

REVISED 6/5/96'

Protocol# 5

NATURAL RESOURCE MANAGEMENT IN THE MINNESOTA PORTION
OF THE 1837 CEDED TERRITORY

I. MANAGEMENT PRACTICES.

The State and the Bands have the responsibility to and will fairly regulate their respective harvest activities within the Minnesota portion of the 1837 Ceded Territory (hereafter, the Ceded Territory) in a manner consistent with sound conservation practices and the opinions and orders of the Court in this case. The State has a trust responsibility and authority to manage natural resources for the benefit of all current and future users consistent with the treaty harvest rights of the Bands, including the Bands' rights to regulate and protect Band member harvest opportunities, as affirmed by the federal court. The State acknowledges the Bands' traditional interest in natural resource stewardship, and shall give weight to the findings and advice of the Bands concerning natural resource management and conservation.

II. BIOLOGICAL INFORMATION.

To allow the State and the Bands to fulfill their responsibilities, they will provide each other with timely access to all available biological and harvest information. The procedures and timetable by which the information will be mutually shared is covered in a separate protocol. (See Protocol# 4.)

III. HARVESTABLE SURPLUS AND HARVEST MANAGEMENT UNITS.

A. Wildlife.

The State has developed and utilized methodologies for calculating the harvestable surplus of bear, antlerless deer, wild turkey, and registered furbearers (bobcat, otter, marten, lynx and fisher). The State calculates the harvestable surplus of these animals in areas ("harvest management units") that do not coincide with the boundaries of the Ceded Territory; some of these units are wholly inside or wholly outside the Ceded Territory, and others include lands and waters that are partially inside and partially outside the Ceded Territory. The State believes that its existing methodologies and harvest management units for calculating harvestable surpluses are consistent with the ability of the entire ecosystem to support these resources, and are based on sound resource data that considers human and cultural values.

The State desires to continue using its current methodologies and harvest management units for calculating the harvestable

surplus of bear, antlerless deer, wild turkey, and registered furbearers in the Ceded Territory. For harvest management units that cross the boundaries of the Ceded Territory, the State proposes to calculate the harvestable surplus for the portion of the unit within the Ceded Territory on the basis of the percentage of the unit's total acreage that is within the Ceded Territory.

The Bands do not now have information or experience to suggest that the State's existing methodologies or harvest management units for calculating harvestable surpluses for these species will violate their treaty rights. Accordingly, they have agreed to limit treaty harvests of these species by adopting harvest quotas within each of the State's existing harvest management units, and have not objected to the continued use of the State's existing methodologies for calculating harvestable surpluses within those units, including its proposal for calculating harvestable surpluses in the Ceded Territory portion of a unit that is only partially within the Ceded Territory. To enable the Bands to: (1) better understand the State's methodologies and their impact on treaty harvests; and (2) insure that such methodologies take into account the Bands' views of "sound resource data" and the Bands' "human and cultural values", the State agrees to fully involve the Bands' technical representatives in the annual calculations of the harvestable surpluses. This will include involving representatives of the Bands in meetings with Area DNR managers, State management committees or working groups where harvestable surplus or quota calculations are discussed.

If the Bands develop concerns regarding the State's methodologies, harvestable surplus calculations or harvest management units, they will present their concerns to the 1837 Ceded Territory Wildlife and Plant Committee, and seek to resolve their concerns through the committee and mediation process established in Protocol No. 2. Similarly, if the State seeks to change its methodologies, harvestable surplus calculations or harvest management units, it will present its proposal for a new methodology, calculation or unit to the Wildlife Committee, together with any supporting rationale, and seek the Bands' concurrence through the committee and mediation process. In the absence of agreement on such matters following the committee and mediation process, either the State or the Bands have the option of invoking the court's continuing jurisdiction to seek resolution of the matter, unless the court has determined that one party has the authority to resolve the matter unilaterally and that its decision cannot be challenged in court. ⁱ

ⁱ The State contends it has authority to resolve disputes over the harvestable surplus of a species unilaterally and that its decision cannot be challenged by the Bands in court. The Bands dispute this. They propose that, in the event of a dispute over harvestable surplus levels, a neutral expert, jointly selected by

The Bands and the State agree to work cooperatively through the 1837 Ceded Territory Wildlife and Plant Committee to gather information about the moose population in Nemadji State Forest and elsewhere in the Ceded Territory, and to close State deer registration block 184 to all moose harvests pending a determination through the committee (and if necessary dispute resolution) process that the population is capable of withstanding harvest or a sustainable population will not survive there in any event. The Bands further agree, for the period 1997-2001, that they will not harvest more than five moose per year outside of State deer registration block 184 under Conservation Code § 6.24, and will propose a limit on such harvests for future years on or before June 15, 2000. Any disagreement over that limit will be resolved through the committee and dispute resolution process.

Subject to future adjustments through the 1837 Ceded Territory Wildlife and Plant Committee or the dispute resolution process, the Bands agree to prohibit the harvest of beardless wild turkey.

B. Fisheries.

With limited exceptions outside the Ceded Territory, the State has not previously used harvestable surplus calculations to manage fisheries. --However, the State is moving toward individual waters management. The State and the Bands have agreed to the initial methods for calculating the harvestable surplus of fish outlined in Attachment A hereto. The State and the Bands will utilize the 1837 Ceded Territory Fisheries Committee as the forum to address changes in those methods or concerns about the calculations, in accordance with the provisions of Protocol No. 1. In the absence of agreement regarding such matters following the committee and mediation process, either the State or the Bands have the option of invoking the court's continuing jurisdiction to seek resolution of the matter, unless the court has determined that one party has the authority to resolve the matter unilaterally and that its decision may not be challenged in court.

The Bands will not authorize open-water spear or net fisheries in lakes other than Mille Lacs that exceed the threshold level set forth below unless a standard gillnet survey has been conducted on the lake within 24 months before the beginning of the fishing year. The threshold level is:

For Lakes over 1,000 acres, either (a) 3 standard 100-foot gillnet set per 100 surface acres per year; (b) 0.2 walleye per surface acre taken by open-water spear fishing per year; or (c) a percentage of each component, provided the sum of the percentages

the State and the Bands, be given authority to determine such levels on an interim basis, pending resolution of the matter by the parties or the court.

does not exceed 100 percent;

for lakes under 1,000 acres, either (a) 2 standard 100-foot gillnet sets per 100 surface acres per year; (b) 0.2 walleye per surface acre taken by open-water spear fishing per year; or (c) a percentage of each component, provided the sum of the percentages does not exceed 100 percent;

the number of gillnet sets will be rounded up to the nearest integer (for example, in a 1,210 acre lake, the threshold level would be 37 since $3 \times 12.1 = 36.3$).

The State will not have to adjust the regulation of its fisheries on those lakes in which Band harvests in open-water spear and net fisheries will be at or below the threshold level. The Bands and the State will review the biological impact of such Band and State harvests and consider appropriate revisions at the end of a three-year trial period.²

The State agrees that Band or Great Lakes Indian Fish and Wildlife personnel authorized by the Bands may conduct fisheries assessments and that the results of such assessments may be utilized in calculating harvestable surplus levels as provided in Attachment A, provided that the assessments are conducted pursuant to a protocol agreed upon by the parties.

Fish captured in gillnets may only be released as follows:

muskellunge may be released if they appear capable of surviving;

northern pike may be released if they appear capable of surviving, but 35 percent of those released when water temperatures at the 3 to 4 foot depth are between 50 and 60 degrees, and 100 percent of those released when such temperatures are over 60 degrees, shall count against any applicable quota (these rates shall be subject to review by the Fisheries Committee on the basis of the best available mortality data);

yellow perch may be released if water temperatures are below 50 degrees and the fish appear capable of surviving; all others shall be retained and count against any applicable quota;

² The State and the Bands disagree as to whether there is a conservation concern with respect to any gillnetting in lakes smaller than 1,000 acres. This issue will be presented to the court for final resolution. If the court determines that gillnetting may be conducted in these lakes, the above provision will govern such harvest.

tullibee may not be released; all fish must be retained and shall count against any applicable quota;

smallmouth bass and other species captured incidentally in gillnets may be released if they appear capable of surviving; all others shall be retained and count against any applicable quota.

As used herein, the phrase "appears capable of surviving" refers to fish that are able to maintain themselves upright.

The Bands and the State agree to manage their fisheries to remain within their respective shares of the harvestable surplus. During an initial three-year trial period, there will be no prescribed penalties for quota overruns. The parties will seek agreement through the Fisheries Committee on a mechanism to address quota overruns thereafter.

IV. SCIENTIFIC INVESTIGATIONS.

The State and the Bands will coordinate their efforts to research the Ceded Territory's natural resources, and make best efforts to insure that research projects are not impeded, interfered with, or unnecessarily duplicated by other parties. The appropriate 1837 Ceded Territory Resource Committee should review and evaluate all such proposals, and the dispute resolution procedure in the committee protocol should be used to resolve any disputes about them. The parties shall diligently and in good faith endeavor to maximize the usefulness and consistency of their scientific investigations. Band proposals for scientific investigations that involve harvest or collection activities not otherwise permitted under the Bands' 1837 Treaty Conservation Codes, including all investigations by non-Band members, shall be subject to prior State approval, but the State may not unreasonably delay or deny such approval. The State may deny such approval for investigations by Band members only for conservation, health or safety reasons authorized by the court in its Phase I decision. For informational purposes, the Bands shall notify the State of any scientific investigations that involve harvest activities permitted under their Codes, and shall share the data collected during the course of the investigation. Similarly, the State shall notify the Bands of any scientific investigations it conducts (or which are conducted on its behalf), and shall share with the Bands the data collected during the course of the investigation.

V. FISH STOCKING.

The Band Commissioner shall not issue a permit under Conservation Code Section 3.06A, Subsection 1, without prior approval by the State, but the State shall not unreasonably delay or deny such approval.

VI. ENDANGERED OR THREATENED SPECIES.

The State and the Bands agree that Mille Lacs Band's Commissioner of Natural Resources may issue permits under the Bands' Conservation Codes, § 3.25, only in the following circumstances: (1) for scientific investigation or rehabilitation of a threatened or endangered species, but only upon approval of the project by the State pursuant to Part IV of this protocol; (2) for ceremonial or religious use by a Band member of a threatened or endangered species, but only upon: (i) a determination by the Mille Lacs Band's Commissioner that such use will not be detrimental to the species; and (ii) 24-hours prior notice to the State, during which period the State does not object in writing to the permit; or (3) when the circumstances set forth in Minn. R. 6212.2000 are present. Except where prior notice is required, the Mille Lacs Band's Commissioner shall provide immediate notice to the State of any permit issued under Band Code § 3.25, and any dispute between the Commissioner and the State regarding the issuance of such a permit shall be resolved in accordance with the dispute resolution procedures in the committee protocols. In the event the State objects in writing to a ceremonial or religious permit during the 24-hour notice period, the State Commissioner of Natural Resources or one of his or her deputies shall enter into immediate discussions with the Bands in an attempt to resolve the dispute. If the dispute is not resolved, the Bands may elect to pursue it through the dispute resolution procedures outlined in the committee protocols. The Bands may withdraw from their agreement to provide 24-hour prior notice if in practice State objections impair Band member ceremonial or religious harvests. The Bands will give the State sixty days' notice of their intent to withdraw, and the State and the Bands will seek an alternative arrangement for notice and objections through the committee process. Nothing herein shall limit or affect Band members' rights under federal law to freely exercise their religion, or to assert such rights in defense to any prosecution or enforcement action.

VII. 1837 CEDED TERRITORY COMMITTEES AND DISPUTE RESOLUTION.

The composition of the Fisheries and Wildlife and Plant Committees for the Minnesota 1837 Ceded Territory is outlined in separate protocols. The committees are charged among other things with gathering information, input and advice on resource management within the Ceded Territory. The State and the Bands shall take regular part in these committees. Any disputes over the methodology for calculation of harvest numbers, changes to special designations, permit and quota areas, or harvest zones, or perceived discriminatory impact on treaty harvest, shall be raised with the committees before being referred to the balance of the dispute resolution process outlined in the protocols.

**Harvestable Surplus Methodologies for Fish
within Minnesota Ceded Territory**

Methodology for Mille Lacs Lake

Walleye There are three primary steps in the management procedure for determining the annual harvestable surplus of walleye in Mille Lacs Lake: harvest strategy, stock assessment models, and harvest tactics. The management procedure is adaptable in the sense that various components will be updated as new, better information becomes available. Initially, the harvest strategy for walleye is an annual exploitation fraction of 24% of the vulnerable stock based on an $F_{0.1}$ exploitation policy. This harvest strategy may be revised as additional information is acquired such as the relative amount of effort put forth by the various fisheries (e.g. gillnet, spearing, and angling), or in light of the technical committee's decisions regarding an appropriate mesh size or sizes after the first five years of the fishery.

The management procedure is designed to use several stock assessment models for determining annual abundance of walleye. Initially, two assessment models will be used: (1) a survey-tuned virtual population analysis; and (2) a modified DeLury method to estimate abundance from survey data (i.e. the "Collie-Sissenwine Model"). Additional assessment models may be added as the technical committee continues its work.

The harvest tactics include all methods for harvesting fish, including gillnets, spears, and angling. During the first five years of fish harvest under the Band code, the Bands will phase in their harvests at low levels as specified in the Bands' interim fisheries management plan, and will fish a variety of gillnet mesh sizes as authorized under the Band Code and management plan. This will allow the technical committee to gain additional data on the effects of various harvest schemes, and the preferences and patterns of band harvest. This will provide the committee with information to determine the most appropriate mesh size or sizes in the future. At the same time, the State will experiment with various tactics for regulating the recreational fishery.

Yellow Perch, Tullibee/Cisco, and Burbot -- current biological information for these species is limited and thus precludes forecasting changes in abundance and quotas from year to year. Until such information becomes available, the following total annual quotas based on observed long-term harvests shall be used: yellow perch 270,000 lbs.; tullibee/cisco--24,000 lbs., and burbot--28,000 lbs. If these species have been under-utilized, then these quotas will be conservative. The technical committee should therefore review these harvest levels during the first five years of the mixed fishery, and adjust these quotas accordingly

with new data collected during this five year period, and also existing data {e.g. age data) that has yet to be processed. Additional data for burbot may be difficult to obtain since catchability of this species is very low during the open water season. Potential development of a tribal winter fishery may provide data for more detailed stock assessment of burbot. When the appropriate data become available for any of these three species that may be harvested at a level close to their optimum yield, then a management procedure similar to that for walleye should be invoked.

Northern Pike -- Northern pike population estimates are made each spring by mark and recapture methods. These estimates indicate that this population density is low, and thus can sustain maximum annual harvests of 23,000 pounds. Future population estimates for northern pike may be conducted on a biannual schedule, and will determine the need for future adjustments to total harvests.

Muskellunge At this point in time, there is insufficient information about the level of Band incidental harvest of muskellunge in gillnets to warrant establishing a harvestable surplus quota on Lake Mille Lacs. As referenced in the Bands' fisheries management plan, if the numbers of muskellunge in gillnets exceed five (5) percent of the estimated muskellunge population (to be determined with the best available data), the Bands will institute time and/or area closures to reduce the capture of muskellunge in nets.

Methodology for lakes other than Mille Lacs

Walleye - The model for estimating safe walleye harvest levels for lakes other than Mille Lacs is

$$\text{pounds} = 0.32 \text{ CPUE acres}$$

if CPUE is the catch rate in a standard gillnet survey of the lake conducted 0-12 months before the beginning of the fishing year. The model is

$$\text{pounds} = 0.25 \text{ CPUE acres}$$

if the survey is conducted 12-24 months before the beginning of the fishing year. This method is based on the catchability model which uses catch rates in standard gillnet surveys to estimate population size, and incorporates a safe exploitation rate (0.25), mean weight (1.22), net efficiency (0.585), and maturity (0.56) factors.

Northern Pike -- The average harvest level of northern pike preferred by anglers appears to be 2.3 pounds per acre. This level is based on lakes that had fishing mortality less than or equal to natural mortality (F M) and is therefore conservative. It will be applied by the parties to northern pike over 23 inches. The Bands and the State will review the biological impact of this approach

and may propose appropriate revisions at the end of a three-year trial period.

Bluegill, Largemouth Bass, Black Crappie, and Yellow Perch -- Safe harvest levels for one or more of these species shall be imposed for those lakes where the Bands authorize commercial harvest of a specific species. Before any commercial harvest is authorized, a safe harvest level shall be agreed upon by the technical committee. The harvest level shall be estimated as a pounds/acre value, and assigned by lake class. Additionally, if the level of Band subsistence harvest of one or more of these species on a given lake becomes high enough to cause concern over the total, safe harvest, the technical committee shall review the information and make appropriate recommendations for regulation changes for Band and/or non-Band harvest.

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