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The Absent American Indian Treaties An update

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Abstract

This note represents further analysis of materials discussed in “The Absent American Indian Treaties: a guide to treaties never referenced at the federal court level,” which appeared in 2001 in the *Journal of Government Information*, 28, 171–178.

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In a previous note (Bernholz, 2001), 84 treaties with various American Indian nations were reported as never cited in the opinion of any trial at the federal court level.

Ten of those 84 treaties were a combination of seven pre-Revolutionary documents and three from volume 1 of *American State Papers: Indian Affairs*. These materials were identified in Table 1 and the Appendix of that note as ratified treaty number 1 through 7, 19, 28, and 44. Unlike the other items in Table 1, none of these 10 has an entry in *Statutes at Large*.

Further analysis of these 10 instruments reveals that three have been referenced in opinions at the federal court level. The three are:

- Ratified treaty number 7: *Treaty of Fort Stanwix, or The Grant from the Six Nations to the King and Agreement of Boundary Line—Six Nations, Shawnee, Delaware, Mingo of Ohio, 1768*;

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- Ratified treaty number 19: *Treaty with the Five Nations, 1792*; and
- Ratified treaty number 28: *Treaty with the Oneida, 1798*.

This reduces the total number of treaties never cited in the opinion of any federal court, listed in Table 1 of the prior note, to 81 documents. Furthermore, the *Treaty of Fort Stanwix, 1768* was referenced in *Sims v. Irvine* (1799, p. 438), and thereby moves to 1799, the earliest appearance of an acknowledged Indian treaty in an opinion of the Supreme Court.¹

The volumes of *Shepard's Federal Statute Citations*² were used in the preceding report, in conjunction with the *Statutes at Large* citation for each treaty, to identify relevant federal court cases. By using this method, the Supreme Court case *Minnesota v. Mille Lacs Band of Chippewa Indians* (1999; hereafter *Mille Lacs*) was identified as a recent exemplar of the use of Indian treaties in the federal court system. That case brought for the first time before the Court two treaties with the Winnebago—one treaty from 1837 (ratified treaty number 228; 7 *Stat.* 544), and another from 1846 (ratified treaty number 249; 9 *Stat.* 878).³

Examination of the text of the *Mille Lacs* opinion unveils a third treaty that made its initial appearance before the Supreme Court at that time. This was the *Treaty with the Sauk and Foxes, 1837* (ratified treaty number 227; 7 *Stat.* 543).⁴ *Shepard's Federal Statute Citations* incorrectly reports this treaty reference in *Mille Lacs* under the *Treaty with the Sauk and Foxes, 1837* (ratified treaty number 225; 7 *Stat.* 540).⁵ The relevant footnote in the *Mille Lacs* opinion contains the statement “all the right to locate, for hunting or other purposes, on the land ceded in the first article of the treaty of July 15th 1830.” This phrase is from ratified treaty number 227, and not from ratified treaty number 225 as the *Shepard's* entry indicates.⁶ Further, *Shepard's* lists an entry for ratified treaty number 227 in an earlier Court of Appeals opinion, *Mille Lacs Band of Chippewa Indians v. Minnesota* (1997, p. 920), which demonstrated the government's ability “to draft a treaty to revoke usufructuary rights.”⁷ The same treaty was presented before the Supreme Court in *Mille Lacs* (1999, p. 195) to support the contention that “the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights.” The decision by the Court in *Mille Lacs* affirmed the judgement in the *Mille Lacs Band of Chippewa Indians v. Minnesota* appeal.

Notes

1. The *Commonwealth v. Coxe* case (1800) was reported as the first one in which an Indian treaty recognized by the Department of State was cited in an opinion of the Supreme Court. That case was not heard at the federal level, but by the Supreme Court of Pennsylvania.

2. Volume 6 of the 8th edition of *Shepard's Federal Statute Citations* (1996) covers volumes 1 through 504 of *United States Reports*. Cumulative soft covered issues update the bound permanent volumes, and bound permanent supplement volumes then replace these. The fourth volume of *Shepard's Federal Statute Citations* (2001), used in this note, is an example of this updating.

3. See these instruments in Kappler (1971), pp. 498–500 and 565–567, respectively.

4. See footnote 6 on p. 196 for the treaty citation in *Mille Lacs* (1999). Kappler (1971, pp. 497–498) provides the text of this treaty.

5. This erroneous treaty reference is entered as “526 US 196” under Article 2 of the 7 Stat. 540 section for 1837 (*Shepard’s Federal Statute Citations*, 2001, vol. 4, p. 271). The full text of this document is on pp. 495–496 of Kappler (1971).

6. In addition, footnote 6 in *Mille Lacs* (p. 196) mistakenly identifies Article 2 as the source of this quotation. The excerpt comes from the second section of Article 1 of ratified treaty number 227 (7 Stat. 543, 543).

7. The entry in *Shepard’s* is indicated under Article 1 of the 7 Stat. 543 section for 1837 as “124 F3d 920” (*Shepard’s Federal Statute Citations*, 2001, vol. 4, p. 271).

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