The DNR has stated that tribal fishing by the Chippewa and other Native American Bands, is likely putting a strain on the male walleye population, at a rate that is unsustainable.⁹⁰ Tribal netting of walleye is allowed during early “ice-out” on Mille Lacs, during which sport walleye fishing is restricted.⁹¹ During early ice-out, male walleye enter the shallows of the lake and prepare for spawn, while females remain in deeper waters, out of reach of tribal nets.⁹² These early harvests during the spawning season result in approximately eighty to eighty-five percent (80-85%) male harvests, which exceed fifty percent (50%) of the harvestable male surplus of the tribal safe harvest level.⁹³ Current DNR reports show that spawn season harvesting of the male population of walleye could result in a decrease in the strength of the overall walleye class in Mille Lacs.⁹⁴ This reduction in the male population has continued to increase over the past decade.⁹⁵

Also adding to the pressure on the walleye population is the increasing number of tribal gillnets in use on Mille Lacs Lake,

⁸⁹ Spielman, *supra* note 86.

⁹⁰ *Id.*

⁹¹ *Id.*; “Ice-out” refers to “the disappearance of ice from the surface of a body of water (as a lake) as a result of thawing.” *Ice-out Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/ice-out>.

⁹² Tom Robertson, *On Red Lake, Walleye Netting Makes a Comeback*, MINN. PUB. RADIO (Aug. 3, 2009), <http://www.mprnews.org/story/2009/08/03/red-lake-walleye-fishing>; *see also* Dan Gunderson, *Red Lake Walleye Fishing Ruined*, MINN. PUB. RADIO (Apr. 15, 1998), http://news.minnesota.publicradio.org/features/199804/15_gundersond_walleye-m/.

⁹³ Spielman, *supra* note 86.

⁹⁴ Management Plan, *supra* note 8, at 2-3 (stating that the declaration of tribal harvest levels which are not subsequently harvested causes skewed numbers).

⁹⁵ *Id.*

which has increased significantly since 1997.⁹⁶ Since 1997 tribal gillnets have increased from fewer than 500 in 1997 to more than 3,250 in 2011.⁹⁷ Gillnetting has proven to cause serious harm to fisheries.⁹⁸ Further, delayed mortality due to non-retention creates a significant burden on the reproductive cycles of most species of fish.⁹⁹ “One of the major issues with . . . gillnetting . . . is the fact that, unlike a sports fisherman, gillnets do not differentiate between . . . fish.”¹⁰⁰ In determining how much of the allocated quota the tribes have filled, mortality rates are to be included in the calculations, and there are indications that tribal fishermen are not including counts for all mortality due to their fishing activities.¹⁰¹

In determining the safe harvest level (SHL) for walleye in Mille Lacs, the DNR uses a computer model, which takes into account the DNR sampling, biomass index of the fishery, as well as other conditional factors present from the prior year.¹⁰² The DNR provides in depth information on how SHLs are calculated each year.¹⁰³ Experts call into question the DNR’s calculation of SHLs in Mille Lacs, asserting that through number manipulation the DNR is greatly exaggerating SHLs and exploitation rates of the walleye population in Mille Lacs.¹⁰⁴ Although intentions are well placed,

⁹⁶ *Id.*, Figure 2.

⁹⁷ *Id.*

⁹⁸ Matthew R. Baker, *Injuries from Non-Retention in Gillnet Fisheries Suppress Reproductive Maturation in Escaped Fish*, PLOS ONE (July 24, 2013), <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0069615>.

⁹⁹ *Id.*

¹⁰⁰ Josh Stellmon, *Under the Guise of ‘Treaty Rights:’ the Nez Perce Tribe of Idaho, Steelhead, and Gillnetting*, 29 PUB. LAND & RES. L. REV. 63, 78 (2008).

¹⁰¹ See generally Management Plan, *supra* note 8.

¹⁰² See generally Sternberg I, *supra* note 8.

¹⁰³ See Eric Jensen & Aitkin Area Fisheries, *Completion Report: Mille Lacs Lake Creel Survey Report for Open Water Season of 2012*, (2012) (explaining the techniques and calculation models used by the Minnesota DNR in creating SHL reports) (copy on file with author); see also Sternberg I, *supra* note 8 at 7 (noting that the DNR calculations may be based on incorrect numbers due to variances in net results).

¹⁰⁴ Sternberg I, *supra* note 8, at 4.

While overstating my post-treaty harvest proposal, the DNR greatly understated their own. Their proposed safe harvest level

the potential miscalculation of SHLs on Mille Lacs raises questions about the ability of the DNR and the GLIFWC to successfully co-manage the fishery and assess proper regulation strategies.¹⁰⁵ The proposed slot limits and projected SHLs of walleye have historically been subject to great variances.¹⁰⁶ Because of these variances, the DNR's original projections are often incorrect, leading to stricter regulations on sport-anglers mid-season.¹⁰⁷ These changes in regulations affect the number of anglers who travel to Mille Lacs Lake, and have correlated to sharp declines in the fishing resort and guide industry surrounding Mille Lacs Lake.¹⁰⁸ Because of the DNR's inability to properly calculate SHLs of walleye, the current regulation system is flawed, and fails to address properly the impact of Native American harvesting.

While gillnetting is a significant factor in the decline of the Mille Lacs fishery, other causes are also playing a role in the

(SHL) of 400,000 pounds per year is considerably below the 586,000-pound SHL recommendation generated by their own computer model. The problem is, they have given back more than 200,000 pounds per year after negotiations with the Band, although they have denied doing so.

Id.

Dick Sternberg was a Senior Fisheries Biologist for the St. Paul office of the Minnesota DNR. He is currently a member of the Minnesota Fishing Hall of Fame, the National Freshwater Fishing Hall of Fame, and in 2007 was selected by Outdoor life as "one of the prestigious OL 25 'People Who Have Changed the Face of Hunting and Fishing'". Mr. Sternberg was also one of the driving forces in creating the Minnesota DNR Roundtable, a forum for Minnesota anglers to have input in fish management regulations implemented. *Dick Sternberg – Fishing Hall of Fame*, FISHING HALL OF FAME MN, available at <http://www.fishinghalloffamemn.com/hall-of-famers/dick-sternberg/> (last visited Feb. 13, 2014).

¹⁰⁵ See generally Sternberg I, *supra* note 8.

¹⁰⁶ Sternberg II, *supra* note 86, at 4.

¹⁰⁷ *Id.* (showing that in 2001 the original regulations provided for less than 10% chance the quota would be exceeded, but within three months of the beginning of the fishing season sport anglers were on pace to double the quota).

¹⁰⁸ Sternberg II, *supra* note 86, at 4 (referencing a reduction in the slot limit mid-season in 2001 on Mille Lacs Lake, "many resorters reported a 50- to 90-percent decline in business after the 2-inch slot was imposed.").

decline.¹⁰⁹ Over the past decade, non-native species, including zebra mussels and Eurasian watermilfoil, and forage species, such as tullibee, have crept into Mille Lacs Lake.¹¹⁰ The presence of zebra mussels, which were introduced into Mille Lacs around 2005, put an increased strain on the walleye population.¹¹¹ One negative corollary between zebra mussels and the walleye population is with water clarity.¹¹² Walleyes prefer cloudy waters, and as the zebra mussel population increases, so does the clarity of the water.¹¹³ This water clarity aids predatory fish who rely on sight to easily target young walleye.¹¹⁴ Water clarity also aids vegetation to densely grow and thrive at greater depths, particularly in comparison to naturally cloudy water.¹¹⁵ The DNR has also acknowledged that, to some extent Eurasian watermilfoil, an invasive aquatic plant, is a factor in the decline of the walleye population.¹¹⁶ Eurasian watermilfoil itself is not a threat to the walleye population in Mille

¹⁰⁹ Dave Orrick, *Lake Mille Lacs: Invasive Species and Predators Complicate Walleye Picture*, TWINCITIES (Mar. 30, 2013, 12:01:25 PM), http://www.twincities.com/ci_22902437/dave-orrick-unraveling-mille-lacs.

¹¹⁰ Anderson, *supra* note 82.

¹¹¹ Doug Smith, *Look Reveals Mille Lacs has Grown Mussel-Bound*, STARTRIBUNE (Aug. 16, 2011, 12:53 PM), <http://www.startribune.com/sports/outdoors/127646623.html>; *see also New DNR Plan*, *supra* note 73 “Improved water clarity has been linked to movement of young of the year walleye off-shore at smaller sizes, and may have also benefited sight-feeding fish that prey on walleye and perch.”

¹¹² Craig Springer, *Zebra Mussels Hurt Walleye Habitat*, SPORTSMANSGUIDE.COM, available at <https://www.sportsmansguide.com/Outdoors/Subject/SubjectRead.aspx?sid=0&aid=158603&type=A> (last visited February 18, 2014).

¹¹³ *Id.* *See also New DNR Plan*, *supra* note 73 (stating that the federal Clean Water Act has also caused water clarity to sharply increase, and the water clarity is currently approximately twice as clear as it was in the 1980s).

¹¹⁴ *See New DNR Plan*, *supra* note 73.

¹¹⁵ *Id.*

¹¹⁶ *Id.* *See also Eurasian Watermilfoil FAQ*, MINN. DEP’T. OF NATURAL RES., <http://www.dnr.state.mn.us/invasives/aquaticplants/milfoil/faq.html> (last visited Jan. 29, 2014). Eurasian watermilfoil is considered an invasive species by the Minnesota DNR. Because of its aggressive growth, it chokes out native aquatic species and eventually changes the ecosystem.

Lacs Lake.¹¹⁷ Instead, the presence of Eurasian watermilfoil creates dense vegetation patches, providing greater cover for northern pike, a natural predator to walleye.¹¹⁸ Finally, changes in the forage species, most notably tullibee, are adding to the decline of the walleye population.¹¹⁹ The decrease in tullibee and other forage species of the walleye, results in weaker year classes by limiting the amount of food available.¹²⁰

The change Mille Lacs Lake is undergoing is extensive, with multiple negative influences being introduced over the past fifteen years. Since the Supreme Court's ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians*, the DNR has focused most of its regulations on sport anglers.¹²¹ Prior to the Court's decision in *Minnesota v. Mille Lacs band of Chippewa Indians*, the DNR only implemented walleye harvest restrictions in two out of thirty seven (37) years.¹²² Since the Supreme Court's ruling, the DNR has placed a restrictive slot on sport walleye fishing every year, with subsequent year protective slots being increased.¹²³

¹¹⁷ *New DNR Plan*, *supra* note 73, at 15 (stating that although the DNR is not sure what implications invasive species have on the walleye population, there could be a correlation between invasive species and predator rates).

¹¹⁸ *New DNR Plan*, *supra* note 73.

¹¹⁹ See Darby Nelson, *Canaries of Deep Water: Declines of This Small, Silvery Fish Could be Signaling Big Changes in Some Minnesota Lakes*, Minnesota Conservation, MINN. DEP'T. OF NATURAL RES. (July-Aug. 2008), http://www.dnr.state.mn.us/volunteer/julaug08/canaries_deepwater.html (stating that tullibee (*Coregonus artedii*) are also known as cisco or lake herring and are common prey fish in Minnesota lakes. Ms. Nelson continues by noting that by observing tullibee levels one can determine the health of a lake "[i]f you have tullibee in a lake, you know things are pretty good. If they are declining, you know something is wrong."). See also *New DNR Plan*, *supra* note 73, (noting that the decline in tullibee, the most caloric prey of the walleye, is likely reducing the growth rate of walleye).

¹²⁰ See *New DNR Plan*, *supra* note 73.

¹²¹ See 2008 Creel Eric Jensen & Aitkin Area Fisheries, *Completion Report: Mille Lacs Lake Creel Survey Report for Open Water Season of 2008*, [hereinafter "2008 Creel Report"] at 15 (copy on file with author).

¹²² 2008 Creel Report, *supra* note 120, at 15 (stating that in 1997 the DNR implemented a protective slot minimum of 15-inches, and one fish over 20-inches; in 1985 the protective regulation was 1 walleye over 20 inches).

¹²³ See 2012 Creel Report, *supra* note 102, at 16.

Current conservation efforts appear to focus almost exclusively on controlling invasive species, as well as other fish populations.¹²⁴ While the DNR is addressing these natural causes of decline in the walleye population, it is much more reserved in proposing new regulations on Native American tribes.¹²⁵ In its most recent press release, the DNR concedes that its regulations and efforts are not enough, and further help is required.¹²⁶ The DNR announced that because of the changes to Mille Lacs Lake, and the potential for irreparable damage to the fishery it will be requesting national help.¹²⁷

IV. PROPOSED SOLUTIONS

A. Legal Precedent Supporting Tribal Regulation

The Supreme Court, as well as lower federal courts, found regulation of tribal hunting and fishing rights by state agencies to be valid in certain situations.¹²⁸ The United States District Court for the Southern District of Indiana held that a state DNR agency is within its constitutional rights in prohibiting gillnetting in all

¹²⁴ *New DNR Plan*, *supra* note 73, (explaining that in the wake of the decline of the Mille Lacs Lake walleye population, a national review has occurred over the management techniques used by the Minnesota DNR. This review focuses on five areas of concern which must be addressed in order for the walleye population to regain strength. These areas are: (1) increased water quality, (2) increased walleye predator populations, (3) multiple aquatic invasive species, (4) changing zooplankton community, and (5) long-term changes in key forage species).

¹²⁵ The DNR's reports until 2002 included information on the treaty rights of the Chippewa. After 2002, the DNR has ceased including treaty right information in their annual report. This is a negative inference because of the lack of available DNR information specifically regarding treaty rights. One reason for a lack of information on negotiations and restrictions agreed to between the DNR and the GLIFWC is that these meetings are closed to the public.

¹²⁶ *See The Solution*, SAVE THE MILLE LACS SPORT FISHING, <http://www.savemillelacssportfishing.org/the-solution/> (last visited January, 25 2014).

¹²⁷ *Id.*

¹²⁸ *See generally* Puyallup I, 391 U.S. 392 (1968); *People of State of New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Burns Harbor Fish Co., Inc. v. Ralston*, 800 F. Supp. 722 (S.D. Ind. 1992); *Stellmon*, *supra* note 100, at 66-67.

uses.¹²⁹ In *Burns Harbor Fish Co. v. Ralston*, the United States District Court of Indiana held that “a State should be able to take preemptive measures to protect its natural resources even before those resources appear threatened with extinction or before the State incurs significant costs in maintaining or rehabilitating the resource.”¹³⁰ Justice Douglas in *Puyallup Tribe v. Dept. of Game* held that “the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against Native Americans.”¹³¹ These regulations must be vetted to ensure that increased regulation on tribal harvesting are reasonable, and are the least restrictive option available.¹³²

Although the Court in *Minnesota v. Mille Lacs Band of Chippewa Indians* held that the tribe retains usufructuary rights, there is precedent set that would allow for strict regulations to be implemented.¹³³ While Minnesota may not completely strip the Chippewa Indians of their right to harvest fish from Mille Lacs Lake, the State is within its power to regulate for conservation reasons. The current status of Mille Lacs Lake falls squarely within the requirements for Minnesota to enforce their police power to mitigate and rectify the damage being done to the lake.¹³⁴

¹²⁹ *Id.* at 733.

¹³⁰ *Burns Harbor Fish Co., Inc. v. Ralston*, 800 F. Supp. 722, 732 (S.D. Ind. 1992).

¹³¹ *Stellmon*, *supra* note 100, at 72. *See generally* *Puyallup Tribe v. Wash. Game Dep’t.*, 391 U.S. 392 (1968).

¹³² *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (the Court holding that (1) there must be a public safety or health risk, (2) the regulation sought is “necessary to the prevention or amelioration of the public health or safety hazard”, and (3) regulation of “the tribes is necessary to effectuate the particular public health or safety interest”).

¹³³ *See generally* *Puyallup Tribe v. Wash. Game Dep’t.*, 391 U.S. 392 (1968).

¹³⁴ *See generally* *New DNR Plan*, *supra* note 72; *Management Plan*, *supra* note 8; *Anderson*, *supra* note 82.

B. Specific Proposed Solutions

All walleye harvest during the spawning season must come to an end.¹³⁵ As Tom Jones, DNR Treaties Manager, stated, “we don’t want to continue down the path we’ve been going down . . . we want to make sure we know where we are and change direction and make things improve.”¹³⁶ As current DNR surveys show a 40 year low in the walleye population, the DNR cannot afford to hesitate in implementing new regulations.¹³⁷ Although the DNR claims they are not sure of the reason why Mille Lacs Lake has lost its walleye luster, the agency admits that, “far fewer walleye are growing to catchable size and maturity than in the past.”¹³⁸ Within the same passage the DNR states that sustainability is not yet an issue, but unless action is taken immediately, sustainability could soon be an issue for the survival of young walleye.¹³⁹ With DNR regulations focusing on non-Native American causes of the walleye decline failing to mitigate rectify the problem, the DNR must shift its focus to regulating the Native American commercial fishing before the sustainability of the walleye population reaches a critical levels.

A potential problem to banning gillnetting, or any harvesting of walleye during the spawn season, is satisfying the requirement that the regulation does not discriminate against tribal fisherman.¹⁴⁰ Typically, the Minnesota sport fishing season runs

¹³⁵ See *The Solution*, *supra* note 126.

¹³⁶ Conrad Wilson, *Walleye Population Decline in Lake Mille Lacs Concerns DNR Researchers*, MINN. PUB. RADIO (June 24, 2013), <http://www.mprnews.org/story/2013/06/24/environment/walleye-population-decline>.

¹³⁷ See generally 2011 SURVEY REPORT, *supra* note 75; *Mille Lacs Lake: Building a Sustainable Future* note 138.

¹³⁸ *Mille Lacs Lake: Building a Sustainable Future*, MINNESOTA DEPT’ OF NATURAL RES., <http://www.dnr.state.mn.us/millelacs/index.html> (Background FAQ tab, Why is this Happening Link) (last visited Jan. 31, 2014).

¹³⁹ *Id.*

¹⁴⁰ See *Puget Sound Gillnetters Assoc. v. Moos*, 92 Wn.2d 939 (Wash. 1979). The Supreme Court of Washington ruled that a ban on gillnetting would be prejudicial to native tribes. This prejudice resulted from the fact that the only way

from early May through the end of February of the following year.¹⁴¹ The period of time where fishing is not allowed by sport anglers, the end of February through the beginning of May, is designed to give all species of fish enough time to spawn safely, without predatory threat from human fishing during their most vulnerable time.¹⁴² Essentially, sport anglers are restricted from fishing to protect walleye during points of vulnerability.¹⁴³ However, during this restricted sport fishing and delicate spawning season for walleye in Minnesota, tribal fishing is allowed.¹⁴⁴ When only tribal fishing is taking place, a restrictive ban on all harvesting may be viewed as unjustly discriminating against tribal fishing.¹⁴⁵

One possible solution to the Mille Lacs Lake problem has already been tested and succeeded in another one of Minnesota's great walleye fisheries, Red Lake.¹⁴⁶ On Red Lake, the walleye

native tribes harvested fish was through gillnetting. By placing an outright ban on all gillnetting, the State's actions discriminated only against the tribes because only the tribes were losing their right to harvest fish.

¹⁴¹ *Fishing Seasons*, MINN. DEP'T OF NATURAL RES., <http://www.dnr.state.mn.us/fishing/seasons.html> (last visited Jan. 16, 2014). The walleye season in Minnesota for the year of publication was May 10, 2014 through February 22, 2015. The 2013 walleye season ran from May 11, 2012 through February 23, 2013.

¹⁴² See generally Sternberg I, *supra* note 8.

¹⁴³ *Open-Water Spearing and Netting Regulations: 1837 Ceded Territory in Minnesota*, GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION, available at http://www.glifwc.org/Regulations/MN_SpearingNetting.pdf (last visited Jan. 15, 2014) ("Gillnetting in Mille Lacs Lake is allowed year around. Only subsistence netting may occur from March 2 - May 31.").

¹⁴⁴ See Hal Schramm, *Walleye Spawn Map: Where to Find 'Eyes,'* NORTH AMERICAN FISHERMAN (Apr. 21, 2011), <http://www.fishingclub.com/magazine/articles/articletype/articleview/articleid/2903/walleye-spawn-map>.

¹⁴⁵ *Puget Sound Gillnetters Ass'n v. Moos*, 603 P.2d 819 (Wash. 1979).

¹⁴⁶ Red Lake Fisheries Program, RED LAKE DEP'T OF NATURAL RES., <http://www.redlakednr.org/Fisheries.html>, (last visited Jan. 15, 2014). Red Lake is separated into two sections, Upper Red Lake and Lower Red Lake. Lower Red Lake is contained entirely within the Red Lake Chippewa reservation and is restricted to tribe members only. Upper Red is divided between tribe ownership and state ownership. Approximately 60 percent of Upper Red is located within the Red Lake Chippewa Reservation and is non-tribe fishing is restricted. The other 40 percent is owned by the State and is fully regulated by the Minnesota

stock collapsed in the late 1990's due to overfishing by the Red Lake Chippewa, in an effort to expand their commercial walleye processing plant.¹⁴⁷ In 1997 the Red Lake Band, the State of Minnesota, and the Bureau of Indian Affairs, joined in an effort to revive the once great fisheries in both Upper Red and Lower Red Lake.¹⁴⁸ As part of this effort to save the fishery, the Red Lake Chippewa voluntarily ceased commercial fishing operations in 1997.¹⁴⁹ The Red Lakes Walleye Recovery Plan was divided into two phases.¹⁵⁰ The short-term phase, designed to help the walleye population recuperate, consisted of a "no kill/no possession" regulation.¹⁵¹ The second phase, which dealt with sustainability, only allowed walleye harvesting "when mature female biomass exceeds a predetermined density for three consecutive years."¹⁵² As a result of the cessation of commercial fishing on Red Lake, by 2006 the fishery had regenerated, and indications point to the fishery becoming the healthiest it has been in almost a century.¹⁵³ Although commercial fishing has resumed on Red Lake, both the DNR and the Red Lake Chippewa Band are taking caution in increasing commercial harvest levels.¹⁵⁴ Currently commercial harvesting is

DNR. (Dan Gunderson, *Red Lake Fishing Ruined*, MINN. PUB. RADIO (April 15, 1998),

http://news.minnesota.publicradio.org/features/199804/15_gundersond_walleye-m/) *The Red Lake Chippewa live on the only "closed reservation" in Minnesota. In a closed reservation there are no private property rights.*

¹⁴⁷ Robertson, *supra* note 92. *See also* Gunderson, *Red Lake Walleye Fishing Ruined*, *supra* note 92 (stating that at one point Red Lake's walleye population was as good or better than Mille Lacs Lake, but due to commercial over-fishing, "only a remnant of the world-famous Red Lake walleye remain.").

¹⁴⁸ Red Lake Fisheries Program, *supra* note 146.

¹⁴⁹ *Id.*

¹⁵⁰ *Red Lake Walleye Recovery Program*, HARVARD KENNEDY SCHOOL ASH CENTER FOR DEMOCRATIC GOVERNANCE AND INNOVATION, <http://www.innovations.harvard.edu/awards.html?id=31351> (last visited Apr. 5, 2014).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Robertson, *supra* note 92, (quoting Pat Brown, tribal fisheries biologist).

¹⁵⁴ Gunderson, *supra* note 92, (beginning in 2006 gillnetting was still not allowed on Lower or Upper Red Lake, and all commercial fishing must be by line and hook, with tribe members being allowed a limit of 100 fish per day).

limited to traditional rod and reel fishing, with gill-netting and other large-scale operations on hold until they have been deemed safe for the walleye population.¹⁵⁵ During the cessation of commercial harvesting, the portion of Red Lake, which is open to non-tribe anglers, was still used for sport fishing.

The State of Minnesota has within its authority the ability to regulate tribal hunting and fishing on ceded lands, which must be utilized.¹⁵⁶ While it is clear that many different factors are contributing to the decline of the Mille Lacs fishery, one factor that the State has absolute control over is the usufructuary fishing rights of the Mille Lacs Chippewa and their harvesting techniques.¹⁵⁷ Through the use of the State's police power, Minnesota is able to control one of the key factors in the decline of Mille Lacs through regulations limiting tribal harvesting of Walleye during the spawning period, which is when walleye are at their most vulnerable.¹⁵⁸

The Minnesota DNR has recently stated that because of the significant changes to Mille Lacs Lake, the DNR is requesting national help in its attempt to revitalize the walleye population. Part of this new effort to revive the Mille Lacs Lake fishery is the creation of a "blue-ribbon" panel consisting of national fishery experts.¹⁵⁹ This panel will be reviewing proposed conservation strategies and recommending new courses of action.¹⁶⁰ Included in the latest press release, is one of the few acknowledgements by the DNR that prior tribal and state management techniques have been part of the cause for the decline of the walleye population in Mille Lacs Lake.¹⁶¹

¹⁵⁵ *Id.*

¹⁵⁶ *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F. Supp. 1362 (D. Minn. 1997).

¹⁵⁷ Orrick, *supra* note 109 (multiple invasive species and over fishing are causing the Mille Lacs decline).

¹⁵⁸ *See generally*, The Solution, *supra* note 126.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Imposing stricter regulations on tribal fish harvesting may bring concerns of improper or unfair regulation of tribal fishing rights.¹⁶² There are instances where the state and native tribes have come to a mutual voluntary agreement to reduce harvest levels, as shown by the successful rehabilitation of the Red Lake Fishery.¹⁶³ Imposing a complete gillnetting ban on Mille Lacs Lake may not be feasible, but through negotiations, and the state using its inherent police power to leverage negotiations, an amicable agreement should be possible.

V. CONCLUSION

Due to the historical treatment of Native American Tribes, imposing regulations on individual tribes is often seen as an attempt to reign in or limit tribal sovereignty.¹⁶⁴ This tension, combined with the Supreme Court's ruling in *Minnesota v. Mille Lacs Band of Chippewa*, has resulted in the deterioration of the fishery of Mille Lacs Lake.¹⁶⁵ Since *Minnesota v. Mille Lacs Band of Chippewa*, the fishery has continued to see ever decreasing numbers and quality of walleye, with 2012 showing the weakest walleye population in over forty (40) years.¹⁶⁶

Current conservation efforts on the part of the GLIFWC and the Minnesota DNR are failing to remedy the decline of the walleye population. For the State of Minnesota to avoid implementing regulations which would run afoul of tribal sovereignty, Minnesota must work closely with the Mille Lacs Band of Chippewa to ensure the regulations are reasonable and necessary, and are as least imposing on the Chippewa as possible. When the health and future of a natural resource is threatened, a state does not have to wait for irreparable harm to happen before stepping in. This means that if negotiations with the Mille Lacs Band of Chippewa Indians fail to

¹⁶² Puget Sound Gillnetters Ass'n v. Moos, 92 Wn.2d 939, 942 (Wash. 1979).

¹⁶³ See Red Lake Fisheries Program, *supra* note 146.

¹⁶⁴ See generally Stellmon, *Under the Guise of Treaty Rights*, *supra* note 100 (discussing the tension between local fishermen and the Nez Pierce Tribe near the Columbia River).

¹⁶⁵ See generally Sternberg I, *supra* note 8.

¹⁶⁶ 2012 Mille Lacs Report, *supra* note 4.

address and resolve the issue of commercial harvesting during vulnerable times, the State is within its right to impose new regulations.

While drastic measures may leave some with a sour taste, controlling over harvesting through regulations, whether self-imposed, or through police power has proven to be an effective way of rehabilitating Minnesota's legendary fisheries.¹⁶⁷ With the current conservation techniques failing to remedy the situation, the State must resolve to put an end to spawn season gillnetting in Mille Lacs Lake.¹⁶⁸

¹⁶⁷ Robertson, *supra* note 92.

¹⁶⁸ *New DNR Plan*, *supra* note 73.