

RESPONSE TO SANDERS: MA'IINGAN AS PROPERTY

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American law has long recognized the state as the owner of wild game within a state's borders, including gray wolves (or "*ma'iingan*" in Anishinaabemowin), within the States of Wisconsin, Minnesota, and Michigan.¹ However, as Anishinaabe scholar Jason Sanders forcefully demonstrates, the Anishinaabeg—indigenous people of the western Great Lakes known as the Ottawa (Odawa), Potawatomi (Bodewadmi), and Chippewa (Ojibwe)²—considered *ma'iingan* siblings, not property.³ One does not hunt one's siblings.⁴

Sanders makes the treaty rights case for why a state-sanctioned wolf hunt must be tempered and perhaps even regulated in accordance with Anishinaabe treaty rights.⁵ Treaty rights are powerful rights, both in terms of rule of law and in terms of Anishinaabe culture.⁶ Importantly, Sanders's argument is pragmatic, recognizing that treaty rights do not

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1. E.g., *Missouri v. Holland*, 252 U.S. 416, 431 (1920) (acknowledging the state "as owner of the wild birds within its borders and otherwise"). See also *State ex rel. Meyer v. Keeler*, 205 Wis. 175, 185, 236 N.W. 561 (1931) ("We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative, and for the benefit, of all its people in common.") (quoting *State v. Rodman*, 59 N.W. 1098, 1099 (Minn. 1894)).

2. See Patty Loew & James Thannum, *After the Storm: Ojibwe Treaty Rights Twenty-Five Years after the Voight Decision*, 35 AM. INDIAN Q. 161, 184–85 n.1 (2011).

3. See Jason D. Sanders, Comment, *Wolves, Lone and Pack: Ojibwe Treaty Rights and the Wisconsin Wolf Hunt*, 2013 WIS. L. REV. 1263, 1265 (citing EDWARD BENTON-BANAI, *THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY* 8 (2d. ed. 2010)).

4. Cf. 2011 Wis. Act 169 (authorizing the hunting of wolves).

5. See Sanders, *supra* note 3, at 1284–93.

6. See generally Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 375–80.

extend to *all* wolves in the State of Wisconsin.⁷ Moreover, the State has an important public policy interest at stake: its liability for wolf depredations.⁸

The official and unofficial dialogue usually focuses on religious and cultural rights or legal rights, but rarely on the proper course for dealing with wolf depredations. Treaty rights, American Indian culture, and legislative prerogatives may be at odds here, but they all share an important commonality: the imposition of the legal privilege of one side of a debate over another. We agree with Sanders that “[i]t is unwise for either sovereign to attempt to unilaterally dictate the use of that shared resource or the management of that shared responsibility.”⁹ Long-lasting solutions are far more complicated than winning a legal or political fight.

It is not all that surprising that disputes over wolf hunting emerge once wolf populations rebound.¹⁰ When these highly effective predators come back from near extinction and start making their living hunting prey animals, some farmers and ranchers lose livestock that they have worked very hard to raise. Hunters become concerned that they are competing for prey animals with wolf packs. Anishinaabe and other American Indians, who see wolves as their relatives, cannot agree to recreational wolf hunts, even if the public justification is to reduce depredations.¹¹ Disputes over bison, anadromous fish, and other animals—similarly forged in cross-cultural differences—are already part and parcel of American Indian policy.¹² Moving beyond the adversarial processes of politics and law is the only way to resolve these conflicts.

7. Sanders, *supra* note 3, at 1286 (“It is almost unthinkable that a court might find that the Tribes have meaningful control over all wolves in the ceded territory.”).

8. *Id.* at 1266 (“However, the Tribes must respect that the State has a legitimate sovereign interest in wolf depredation.”).

9. *Id.* at 1293.

10. *E.g.*, *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1228 (10th Cir. 2000) (dispute over reintroduction of gray wolves into Yellowstone National Park); *Defenders of Wildlife v. Sec’y Dep’t of Interior*, 354 F. Supp. 2d 1156, 1158–59 (D. Or. 2005) (dispute over delisting of gray wolves from “endangered” to “threatened” under the Endangered Species Act).

11. *See* Sanders, *supra* note 3, at 1275 (“The Ojibwe tribes have traditionally protected wolves as brothers and prohibited wolf hunting in all but the most extreme and humane circumstances.”); *see also id.* at 1275–76 (quoting Victoria Shelley, *The Influence of Culture on Attitudes to Wolves and Wolf Policy among Ojibwe Tribal Members and Non-tribal Residents of Wisconsin’s Wolf Range* 46–47 (unpublished thesis, 2010) (internal citations omitted), available at http://faculty.nelson.wisc.edu/treves/pubs/Shelley_MSThesis.pdf).

12. *E.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 662 (1979) (dispute over Indian treaty rights to harvest anadromous fish in off-reservation areas); *W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095 (D. Mont. 2011). In a dispute over changes to a management plan involving the Yellowstone bison herd, the court stated, “In 2005, the IBMP was adjusted to allow bison hunting in

Americans, including American Indians, love to hunt and fish and often persuade policy makers to roll back restrictions on hunting and fishing. If overly eager to create new harvest or recreation opportunities, their influence over the policymaking process can come at the cost of sustainability; such may be the case with wolf hunting in the upper Great Lakes, where recreational hunts have been initiated shortly after the Great Lakes grey wolf population was lifted off the Endangered Species list.¹³

Sanders convincingly points out that the most sustainable wolf management policy is likely to come about via co-management between tribes and the State of Wisconsin.¹⁴ Ojibwe tribes and the State of Wisconsin have worked for over twenty-five years to forge co-management institutions that have greatly benefited regional lands and natural resources.¹⁵ These institutions and relationships are being ignored but should be the foundation for sorting out the wolf-hunt conflict. Sanders rightfully recommends negotiation outside of the courtroom.

The only question is whether the State would prefer to hear, debate, and reconcile these concerns at the table of cooperative management or at the bench of a federal courthouse. Given the length, cost, and uncertainty of litigation, Wisconsin would almost certainly better serve its interests via cooperative management.¹⁶

Many Anishinaabe believe in a worldview called “*mino-bimaadziwin*,” a concept in Anishinaabemowin loosely defined as “well-being.”¹⁷ An individual or a community living in accordance with *mino-bimaadziwin* recognizes that humans, animals, places, and even inanimate objects are interrelated and connected.¹⁸ In this worldview, a person or community’s well-being is dependent on the well-being of others. *Mino-bimaadziwin* influences policy choices and legal outcomes in exactly the opposite manner as the political realm dominated by

the State of Montana by licensed hunters and American Indians with treaty rights.” *Id.* at 1105.

13. For examples of statutes authorizing the hunting of wolves, see Mich. Pub. Act 21 (2013); 2012 Minn. Laws Ch. 277; 2011 Wis. Act 169.

14. See Sanders, *supra* note 3, at 1289–90.

15. See Loew & Thannum, *supra* note 2, at 178–80.

16. Sanders, *supra* note 3, 1292.

17. See generally Lawrence W. Gross, *Bimaadiziwin, or the Good Life, as a Unifying Concept of Anishinaabe Religion*, 26 AM. INDIAN CULTURE & RES. J. 15 (2002); Gloria Valencia-Weber, Rina Swentzell, & Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women’s Reflections*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY 39, 47–48 (Kristen A. Carpenter et al., eds. 2012).

18. Valencia-Weber et al., *supra* note 17 at 47–48 (citing Eva Petoskey).

majority rule or the legal realm dominated by the winner-take-all adversarial system.

Sanders's paper is a fine example of cutting edge, pragmatic legal scholarship that will allow the stakeholders, in time, to push through the adversarial rhetoric and move into a more useful cooperative mode. Federal Indian law, often through the assertion of American Indian treaty rights, has historically been a powerful engine for change. Treaty rights cases arising from Anishinaabeg treaties often do not result in a winner-take-all outcome, with either tribes or states prevailing over all opponents. Instead, the rule of law as exemplified by Indian treaty rights forces state interests to reckon with the interests of a discrete and insular minority. As such, regulation of hunting, fishing, gathering, and other activities on or near Indian country is an intergovernmental affair, dominated by cooperative fact finding and negotiation.¹⁹

In many ways, *ma'iingan* is a stranger in this world that has changed so dramatically in the past few centuries. Legal and policy decision makers examining how to reincorporate *ma'iingan* into this new world would be well served to consider *mino-bimaadziwin* in addressing these questions.

19. E.g., Frank Ettawageshik, *Remarks of Tribal Chairman Frank Ettawageshik: Panel III—The Boundary Waters Treaty and Protecting Fresh Water Resources in North America*, 54 WAYNE L. REV. 1477, 1480–82 (2008); Jacqueline Phelan Hand, *Protecting the World's Largest Body of Fresh Water: The Often Overlooked Role of Indian Tribes' Co-Management of the Great Lakes*, 47 NAT. RESOURCES J. 815, 817 (2007).