Treaties and International Law

The United States Constitution declared treaties are the supreme law of the land, before the U.S. entered into a series of 44 treaties with Chippewa.[1] The U.S. government under federal law should honor the rights guaranteed to tribal members in their treaties, which must necessarily include meaningful consultation with free, prior, informed consent of Indigenous People[2] before permitting large infrastructure projects permanently damaging environmental resources.

The United States, also a plaintiff in Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (D.Minn.1971), contended "that the treaty protected rights to hunt, fish, trap and gather wild rice are property rights to be used in whatever fashion the Indians, as owners, desire, whether to eat, clothe, or sell." The rights to *hunt, fish and gather* are really old words or terms for *food, clothing and shelter* and the *new canoe is the automobile*. The Chippewa were engaged in international commerce before and at the times of treaty making, from which they have an on-going right to earn their modest living.[3]

The proposed replacement pipeline and pipeline abandonment will violate the federally protected treaty rights of the Anishinaabeg by endangering primary areas of hunting, fishing, wild rice harvest, medicinal plant harvest, and organically certified wild rice crops as reserved in the Chippewa treaties from 1825 to 1867. The U.S. Supreme Court has repeatedly upheld the rights of native peoples to hunt, fish, and subsist off the land. Important for the Chippewa was a February 2015 decision by the US 8th Circuit Court of Appeals in U.S. v. Brown[4] which upheld the individual usufructuary property rights of Ojibwe people to commercially hunt, trap and fish on the Leech Lake, White Earth and Red

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[1] See *Table of Chippewa Treaties* in Appendix A.

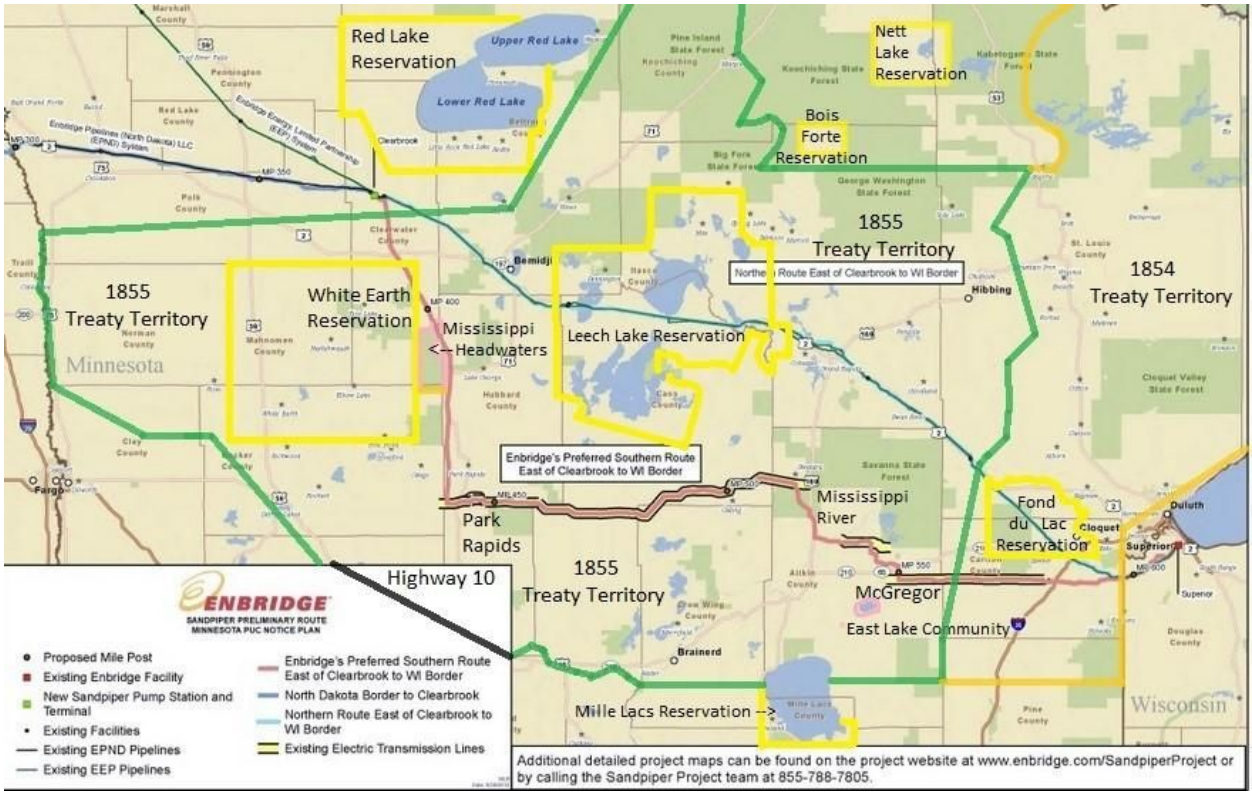
[2] See UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: http://www.refworld.org/docid/471355a82.html

[3] See LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,et al., v. VOIGT, et al., v. STATE OF WISCONSIN, a sovereign state, and Sawyer County, Wisconsin, 700 F.2d 341 (7th Cir. 1983) As Amended on Denial of Rehearing and Rehearing En Banc March 8, 1983.

[4] See U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015) upholding U.S. v. Brown 2013 WL 6175202. (According to the Eighth Circuit, although continuation of long-standing usufructuary property rights were not discussed in the 1855 Treaty, as they had been in the 1837 and 1854 Treaties, the fact they were NOT discussed showed that the continuation of the existing conditions was assumed by the parties. U.S. v. Brown, 777 F.3d 1025, 1028 (2015). The Eighth Circuit opinion also held that these Treaty Rights can be asserted by individuals in a criminal context. See Brown at 1032).

Lake reservations[5]. These same federally protected usufructuary property rights exist off reservation in the Chippewa ceded territories in Minnesota; where pipelines and inevitable abandonment presently threatens the culture, way of life, and economic physical survival of the Ojibwe people.

The proposed pipeline corridor will cut through the heart of the 1855 ceded territory (as well as the 1863, 1854 and 1842). Within these treaty areas, Ojibwe people still retain hunting, fishing, and gathering rights. These rights, and related Trust responsibilities of the U.S. Army Corps of Engineers (USACE) has been upheld in court and spelled out specifically for the Chippewa.[6]

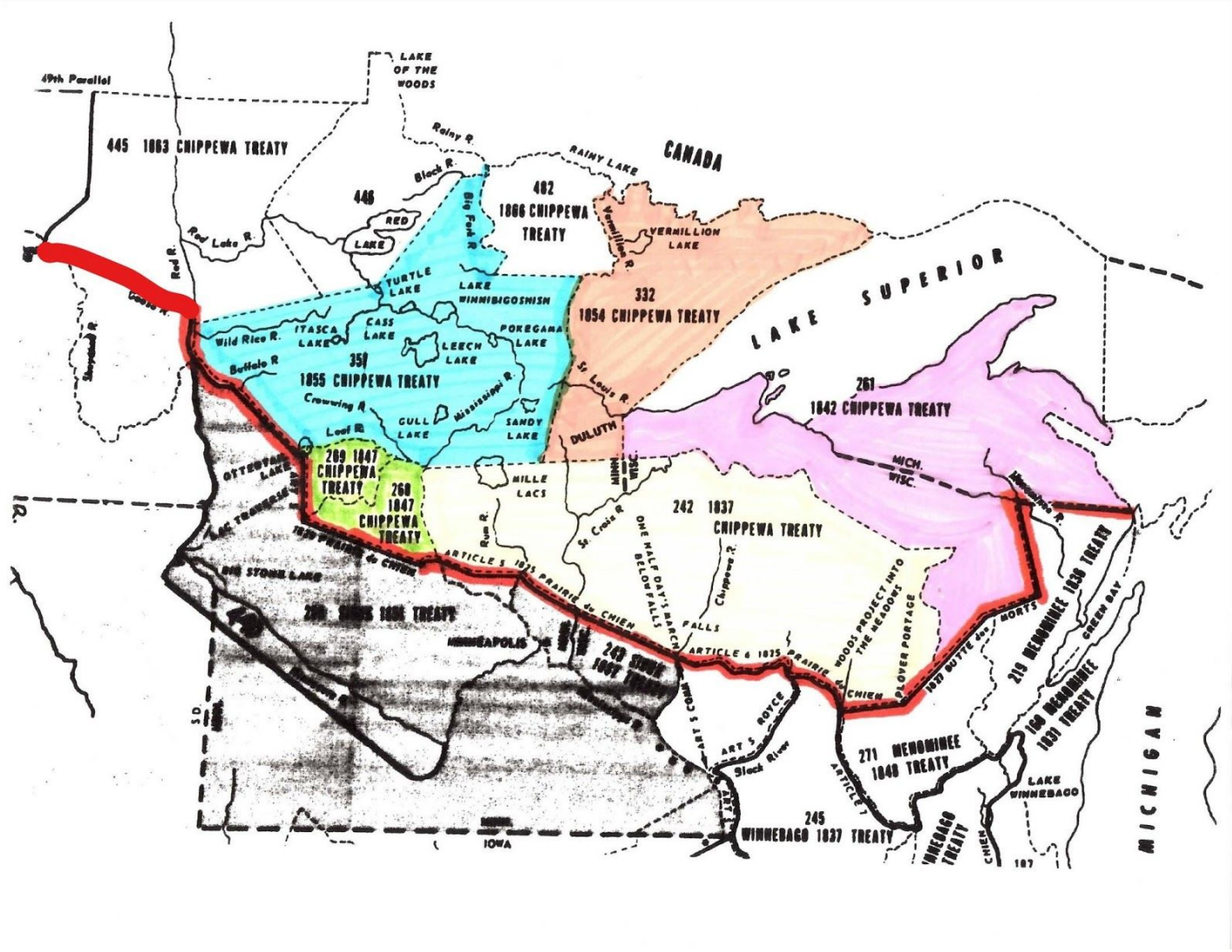


[5] See Id. at 4. Declaring in more recent years, courts have determined that treaty reservations of usufructuary rights to the Chippewa Indians remain in effect. In Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (D.Minn.1971), the Leech Lake Band sought a declaratory judgment that the state of Minnesota could not regulate fishing, hunting, and gathering wild rice within its reservation. The United States, also a plaintiff, contended "that the treaty protected rights to hunt, fish, trap and gather wild rice are property rights to be used in whatever fashion the Indians, as owners, desire, whether to eat, clothe, or sell."

[6] See *Issue Paper and District Recommendation, the Agency's Trust Responsibilities Toward Indian Tribes in the Regulatory Process*, attached to letter to Mr. James Schlender, Executive Administrator, Great Lakes Indian Fish , Wildlife Commission dated SEP 29 1997, regarding the Crandon Mining project in Appendix A.

Chippewa Treaties and Reserved Rights

The Chippewa were party to 44 treaties with the United States, partially described in the Historical Context section. Today, treaties and territories are not completely recognized and respected, equally by the State of Minnesota. The Chippewa reserved the right to decide who hunted north of the 1825 Treaty of Prairie du Chien boundary[7] before ceding lands. (Red boundary from Michigan to North Dakota).



[7] See 1825 Treaty with the (Sioux) Chippewa (Aug. 19, 1825, 7 Stat. 272 (Treaty of Prairie du Chien)) and 1826 (Aug. 5, 1826, 7 Stat. 290 (Treaty of Fond du Lac)), the United States recognized the jurisdictional sovereignty and right of occupation of the Chippewa in the form of federally protected "Treaty-recognized title" and sovereignty, in the territory north of the dividing line with the Lakota people, roughly where I-94 runs today.

The most recent federal cases that best express how Chippewa rights should be understood are Minnesota v Mille Lacs[8] (1999) and U.S. v Brown *et al*[9] (2015) also known as *Operation SquareHook*. Chippewa usufructuary rights are exclusive of the State of Minnesota.[10] The Chippewas of the Mississippi and Lake Superior as described in the 1842 Treaty[11] hold all lands in common with each other, *unlike "in common" with other non-Indian citizens like western tribes*.

As such, a cooperative management agreement is not required, but usually desirable. Even when agreements exist, both the state of Minnesota and Chippewa have opened game and fish harvesting on and off reservation, contrary to the wishes of the other. In 2015, Governor Dayton extended walleye fishing on Mille Lacs (after negotiation with Mille Lacs Band to close walleye fishing)[12] and Fond du Lac opened an off-reservation Moose hunt in 2016.[13]

In a September 11, 2017 press release the DOC announced "After extensive review, Minnesota Commerce Department releases expert analysis and recommendation on the certificate of need for Enbridge's proposed Line 3 oil pipeline project. Oil market analysis indicates that Enbridge has not established a need for the proposed project; the pipeline would primarily benefit areas outside Minnesota; and serious environmental and socioeconomic risks and effects outweigh limited benefits." With these shared beliefs about this Line 3 project, and recognizing the wide range of tribal concerns that may have

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[8] See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, (1999) (Court firmly rejected that argument the 1855 Treaty abrogated the pre-existing Treaty-recognized rights of the Minnesota Chippewa to hunt, fish and gather in the 1837 and 1855 Treaty Territory, or elsewhere in Minnesota).

[9] See U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015) upholding U.S. v. Brown 2013 WL 6175202.

[10] Id. and see Public Law 280, **28 U.S.C. § 1360(b). State civil jurisdiction in actions to which Indians are parties** "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, *belonging to any Indian or any Indian* tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

[11] See *TREATY WITH THE CHIPPEWA, 1842*, Oct. 4, 1842, 7 Stat., 591, (Proclamation, Mar. 23, 1843).

[12] See *Minnesota DNR chief apologizes for extended walleye ban on Lake Mille Lacs Catch-and-release will resume on Aug. 11.* By Tony Kennedy Star Tribune JULY 22, 2017 at http://www.startribune.com/minnesota-dnr-chief-apologizes-for-extended-walleye-ban-on-lake-mille-lacs/435936603/

[13] See *Minnesota DNR objects, but tribe to hold moose hunt this fall* By FORUM NEWS SERVICE, September 22, 2016 at http://www.twincities.com/2016/09/22/minnesota-dnr-objects-but-tribe-to-hold-moose-hunt-this-fall/

been omitted according to former Danielle Oxendine Molliver, the tribal liaison brought on by Minnesota's Department of Commerce[14] (alleging tribal input, questions and concerns were omitted by DOC), Minnesota's EIS process needs to consider the big picture and need for an Anishinabe-centric Cumulative Impact Assessment.[15]

Despite these realities, the Minnesota Public Utilities Commission (PUC) and DOC ignored Tribal rights and did not conduct appropriate consultation or hearings within tribal communities. The Bands have not finished tribal hearing processes and the Tribal consultation process by the Minnesota Department of Commerce (DOC), which have been primarily *lip service*[16] as revealed in the Environmental Impact Statement (EIS) sections on *Environmental Justice* and *Tribal Resources*.

The summary of the DOC public meetings, is that no Tribal members that attended are in favor of the pipeline. In fact, many tribal members were extremely concerned about the potential impacts on their health, gathering areas, wild rice, way of life, and their children's children. Relevant environmental information from related federal and state permitting processes and contested case proceedings like Sandpiper and Line 67 Expansion[17] projects provides additional information related to this Line 3 pipeline.

Treaties and Treaty making

> *We have treaties with creation. We have treaties with the fish, we have a treaty with the rice, [with] that lake…. When we negotiated treaties with the United States we had*

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[14] See *TRIBAL LIAISON IN MINNESOTA PIPELINE REVIEW IS SIDELINED AFTER OIL COMPANY COMPLAINS TO GOVERNOR*, by Alleen Brown, August 12 2017, 7:55 a.m. https://theintercept.com/2017/08/12/tribal-liaison-in-minnesota-pipeline-review-is-sidelined-after-oil-company-complains-to-governor/

[15] See MCT Resolution 72-17 in Appendix A.

[16] See *TRIBAL LIAISON IN MINNESOTA PIPELINE REVIEW IS SIDELINED AFTER OIL COMPANY COMPLAINS TO GOVERNOR*, by Alleen Brown, August 12 2017, 7:55 a.m. https://theintercept.com/2017/08/12/tribal-liaison-in-minnesota-pipeline-review-is-sidelined-after-oil-company-complains-to-governor/

[17] See *Draft Supplemental Environmental Impact Statement Line 67 Expansion Applicant for Presidential Permit: Enbridge Energy, Limited Partnership* by Dept. of State, Jan. 2017, Cooperating Agencies: United States Army Corps of Engineers, United States Environmental Protection Agency, United States Fish and Wildlife Service, Fond du Lac Band of Lake Superior Chippewa, Leech Lake Band of Ojibwe, Red Cliff Band of Lake Superior Chippewa Indians.

> *to go back and renegotiate our treaties with creation. Creation doesn't give a second chance; we can't renegotiate again. Protect the land, live with the land, not off of it."*[18]

Native American people used treaties long before contact with Euro-westerners. These treaties helped to define boundaries, keep the peace, and bind groups into mutually interdependent relationships. Negotiating treaties between groups with similar lifestyles and desires for peace is easier than between groups with dissimilar lifestyles.[19]

These treaties more often than not involved annual rounds of gifting as part of the treaty process. It is in these annual meetings where the relationship between the two groups was continually solidified. The economics of gifting helped to keep the groups in a mutually interdependent relationship, and the annual meetings allowed for any grievances from the past year to be given voice and rectified.

Historical Context

During the 20th century, Congress passed several acts to allow various Indian tribes and bands to bring suit against the United States for a variety of claims. The Chippewa were involved in a series of cases brought to the Indians Claims Commission and Court of Claims often for non-payment and underpayment of land and timber, of which some were ultimately heard and decided by the United States Supreme Court. As part of the claims process, a historical context was developed to provide a common understanding and background for the courts and parties and recounted here now. These cases are illustrative of some of the treaty history, but were limited in relief that could be sought (money only not return of the lands) and therefore have bias and flaws in legal reasoning and were ultimately superseded by the 1999 Mille Lacs decision "what did the Indians understand at the time of the treaties?"

In 1937, the United States Supreme Court provided a summary on appeal from a judgment of the Court of Claims noting that at:

> [a]bout the beginning of the last century the Chippewas constituted one of the larger Indian tribes in the northerly part of the United States. In early

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[18] See *The Thunderbirds Versus The Black Snake, On Anishinaabe Akiing, an epic battle against oil pipelines is underway*, by Winona LaDuke, Autumn 2015 Earth Island Journal at http://www.earthisland.org/journal/index.php/eij/article/the_thunderbirds_versus_the_black_snake/

[19] See *Linking Arms Together: American Indian Visions of Law and Peace 1600-1800* by Robert Williams, Jr., (New York: Routledge, 1999), p. 62.

> treaties they were dealt with as a single tribe and were shown to be occupying a large area reaching from Lake Huron on the east to and beyond Lake Superior on the west.[20] In later treaties they were regarded as divided into distinct bands; and particular bands-in some instances a single band and in others a limited plurality of bands-were recognized as occupying separate areas in Michigan, Wisconsin, Minnesota and Eastern Dakota, and as entitled to hold or cede the same independently of other bands and of the Chippewas as a whole.[21] Some of the bands became permanently settled in Michigan and Wisconsin. Others-usually as a single band and exceptionally as a group of a few bands-became the recognized occupants and holders of twelve separate reservations in Minnesota.

See Chippewa Indians of Minnesota v. United States (Red Lake Band of Chippewa Indians of Minnesota, Intervenors), 301 U.S. 358 at 360, 57 S.Ct.826 at 827(1937).

A few years later in 1953, a more concise history of the Chippewa was recounted in a case before the United States Court of Claims captioned Mole Lake Band et al v. United States, et al, 126 Ct. Cl. 596, 1953 WL 6071 (Ct. Cl). The Mole Lake[22] case involved "claims

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[20] Treaties Aug. 3, 1795, 7 Stat. 49; July 4, 1805, 7 Stat. 87; Nov. 17, 1807, 7 Stat. 105; Sept. 24, 1819, 7 Stat. 203; June 16, 1820, 7 Stat. 206; July 6, 1820, 7 Stat. 207; Aug. 29, 1821, 7 Stat. 218; April 19, 1825, 7 Stat. 272; Aug. 5, 1826, 7 Stat. 290; Aug. 11, 1827, 7 Stat. 303.

[21] Treaties May 9, 1836, 7 Stat. 503; Jan. 14, 1837, 7 Stat. 528; Dec. 20, 1837, 7 Stat. 547; Oct. 4, 1842, 7 Stat. 591; Aug. 2, 1847, 9 Stat. 904; Aug. 21, 1847, 9 Stat. 908; Sept. 30, 1854, 10 Stat. 1109; Feb. 22, 1855, 10 Stat. 1165; Oct. 2, 1863, 13 Stat. 667; April 12, 1864, 13 Stat. 689; May 7, 1864, 13 Stat. 693; April 7, 1866, 14 Stat. 765; March 19, 1867, 16 Stat. 719.

[22] Mole Lake Band, Lac Du Flambeau Band, Lac Court O'Reilles Band, Bad River, Otherwise known as the La Pointe Band, Red Cliff Band, St. Croix Band, Comprising Bands of Lake Superior Chippewa Indians of Wisconsin v. United States, Defendant, Fond du Lac Band, Grand Portage Band, and Nett Lake Band, Otherwise Known as Bois Forte Band, all Bands of Lake Superior Chippewa Indians of Minnesota, Intervenors, 126 Ct.Cl. 596, 1953 WL 6071 (Ct.Cl.), United States Court of Claims, No. 45162, November 3, 1953. (Any claims growing out of any failure of the United States to make payments promised by treaties to the plaintiff tribes of Indians shall be litigated in case No. 45,162 in the United States Court of Claims and that this litigation shall not be pleaded by the United States as a bar to the prosecution by plaintiffs of cases Nos. 18, 18C, 18D, 18E, 18G, 18H, 18J, 18K, 18L and 18M before the Indian Claims Commission, in which plaintiffs have filed claims under subdivision 3 of Section 2 of the Act of August 13, 1946, 60 Stat. 1049, as quoted above.)

which would result if the treaties, contracts and agreements between the claimant [Chippewa] and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; [60 Stat. 1049, 1050]."[23] The Mole Lake Court provided the following history in selected Sections 8 to 32:

GENERAL

8. Among the Indians who inhabited North America when European colonization of this continent was begun in the sixteenth century was a large group which has since come to be known, because of linguistic features, as Northern Algonquians. This linguistic group included such smaller and better known groups as the Chippewas, Delawares, Illinois, Miamis, Ottawas, Pottawatamies, and Shawanoes. There was a loose confederation between the Chippewas, Ottawas and Pottawatamies, who were sometimes referred to as the Three Fires.

9. At one time the Chippewas may have (according to their own traditions they had) lived on the Atlantic coast. They are believed by some historians to have begun their migration westward in the fifteenth century or earlier, and to have been in the area of the Great Lakes and the Mississippi River by 1492. In any event they were in that area in the seventeenth and eighteenth centuries, and were known as a distinct cultural group to the explorers, traders, and settlers who pressed into the Northwest Territory during the latter part of the eighteenth and the early part of the nineteenth centuries.

10. The Chippewas traced descent through the males and identified family lines by totemic distinctions. Ties of known blood relationship and totemic kinship were acknowledged within family groups and clans, and they shared a common cultural heritage. Otherwise, they were an individualistic people. The small groups in which they lived were usually comprised of a chieftain or headman and his brothers or other close relatives and their women and children. When any group became too large for its support to be readily drawn from the immediate hunting or fishing grounds, part of the group would split off into a separate village and occupy other lands usually

[23] Id. at 3.

nearby. In this manner clusters of villages developed, and have come to be known as bands, frequently named from the geographic area occupied. It was inherent in this process that headmen and chiefs emerged as such on the basis of their personal influence over their kinsmen. Family and totemic position were important, but personal leadership was more so. Individual Chippewas responded to leadership, but seldom, if ever, did they acknowledge authority imposed. Because of these characteristics of the Chippewas as a people, their leaders were of many and varied gradations of influence at any particular time and within any specific area.

11. White men in the Northwest Territory found the Chippewas to be a nomadic people who lived by hunting and fishing. The areas occupied by them south of Lake Superior, in what are now the states of Wisconsin and Minnesota, were characterized by large stands of pine timber in which there was little or no underbrush. The portions of rivers and streams traversing these stands of timber were devoid of fish. The pine forests were therefore sterile, from the standpoint of the Indians, since conifer supported neither game nor fish. Interspersed among the pine forests were stands of deciduous trees and open spaces where game was plentiful and fish were abundant in the lakes and rivers. There the Indians lived in small groups or villages near the food supply, moving from time to time from one hunting or fishing ground to another.

ALLEGIANCE

12. By the end of the American Revolution the Chippewas had spread over a wide area and were found, with other tribes of Indians, in territory now included in the states of Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota, and the Dakotas. In the course of their expansion they had driven back the Iroquois on the east and the Foxes and the Sioux on the west. One historian expresses the opinion that their militant dispersal to the east, south, and west resulted from their eagerness to trade furs to the white men for guns, ammunition, and liquor. Such a thesis finds support in the fact that the Chippewas generally were in rapport with the nationalities of the white men with whom they traded. Chippewas living in the areas affected by the conflict between French and British over Canada first stood with the French, with whom they had traded, until the British were victorious. Similarly,

Chippewas who had dealt with the British in Canada aligned themselves with the British against the Americans in the War of 1812.

13. The Treaty of September 8, 1815 (7 Stat. 131) between the United States and "the Wyandot, Delaware, Seneca, Shawanoe, Miami, Chippewa, Ottawa, and Potawatimie Tribes of Indians, residing within the limits of the State of Ohio, and the Territories of Indiana and Michigan," began with these words:

> Whereas the Chippewa, Ottawa, and Potawatimie, tribes of Indians, together with certain bands of the Wyandot, Delaware, Seneca, Shawanoe, and Miami tribes, were associated with Great Britain in the late war between the United States and that power, and have manifested a disposition to be restored to the relations of peace and amity with the said States: ***

On September 8, 1815, the State of Ohio and the Territories of Indiana and Michigan included only the areas now contained in the States of the same names.

> The ordinance for the government of the territory northwest of the Ohio River was adopted on July 13, 1787 (1 Stat. 50). By the Act of May 7, 1800 (2 Stat. 58) the Northwest Territory was divided into two parts, one part being what soon thereafter became and now is the State of Ohio. The remaining part of the Northwest Territory became the Indiana Territory.
>
> By the Act of January 11, 1805 (2 Stat. 309), there was withdrawn from the Indiana Territory all that portion of the present State of Michigan represented by the mitten and thumb and part of the northern peninsula. The part so withdrawn was made the Territory of Michigan, and as such remained virtually unchanged until 1834 (4 Stat. 701), when a portion of the Illinois Territory (including what is now the State of Wisconsin) was added to it.

What is now the State of Indiana was made into a territory in preparation for statehood, by the Act of February 3, 1809 (2 Stat. 514), and the remainder of the former Indiana Territory became the Illinois Territory.

14. After the close of the War of 1812, the British maintained an Indian agency on Drummond Island.[24] Many Chippewa Indians living south and west of Drummond Island, including some Chippewas of Lake Superior, visited this British agency through the years and as late as 1830.

In 1822 the United States established an Indian agency at Sault Ste. Marie (in what is now Michigan) for the express purpose of endeavoring to quiet down the Chippewa Indians living in the United States territory south and west of there. A few years later, a subagency was established at Michilimackinac to assist in the endeavor.

15. It is not established by the evidence that any of the plaintiff or intervenor bands (a) ever committed warlike acts against the United States or (b) acknowledged allegiance to the United States prior to 1822.

TREATIES

Plaintiffs' claim is for "unpaid balances claimed to be due as consideration for" five specified treaties.[25]

16. In the 86 years from 1785[26] to 1870[27] (both inclusive), Chippewa

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[24] Drummond Island is now the easternmost point off the tip of the northern peninsula of Michigan. It was not determined to be United States territory until 1831.

[25] Cf. finding 7 (b).

[26] The first treaty between the United States and Chippewa Indians, made on January 21, 1785 (7 Stat. 16), was the third treaty between the United States and Indian tribes.

[27] The Act of March 3, 1871 (16 Stat. 566; 25 U. S. C. 71) provided: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired."

Indians were parties to 43 treaties with the United States. The first three of the treaties (1785, 1789, and 1795) represented efforts to establish peace between the several Indian tribes and the United States. The commitments made by the Indians in the first two treaties were not sufficiently honored by them to accomplish the intended purposes. The third treaty covered the same points as the first two.

17. The first two treaties (1785 and 1789) to which Chippewa Indians were parties were made with the panoply of commissioners plenipotentiary of the United States. Sachems and warriors represented the several Indian "nations." In the Treaty of Greenville (August 3, 1795; 7 Stat. 49) General Anthony Wayne, as "sole commissioner" for the United States, dealt with the Indian "tribes." Commissioners plenipotentiary appeared again in the treaties of 1808 and 1816, only. The word "nation"[28] recurred in the treaties as late as 1838, appearing in 16 of the 26 treaties made with Chippewa Indians up to that time.

18. The Treaty of Greenville (August 3, 1795; 7 Stat. 49) "declared" peace and described a "general boundary line" between the lands of the United States and the lands of the Indians. This line ran in a southwesterly direction from the mouth of the "Cayanhoga" river to the mouth of the ""Kentucke" river. The Indians ceded "all their claims lying eastwardly and southwardly of the general boundary line." Among other obligations assumed by the United States in this treaty there was a promise to deliver to the Chippewas "henceforward every year forever" goods of the value of $1,000.[29]

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[28] The connotation of the word "nation" at that time carried a greater emphasis on cultural ties than on political bonds.

[29] The Treaty of August 3, 1795, is the first of the five treaties under which plaintiffs claim "unpaid balances *** due as consideration for" the treaty. By the Act of May 6, 1796 (1 Stat. 640), Congress authorized annual appropriations for carrying the treaty into effect. Such annual appropriations were thereafter made through 1812 and after. Records of payments for years prior to 1812 are not available. During the period from January 1, 1812, to June 30, 1856, according to the records of the General Accounting Office, a total of $44,000 was disbursed by the United States in annuity payments for the benefit of the Saginaw Bands of Chippewa Indians. By the Treaty of July 31, 1855 (11 Stat. 621), and the Treaty of August 2, 1855 (11 Stat. 633), the Chippewa Indians of Michigan released the United States from all liability on account of former treaty stipulations. Cf. Finding 30 and footnote 29. Payments to Chippewa Indians under the Treaty of August 3, 1795, were thereafter discontinued.

In 1805[30] the Indians again ceded to the United States the land east and south of the boundary line described in the Treaty of Greenville.

19. By the Treaty of November 17, 1807 (7 Stat. 105), the Indians ceded lands in Ohio and Michigan, for which the United States agreed to pay, among other considerations, "an annuity forever," of $800 to the Chippewas.[31]

In 1808[32]further cessions of land in Ohio were made.

In 1815[33] the United States again "gave peace" to the Chippewa, Ottawa, and Pottawatamie tribes, who had been associated with Great Britain in the War of 1812, and the Treaty of Greenville (1795) was again confirmed.

In 1816[34] the Indians made a further cession of lands in Illinois and southern Wisconsin.

20. Lewis Cass was appointed territorial governor of Michigan in 1816, and began negotiations with the Indians of that area in 1817. He was one of the two commissioners for the United States who made the Treaty of September 29, 1817 (7 Stat. 160), whereby the Indians (including the Chippewa "nation") ceded lands in Ohio, Indiana, and Michigan.

By the time Lewis Cass went to Michigan, responsible officials of the United States (including Cass) realized that success in treating with the Indians required councils with headmen who could command the following of all of the Indians occupying the area to be quieted. The Indians, on their part, had long since learned that presents might and probably would be

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[30] Treaty of July 4, 1805 (7 Stat. 87).

[31] The Treaty of November 17, 1807, is the second of the five treaties under which plaintiffs claim. The obligation of this treaty (insofar as it ran to Chippewa Indians) was, like that of the Treaty of August 3, 1795, treated as running to Chippewa Indians of Michigan (the Saginaw Band in particular). Payments appear to have been made regularly until the release contained in the Treaty of July 31, 1855 (11 Stat. 621), and the Treaty of August 2, 1855 (11 Stat. 633). Cf. Finding 30.

[32] Treaty of November 25, 1808 (7 Stat. 112).

[33] Treaty of September 8, 1815 (7 Stat. 131). Cf. Finding 13.

[34] Treaty of August 24, 1816 (7 Stat. 146).

passed out at councils with the white men.[35] As a consequence, many councils were attended by some sachems and warriors who were more eager than they were qualified to represent the real parties in interest.

21. By the Treaty of September 24, 1819 (7 Stat. 203) the Indians ceded land in Michigan (subject to reservations of 16 tracts comprising 101,400 acres "for the use of the Chippewa nation of Indians," and 16 sections for the use of named individuals, described as "Indians by descent"); and the United States agreed "to pay to the Chippewa nation of Indians, annually, forever, the sum of" $1,000,[36] and "to provide and support a blacksmith for the Indians at Saginaw, so long as the President of the United States may think proper ***."

22. In 1820, Henry R. Schoolcraft joined the staff of Lewis Cass as a geologist. In 1822, he began his work as Indian Agent at Sault Ste. Marie, Michigan (Territory). Schoolcraft spent 30 years among the Indians and came to know them, particularly the Chippewas, as well as any man of his time.

Early in his work Schoolcraft realized the importance of being able to identify roving bands of Indians by tribes and by the geographical areas in which they usually resided. Shortly after the opening of the Indian Agency at Sault Ste. Marie, he began the task, in which he persevered over the years with unremitting care, of identifying and listing the Indians of the Michigan-Wisconsin-Minnesota area according to tribes, bands, and customary habitat. This task was rendered more important by the necessity for him, as the administrative officer in charge of arrangements, to determine the identity of individuals as well as bands who were proper and legal recipients of the various annuities required by treaty and provided by Congress.[37]

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[35] The practice was early established and long maintained of providing food for the attending Indians. In some of the earlier councils, liquor was also provided.

[36] The Treaty of September 24, 1819, is the third of the five treaties under which plaintiffs claim. During the period from January 1, 1820, to June 30, 1856, the United States disbursed $36,000 in annuity payments to the Saginaw Band of Chippewa Indians pursuant to this treaty. Payments were discontinued after the releases contained in the Treaty of July 31, 1855 (11 Stat. 621), and the Treaty of August 2, 1855 (11 Stat. 633). Cf. Finding 30.

[37] The identification of Indians, by tribes and bands, and as individuals, has proved a continuing task for the white man. Cf. Clyde F. Thompson, et al. v. United States, decided May 6, 1952, on appeal from the Indian

23. Four treaties of the 1820's[38] to which Chippewa Indians were parties reflect the effort on Schoolcraft's part to improve order in Indian affairs. The purpose of these four treaties was to promote peace among warring Indian tribes, including the Chippewas, Ottawas, and Pottawatamies (the loose federation known as the Three Fires), and the Sioux, Fox, Menominee, Ioway, and Winnebago. Boundary lines between the several tribes were defined and agreed upon. One of the four treaties was made for the express purpose of communicating with and obtaining the assent of the Chippewas of Lake Superior. [39]

24. By the Treaty of July 29, 1829 (7 Stat. 320), "the United Nations of Chippewa, Ottawa, and Pottawatamie Indians, of the waters of the Illinois, Milwaukee, and Manitouck Rivers" ceded land in Illinois and southern Wisconsin, in consideration of which the United States agreed "to pay to the aforesaid nations of Indians *** annually, forever" the sum of $16,000, "said sum to be paid at Chicago."[40]

25. On August 10, 1830, Schoolcraft wrote the Secretary of War:

There is but a single annuity payable by existing treaties to the Chippewas of Lake Superior. It is that of one thousand dollars, annually (during the pleasure of Congress), provided by the Treaty of Fond du Lac. This annuity is pledged, by the Chippawas, for the support of a school, and is

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Claims Commission. While the Chippewa tribe has long been known, the identity of some of its bands was at one time in issue in the instant case, and the Office of Indian Affairs and the General Land Office are still engaged in efforts to identify individual Chippewas.

[38] Treaty of August 19, 1825 (7 Stat. 272); Treaty of August 5, 1826 (7 Stat. 290); Treaty of August 11, 1827 (7 Stat. 303); and Treaty of August 25, 1828 (7 Stat. 315).

[39] Treaty of August 5, 1826 (7 Stat. 290), between the United States and the Chippewa Tribe of Indians. "Whereas, *** owing to the remote and dispersed situation of the Chippewas, full deputations of their different bands did not attend at Prairie du Chien, which circumstance *** would render the Treaty of doubtful obligation with respect to the bands not represented ***."

[40] The Treaty of July 29, 1829, is the fourth of the five treaties under which plaintiffs claim. Pursuant to the obligation of the treaty, payments were made by the United States to Chippewa Indians (and to the Ottawas and Pottawatamies) over a period of many years, until the obligation was commuted. It is not clear from the General Accounting Office report (in Court of Claims No. H-211) to what band or bands of Chippewas these payments were made. Some of the payments were made to Chippewas living in Michigan. Other payments were made to Chippewas of Michigan, Illinois, and Wisconsin who moved to Iowa, then to Kansas, and were incorporated with the Pottawatamies.

paid to the Treasurer of the Baptist Society at Boston.[41]

26. By the Treaty of March 28, 1836 (7 Stat. 491), between the United States (Henry R. Schoolcraft, commissioner) and "the Ottawa and Chippewa nations of Indians," lands in Michigan were ceded to the United States (subject to stated reservations for the use of several different groups or bands of Indians), and the United States agreed "to pay to the Ottawa and Chippewa nations" various annuities to Indians within defined areas in Michigan.[42]

27. By the Treaty of October 4, 1842 (7 Stat. 591), made at La Pointe, Wisconsin, with the Chippewa Indians of the Mississippi and Lake Superior, the Indians ceded land in Wisconsin and Michigan, in consideration of which the United States agreed "to pay to the Chippewa Indians of the Mississippi, and Lake Superior," annually, for 25 years, in specie, $12,500, and other considerations.

28. By the Treaty of August 2, 1847 (9 Stat. 904), the Chippewa Indians of the Mississippi and Lake Superior ceded land in Minnesota, in consideration of which the United States agreed "to pay to the Chippewas of Lake Superior" $17,000 in specie, and "to the Chippewas of the Mississippi," a like amount, also in specie, "within six months after this treaty shall be ratified." There was a further obligation to pay to the Mississippi Indians $1,000 annually for 46 years.

29. By the Treaty of September 30, 1854 (10 Stat. 1109), made at La Pointe, Wisconsin, the Chippewa Indians of Lake Superior and the Mississippi ceded lands in Michigan, Wisconsin and Minnesota (including lands occupied by the plaintiff and intervenor bands). Reservations were set apart by the United States from the ceded lands "for the use of the Chippewas of Lake Superior," including specified reservations for "the La Pointe band, and such other Indians as may see fit to settle with them," for "the other Wisconsin

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[41] The *Treaty of Fond du Lac* was the Treaty of August 5, 1826 (7 Stat. 290).

[42] The Treaty of March 28, 1836, is the last of the five treaties under which plaintiffs claim. The obligations of this treaty were discharged by the United States to Chippewa and Ottawa Indians living in Michigan until the release contained in the Treaty of July 31, 1855 (11 Stat. 621). Cf. Finding 30.

bands," ""the Fond du Lac bands," "the Grand Portage Band," and other bands not included among plaintiff or intervenor bands herein.

In return for the cessions of land the United States agreed "to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums, to wit:" $5,000 in coin; $8,000 in goods, household furniture and cooking utensils; $3,000 in agricultural implements and cattle; and $3,000 for moral and educational purposes.

30. The Treaty of July 31, 1855 (11 Stat. 621), made at Detroit, with "the Ottawa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836,"[43] contained the following provision:

The Ottawa and Chippewa Indians hereby release and discharge the United States from all liability on account of former treaty stipulations, it being distinctly understood and agreed that the grants and payments herein before provided for are in lieu and satisfaction of all claims, legal and equitable on the part of said Indians jointly and severally against the United States, for land, money, or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; ***

31. The whole series of treaties between the United States and various groups of Chippewa Indians was primarily concerned with the use and occupancy of land. When the series was begun, Chippewa Indians were dispersed, with other Indian tribes, over areas extending north and west of the Ohio River to the Rocky Mountains of the Dakotas. As white men moved across the Northwest Territory, into Ohio, Indiana, and Michigan, the United States held repeated councils and made successive treaties with the various tribes of Indians, constantly seeking to define and redefine boundaries between the Indians and the settlers. The early efforts to treat with the Indians were obviously empirical. As experience multiplied, methods of intercourse and forms of expression that had proved compatible with the

[43] The Indians who were parties to the Treaty of March 28, 1836, were described therein as "the Ottawa and Chippewa nations of Indians, by their chiefs and delegates." Actually, the parties to the treaty were Ottawa and Chippewa Indians of Michigan. There is no evidence that the release of former treaty obligations, contained in the Treaty of July 31, 1855, was applied against Chippewas other than those residing in Michigan.

pride, dignity, and understanding of the Indians were retained. Some of the forms of expression, particularly the designations of Indian "nations" and "tribes", assumed definitive reality only in the process of administration.[44]

The Indian lands west of the various boundaries were not well known during the early years of this process. The interest of the United States was centered on the lands east of the various boundaries, which were known. After 1816, the course of dealing established the practice of the United States in treating with Indians of fairly well defined geographic areas.[45] From the beginning the obligations assumed by the United States, as to the recipients of money, goods, and services, were defined by administration.

32. After the advent of Lewis Cass in 1817 and Henry R. Schoolcraft in 1822, all responsible officials of the United States were careful, in their dealings with the Chippewa Indians, to summon to council the headmen of all bands known or believed to be in occupancy of the lands in question or otherwise interested in matters to be discussed, and not to summon other Indians. Schoolcraft was meticulous in his determinations of bands and individuals to whom the obligations of the United States were payable, in all treaties made before and during his term as Indian Agent, and in the discharge of those obligations.[46]

A decade later, the United States Court of Claims was considering whether the Chippewa[47] had recognized title after the United States acquired 1855 region by cession whereby the

> entire area involved in this proceeding before the Commission (known as Royce Area 357)[48] extends across north-central Minnesota around the

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[44] Chippewa Indians were aware of this practical application as early as the Schoolcraft regime.

[45] By the Treaty of June 16, 1820 (7 Stat. 206), the Chippewa "tribe" ceded to the United States 16 square miles near the Canadian border. On July 6, 1820, by another treaty (7 Stat. 207), the Chippewa "nation" ceded islands in Lake Huron. By the Treaty of September 26, 1833 (7 Stat. 431), the Chippewa "nation" ceded lands in Wisconsin, Illinois, and Iowa. On September 27, 1833, by another treaty (7 Stat. 443), the Chippewa "nation", by chiefs and headmen residing in Michigan, ceded land in Michigan.

[46] During his tenure as Indian Agent, Schoolcraft was responsible for administering all of the five treaties under which plaintiffs claim.

[47] Minnesota Chippewa Tribe et al v. United States, 161 Ct. Cl. 258, 315 F.2d 906, (1963).

[48] From Royce's maps in the *18th Annual Report of the Bureau of American Ethnology* (Part 2), Indian Land Cessions (1896-1897). (See Minnesota maps 1 and 2 in Appendix A).

headwaters of the Mississippi River, with a triangular shaped portion reaching north to the Canadian border; the area (less seven reservations within its perimeter) contains about 10.1 million acres. By the Treaty of February 22, 1855, 10 Stat. 1165, this large tract was ceded by the Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians to the United States (with certain portions retained as reservations).[49]

The Court of Claims also provided a similar treaty history and cited to the Mole Lake case as part of its analysis. The MCT court noted that

> [t]he history of Congressional dealings with the Chippewas begins, for our purposes, with the Prairie du Chien Treaty of 1825, 7 Stat. 272, which attempted to settle inter-tribal conflicts among the Chippewas, Sioux, Iowas, and the Sacs and Foxes, by drawing lines (in what is now Minnesota and Wisconsin) between the 'respective countries' of the different tribes. Area 357 lies wholly on the Chippewa side of the boundary established by Article 5 of this Treaty to divide the Chippewas from the Sioux living to the south. On the basis of the Treaty's purpose, the negotiations leading to it, its terms, and its subsequent treatment by the Government and the Indians, appellants urge strongly that the 1825 Treaty, in itself, constituted recognition of the Chippewas' claim to ownership of all land to the north of the line, including Area 357. The Commission and the Government answer that the Treaty merely drew, under the aegis of the United States, an open-ended boundary between warring tribes, and for the Chippewas did not circumscribe or enclose any area as concededly theirs. We pass the issue at this time, merely noting that Article 10 of the Treaty stipulates that 'the United States agree to, and recognize, the preceding boundaries' between the tribes, and Article 13 provides that 'no tribe shall hunt within the acknowledged limits of any other without their assent' (emphasis added).
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> There followed, after the 1825 Treaty, a series of agreements with the Chippewas culminating, for this case, in the 1855 Treaty by which Area 357 was ceded to the United States. The Treaty of August 5, 1826, 7 Stat. 290, bound the Lake Superior band of Chippewas (who had not attended the 1825 negotiations) to the 1825 Treaty and reaffirmed that agreement for the

[49] MCT v US at 908.

whole Chippewa Tribe. In Article 3 the Chippewas granted the United States 'the right to search for, and carry away, any metals or minerals from any part of their country. But this grant is not to affect the title of the land, nor the existing jurisdiction over it'; by Article 4 the Chippewas 'grant' to each of their half-breeds certain land to be located by the President, 'and as soon as such locations are made, the jurisdiction and soil thereof are hereby ceded' (emphasis added). In 1827, the Treaty of August 11, 1827, 7 Stat. 303, settled the segment of the line dividing the Chippewa 'country' from that of the Menominees, left open by the 1825 Treaty.

Thereafter, from 1837 to 1855, the Federal Government entered into five treaties of cession with the Chippewas, in which these Indians ceded various lands on their side of the Chippewa-Sioux line marked by the Prairie du Chien Treaty of 1825. The first was the Treaty of July 29, 1837, 7 Stat. 536 which granted Area 242 in Chippewa 'country' (to the southeast of Area 357 with which we are now dealing), leaving to the Indians the privilege of hunting, fishing, and gathering wild rice in this territory 'during the pleasure of the President of the United States.'[50]

Of special importance for the excluded segments of Area 357 involved in this appeal was the Treaty of October 4, 1842, 7 Stat. 591, with the Mississippi and Lake Superior Bands of Chippewas, ceding Chippewa land in Michigan and Wisconsin (to the east of Area 357)-again with the privilege of occupancy and hunting until required to remove by the President of the United States. Article III stipulated 'that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging' to the Lake Superior Chippewa and the Sandy Lake and Mississippi bands of Chippewas, 'shall be the common property and home of all the Indians, party to this Treaty' (emphasis added). Even more definite was Article V which declared:

'Whereas the whole country between Lake Superior and the Mississippi, has always been understood as belonging in common to the Chippewas, party to this treaty; and whereas the bands bordering on Lake Superior, have

[50] On the 1837 Treaty, see Mole Lake Band of Chippewa Indians v. United States, 139 F.Supp. 938, 134 Ct.Cl. 478, 497-500, (1956), cert. denied, State of Wis. v. United States, 352 U.S. 892, 77 S.Ct. 130, 1 L.Ed.2d 86 (1956).

not been allowed to participate in the annuity payments of the treaty made with the Chippewas of the Mississippi, at St. Peters July 29th 1837, and whereas all the unceded lands belonging to the aforesaid Indians, are hereafter to be held in common, therefore, to remove all occasion for jealousy and discontent, it is agreed that all the annuity due by the said treaty, as also the annuity due by the present treaty, shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every person shall receive an equal share.' (Emphasis added).

In 1842 'the whole country between Lake Superior and the Mississippi', to which Article V refers, covered-in addition to the area then being ceded by the 1842 Treaty, another area the west (Area 332) later ceded in 1854, and an area ceded still later in 1866-that part of Area 357 now in dispute, east of the Mississippi, including, we believe, both of the segments excluded by the Commission (which lie east and north of the Mississippi River). It was this region which the 1842 Treaty said had 'always been understood as belonging in common to the Chippewas' and would thereafter 'be held (by them) is common.'

Likewise significant for this appeal were the preparatory documents preliminary to negotiations for further cessions in 1847. The texts of the resulting treaties (Treaty of August 2, 1847, 9 Stat. 904; Treaty of August 21, 1847, 9 Stat. 908), which ceded relatively small tracts south of Area 357 and west of the Mississippi, are not themselves of great importance but the preliminary reports by Government representatives show that the segments now in question were within the region considered by the defendant's officers to be Chippewa land under the earlier treaties. A map accompanying these officers' reports circumscribed in red dots an area marked 'G', embracing the territories to the east of Area 357 plus that part of 357 itself which lay east of the Mississippi and of a line drawn from Lake Winnibigoshish to the Big Fork River-plainly including all of one of the excluded sectors and a part of the other. On the basis of this map, the report stated that the 'country within the dotted boundaries (G) * * * and that immediately West to Upper Red River * * * is what is termed the common property of the Chippewas of Lake Superior and the Mississippi River * * *' (emphasis added), and that the then 'unceded land East of the Mississippi * * * are by the terms of the Treaty of 1842, made the common home and

property of the Indian parties to the Treaty.' These statements appear to cover both of the omitted segments in this case. The same map also marked a straight red line running north from Lake Itasca (the source of the Mississippi, in the western portion of Area 357) to the Canadian border; the investigator reported that the lands west of the Mississippi and of this straight red line were 'represented to be claimed by certain bands of Chippewas termed 'Pillagers'-who make no claim to any part of the land East of that line.' (The second excluded segment lies east of this straight north-south line). Based on these reports, the official instructions to the treaty commissioners (in June 1847) directed them to obtain an agreement ceding (among other lands) those 'unceded lands owned by' the Chippewa Indians of the Mississippi and Lake Superior east of the Mississippi and of a specified line to the international boundary-covering all of one excluded segment and part of the other. This directive to obtain such a large cession was unsuccessful at that time but, again, it authoritatively shows the position taken by the defendant's officials as to the then Indian ownership of most of the land disputed on this appeal.[51]

Perhaps even more enlightening was the Treaty of September 30, 1854, 10 Stat. 1109, under which, in the course of further cessions, 'the Chippewas were divided into the Chippewas of Lake Superior and the Chippewas of the Mississippi and were treated with as separate parties. By this treaty these two large subdivisions of the Chippewa Nation agreed on a north-south boundary line running through the eastern part of Minnesota which effected a division of the Chippewa country between them.' Chippewa Indians of Minnesota v. United States, 80 Ct. Cl. 410, 462 (1935), affirmed 301 U.S. 358, 57 S.Ct. 826, 81 L. Ed. 1156 (1937). The treaty commissioners reported that, during the negotiations, they proposed a division of territory 'on one side of which the country should belong exclusively to the Lake Superior and on the other side to the Mississippi Indians' (emphasis added)-to which the Indians readily agreed. By Article I the Lake Superior Chippewas ceded to the United States all the lands 'heretofore owned by them in common' with the Mississippi Chippewas lying east of the eastern edge of Area 357, and were to

[51] The text of the instruction to the treaty commissioners makes it clear that the Government did not deem the cession sought at that time as exhausting all of the remaining Chippewa-owned lands.

receive payments in which the Mississippi groups would not share; significantly for our case, the Lake Superiors in turn relinquished to the Mississippis 'all their interest in and claim to the lands heretofore owned by them in common, lying west' of the east boundary of Area 357 (emphasis added), i.e., covering, at the least, the eastern and northeastern part of Area 357. This reflects a clear understanding that both groups of Chippewas had previously owned the eastern and northeastern portion of Area 357 (at a minimum), but that thereafter only the 'Chippewas of the Mississippi' would own it.

The 1854 Treaty led to the Treaty of February 22, 1855, 10 Stat. 1165, on which appellants ground their present claim of a cession for an unconscionably small consideration. Both treaties were viewed by the United States as part of a plan to buy as much as possible of the remaining Chippewa lands and to create reservations for these Indian groups. In its ceding portion the 1855 Treaty (Article I) refers to 'the lands now owned and claimed' by the Indians as well as to 'Chippewa country', again exhibiting, in the light of the historical background, an acknowledgment of Indian ownership.

From this sequence of Treaty materials, extending from 1825 to 1855, we draw the conclusion that at least by 1855 the United States had recognized the Chippewas' title to the two segments of Area 357 excluded by the Commission from Chippewa ownership. Recognition does not turn on ritualistic wording in a treaty or statute, but on the legislative purpose, gleaned from the enactment, to acknowledge Indian ownership. 'There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.' Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-279, 75 S.Ct. 313, 99 L.Ed. 314 (1955). See also Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 339-340, 349-350, 65 S.Ct. 690, 89 L.Ed. 985 (1945); Hynes v. Grimes Packing Co., 337 U.S. 86, 103-104, 69 S.Ct. 968, 93 L.Ed. 1231 (1949); the Miami Tribe of Oklahoma v. United States, 175 F.Supp. 926, 936-940, 146 Ct.Cl. 421, 439-446 (1959); Crow Tribe of Indians v. United States, Ct.Cl., decided Nov. 2, 1960, 284 F.2d 361, cert. denied, 366 U.S. 924, 81 S.Ct. 1350, 6 L.Ed.2d 383; Fort Berthold

Indians v. United States, 71 Ct.Cl. 308, 333 (1930).[52] Such definite acknowledgment of legal ownership existed here at least by the time of the 1855 Treaty.

The events occurring from the Prairie du Chien Treaty of 1825 to 1842 may have already accorded that recognition. But, as we have indicated, we need not at this time unravel that earlier skein, for the 1842 Treaty declared in express terms that 'the whole country between Lake Superior and the Mississippi, has always been understood as belonging in common to the Chippewas' (of the Mississippi and Lake Superior). This 'whole country' thus formally recognized clearly covered all of one of the excluded segments (lying due east of the Mississippi) and appears also to have included the other (which lies to the north and east of the river). For the future, the 1842 agreement provided that the still unceded lands 'belonging to the aforesaid Indians' to the west of the easterly cession then being made-again including the two disputed segments-'shall be the common property and home' of the Indians and 'are hereafter to be held in common.' Shortly thereafter the official Government reports prior to the 1847 treaties made it even more definite that both excluded segments lay within territory which under the 1842 agreement was acknowledged as 'the common property' of the Indians, and 'owned' by them. And if sufficient recognition in the technical sense had not been granted by the 1842 Treaty, the 1854 Treaty closed the gap. The latter agreement divided the then remaining unceded territory between the Lake Superior Chippewas and the Mississippi Chippewas; the general area in suit, which was characterized as 'heretofore owned' by the two groups 'in common', was assigned to the Mississippis. The treaty commissioners told the Indians that thereafter the land on the west side of the dividing line (including the two omitted areas) was to 'belong exclusively' to the Chippewas of the Mississippi. Since these bands were relinquishing all interest to the lands on the other side of the new line, and were also giving up all right to monetary compensation for that land, they must, in turn, have received (or been confirmed in) permanent rights to that territory on their side of the new boundary which was now declared to be theirs alone. In view of what had transpired in the past, of the terms of the treaty, and of what they were told, the Indians must have believed this to be so; and it is hard to

[52] See also the discussion of recognition in The Sac and Fox Tribe of Indians of Oklahoma et al. v. United States, 315 F.2d 896.

read the treaty words against the background of the prior agreements and of the preparatory materials without sensing that the Government's representatives must have had the same concept in mind.

In the light of these two treaties, 1842 and 1854, it is wholly proper to read the critical reference in the 1855 compact to 'the lands now owned and claimed' by the Indians-insofar as these words relate to the disputed segments-not as a mere catch-all phrase covering all land to which the Indians asserted or could conceivably assert a claim (see The Sac and Fox Tribe of Indians of Oklahoma, et al. v. United States, 315 F.2d 896), but as a continuing acknowledgment of recognized and concrete legal rights.[53] At least with respect to the eastern and northern parts of Area 357, Congressional recognition was plain by 1855, and the limits of the recognized territory were sufficiently definite. The Indian Claims Commission erred as a matter of law in holding otherwise as to the excluded segments.

Old federal case law superseded by 1999 Mille Lacs

The 1855 and 1863 (Red Lake) Treaties do not contain the words "hunt, fish and gather" but do include language that the "Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." (Also in the 1854 Treaty). These issues were fully litigated and resolved by the 1999 Mille Lacs Supreme Court decision and do not relate to or cancel usufructuary rights to hunt, fish and gather. Therefore, the Chippewa retain the same usufructuary rights in the 1855 and 1863 Treaty territories, like those rights expressly reserved in the 1854 and 1837 Treaties.[54]

Federal Consultation

Section 404 Clean Water Act

[53] The area thus characterized was very different from those territories ceded by prior treaties (1837, 1842), on which the Indians were permitted to continue to hunt and live during the pleasure of the President. Those were mere temporary privileges of permissive occupation embodying no legal rights.

[54] The 1999 Mille Lacs decision resolved two nearly 40 year old federal court cases White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (8th Cir. 1982) and United States v. State of Minn., 466 F. Supp. 1382 (D. Minn. 1979), by recognizing treaties are to be interpreted as the Indians would have understood at the time of the signing.

Enbridge applied is required to secure a Clean Water Act (CWA) Section 404 permit from the U.S. Army Corps of Engineers (USACE) for construction of the XL3 including temporary bridges, grading, and utility crossings. This permit is required for the discharge of dredge or fill material into waters of the United States, including in wetlands. As a Federal Agency, the USACE has consultation requirements for the issuance of this permit.

Section 106 National Historic Preservation Act Consultation

As amended, requires the lead state or federal agency with jurisdiction over a state or federal undertaking (i.e., a project or activity that requires a state or federal permit, license, or approval) to consider effects on historic properties before that undertaking occurs. The intent of Section 106 is for state and federal agencies to take into account the effects of a proposed undertaking on any historic properties situated within the Area of Potential Effect (APE) and to consult with the Advisory Council on Historic Preservation (ACHP), State Historic Preservation Officer (SHPO), federally recognized Indian tribes, applicants for federal assistance, local governments, and any other interested parties regarding the proposed undertaking and its potential effects on historic properties. A "historic property" is defined as any district, archeological site, building, structure, or object that is either listed, or eligible for listing, in the National Register of Historic Places (NRHP). To be considered eligible for listing in the NRHP, a property generally must be greater than 50 years of age, although there are provisions for listing cultural resources of more recent origin if they are of "exceptional" importance.

Section 7 Endangered Species Act Consultation

The U.S. Fish and Wildlife Service (USFWS) is responsible for ensuring compliance with the ESA. Section 7 of the ESA, as amended, states that any project authorized, funded, or conducted by any federal agencies should not "… jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined…to be critical…."

Migratory Bird Treaty Act Consultation

Under the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA), the impact of XL3 on the birds must be assessed.

Tribal Consultation

State agencies have a mandate to consult with Tribal governments in the review of projects that impact Tribal resources. This process has been fraught with issues. The most recent of which is the resignation of the DOC's Tribal Liaison Officer.

Minn. Tribal Consultation Policy[55]

The Governor's Executive Order 13-10 on government to government relations with Minnesota Tribal Nations was explained[56] by Daniel P. Wolf, Executive Secretary for PUC by letter to Ms. Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe dated June 21, 2015. In short, Minnesota Government to Tribal Government does not exist.

As part of the federal review and consultation process, the MCT requested that the USACE work together to update the *1997 Issue Paper* to reflect the more fully defined usufructuary rights by the 1999 Mille Lacs decision and the 2013 and 2015 U.S. v Brown *SquareHook* decisions. (See also MCT Resolution 32-17 in Appendix A).

- **The Voigt Decision (1983)**- the US 7th Circuit Court of Appeals delivered the "Voigt Decision" in LCO Band of Chippewa Indians v. Voigt, et al, affirming Ojibwe rights to hunt and fish anywhere on ceded territory, even on privately owned land.

- **1999 Supreme Court Decision** - Minnesota v. Mille Lacs Band of Chippewa Indians. The Court ruled that the Ojibwe retained hunting, fishing, and gathering rights on the lands it had ceded to the federal government in the 1837 White Pine Treaty and that the state governments of MI, MN, and WI, had unfairly asserted authority of hunting and fishing rights without regard for treaty rights guaranteed to the Ojibwe before those states were even formed. The Court also concluded that the same protections survived in the 1855 Treaty, even though it did not explicitly outline usufructuary rights, because the Chippewa delegates that signed it clearly did not believe they were relinquishing such rights.

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55 https://mn.gov/mdhr/news-community/government-relations/tribal-consultation/tribal-consultation-policy.jsp

56 See June 21, 2015 letter to Ms. Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe from Daniel P. Wolf, Executive Secretary for PUC, regarding Executive Order 13-10 issued by Governor Mark Dayton on August 8, 2013. "By the terms of that Executive Order, its provisions do not apply to the Commission. Per the second ordering point, the Order applies to certain defined "Cabinet Agencies" and then lists the executive branch agencies which are included in that definition. The Commission is not listed as one of those defined agencies, perhaps due to its independent, quasi-judicial nature. Because of the Commission's ex parte rules, like a court, consultation with affected interests is prohibited; all communications with the Commission must be submitted into the formal record."

- **2015 Squarehook Case-** Operation Squarehook was a large multi-year state and federal investigation into black market walleye. The 8th Circuit U.S. Court of Appeals ruled that the federal government could not prosecute 4 Ojibwe men for netting walleye on Leech Lake Reservation and selling them. This up held the 2013 U.S. District Court decision to dismiss the cases. The men were accused of selling hundreds of thousands of dollars' worth of netted fish and charged with wildlife trafficking under the Lacey Act. The court upheld the rights guaranteed by the 1837 White Pine Treaty as the same rights the signatory Chiefs would have understood in 1855, even though the 1855 treaty did not directly apply because the Leech Lake Reservation did not exist yet. In its decision, the court repeatedly referenced the Supreme Court's landmark 1999 Mille Lacs decision.

International Law and Standards

The XL3 project is an international project. The pipeline itself crosses the border between Canada and the United States. It also crosses the territory of numerous First Nations in both nation-states. The products it would carry are bound for international markets, and the effects of the mining, refining, and combustion of the crude have global implications. As such, this project should abide by international standards. Beyond that, it is important for Tribal Governments to understand and begin to apply international standards for themselves. The following sections summarize various international standards that relate to this project.

United Nations Declaration on the Rights of Indigenous People[57]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is intended to protect the collective and individual rights of Indigenous Peoples and affirm their rights related to culture, environment, health, education, economic, and social development. This declaration has been a long time coming. It's routes trace back to the Haudenosaunee and other Indigenous groups visiting the UN for decades. The declaration itself took over two decades to be be adopted. It is the most comprehensive international instrument to set the standards for the promotion and protection of Indigenous People. The process of negotiating the declaration has increased global solidarity among Indigenous People. This movement is now pushing for implementation of the declaration in all levels of government.

[57] http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx

While the declaration is not legally binding, it represents the development of international legal norms and the evolution of standards-setting.

In many countries, constitutional reform has codified the declaration into law. New constitutions in Ecuador, Bolivia, Costa Rica, El Salvador, Nicaragua, Mexico, Kenya, and Myanmar contain elements of the declaration. Bolivia has fully embraced the declaration, incorporating both Indigenous Peoples' right to self-determination and self-government in their constitution. Bolivia is also one of the early adopters of the Rights of Nature (see Rights of Nature section). Finland, Norway, and Sweden are also attempting to apply the declaration and have agreed to a Draft Nordic Sami Convention.

The Declaration is has also been cited in several legal decisions, including the historic Cal v. Belize case. This case, brought by Maya people, argued for concessions for exploitation of their natural resources without consent. Their title was upheld and legal protection under the Belize Constitution was recognized. In the case, the Chief Justice of the Supreme Court of Belize, Abdulai Conteh directly referred to the Declaration, specifically Article 26, Para 1:

> *Indigenous Peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied, or otherwise used or acquired*

Additional applications of the Declaration in legal decisions include:

In Proprietors of Wakatū & Rore Staford v. Attorney General: Aotearoa (New Zealand), a claim by the Maori that the British Crown owed fiduciary duties for their failure to reserve 15,100 acres for the Maori. Presiding Chief Justice Elias CJ quoted Article 40:

> *Indigenous Peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous Peoples concerned and international human rights*

In Kichwa Indigenous People of Sarayaku v. Ecuador, it was found that Ecuador had violated both international and domestic law, including the Sarayaku's right to communal property, cultural identity and for failure to obtain their Free, Prior and Informed Consent (FPIC). Ecuador had used armed forces to support the State Petroleum Company's destruction of the environment and sacred sites of the Sarayaku.

The Declaration was also used during the negotiations of the Paris Climate Accord to solidify the rights of Indigenous Peoples and the importance of traditional knowledge for climate change[58]

The United States is one of numerous countries that supports the United Nations Declaration on the Rights of Indigenous Peoples. Contamination from these pipeline projects would wipe out the practice of harvesting manoomin and all associated religious ceremonies. Manoomin is an intrinsic, identity-forming aspect of Anishinaabe life -- to lose access to these manoomin beds would devastate and permanently harm Anishinaabe culture.

The UNDRIP also contains provisions mandating free and informed consent from an affected tribal nation by the state.[59] In this case, the state of Minnesota has failed to properly consult or even adequately consider the impacts of these projects on the indigenous peoples of the region. The damages that will result from these projects cannot be undone, nor can they be measurable in terms of losing an entire culture that has existed prior to the formation of the United States. A fossil fuel project should not be considered without fully examining cultural impacts and the potential losses that will occur if spills occur, which is a mathematical certainty.

U.S. President Barack Obama announced that the United States would "lend its support" to the UN Declaration on the Rights of Indigenous Peoples. *"The aspirations it affirms,"* he said, *"including the respect for the institutions and rich cultures of Native peoples, are one we must always seek to fulfill. . . I want to be clear: what matters far more than words, what matters far more than any resolution or declaration, are actions to match those words. And that's what this conference is about. . . That's the standard I expect my administration to be held to."*

The statement is significant because the United States was one of only four countries that voted against the declaration when the UN General Assembly adopted it in 2007, and the last of those four to have reversed its former opposition[60].

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[58] www.cs.org Cultural Survival Quarterly September 2017

[59] *Id*.

[60] https://www.culturalsurvival.org/news/victory-us-endorses-un-declaration-rights-indigenous-peoples

International Labour Organization Convention No. 169 on Indigenous People[61]

The International Labour Organization (ILO) brings together governments, employers and workers to set labour standards, policies, and implement programs to provide decent work/working conditions for all people.

The aim of the Convention is to overcome discriminatory practices affecting indigenous and tribal people, and enable them to participate in decision-making. It covers a number of issues including consultation and participation, rights to land, employment and vocational training, education, health and social security, customary law, traditional institutions, and cross-border cooperation.[62] It was adopted in 1989.

Convention on Biological Diversity

The UN Convention on Biological Diversity (CBD) negotiated at the Earth Summit in Rio de Janeiro in 1992. It addresses the conservation and sustainable use of biodiversity, and with access to biological diversity and sharing of the benefits arising from this access. The CBD's decision-making body is the Conference of Parties (COP).

Equator Principles[63]

The Equator Principles (EPs) has been adopted by financial institutions to determine, assess and manage environmental and social risk in projects. Its primarily utilization is to support due diligence and responsible decision making.

EPs are applied globally and to all industries. The are four specific financial products they apply to:

1) Project Finance Advisory Services
2) Project Finance
3) Project-Related Corporate Loans
4) Bridge Loans.

Ninety financial institutions (as of 2016) have adopted the Principles. These "Equator Principles Financial Institutions (EPFIs) commit to implementing the EPs in their internal policies and withholding financing to clients that do not comply with the Principles.

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[61] http://www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm

[62] http://www.ilo.org/global/topics/indigenous-tribal/WCMS_502755/lang--en/index.htm

[63] http://www.equator-principles.com/index.php/about-ep

Currently, there is little upholding of the Principles globally. Wells Fargo, on of the adopters of the Principles invested in the Dakota Access Pipeline- and stayed invested through the violent confrontations with Water Protectors.

Multilateral development banks, such as, the European Bank for Reconstruction & Development, and credit agencies of the OECD Common Approaches, are also being to incorporate elements of the Principles in their policies.

The EPs initiative has also been involved in the development of the US Carbon Principles and global Climate Principles.

The Rights of Nature

> *Stated in another way, if we naively attach our Indigenous categories of thought to colonial religious and legal language that does not have the ability to understand those concepts, then without a mechanism to keep our traditional understandings of those relationships intact, we are in constant risk of participating in our own cultural genocide*
>
> Mark Freeland

Relying on only the US Legal system, or the international legal system constrains Indigenous People to a system developed through the logic of Euro-Westerners. As described in the sections on Indigenous Science, Traditional Ecological Knowledge and Anishinaabeg Akiing, Indigenous Worldviews and Euro-Western Worldviews do not coincide. History has shown that engagement with this legal system has little success in protecting Land. Freeland (unpublished dissertation) has argued that this engagement runs the risk of the colonization of thought. He stresses the importance of maintaining cultural and communal functionality in the midsts of these engagement. Since Indigenous communities constantly negotiate from a place of reduced efficacy, it is essential to identify methods of engagement that do not compromise Indigenous thought patterns while also providing better land protection.

A movement that may allow this engagement is the advancement of the Rights of Nature

> *Rights of Nature is the recognition and honoring that natural ecosystems including trees, oceans, animals, mountains have rights just as human beings have rights.*

> *Rather than treating nature as property under the law, the time has come to recognize that nature and all our natural communities have the right to exist, maintain and regenerate their vital cycles.*
>
> *And we – the people – have the legal authority and responsibility to enforce these rights on behalf of ecosystems. The ecosystem itself can be named as a rights bearing subject with standing in a court of law*[64]

This movement began in with Indigenous communities in Ecuador. These rights were codified in the Ecuadorian constitution in 2008. Soon after, in Bolivia, the World's People's Conference on Climate Change and the Rights of Mother Earth drafted the Universal Declaration on the Rights of Mother Earth.[65] Since then, a number of other communities (Indigenous and non-Indigenous) have used this principle to protect their lands.

New Zealand

" *Ko au te awa, Ko te awa ko au ~ I am the river and the river is me*" expresses the special, spiritual relationship the iwi peoples (Maori) hold with the Whanganui river (New Zealand). In a landmark agreement between the Crown government of New Zealand and the Whanganui River iwi, the Whanganui River was granted legal personhood status. The agreement recognizes the river and all its tributaries as a single entity, Te Awa Tupua, and makes it a legal entity with rights and interests, and the owner of its own river bed. Two guardians, one from the Crown and one from a Whanganui River iwi, are given the role of protecting the river (Global Alliance, September 2012)[66].

India

An Indian court has recognized Himalayan glaciers, lakes and forests as "legal persons" in an effort to curb environmental destruction, weeks after it granted similar status to the country's two most sacred rivers (PRI, April 2017).[67]

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[64] http://therightsofnature.org/learn-about-rights-of-nature/

[65] https://celdf.org/rights/rights-of-nature/

[66] http://therightsofnature.org/tag/new-zealand/

[67] https://www.pri.org/stories/2017-04-01/himalayan-glaciers-are-granted-rights-human-beings-protection

Pennsylvania
Grant Township in Pennsylvania, USA, has passed a law legalising direct action to prevent the fracking wastewater injection wells within the township. The law permits non-violent direct action to enforce the provisions of the Grant Township Community Bill of Rights Ordinance which established rights to clean air and water, the right to local community self-government and the rights of Nature. The proposed well would be a violation of those rights.[68]

There are many other communities across the globe that are adopting, or looking at adopting this legal framework. The recognition of the Rights of Mother Earth (Nature) is essential to create a sustainable future. Anishinaabeg leaders should explore these standards and strive to include them in their internal policies. Anishinaabeg and other Native Nations need to continue to work together to push this standards, both locally and globally.

[68] http://therightsofnature.org/tag/grant-township/