1855 Ceded Territory potential lawsuit - UPDATE

Judge hears arguments in Gull Lake netting case

PAY ATTENTION MINNESOTA!

Jennifer Kraus' report today (Sept 6) in the Brainerd Dispatch *Judge hears arguments in Gull Lake netting case* [http://bit.ly/2Pic9C7] provides important details of a case that potentially has more far-reaching consequences than the Mille Lacs 1837 Treaty case, for several reasons.

High Stakes

The case applies to the entire 1855 ceded territory area (900,000 acres or 1,400+ square miles) including the Brainerd lakes area along with most of northern Minnesota's large lakes. It also includes a small portion of Mille Lacs Lake, which means the entire lake if the usual "contiguous waters" principle is applied. See map at perm.org.

This is not a routine case. It has dragged on now over three years since four tribal members were arrested for illegal rice harvest and gillnetting in Gull Lake. Three of the four tribal members involved in the original protest have had their charges dropped. Four 9th Judicial District judges in Crow Wing County recused themselves without giving any reason for recusal.

In August of 2017, 9th Judicial District Judge Jana M. Austad from Cass County took on the case. A year later (this Wednesday) there was a hearing, after which she will decide whether or not the defendant is protected under the 1855 treaty.

Traveling Rights?

A question about the remaining defendant James Warren Northrup's membership in either the Leech Lake or Fond du Lac tribe complicates the case. If he is a member of the Leech Lake tribe he could be liable for netting without a state license. If he is a member of the Fond du Lac Tribe he could be protected by the 1855 treaty's coverage of the Fond du Lac Reservation.

Jennifer Kraus reported on conversations after the hearing that shed light on such "portable" rights. Tribal defense attorney John Plumer stated that "all the territories of all the different treaty areas are all controlled by the Tribal Executive Committee and that we are one tribe." He added, "This committee determines whether or not people have rights to go outside the area they were historically enrolled in."

Does that mean the "Tribal Executive Committee" gets to decide how the exercise of any given treaty's provisions can be applied, regardless of which tribe was covered by the treaty, as long as they are part of the collective "Ojibwe tribe"?

That would allow the 1855 Treaty’s ceded territory—currently without any off-reservation hunting, fishing, gathering rights—to "inherit" rights from any other treaty.

A somewhat similar formula was created by the DNR to avoid regulations limiting wild rice harvest. Instead of being reservation specific, all Native Americans (DNR's language) could harvest wild rice on any reservation.

Honoring Treaties?

How does the Tribal Executive Committee come by the authority to supersede the plain language of the 1855 Treaty? Specifically, how does it supersede the agreement to "fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere"?

In 1980 a U.S. District Court ruled in a Red Lake case that clear language like that in the 1855 Treaty extinguished all off-reservation hunting and fishing claims. The 8th Circuit Court of Appeals later upheld this ruling.

PERM stands by all treaties with the tribes as they are written.

Harvest Rights Morph into 'Property Rights'

Notice in Jennifer Kraus' report how defense attorney Plumer added to the narrative that Treaty rights also mean "property rights." He stated, "All we are asking is to honor the treaties that we made with the United States that made this state possible. (We are) exercising our hunting, fishing, gathering of properties, as it is our property rights."

The biggest threat from acceding to any 1855 Treaty harvest claims in this case comes from the tribe's addition of "property rights" to claimed treaty harvest rights.

The property rights concept springs from attorney Peter Erlinder's analysis of treaties going back to 1795. He found them to be likely sources of "as yet unrecognized" and of "as yet undeveloped" property rights.

Recognizing property rights will have land-use management implications far beyond wildlife harvest. Arthur LaRose, chairman of the "1855 Treaty Authority," after the August 2015 protest, said that having these property rights would allow the tribe to "more forcefully assert management or regulatory rights on larger environmental issues such as the burying of oil pipelines or the relaxation of mining-related sulfate standards for wild rice." That's behind what Plumer was referring to when he said, "We want to guarantee that people have pristine drinking water."

Again, PERM stands by all treaties with the tribes as they are written.

Made Whole?

Defense attorney Plumer wrapped up his argument saying, "We're not the bad guys. We have poverty, historical, social and economic conditions that we are still paying for those treaties."

They are not the bad guys. Neither are non-tribal members. In 1946 Congress created a tribunal, the Indian Claims Commission (ICCA), [http://bit.ly/2q5Xeg1]

to hear and resolve all types of Indian claims, including treaty rights claims by Indians against the United States.

The ICCA is unusual in that Congress gave the Commission authority to also hear claims that were moral in nature. Therefore, tribes could bring cases claiming that the federal government had coerced them into signing treaties or misrepresented agreements, or acted in other ways that could be seen as violating fair and honorable dealings that were not recognized by any existing laws.

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

In 1965 the ICC awarded the collective Ojibwe tribe, $3.93 million ($31,341,000 in 2018 dollars) for insufficient payment under the 1855 Treaty. As with all ICC cases, the Chippewa, by accepting payment, were forever barred from future claims under the 1855 Treaty.

Again in 1973 the ICC awarded the collective Ojibwe tribe, $9.02 million ($71,933,000) for claims under the 1837 treaty, including claims for lost hunting and fishing rights. What will the cost be if "co-management" comes to the 1855 ceded territory?

District Judge Jana Austad, who has taken the case under advisement, has up to 60 days to make a decision.