

A PATH TO VICTORY

The past dozen years have been discouraging for Minnesota citizens who opposed the effort by the Ojibwe Bands to reinstate the 1837 Treaty hunting and fishing rights. Many people believe that the battle ended with the United States Supreme Court's decision in 1999 recognizing the treaty rights.

But two legal issues were not addressed by the United States Supreme Court's decision in 1999:

- 1) Whether the Indian Claims Commission Act prevents the courts from issuing an injunction barring the State of Minnesota's enforcement of its fish and game laws.
- 2) The Second Phase of the trial was never heard in the District Court or at any other level, because the State of Minnesota opted to enter into agreements or protocols with the Bands allowing the treaty harvest under the Bands' hunting and fishing codes.

The only issues ultimately decided by the Supreme Court and District Court decisions were whether the treaty right was still in existence and whether it extended to private lands.

The first issue, the Indian Claims Commission Act, has been the subject of other articles. This will focus on the Phase II issues, which should be heard in the District Court.

A POLITICAL BATTLE

The battle over the 1837 Treaty rights has always been more about politics than the law. The position taken by the landowners and the State of Minnesota before the Supreme Court was fully supported by all existing legal precedent and yet, in a 5 to 4 decision that Chief Justice Rehnquist decried as having no principled basis, the majority overruled existing case law and disregarded other precedents in finding that the 1837 Treaty right still existed. The case started as a battle in the Minnesota Legislature over a "settlement" that would have allowed the Band an exclusive fishing area on Lake Mille Lacs, which was defeated so that the issues could be heard and tried in the courts. Yet today the Phase II issues have never been decided, because the State of Minnesota made a political decision that it didn't want to risk the allocation the court might award in a Phase II trial to the

Band. Instead the State entered into agreements with the Band to allow hunting and fishing. The result has been allowing the Band nearly 50% of most fish species, while the walleye harvest methodology has proven to be a practical and biological disaster.

In a Phase II trial, the Court would decide how much of the resource the Band members would be allowed to harvest, not to exceed 50% of the safe harvest level of each species. There is no guarantee that the Band would get 50% of the safe harvest level of any species. The Supreme Court standard on allowable harvest also looks to whether the Band has attained a moderate standard of living and, if so, the Band may be entitled to no treaty harvest.

PERM supported the landowners in the Treaty lawsuit because of its belief that all citizens in the State of Minnesota should have the right to hunt and fish under the same rights and laws. The equal rights of all individuals is the cornerstone of our Constitution and government, and when the United States has denied the equal rights of all individuals powerful movements have risen up to address the injustices. The vast majority of Americans of all political persuasions accept that equal rights cannot be denied on the basis of race, gender, religion or origin.

A dozen years ago, when the landowners were preparing for a Phase II trial, the evidence pointed to economic hardship if treaty rights were exercised, because of the damage to the economy around Lake Mille Lacs. There were concerns about whether any system that used two different harvest methods, administered through different government agencies, could safely, effectively, and fairly manage the complex harvest issues for the species involved.

The answers, as we know today, are that treaty harvest has caused damage to the economy around Lake Mille Lacs, and has caused genuine biological concerns regarding the impact on the walleye population. Put simply, the benefit of treaty harvest to Band members is outweighed by the damage done by treaty harvest, at a time when the Mille Lacs Band's two highly successful casinos generate millions and millions of dollars of profit. The studies commissioned by PERM establish that the Mille Lacs Band has attained a moderate standard of living and that Treaty harvest has caused real damage to the economy in Mille Lacs County.

THE PHASE II ISSUES

When the case was tried before Judge Murphy, it was divided into two phases. 1) whether the 1837 Treaty right existed and, if so, whether it applied to private lands and 2) in Phase II whether and to what extent the Treaty right could be exercised. The Court never reached Phase II because the State of Minnesota entered into agreements or protocols with the Band permitting treaty harvest under the Band's Code, which agreements are renewed periodically (5-year time frames). No Phase II trial will be heard until the State of Minnesota stops entering into agreements

with the Bands allowing the harvest, which would then force the matter back to the District Court for a Phase II decision.

Among the Phase II issues is the amount of treaty harvest the Band could exercise. The U.S. Supreme Court's decisions in other cases have indicated that treaty harvest cannot exceed 50% of the safe harvest of any particular resource, and may be a lesser percentage down to 0% depending upon whether the Bands have attained a moderate standard of living. The Bands have argued that the moderate standard of living must be obtained through hunting and fishing alone, and the 8th Circuit in *dicta* (a statement by the Court that isn't essential to its holding) stated the same thing. This, of course, is nonsense for two reasons. First, is it likely that the U.S. Supreme Court adopted a moderate standard of living based on treaty harvest, when no one reasonably anticipated, even in the 1800s, that Bands that had been moved to reservations could maintain a living by hunting, fishing and gathering alone?

Second, assuming that it had to be based only on hunting, fishing and gathering, this would mean that the Court could only reduce hunting, fishing and gathering rights once a Band attained a moderate standard of living, which presumably would reduce the moderate standard of living! So the argument is logically inconsistent, and inconsistent with what the Supreme Court almost certainly meant when it established the moderate living standard test. Most believe that a "moderate living standard" is based on the standard of living of the average person in the area at issue.

The moderate living standard is impacted by the economic condition of tribal members, including the monies generated by tribes from their casino operations. In this case, the Mille Lacs Band has two very successful casinos that generate tens of millions of dollars, if not more, per year. This not only has resulted in jobs and other benefits for Band members, but tribal members also generate income from their own personal business or employment activities. The economic study done by PERM concludes that the Mille Lacs Band has attained a moderate standard of living.

Another test that is relevant to injunction standards is the benefit vs. harm caused by the injunction. Put simply, is the benefit to the Band from treaty harvest commensurate with the harm to non-Band members and/or to the resource? The economic study done by PERM shows that the economic consequences to Mille Lacs County have been devastating, while the economic benefit to the Band from treaty harvest is marginal.

At the same time, the biological injury from treaty harvest is a serious issue. Among the outcomes are: years in which non-Band harvest levels have been below allowable harvest; years in which the non-Band harvest has been composed in substantial part by fish caught and released outside the slot limit, with non-Band

members assigned the mortality rate associated with catching and releasing those fish. More recently, there is a serious issue about the impact of this dual harvest method/dual management system by the State and Bands which has resulted in a sudden drop in the walleye population.

If the most recent netting data is to be believed, the trend toward a lake with an unusually large percentage of older year fish classes or larger fish versus a typical population spread has either impacted the male walleyes adversely for reproduction, has caused a dramatic drop in the forage fish resulting in a mortality of walleyes, or a combination of these and/or other factors that have caused a dramatic decline in the walleye net sampling. If the net results are accurate, this indicates that this experiment with a harvest focused on smaller class sizes, both for angling and netting, has disrupted the natural balance in the lake and has caused damage to the fishery.

All of these factors indicate that the time is right for the public to demand answers, for the Legislature to hold hearings, and for the State of Minnesota to stop entering into agreements governing the harvest with the Band and returning the matter to the United States District Court for a determination of the Phase II issues. Not only does the information indicate that the Mille Lacs Band has attained a moderate living standard, but the impact on the fishery and the economy from tribal harvest is not commensurate with the benefit to Band members from netting.

Douglas J. Meyenburg Jr.

Douglas Meyenburg, Jr.
Proper Economic Resource Management, Inc.

Howard B. Hanson

Howard B. Hanson
The Hunting & Angling Club

