STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0130

State of Minnesota,
Respondent,

vs.

James Warren Northrup,
Appellant.

Filed December 16, 2019
Affirmed; motion granted in part and denied in part
Worke, Judge
Dissenting, Klaphake, Judge[*]

Crow Wing County District Court
File No. 18-CR-16-19

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota (for respondent)

Joseph Plumer, Bemidji, Minnesota; and

Frank Bibeau, Deer River, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant was found guilty of three conservation offenses relating to setting a gill net on Gull Lake. Appellant, a member of the Fond du Lac Band of the Minnesota Chippewa Tribe, challenges the district court's order denying his motion to dismiss the charges against him because the court was without subject-matter jurisdiction and because his actions were immune from prosecution due to treaty-guaranteed usufructuary rights. We affirm.

FACTS

On August 28, 2015, Minnesota Conservation Officers observed appellant James Warren Northrup and another man in a canoe on Gull Lake. After placing a gill net into the lake, the men paddled back to shore and disembarked from the canoe. The officers removed the gill net from the lake and discovered that it lacked identification and licensing information. The canoe similarly lacked registration information and was not equipped with personal flotation devices. The officers then spoke with the men, who admitted that they set the gill net and did not have a permit or license to net fish, but asserted that they had federal treaty rights to fish on Gull Lake. Respondent State of Minnesota charged Northrup with one count of illegal means of taking fish, one count of netting fish without a license, one count of operating a watercraft without registration, and one count of using a watercraft without personal flotation or lifesaving devices.

Northrup, who is an enrolled member of the Fond du Lac Band of the Minnesota Chippewa Tribe, filed a motion in district court to dismiss the charges against him for lack

of subject-matter jurisdiction, arguing that he has unabrogated usufructuary rights[1] to fish on Gull Lake. In support of this motion, Northrup provided the district court with 40 exhibits, including numerous treaties, maps, findings, and opinions of the Indian Claims Commission, annual reports of the Commissioner of Indian Affairs, and an affidavit from an expert witness. On November 8, 2017, the district court denied Northrup's motion to dismiss.

The district court determined that the conduct in question occurred on Gull Lake, which was previously part of the Gull Lake Reservation established in an 1855 Treaty and later ceded to the United States in an 1864 Treaty. The district court noted that the uncontradicted expert testimony was that the United States did not comply with the terms of the 1864 Treaty, and therefore the Chippewa of the Mississippi, Leech Lake, and Lake Winnibigoshish bands retained usufructuary rights on the ceded land. The district court concluded that because Northrup is a member of the Fond du Lac Band of the Lake Superior Chippewa, he is not a member of a band that was a signatory to the relevant treaties and so he did not have usufructuary rights to fish on Gull Lake.

Northrup agreed to a court trial based on stipulated evidence pursuant to Minn. R. Crim. P. 26.01, subd. 3. The district court found Northrup guilty of all charges and sentenced him to one year in jail, stayed the sentence for two years, and placed him on unsupervised probation. This appeal follows.

[1] "Usufructuary rights" include the right to "live off the land" or to make a "modest living by hunting and gathering from the resources of the land." *United States v. Gotchnik*, 222 F. 3d 506, 508 n.3 (8th Cir. 2000).

D E C I S I O N

On appeal, Northup argues that the district court erred by denying his motion to dismiss the charges against him because (1) the state lacked subject-matter jurisdiction pursuant to federal law because he is "Indian" and his actions occurred within "Indian country"; and (2) he has individual usufructuary rights to fish on Gull Lake that operate as an affirmative defense to the enforcement of the criminal charges. After briefing was complete, the state moved to strike arguments in Northrup's reply brief that were not raised in his principal brief, and to strike references and arguments in both briefs to materials not part of the record on appeal.

I. Motion to strike.

In its motion to strike, the state argues that Northrup raises for the first time in his reply brief the issues of res judicata, collateral estoppel, and stare decisis. This court generally does not consider issues raised for the first time in a reply brief, and such issues may be deemed waived and stricken from a party's pleadings. *See State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009). Upon review of the parties' briefs, we conclude that Northrup addresses the issues of res judicata, collateral estoppel, and stare decisis solely in response to the state's arguments in defense of the judgment, and not as additional substantive bases for relief. Accordingly, we deny the state's motion to strike in this regard.

The state also argues that Northrup's principal brief and reply brief "attempt to expand the record for this appeal." The appellate record is limited to "documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. This court may not base its decision on matters outside the record on

appeal. *State v. Dalbec*, 594 N.W.2d 530, 533 (Minn. App. 1999). To the extent that Northrup's briefs presented and relied on materials not made part of the record on appeal, the state's motion is granted, and this court disregarded such materials in the disposition of this appeal.

II. The State of Minnesota has subject-matter jurisdiction over the prosecution of Northrup because his acts did not occur in "Indian country."

Public Law 280, codified at 18 U.S.C. § 1162(a) (2010), grants Minnesota jurisdiction over criminal offenses "committed by or against Indians" in "[a]ll Indian country within the state, except the Red Lake Reservation."[2] This statute also provides, however, that this grant of jurisdiction does not authorize the state to "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." 18 U.S.C. § 1162(b). In *State v. Clark*, 282 N.W.2d 902, 908-09 (Minn. 1979), the Minnesota Supreme Court construed Public Law 280 as depriving the state of jurisdiction to prosecute offenses that would constitute a regulation of treaty-guaranteed hunting and fishing rights.

Here, Northrup argues that—pursuant to Public Law 280—the state is without subject-matter jurisdiction to prosecute him for the charged offenses because he is an

[2] Although Red Lake is the only reservation specifically exempted from Public Law 280, the Minnesota Legislature in 1973 retroceded criminal jurisdiction over the Bois Forte Reservation—located in St. Louis and Koochiching Counties—back to the United States, thus exempting it from such state jurisdiction as well. 1973 Minn. Laws ch. 625, § 3, at 1501. Although not relevant to the analysis in this opinion, we note it here for the sake of completeness.

Indian, his conduct occurred in "Indian country," and criminalization of his conduct constitutes a deprivation of federally-guaranteed treaty rights. Northrup's claim involves a question of statutory interpretation, which we review de novo. *State v. Defatte*, 928 N.W.2d 338, 340 (Minn. 2019).

"Indian country" is defined, in relevant part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151 (2010). Northrup argues that Gull Lake "is physically located within the original Gull Lake Reservation, which was originally reserved in the 1855 Treaty with the Chippewa." Northrup is correct that the 1855 Treaty established a reservation that encompassed Gull Lake, where he was cited for the offenses at issue in this case. 1855 Treaty with the Chippewa, art. 2, Feb. 22, 1855, 10 Stat. 1165 (1855 Treaty).

In exchange for the establishment of a reservation at Leech Lake, the Chippewa, however, later ceded the Gull Lake Reservation land to the United States in unequivocal language in an 1864 treaty. 1864 Treaty with the Chippewa, Etc., arts. 1, 2, May 7, 1864, 13 Stat. 693 (1864 Treaty). In so doing, the Gull Lake reservation ceased to exist and the land within its boundaries thus ceased to constitute "Indian country." *See, e.g., DeCoteau v. Dist. Cty. Court*, 420 U.S. 425, 427-28, 95 S. Ct. 1082, 1084-85 (1975) (holding that termination of a reservation by the federal government confers jurisdiction to the state over non-Indian lands within the original reservation boundaries); *DeMarrias v. South Dakota*, 319 F.2d 845, 846-47 (8th Cir. 1963) (affirming that reservation land later ceded to the United States ceases to constitute "Indian country").

Accordingly, although there is no dispute that Northrup is Indian, his fishing activities on Gull Lake did not occur in "Indian country" and so the jurisdictional limitations of Public Law 280 are inapplicable here. The district court did not therefore err by denying Northrup's motion to dismiss the charges against him for lack of subject-matter jurisdiction.

III. The district court did not err by concluding that Northrup did not possess usufructuary rights on Gull Lake.

Although the state has subject-matter jurisdiction over this prosecution, Northrup correctly asserts that his individual treaty rights to hunt, fish, and gather may be asserted as an affirmative defense against charges for conduct that would otherwise be unlawful. *See, e.g., United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288, 1291 (7th Cir. 1974) (noting that it is "well settled" that statutes of general applicability are enforceable against Indians "unless there exists some treaty right which exempts the Indian from the operation of the particular statutes in question").

In its order denying Northrup's motion to dismiss the charges against him, the district court concluded that he did not have usufructuary rights to Gull Lake because the Fond Du Lac Band of Chippewa was not a party to the treaties of 1855 or 1864, the latter of which expressly provided for the retention of such rights by the signatory bands. On appeal, Northrup does not dispute this conclusion but argues instead that his usufructuary rights to Gull Lake were established by the earlier treaties of 1795, 1825, and 1826. Specifically, he argues that these treaties elevated the aboriginal hunting, fishing, and gathering rights to the status of treaty-guaranteed usufructuary rights, which are not

extinguished upon the cession of mere land title, and which require clear abrogation before they may be deemed forfeited. Accordingly, although Gull Lake and the land surrounding it were ceded to the United States in the treaties of 1855 and 1864, Northrup asserts that neither these treaties, nor any prior or since, have operated to abrogate the land-use rights previously reserved and held in common by all Minnesota Chippewa, and so his fishing activities are exempted from criminal prosecution.

The interpretation of treaties presents questions of law that are reviewed de novo. *Richard v. United States*, 677 F.3d 1141, 1144-45 (Fed. Cir. 2012). In interpreting treaties between Indian tribes and the Unites States, courts are instructed to look beyond the text itself and to consider the context provided by "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S. Ct. 1187, 1200 (1999). Although the district court did not address whether the treaties relied upon by Northrup guaranteed usufructuary rights to the Chippewa, we choose to address this claim on appeal because the Minnesota Supreme Court has previously determined as a matter of law that they did not. *State v. Keezer*, 292 N.W.2d 714, 717 (Minn. 1980). Because this court is bound to follow supreme court precedent, *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018), we conclude that the district court did not err when it denied Northrup's motion to dismiss the charges against him.

The 1795 Treaty of Greenville was a peace treaty between the United States and a number of Indian tribes. It established a boundary between the land claimed by the United States in the Northwest Territory and lands claimed by the Indians—lands which include

Gull Lake, as well as most of modern-day Minnesota. 1795 Treaty with the Wyandot, Etc., Aug. 3, 1795, 7 Stat. 49 (1795 Treaty). Article 5 of this treaty reads, in relevant part, as follows:

> The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same.

Id. at art. 5. This language, Northrup argues, constituted an affirmative guarantee of the several tribes' continuing usufructuary rights to the land.

In *Keezer*, however, the supreme court rejected this identical argument. Similar to Northrup's claim here, the defendants in *Keezer* asserted "that Article V raised the status of hunting rights as mere incidents of the rights of occupancy to the status of a separate treaty right of hunting held in common with all tribes in a vast Northwest Territory Reservation." 292 N.W.2d at 717. The supreme court disagreed, holding that the Treaty of Greenville did not cede land to the United States and so its interpretation is not governed by the canon of construction that any rights not expressly granted by the Indians are reserved to them. *Id.* The court held, rather, that this treaty merely recognized Indian title and right of occupancy to the land, and "described, rather than altered, the basic nature of those rights." *Id.* at 717, 719.

The 1825 Treaty of Prairie du Chien was, similarly, a peace treaty among several tribes including the Chippewa of Minnesota. 1825 Treaty with the Sioux, Etc., Aug. 19,

1825, 7 Stat. 272 (1825 Treaty). Among the provisions of this treaty was the establishment of a boundary line passing roughly northwest to southeast across the middle of present-day Minnesota, which divided the territory between the Chippewa to the north and the Dakota to the south. *Id.* at art. 5. This treaty provided that:

> It is understood by all the tribes, parties hereto, that no tribe shall hunt within the acknowledged limits of any other without their assent, but it being the sole object of this arrangement to perpetuate a peace among them, and amicable relations being now restored, the Chiefs of all the tribes have expressed a determination, cheerfully to allow a reciprocal right of hunting on the lands of one another, permission being first asked and obtained, as before provided for.

Id. at art. 13. Northrup asserts that this language operated as an official recognition by the United States of the right to the taking of wild game by the Chippewa of northern Minnesota, further reinforcing that such rights were specifically reserved by treaty. But the *Keezer* court rejected this same argument as well, stating that the quoted langue "does not memorialize a continuing reciprocal hunting right but only indicates that permission, being first asked, will be freely given in order to perpetuate the peace established in the treaty." 292 N.W.2d at 719.

The 1825 Treaty also provided that a second treaty assembly would be held the following year on Lake Superior to explain the 1825 Treaty to those bands unable to attend the initial counsel, and to obtain their assent to its terms. 1825 Treaty at art. 12. In addition to doing so, however, this treaty also included language, which Northrup notes "describes, almost painfully, the diminished condition and bleak agricultural prospects observed by the treaty negotiators[,]" and so provided for an additional annuity of $2,000 to be paid to

the tribe. 1826 Treaty with the Chippewa, arts. 5, 7, Aug. 5, 1826, 7 Stat. 290 (1826 Treaty). This, Northrup argues, constituted the government's recognition that the hunting, fishing, and gathering rights of the Chippewa on the entirety of the 1825 Treaty territory was a matter of survival, and so reinforces his claim that such rights should be recognized as having been guaranteed by treaty.

Northrup does not assert, however, that the 1826 Treaty operated to independently guarantee hunting and fishing rights. He instead offers its terms solely as evidence of the government's understanding as to the indispensability of these rights and as support for recognizing them as guaranteed by the previous treaties of 1795 and 1825. But considering that the *Keezer* court interpreted these earlier treaties as only recognizing the preexisting rights of occupancy and Indian title, we find nothing in the terms of the 1826 Treaty sufficient to allow us to reach a different conclusion in these regards.

Collectively, therefore, the treaties Northrup relies upon did not provide for any express reservation of usufructuary rights to Gull Lake, and instead only recognized the Chippewa Tribe's aboriginal right to occupancy of the land, to which the right to hunt, fish, and gather is incidental. This distinction is crucial because the court in *Keezer* also recognized that when hunting, fishing, and gathering rights exist only by virtue of the right of occupancy rather than by express reservation in a treaty, the extinguishment of Indian title to the land has the effect of abrogating these use rights as well. 292 N.W.2d at 721 (quoting *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980)). And it noted as well that the United States Supreme Court has held that language ceding

"all right, title, and interest" to land is "precisely suited" for the extinguishment of Indian title. *Id.* at 721.

The 1855 Treaty expressly provided for the conveyance to the United States of all "right, title, and interest in, and to," the land ceded under its terms, land which includes Gull Lake. 1855 Treaty, art. 1, 10 Stat. 1166. In light of *Keezer*, the use of this particular language in the treaty was sufficient to extinguish all Indian title to the land, and with it all the incident rights of hunting, fishing, and gathering. 292 N.W.2d at 720-721. Consequently, because the 1795, 1825, and 1826 treaties Northrup cites as authority did no more than recognize the Minnesota Chippewa's aboriginal rights of occupancy to the land, and because Northrup does not argue that the Fond du Lac Band retained any such rights to the land ceded by the 1855 Treaty, Northrup has failed to demonstrate that he possessed any usufructuary rights to Gull Lake by virtue of these earlier treaties.

In his brief, Northrup argues that a different conclusion is compelled by the United States Supreme Court's opinion in *Mille Lacs*. At issue in *Mille Lacs* was an 1837 treaty in which several bands of Chippewa—including the Mille Lacs Band—agreed to sell land east of the Mississippi river in central Minnesota and Wisconsin. 526 U.S. at 175-176, 119 S. Ct. at 1191 (1837 Treaty).[3] Included in the terms of this treaty was the express reservation to the signatory bands of "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded." *Id.* at 177, 119 S. Ct. at 1191. In 1990, the Mille Lacs Band of Chippewa filed suit in federal

[3] The land ceded by the 1837 Treaty did not include Gull Lake or the land immediately surrounding it.

court seeking a declaratory judgment that the Band retained the rights reserved by the 1837 Treaty. *Id.* at 185, 119 S. Ct. at 1195. Among the arguments raised by the state that the usufructuary rights had been extinguished was language included in the 1855 Treaty that provided for the relinquishment of "any and all other right, title, and interest . . . which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." 1855 Treaty, art. 1, 10 Stat. 1166. This clause, the state asserted, was sufficient to abrogate the rights that had been expressly reserved in the 1837 Treaty. *Mille Lacs*, 526 U.S. at 195, 119 S. Ct. at 1200.

The Court, in applying the aforementioned canons of construction applicable to Indian treaties, concluded that "the historical record provides no support for the theory that the second sentence of Article 1 was designed to abrogate the usufructuary privileges guaranteed under the 1837 Treaty." *Id.* at 200, 119 S. Ct. at 1202. The Court noted that the treaty's primary purpose was to transfer land, did not specifically mention usufructuary rights, provided no consideration for their abrogation, and that the article concerning the surrender of any other interests elsewhere in Minnesota was "designed not to extinguish usufructuary rights, but rather to extinguish remaining Chippewa *land claims*." *Id.* at 196-199, 119 S. Ct. at 1201-02 (emphasis in original). Accordingly, the Court held that "there is no reason to believe that the Chippewa would have understood a cession of a particular tract of land to relinquish hunting and fishing privileges on another tract of land." *Id.* at 202, 119 S. Ct. at 1203.[4]

[4] Notwithstanding the Court's holding that the Mille Lacs Band retains the usufructuary rights granted in the 1837 Treaty, such rights are not immutable. Indeed, it is well settled

Northrup asserts that *Mille Lacs* is dispositive because it establishes that the language in the 1855 Treaty was similarly not adequate to abrogate the usufructuary rights guaranteed by the treaties of 1795 and 1825. And he argues as well that principles of res judicata, collateral estoppel, and stare decisis apply to preclude the state's arguments in defense of this appeal because the same arguments were considered and rejected by the Supreme Court in *Mille Lacs*. We disagree in both regards.

First, the *Mille Lacs* decision is factually distinguishable from Northrup's case because of the nature of the rights at issue. The *Mille Lacs* Court addressed usufructuary rights that had been explicitly guaranteed and reserved by the treaty of 1837. Here, however, because the 1795, 1825, and 1826 treaties relied upon by Northrup did not independently guarantee any usufructuary rights, the only rights to the use of Gull Lake which Northrup can assert are those incidental to aboriginal title and right of occupancy to the land. The materiality of the distinction between these rights is evidenced by the Supreme Court's prior decision in *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 105 S. Ct. 3420 (1985), and the discussion of that opinion in *Mille Lacs*.

In *Klamath*, the tribe ceded land to the United States in 1864, a portion of which was set aside as a reservation on which the tribe retained exclusive usufructuary rights; "[n]o right to hunt or fish outside the reservation was preserved." *Klamath*, 473 U.S. at 755, 105 S. Ct. at 3422. It was subsequently discovered that a certain amount of land had

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that Congress may unilaterally abrogate Indian treaty rights upon a clear expression of its intent to do so. *South Dakota v. Bourland*, 508 U.S. 679, 687, 113 S. Ct. 2309, 2315-16 (1993); *State v. St. Clair*, 560 N.W.2d 732, 734 (Minn. App. 1997).

been erroneously excluded from the drawn boundaries of the reservation. *Id.* at 755-756; 105 S. Ct. at 3422. A second treaty was entered into in 1901 in which the tribe ceded all right and title to the excluded land in exchange for monetary consideration. *Id.* at 760, 105 S. Ct. at 3425. In 1982, the tribe filed for an injunction to prevent the state from interfering with members' hunting and fishing activities on the later-ceded land, claiming that such activities remained protected under the usufructuary guarantees of the original treaty notwithstanding the later transfer of title *Id.* at 762, 105 S. Ct. at 3426.

In describing the initial cession of land, the Court stated:

> Before the 1864 Treaty was executed, the Tribe claimed aboriginal title to about 22 million acres of land. The Treaty language that ceded that entire tract—except for the 1.9 million acres set apart for the Klamath Reservation—stated only that the Tribe ceded "all their right, title, and claim" to the described area. *Yet that general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed in over 20 million acres outside the reservation.* Presumptively, the similar language used in the 1901 Cession Agreement should have the same effect.

Id. at 766, 105 S. Ct. at 3428 (emphasis added). As this language clearly indicates, the Court understood that the aboriginal hunting, fishing, and gathering rights attendant to Indian title are effectively extinguished upon the exchange of all "right, title, and claim" to the land, without the need for greater elaboration or specificity in the treaty. *Id.* The Court in *Mille Lacs*, in rejecting the state's reliance on *Klamath*, acknowledged this distinction:

> *Klamath* does not control this case. First, the Chippewa's usufructuary rights under the 1837 Treaty existed independently of land ownership; they were neither tied to a reservation nor exclusive. In contrast to *Klamath*, there is no

> background understanding of the rights to suggest that they are extinguished when title to the land is extinguished.

Mille Lacs, 526 U.S. at 201-02, 119 S. Ct. at 1203.

By distinguishing *Klamath* in this way, the *Mille Lacs* Court appears to have tacitly recognized a substantive difference between aboriginal and treaty-guaranteed rights; at a minimum, it did not overrule the *Klamath* court in this regard. Here, because the terms of the 1855 Treaty contained a similar conveyance of "all right, title, and interest" in the land being ceded, and because Northrup is only able to assert aboriginal title, it is at best unclear whether the Court would have reached the same conclusion had it been presented with these differing circumstances. 1855 Treaty, art. 1, 10 Stat. 1165. Because *Mille Lacs*, therefore, does not adequately address or resolve the issues presented here, we conclude that it does not compel us to depart from the Minnesota Supreme Court's opinion in *Keezer*.[5]

Second, the state's arguments are not precluded under the doctrines of res judicata, or collateral estoppel with regards to the *Mille Lacs* decision. "Fundamental to both doctrines is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the

[5] Although not addressed by the parties, it warrants mention that—even if applicable—the *Mille Lacs* decision would not necessarily have precluded the state's prosecution of Northrup. The Court noted that it has "repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation. *Mille Lacs*, 526 U.S. at 205, 119 S. Ct. at 1205; *see also Klamath*, 473 U.S. at 765 n.16, 105 S. Ct. at 3427. Accordingly, even if the 1795 and 1825 treaties had established guaranteed usufructuary rights to Gull Lake, it is not clear that Northrup would be entitled to outright dismissal of the charges against him.

same parties or their privies." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (quotations omitted). Such doctrines are inapplicable here, first, because the parties are not the same. Northrup is an individual private party, he does not represent the Mille Lacs Band of Chippewa Indians, and neither is he a member of that Band. Second, the state does not appear to dispute any of the issues directly decided by the Supreme Court in *Mille Lacs*, and Northrup does not identify what specific facts decided by the court the state is attempting to relitigate. For these reasons, we decline to apply either res judicata or collateral estoppel. And because, as previously discussed, the *Mille Lacs* decision does not resolve the questions presented in this appeal, the doctrine of stare decisis is similarly inapplicable. *See Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000) ("The doctrine of stare decisis directs that we adhere to former decisions in order that there might be stability in the law.").

We accordingly hold that the district court did not err when it denied Northrup's motion to dismiss the charges against him, and we affirm the judgment of the district court.

Affirmed; motion granted in part and denied in part.

KLAPHAKE, Judge (dissenting)

I respectfully dissent. I disagree with the majority's conclusion that the canons of construction that apply to the interpretation of Indian treaties do not apply to this case. The court in *Keezer* acknowledged the canons but determined they did not apply to the interpretation of the 1795 and 1825 treaties because the treaties did not cede land from the Indians to the United States. *State v. Keezer*, 292 N.W.2d 714, 717, 720 (Minn. 1980). But in *Mille Lacs*, the Supreme Court observed that we apply the canons of construction to treaties in order "to give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S. Ct. 1187, 1201 (1999). The Chippewa and the United States participated in the negotiations of and were signatories to the 1795 Treaty of Greenville and 1825 Treaty of Prairie du Chien, and the treaties imposed obligations on both the Indian signatories and the United States. The application of the canons of construction under these circumstances is equally necessary to achieve the goal expressed in *Mille Lacs* of interpreting the terms as the Indians themselves would have understood them.

There is no logical reason to limit the application of the canons of construction to land-cession treaties. Indeed, the United States Supreme Court has applied the canons to treaties that do not involve the cession of land to the United States. *See Choctaw Nation of Indians v. United States*, 318 U.S. 423, 430-32, 63 S. Ct. 672, 677-78 (1943) (acknowledging the applicability of the canons to a treaty negotiated by the United States between the Chickasaw Nation and Choctaw Nation regarding the allotment of common tribal land to individual tribal members). Moreover, the 1795 Treaty of Greenville

established a boundary line on disputed territory and expressly provided for certain land cessions from the Indians to the United States, which supports the application of the canons of construction even when applying the limitation from *Keezer* that the canons only apply to land-cession treaties. 1795 Treaty with the Wyandot, Etc., art. 3, Aug. 3, 1795, 7 Stat. 49. I would therefore conclude that the canons of construction apply and require an examination of the historical record surrounding the treaty negotiations in order to interpret the terms of the treaties.

In *Mille Lacs*, the Supreme Court emphasized the importance of analyzing how the Indian signatories to a treaty would have understood the terms at the time of signing when interpreting a treaty. 526 U.S. at 196-98, 119 S. Ct. at 1200. The Court noted that to do so "we look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Id.* at 196, 119 S. Ct. at 1200 (quoting *Choctaw Nation*, 318 U.S. at 432, 63 S. Ct. at 672). In *Keezer*, the dissent observed that an analysis of the historical record was necessary because the majority's conclusion—that the references to hunting and fishing rights in the treaties referred to a property right incident to title of the land—was inconsistent with the Indians traditional understanding of such rights. *Keezer*, 292 N.W.2d at 722-23 (Wahl, J., dissenting). Justice Wahl analyzed the Journal of Proceedings of the 1825 Prairie du Chien and concluded that the Indian signatories understood "hunting and fishing and ricing rights as separate from rights of ownership of the land itself, not dependent upon, or incident to, fee title." *Id.* Thus, when the canons of construction are applied and the historical context is analyzed, the terms of the treaties are susceptible to

multiple interpretations. And the canons of construction require that all ambiguities be resolved in favor of the Indians.

Based on the circumstances of this case, I would remand the case to the district court to make factual findings in light of the historical record. *See State v. Butcher*, 563 N.W.2d 776, 781-83 (Minn. App. 1997) (noting that district court must make detailed factual findings on the treaties when interpreting Indian treaties), *review denied* (Minn. Aug. 5, 1997). As the majority observes, the 1855 Treaty with the Chippewa extinguished all Indian title to the land in question, and with it all the incidental rights to hunt and fish. But it did not abrogate any treaty-guaranteed rights, and such rights must be expressly abrogated. *Mille Lacs*, 526 U.S. at 200, 204, 119 S. Ct. at 1202-03. Accordingly, I would reverse and remand for the district court to make additional findings of fact on the 1795 and 1825 treaties. Those findings should reference the canons of construction that apply to Indian treaties and whether the Indians understood these treaties as guaranteeing usufructuary rights. I would also allow the district court in its discretion to reopen the record to provide "the history of the treat[ies], the negotiations, and the practical construction adopted by the parties." *Choctaw Nation*, 318 U.S. at 432, 63 S. Ct. at 678.