STATE OF MINNESOTA
COUNTY OF CLEARWATER

DISTRICT COURT
NINTH JUDICIAL DISTRICT

State of Minnesota,	)	
	)	**REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**
vs.	)	
[redacted],	)	
	)	MNCIS File No. 15-CR-21-[redacted]
Defendant.	)	

TO: The Honorable John E. DeSanto, Judge of District Court; Kathryn Lorsbach, Clearwater County Attorney; and the Clerk of Courts.

COMES NOW Defendant [redacted] and submits this reply brief in support of the Defendant's motion to dismiss the sole count of misdemeanor trespass in the above-captioned case for lack of probable cause or, in the alternative, for the State's violation of the Supremacy Clause of Article VI of the United States Constitution.

The State filed a memorandum in opposition to the Defendant's motion on October 14, 2022. The State's memorandum was submitted nearly two weeks after the filing deadline set by the Court, *see* Tr. at 172:15-22, 174:15-20, without any notice to the defense or apparent leave of the Court. The State's memorandum also includes numerous typos, errors, and incorrect citations; at times merely lists citations in bullet-point format without argument; misstates the facts without support in or citation to the record; and mischaracterizes the applicable law.

Because the Defendant has previously offered a recitation of facts established in the record and, ultimately, the record controls, the Defendant submits this reply brief for the limited purpose of addressing the State's mischaracterizations of the law.

In its memorandum, the State assumes the mantle of a centuries-old position that Indigenous sovereignty exists only by permission from and as subject to the limitations set by colonizing governments. The United States Supreme Court heard these same arguments from the State in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and squarely rejected them.

In arguing the *Mille Lacs* case, the State asserted that Anishinaabe people did not retain off-reservation usufructuary rights in the territories ceded in the 1837 and 1854 Treaties. *See Mille Lacs*, 526 U.S. at 175, 185-86. Applying the canons of treaty construction and pursuant to the reserved rights doctrine, however, the Supreme Court determined that the State was wrong, and that Anishinaabe people had retained off-reservation usufructuary rights in the ceded territories, not withstanding the cession of land. *See id.* at 195-202. In so holding, the Court addressed the 1855 Treaty in particular, explaining that "[t]he 1855 Treaty was designed primarily to transfer Chippewa land to the United States, *not to terminate Chippewa usufructuary rights*." *See Mille Lacs*, 526 U.S. at 198 (emphasis added).

The *Mille Lacs* decision forced the State of Minnesota to admit (and here the State no longer disputes) that Anishinaabe people reserved their sovereign and inherent off-reservation usufructuary rights in the territories ceded in the 1837 and 1854 Treaties. Instead of relinquishing its failed arguments from the *Mille Lacs* litigation, however, the State now recycles them to argue against the off-reservation usufructuary rights reserved in the 1855 Treaty.

To advance its position, the State argues that any and all usufructuary rights not expressly reserved in a treaty are relinquished by implication. *See, e.g.*, Memo. in Opp'n at 28 ("When hunting, fishing and gathering rights are not reserved in the Treaty, silence concerning the same in an ICC judgment, [sic] implies that the rights were determined to have been disposed of by the

cession of the land."). But as the United States Supreme Court has recognized, the inherent sovereignty of Indigenous peoples dictates the opposite conclusion. Properly understood, treaties are "not a grant of rights to [Indigenous peoples], but a grant of rights from them, [as well as] a reservation of those rights not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). As a result, the Supreme Court has held that all sovereign rights not expressly relinquished in a treaty or extinguished by federal statute were and are implicitly reserved by Indigenous signatories. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968). This fundamental principle of treaty law is known as the reserved rights doctrine.

Equally fundamental to interpreting treaties made with Indigenous peoples are the Supreme Court's canons of treaty construction: First, ambiguities in treaties must be resolved in favor of the Indigenous signatories. *See Mille Lacs*, 526 U.S. at 200 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-76 (1979); *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943); *Winters v. United States*, 207 U.S. 564, 576-77 (1908)). Second, treaties must be interpreted as the Indigenous signatories would have understood them at the time of signing. *See Mille Lacs*, 526 U.S. at 196; *Jones v. Meehan*, 175 U.S. 1, 10 (1899); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). And third, treaties must be construed liberally in favor of Indigenous people. *See Mille Lacs*, 526 U.S. at 200 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-76 (1979); *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943); *Winters v. United States*, 207 U.S. 564, 576-77 (1908)).

The off-reservation usufructuary rights retained by Anishinaabe people in their treaty-ceded territories, including those territories ceded in the 1855 Treaty, are well-grounded in the

Supreme Court's reserved rights doctrine and canons of treaty construction. As detailed in the Defendant's memorandum, the Anishinaabe people did not relinquish their usufructuary rights in the 1855 Treaty. *See* Memo. at Parts I(A)-(B), III(A)-(B). The Treaty itself does not expressly relinquish any usufructuary rights, nor would the Anishinaabe signatories have understood it to do so. *Id*. To the contrary, Anishinaabe signatories were familiar with the United States negotiators and understood the federal government's aims, particularly given the context of prior negotiations, to be yet another land-grab. Thus, Anishinaabe signatories were able to "cut to the chase" because they understood that the United States wanted "land, and land only." *See* Tr. 148-152.[1]

The State largely ignores these fundamental principles of treaty interpretation–the reserved rights doctrine and canons of treaty construction–detailed in the Defendant's memorandum. In fact, *not once* in its 43-page brief does the State cite to either the reserved rights doctrine or any canon of treaty construction. Instead, the State's memorandum relies almost exclusively on outdated case law that predates the *Mille Lacs* decision. For example, the State cites extensively to *State v. Keezer*, 292 N.W.2d 714 (Minn. 1980), an opinion issued more than forty years ago that predates *Mille Lacs* by two decades. In that case, the Minnesota Supreme Court determined that the canons of treaty construction did not apply to interpretation

[1] In its memorandum, the State references a letter sent from Chief Hole-In-The-Day to the United States President, which precipitated negotiation of the Treaty of 1864 and described the starvation conditions Anishinaabe people were experiencing at that time. The State argues that "[i]f the Bands understood the Treaty of 1855 to have reserved hunting, fishing and gathering rights in the ceded territory, this letter [that Hole in the Day sent, saying his people were starving] would not have been necessary or sent." But this argument is speculative at best and, at worst, willfully ignores the broader effects of settler encroachments that threatened Anishinaabe peoples' survival at the time. In short, the fact that Anishinaabe people understood the 1855 Treaty to reserve usufructuary rights does not mean that those rights were respected at the time, nor retained sufficient survival resources given the encroachment of settlers.

of the 1795 and 1825 Treaties. *See id*. at 717, 720. But as the *Mille Lacs* decision reflects, the Minnesota Supreme Court was wrong–the canons of treaty construction do apply to interpreting the treaties between the Anishinaabe and the United States government, and this Court is required by precedent to apply them pursuant to binding Supreme Court precedent. *See, e.g*., *Mille Lacs*, 526 U.S. 172.

Similarly, the other cases cited by the State are antiquated and inapposite. For example, in *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), the Minnesota Supreme Court determined that the State lacked jurisdiction to regulate hunting and fishing within the White Earth Reservation. The State relies on dicta from *Clark* to support its claims, despite the fact that the cited dicta was based upon a stipulated factual record the parties had agreed to following a remand directive (as opposed to the robust factual record presented to the Court in this case), and the opinion predates the *Mille Lacs* decision by twenty years. *See id*. Likewise, the State cites to *United States v. Stone*, 112 F.3d 971 (8th Cir. 1997), *United States v. Aanerud*, 893 F.2d 956 (8th Cir. 1990), *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983), *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir. 1982), and *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527 (D. Minn. 1981), despite the fact that each of those cases addressed ancillary issues to that now before this Court and relied on the same pre-*Mille Lacs* analysis that failed to appropriately apply the canons of treaty construction. In addition, the cited opinion *United States v. Minnesota* does not address or even cite to the 1855 Treaty, but rather involved other land cession treaties that post-dated the 1855 Treaty. *See United States v. Minnesota*, 466 F.Supp. 1382 (D. Minn. 1979).

Several other cases cited by the State not only predate *Mille Lacs* and the Supreme Court's robust application of the canons in that case, but also address entirely different treaties

made with different Indigenous peoples that involve different histories and factual records, and thus have limited utility here. *See, e.g.*, *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Western Shoshone Nat. Council v. Molini*, 951 F.2d 200 (9th Cir. 1991); *In re Wilson*, 634 P.2d 363 (Cal. 1981). Notably, the State describes two of these opinions as "recent" United States Supreme Court decisions, a characterization nothing short of absurd considering the cases were decided nearly half a century ago. *See* Memo. in Opp'n at 25 (citing *Rosebud Sioux Tribe*, 430 U.S. 584 and *DeCoteau*, 420 U.S. 425).

In fact, the *only* judicial opinion cited by the State which post-dates the *Mille Lacs* opinion is the Minnesota Court of Appeals' unreported decision in *State v. Northrup*, No. A19-0130, 2019 WL 6838485 (Minn. Ct. App. 2019). That case is distinguishable on multiple grounds. First, much of the *Northrup* opinion centered on the issue of jurisdiction, an issue not contested by the Defendant here. Second, the *Northrup* Court ultimately affirmed the lower court's opinion, which was based on the fact that Northrup was a member of the Fond Du Lac Band and did not contest that Fond Du Lac Band was not a treaty signatory. Importantly, a review of the factual record shows that while the lower court had ruled against Northrup, it had ruled in favor of Northrup's co-defendant, White Earth Band Member Todd Thompson. *See State v. Thompson*, No. 18-CR-16-24 (Nov. 8, 2017) (Findings of Fact, Conclusions of Law and Order issued by Austad, J.). In the Northrup-Thompson case, just as the Defendant asks this Court to do now, Judge Austad applied the canons of treaty construction in light of the record and determined that, under the reserved rights doctrine, signatory tribes retained usufructuary rights to the 1855 Treaty-ceded territories. *See id.* As a result, she found that these rights did extend to Mr. Thompson as a White Earth Band member, *id.*, and the State of Minnesota

subsequently dismissed his case. *See State v. Thompson*, MNCIS No. 18-CR-16-24 (Dec. 8, 2017) (State's Dismissal of Charges Pursuant to Rule 30.01).

The Defendants in the Fire Light cases now before this Court are not Anishinaabe. They do not argue, as Northrup did, that they hold any direct individual right, by virtue of their Indigeneity, to exercise usufructuary rights such as off-reservation hunting or fishing. Rather, the Defendants argue they were present as non-native treaty partners committed to honoring the treaty obligations of all signatories, in support and by invitation of the Anishinaabe Fire Light ceremonial camp participants who did hold such off-reservation usufructuary rights. As detailed in the Defendant's memorandum, the Anishinaabe Fire Light ceremonial camp participants did and do retain off-reservation usufructuary rights in the 1855 Treaty-ceded territory, including the right to invite guests to join them in ceremony. Because they were such guests, the Defendants had a lawful claim of right which precludes the State from establishing a necessary element of the misdemeanor trespass offense with which they each are identically charged.

In 2017, Judge Austad recognized that White Earth Band member Todd Thompson had a right to exercise retained off-reservation usufructuary rights in the 1855 Treaty-ceded territory. This past summer, Judge DeGroat similarly ruled that White Earth Band members Todd Thompson and Justin Keezer and Leech Lake Band member Nancy Beaulieu had a right to exercise retained off-reservation usufructuary rights in the 1855 Treaty-ceded territory, and exercise of such rights included the very same Fire Light ceremonial camp at issue in this case. *See* Ex. 18. Justin Keezer and Nancy Beaulieu testified to these facts, the cultural significance of the Fire Light ceremonial camp, and the particular importance of inviting guests as treaty partners, as did experts Dale Greene and Jaime Arsenault. The Defendants now before this

Court are those treaty partners, as described by the solidarity statement that encapsulated the Fire Light ceremonial camp:

> I am here by the invitation of the Sovereign Anishinaabe Nation to stand and support their efforts to uphold their inherent responsibility to the future generation and protect lands, waters, mahnomin and the Anishinaabe way of life. This is being done in peace and prayer, supporting the defense of Indigenous sovereignty, treaty reserved rights, and the free prior and informed consent of the Anishinaabe Nation for anything impacting them.

See Ex. 16. Thus, while the Defendants do not claim off-reservation usufructuary rights for themselves, they assert that their presence as the invited guests of Anishinaabe treaty partners who do retain off-reservation usufructuary rights amounts to a claim of right sufficient to preclude the State from pursuing misdemeanor trespass charges.

The arguments advanced by the State evince a troubling adoption of the flawed and racist assumptions that undergird a shameful history of genocidal violence in the United States. The State claims, for example, that the doctrine of collateral estoppel should bar such treaty-based claims on privity grounds, essentially arguing that all Anishinaabe people should be treated as fungible by this Court on the basis of their tribal membership alone. Not only is the State's position of expanded privity unsupported by the case law, but it harkens to the myth of the "monolithic Native American," a concept that dates back to Christopher Columbus and was used for hundreds of years to justify ethnic cleansing and removal. *See* Kevin Gover, *Five Myths About American Indians*, WASH. POST (Nov. 22, 2017), *available at* https://www.washingtonpost.com/outlook/five-myths/five-myths-about-american-indians/2017/11/21/41081cb6-ce4f-11e7-a1a3-0d1e45a6de3d_story.html?utm_term=.c73ca14f9617. The State also uses the xenophobic term "mix bloods" to refer to people of multiracial heritage. Memo. in Opp'n at 8. Similarly, the State claims that the treaty text indicates the Anishinaabe signatories' intent to give up their

"wandering ways," although such language reflects the American drafters' efforts to degrade and devalue Anishinaabe hunting, fishing, and gathering practices. *See id*. at 15. Finally, and most fundamentally, the State's position is premised on the idea that it was the United States government that granted rights to Anishinaabe people. *See, e.g*., *id*. at 5 (stating that "even if the Treaty of Prairie du Chien ever *granted* Chippewa rights . . . they were extinguished by virtue of the 1837 Treaty (emphasis added)); *id*. at 22 (misstating the Defendants' position as "contend[ing] that the 1855 Treaty *grants* to all Anishinaabe hunting, fishing, and gather rights" (emphasis added)); *id*. at 23-24 (concluding without citation to any legal authority that "no usufructuary rights were ever reserved *or granted* in the 1855 ceded territory (emphasis added)); *id*. at 26 (same). This paternalistic concept is an antiquated relic of settler-colonialism that ignores the sovereignty of Indigenous peoples, as well as modern United States Supreme Court precedent holding that treaties, including the 1855 Treaty, are to be interpreted as unilateral conveyances of rights *from* sovereign Indigenous peoples to European and American colonizers.

Accordingly, the Defendant asks this Court to properly apply the reserved rights doctrine and the canons of treaty construction to the record before it; to affirm the off-reservation usufructuary rights of Anishinaabe people in their treaty-ceded territory, as the United States Supreme Court ruled in *Mille Lacs*, as Judge Austad ruled in *State v. Thompson*, and as Judge DeGroat ruled in *White Earth Band v. Beaulieu*, *White Earth Band v. Keezer*, and *White Earth Band v. Thompson*; and to dismiss this case because, as a non-native treaty partner and invited guest of Anishinaabe treaty partners lawfully exercising their usufructuary rights, the Defendant had a claim of right which precludes this prosecution for misdemeanor trespass.

Respectfully Submitted,

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