The Wild Rice Mystique: Resource Management And American Indians' Rights As A Problem Of Law And Culture

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THE WILD RICE MYSTIQUE: RESOURCE MANAGEMENT AND AMERICAN INDIANS' RIGHTS AS A PROBLEM OF LAW AND CULTURE

This Article posits that the current controversy concerning wild rice is best understood as a clash between the traditional Ojibway culture and the culture of the European settlers. It provides an extensive historical and scientific background for this thesis. It concludes with suggestions for improved wild rice resource management in Minnesota.

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& HOWARD J. VOGEL†† ‡

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I. INTRODUCTION

Controversy has surrounded the harvesting of wild rice since the Ojibway Indians' lands in Minnesota were appropriated by European settlers. The recent commercialization of wild rice produc-

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1. Throughout this Article, the indigenous people of North America are referred to collectively as "Indian people" rather than the recently fashionable phrase "Native Americans." The authors have chosen this course in the belief that it most closely approaches the widest practice of indigenous people in collectively naming themselves (in addition to the all-important tribal and band names). Evidence of this practice can be found in the
tion has brought a number of issues—some old and some new—to the fore. The nature of these issues suggests that unless state governmental initiatives are developed, commercial interests will drive Indian people out of this market and dominate wild rice cultivation, harvesting, processing, and distribution.

At the root of the continuing controversy is the failure of the state to take a clear position on wild rice management. The state's policy seems to be self-contradictory: on the one hand, there is the paternalistic protection of the interests of Indian people; on the other hand, there is the facilitation of the unrestricted development of commercial techniques for the cultivation of wild rice. The latter could threaten the economic security of Indian people, many of whom depend upon the harvest to supplement their incomes. In addition, the policy of unrestricted development ignores the pivotal place wild rice has assumed in the Ojibway Indian culture in Minnesota.

Although much is known about the horticulture of wild rice in its natural lake setting and in paddies, little has been done to develop a comprehensive state plan to manage the production and sale of wild rice. Studies at the University of Minnesota have focused almost exclusively on the plant itself. They have provided a scientific rationale for state regulation of the wild rice season and the development of paddy grown rice. The United States Depart-
ment of the Interior (the Department) has sponsored the study of wild rice in its larger ecological context. The Department's study is more useful in formulating a comprehensive policy because it views wild rice in relation to other features of its environment, and the effect of human harvesting by traditional methods upon that relationship.

The current controversy centers on the regulation of the natural (lake grown) and domesticated (paddy grown) varieties of wild rice. The question addressed in this Article is how to develop a comprehensive wild rice resource management policy, while insuring the continued protection of natural wild rice as a food staple, a source of economic security, and the focus of Ojibway traditions. The development of an adequate policy is hampered by implicit governmental support for the commercial development of paddy grown wild rice in Minnesota.

This Article assumes that the controversy over wild rice is ultimately a problem of law and culture. The discussion of this problem is presented in four parts. The first part clarifies the considerable historic and contemporary importance of wild rice to the Ojibway people and culture, to the European settlers who came to Ojibway country, and to the agricultural economy of Minnesota. An underlying clash of cultures still characterizes the wild rice controversy. Part two examines Minnesota laws that ostensibly seek to protect wild rice production for the benefit of the Ojibway people. These laws reveal a de facto state policy for wild rice management and help identify the consequences of this policy for Indian people, in both cultural and economic terms. The third part of the Article describes recent developments in statutes, regulations, and research that are important to the development of future management policy. Part four is a proposal for a comprehensive resource management policy for wild rice.

5. G. Fannucchi, Wild Rice in East Central Minnesota (Dec. 1983) (thesis for degree of Master of Science, College of Natural Resources, University of Wisconsin, Stevens Point) (available at the Sherburne National Wildlife Refuge and at Hamline University School of Law, St. Paul, Minnesota); W. Fannucchi, Wildlife Use of Wild Rice Beds and the Impact of Rice Harvesting on Wildlife in East Central Minnesota (Dec. 1983) (thesis for degree of Master of Science, College of Natural Resources, University of Wisconsin, Stevens Point) (available at the Sherburne National Wildlife Refuge and at Hamline University School of Law, St. Paul, Minnesota). The Fannucchis' reports are the result of a two-year study at the Sherburne Wildlife Refuge, Zimmerman, Minnesota. The field research and reports were sponsored by the U.S. Fish and Wildlife Service, Department of the Interior.

6. See infra notes 188-96 and accompanying text.
II. PERCEPTIONS OF THE IMPORTANCE OF WILD RICE AND ITS ROLE IN ESTABLISHING STATE POLICIES

The wild rice controversy is a function of the special attraction wild rice has had for many people over the years. The allure of

7. Stripped of its cultural mystique, wild rice (Zizania aquatica) is an aquatic plant growing in marshes, shallow lakes, and along the borders of slow-moving streams. Prior to the large scale immigration of Europeans to North America, wild rice was found growing as far east as Chesapeake Bay. Contrary to its name, it is a grass similar to oats and is more properly considered a cereal.

If one were to define the edible portion of wild rice, seed is a more accurate term than grain. Seed is the very broad definition of the reproductive part of plants. The common perception of seed, however, is something to plant or use as feed. Many cereals familiar to non-Indians are more inclusive than seeds; they include the hulls as well as the seed portion, and therefore are correctly referred to as grains. Grain is a collective term applied to cereals that are grains grown for edible seeds. J. MARTIN, W. LEONARD & D. STAMP, PRINCIPLES OF FIELD CROP PRODUCTION 15 (3d ed. 1976).

Like other cereal grains, wild rice has a high food value: 3½ ounces have approximately 353 calories. Wild rice is relatively high in protein, low in fat, and high in vitamin B content although it is deficient in vitamin A. Steeves, Wild Rice—Indian Food and Modern Delicacy, 6 ECON. BOTANY 107 (1952). Unlike grains such as oats, wild rice has a hollow stem and a delicate root system, with many short prop roots attached to the main and only node. Wild rice germinates in the spring; by the last week in August, plants resemble a field of grain. Differences in height of stalk, length of grain, and number of grains per head are related to the habitat. The top grains ripen first. The ripening process is progressive, and as the grains mature, they fall off the stalk. This process, called "shattering," was common to all grains prior to selection and research. See generally A. ROGOSIN, AN ECOLOGICAL HISTORY OF WILD RICE (1951) (mimeo published by Univ. of Minn. Dept. of Botany).

In order to germinate, seeds must be moist and cool during the dormancy period. Germination occurs when the dormant seeds come into contact with warm water that has a low oxygen concentration.

This is a normal sequence of events in shallow lakes, there being a depletion of oxygen near the bottom mud in winter and aeration from wave action or current flow in spring. This accounts also for non-germination of wild rice seed in rice lakes when the water level is abnormally high . . . .

J. MOYLE & P. KRUEGER, supra note 2, at 3.

The grain is somewhat subject to ergot, a smut-like fungus which causes grains to be replaced by elongated grayish growths. More often, it is infested with leaf blight. Heavy infestation of leaf blight can cause complete crop failure in paddies, but not in lakes. The greatest danger to crops stems from pests and animals that feed on the grains, such as the wild rice worm, blackbird, and wild ducks. Muskrats occasionally bite off the stalks at the waterline. Id. at 4-5.

Wild rice does not grow in water that is overly alkaline or high in sulfate. Minnesota lakewater provides an ideal habitat because it has a very low concentration of these salts. Wild rice also requires a shallow water environment, ideally between 18 inches and 3½ feet. During the early growing period—the floating leaf stage—water levels must be stable or the rice plant is uprooted.

Lakes that have had wild rice for many years usually have the following characteristics: (1) they contain much water shallower than four feet; (2) they are wide enough to have heavy wave action in spring or have a flow of water through them; (3) they have an organic bottom a few inches to a few feet thick, overlying a hard bottom; (4) they usually are fairly limy and have a total alkalinity exceed-
wild rice, like that of other food stuffs, originated because of its value as a food. To the Ojibway people of the Northern Great Plains, however, cultural, social, and economic considerations are equally important.

The significance attached to wild rice by Indian people differs from the rest of society. Indeed, wild rice is so meaningful to the Indian culture that it can be appropriately described as a mystique. The history of the wild rice mystique provides insight into the nature of the current wild rice controversy and is examined in detail in this Article.

The history of wild rice production, when considered in the context of the European conquest of North America, exemplifies the exploitation of Indian people by European settlers. This exploitation has been evidenced by changes in harvesting and processing, treaties and statutes of the federal government, and actions initiated by the federal and state governments. The political policies now hindering the development of an adequate wild rice management policy stem from the eventual commercialization of wild rice by non-Indians.

A. Ojibway Methods of Harvesting

Over the years, the Indian people perfected a harvesting technique suitable to the particular characteristics of wild rice. Traditionally, in one day harvesters went through the beds in canoes and tied the plants in small bunches. When the rice was ready

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8. A definition of "mystique" is: a complex of transcendental or semimystical beliefs and attitudes directed toward or developing around an object (as a person, institution, idea or pursuit) and enhancing the value or significance of the object by enduing it with an esoteric truth or meaning . . . .


9. For a recent popular exposition of this exploitation as a general characteristic of relations between Indian people and the non-Indian majority, see D. BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1970).

10. See infra notes 39-49 and accompanying text.

11. The Indian people tied the rice together for several reasons. Some tribes tied the stalks to prevent birds from devouring the seeds. Others found it was an excellent method
for harvesting, they went out again, usually two or three people to a canoe. One person poled the canoe carefully through the rice beds so as not to damage plants. The others, using sticks called flails, reached to the left and right of the canoe to catch the tied bundles, bent them over the side of the canoe, and quickly tapped the heads of the rice so only the ripe grains fell into wide receptacles. Given the plant's pattern of progressive ripening, the harvest period usually lasted about ten days. Considerable skill was needed to estimate when harvesting should begin.

Because the exterior of the grain is covered with a rough hull, wild rice is not edible without processing. The Indian people developed processing methods to remove the hulls without losing any flavor. First, the rice was cured by spreading it on blankets to dry or by heating it slowly in iron or copper pots. Pressure was then used to remove the hulls. Finally, the Ojibway separated the grain from the chaff: the traditional method was to pour some rice onto a birch bark tray or blanket, and then toss the rice into the air where the wind could carry away the chaff.

B. The Traditional Mystique: Wild Rice in Traditional Ojibway Culture—The Tale of Weni-boo-jo

The traditional mystique of wild rice goes far beyond food value and is intimately bound with traditional Ojibway culture. Wild rice was very important in the social and religious traditions of the ancient Ojibway people and continues to be so for many of their
descendants. This mystique is illustrated by the traditional Ojibway tale of Weniboo-jo.

[Weni-boo-jo, one of the Great Spirits of the Anishinabe, returned from hunting one evening, but he had no game. As he came toward his fire, tired and hungry and discouraged, he saw a duck sitting on the edge of his kettle of boiling water. So surprised was he at this unexpected good fortune that he forgot to draw his bow and the duck escaped.

After the duck had flown out of sight, [Weni-boo-jo] looked into the kettle and saw some peculiar grains floating on the water. He ate his supper from the kettle, and it was the best soup he had ever eaten.

Early next morning he set out in the direction the duck had taken, coming after many days to a lake filled with a strange water grass bearing the same grain he had found floating in his kettle. He also saw great flocks of ducks and geese, and other waterfowl, feeding and nesting in the heavy growths. After that, whenever [Weni-boo-jo] did not kill a deer he knew where to find food to eat.

Like religious myths of other cultures, the tale of Weniboo-jo explains the origin of many natural phenomena of great significance. Wild rice assumed great religious significance for the In-
dian people of the Upper Mississippi region. They regarded it as a gift, often refusing to cultivate or sow the grain for fear of insulting the bountiful spirits. If the great spirits wanted the Indian people to have rice, it would grow of its own accord. The wild rice myth was further elevated by the association of particular seasons with the harvest. "In the Ojibway's language the September moon is called Manominike-gisiss, or Manomini-gisiss, 'the moon of the gathering of the wild rice.'"

In days past, the actual gathering of wild rice in late summer to late November was intertwined with Ojibway religious and social ceremonies. Before the harvest, the Ojibway held feast days in which offerings were made to the "Water Chief" to protect the people from mishap. New birch canoes were constructed for the occasion and both young men and women participated in regattas. The rice areas were parceled out among the families. On the designated harvest day, additional prayers were offered and then each family, with two to three members in a canoe, began the reaping. After the grain had been gathered in skin receptacles that lined the bottoms of canoes, it was cured.

The traditional method of curing was ceremonial in nature. The rice was cured by cooking it in large pots over fire. The Ojibway poured the cured rice into a large hole in the ground. Accompanied by cheers from the rest of the tribe, the men donned their new moccasins and, using poles for support, stomped on the rice until the hulls fell off. Prizes were awarded to the fastest and best stompers. The women took over to separate the rice from the hulls.

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21. See A. Jenks, supra note 11, at 1093.
22. It is "a world-wide custom of primitive people to name many months or moons of the year after that natural product which, by its abundance or usefulness," assumes tremendous importance to the very livelihood of the peoples. Id. at 1089.
23. Id. (citation omitted).
24. See id. at 1091.
25. C. Eastman, supra note 12, at 201.
26. Id.
and other plant debris.27

During the harvest season, family members went out early in
the morning, traversed the area covered the previous day, and re-
turned at dusk with the day’s collection. Despite the tedium, it
was a special time for young men and women. “The happiest of
all, perhaps, were the young maidens, who were all day long in
their canoes, in two or threes, and when [they] tired of gathering
the wild cereal, would sit in the boats doing their needlework.”28

The tribes set out for the fall hunt immediately after the harvest
ended. To keep the rice out of enemy hands and to avoid trans-
porting the rice, the crop was stored and hidden underground in
bags made from the inside bark of cedar,29 or boxes made from
birch bark.30

Property rights relating to the division of rice were determined
according to occupancy. Certain families who habitually har-
vested one area tied the bunches of rice in a particular manner,
thus giving notice of ownership to other tribal members. The ric-
ing areas passed from family members to family members, much
as property is inherited in non-Indian cultures. Yet such territorial
demarcations did not elevate individual rights over tribal claims.
No family went hungry. The supplies of the tribe compensated for
any deficiency of a particular tribal family member.31

Eighty-five year old Thomas Shingobe, an Ojibway Indian, re-
counted an experience illustrating his tribe’s management of the
harvest:

The people that had experience in wild rice were selected by
the tribes. To be the managers. The encampment gathered in
one spot and had little pow-wow. They would discuss who
should be the leaders or the supervisors, how the wild rice
should be supervised and what the rules would be for the rice
pickers. I remember one time in my life there was a disobeying
couples. Two couples. Brothers. And they were greedy. It
came a time when the rice was a little bit too green. The man-
gerors decided we were going to lay up four days to get that rice
so it would ripen. It would also give the tribe a chance to finish
the rice [it] had picked before. So, after that, nobody could go

27. Id.
28. Id. at 200-01.
29. Some tribes covered all traces of hidden food by building a fire on top of the
mound. Id. at 203.
30. A. JENKS, supra note 11, at 1072.
31. See id. at 1073.
on the lake. Nobody. One day they saw these two canoes out there picking rice during the lay-up. So these rulers took some canoes and went out there and got these guys cornered out in the middle of the lake. They just tipped their canoes over with what rice they had gathered. They lost that in the water and their wives got a bath, and they got a bath themselves. That's the way rules were enforced. That's the way they ruled. That's the way they enforced their rules. They didn't have no jail to put them in but they had a remedy for breaking rules.32

The wild rice area of the Upper Plains supported about 30,000 Indian people33 who comprised the largest Indian contingent within the United States. Anglo-historical chronicles indicate that the Indian people in the Upper Mississippi region were not only peaceful, but had superior physical appearance.34 Since wild rice was a principal food staple in this area, the cereal probably was partially responsible for developing their “superior” physical traits,35 and providing an environment that promoted peace.

Tribes did not attempt to domesticate the wild rice. Wild rice grew so abundantly that it was unnecessary to save and plant the grain. Because wild rice was plentiful even after the European settlement, it was an extremely important food staple. The United States Bureau of Indian Affairs compiled figures from reports and correspondence of immigrants in this particular region which further indicate the importance of wild rice.36 An analysis of these figures concluded that each American Indian family harvested be-

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32. Interview with Thomas J. Shingobe, Member of the Mille Lacs Band, Minnesota Chippewa Tribe 3-5 (Feb. 17, 1978) (on file at Hamline University School of Law, St. Paul, Minn.).

33. F. EDMAN, A STUDY OF WILD RICE IN MINNESOTA 52 (Minnesota Resources Commission, Staff Report No. 14, 1975). See generally A. JENKS, supra note 11, at 1095-113 (contemporary estimates of wild rice district population from 1764 to 1822).

34. See A. JENKS, supra note 11, at 1112.

35. See A. JENKS, supra note 11, at 1112.

36. Reports show that bands of Minnesota Ojibway had varying amounts of rice. F. EDMAN, supra note 33, at 57. For example, in 1864 the Pillagers, Winnibigoshish and Mississippi, with a total population of 3966, produced 5000 bushels of the cereal. The Lake Superior band, in 1873, with a population of 4637, harvested 3200 bushels. In 1909, however, the Nett Lake band, with an undocumented population of probably less than 200 people, harvested 22,000 pounds of wild rice. Id.
tween 250 and 1250 pounds of rice per year, depending on the size of the crop.\textsuperscript{37} In areas where the staple food was not plentiful, the Indian people had to develop the art of cultivation rapidly.\textsuperscript{38}

\section*{C. Making Way for the Europeans}

The coming of explorers marked a period of change in the traditional Ojibway culture that ended in their ultimate domination by the Europeans. The natural habitat of wild rice came under severe pressure with European settlement, and then was radically altered by the application of scientific technology to land and water management. Later, the methods of modern industry changed the processing, harvesting, and finally, cultivation of wild rice itself. In time, these changes played a major role in radically transforming the Ojibway's healthy diet and rich heritage of social, cultural, and religious traditions.

To understand the changes that eventually led to the income potential of wild rice, it is necessary to examine the consequences of the European settlement of Indian land in Minnesota in the late nineteenth and early twentieth centuries. The treaties between the Ojibway and the United States, like those signed by the Lakota, Mohawks, Seminole and others,\textsuperscript{39} reflected that the settlers' political dominance was secured by military force. This power was further expressed by many informal and formal treaty violations.\textsuperscript{40}

The exercise of cultural and political domination by European settlers ultimately led to a serious if not fatal fracture in Ojibway culture and society over a period of about fifty years.\textsuperscript{41} Despite the

\begin{footnotes}
\item[37] F. Edman, \textit{supra} note 33, at 60.
\item[38] See generally id. at 52.
\item[39] \textit{E.g.}, Treaty of Greenville, Aug. 3, 1795, United States-Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Patawatimes, Miamis, Eel-River Weca'a, Kickapoos, Piankashaws, Kaskaskias, 7 Stat. 49.
\item[40] See generally V. Deloria, Jr., \textit{Behind the Trail of Broken Treaties: An Indian Declaration of Independence} (1974).
\item[41] For the Ojibway and other people living on the lands sold to the United States under the terms of the Louisiana Purchase of 1803, Treaty for the Cession of Louisiana and Payments Conventions between France and the United States, Apr. 30, 1803, 8 Stat. 206 (area ceded covered 828,000 square miles extending from the Mississippi River to the Rocky Mountains and from the Gulf of Mexico, at what is now southwestern Louisiana to northern Montana, North Dakota, and Minnesota), the onset of serious attacks on their way of life came after the election of Andrew Jackson in 1828. G. Grossman, \textit{The Sovereignty of American Indian Tribes: A Matter of Legal History} 4 (1979). The events during the fifty-year period included violations of treaty provisions, see generally V. Deloria, Jr., \textit{supra} note 40, forcible removal of Indian people to distant lands, see 25 U.S.C. 174 (1982) (originally enacted as Indian Removal Act of May 28, 1830, ch. 148, §§ 7-8, 4 Stat. 412); see also Choctaw Nation v. United States, 119 U.S. 1 (1886); Worcester
\end{footnotes}
subsequent transfer of Indian land to private ownership by non-
Indians, the Ojibways attempted to preserve the traditional impor-
tance of wild rice in their culture and society. By insisting that
wild rice be included in treaties, 42 tribal chiefs affirmed the cereal’s
importance. In addition, after the Indian people were moved to

(W.D. Ark. 1890), rev’d, 135 U.S. 641 (1888), wars on the Great Plains, see generally V.
DELORIA, JR., supra note 40; D. BROWN, supra note 9, and the eventual establishment of
reservations.

The reservation concept became the dominant United States Policy toward In-
dian tribes in the 1840’s. It constituted an exchange embodied in treaties be-
tween the tribes and the United States: Indian tribes gave up much of their
lands in exchange for the United States’ guarantee of sovereignty over the lands
reserved for the tribes and in exchange for the provision of various services, such
as education and health services. Since the reservations were often inadequate to
support the basic necessities of Indian tribes, food distribution by the United
States and rights to off-reservation hunting or fishing were also frequently pro-
vided in the treaties establishing reservations.

Once confined to reservations, Indian tribes were vulnerable to the domina-
tion of the Federal Government.

G. GROSSMAN, supra, at 5; see also R. TRENNERT, JR., ALTERNATIVE TO EXTINCTION:
FEDERAL INDIAN POLICY AND THE BEGINNINGS OF THE RESERVATION SYSTEM, 1846-51
(1975). The cessation of treaty-making occurred in 1871. G. GROSSMAN, supra, at 7. Af-
ter 1871, “agreements” with the Indian tribes were used to secure the government’s pur-
poses. All of these events severely circumscribed the powers of tribal sovereignty, 25
U.S.C. § 71 (1983) (originally enacted as Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566,
566), and sharply restricted tribal territory, 25 U.S.C. §§ 331-358 (1983) (originally en-
acted as Indian General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 338, 338). Indian
people were reduced to the position of unwanted dependent wards of a paternalistic gov-
ernment.

The period from 1870 through the 1920’s is noted for legislation and administrative
action designed to break up the reservations and tribal governments, assimilate the In-
dian, and open western lands for non-Indian settlement. Characteristic of such legislation
was the Indian General Allotment Act of 1887, supra, which distributed communal Indian
lands to individual tribal members in the hope of advancing non-Indian notions of prop-
erty ownership. After allotment, large amounts of surplus land remained and were left
open to settlement by non-Indians. Consequently, 90 million acres were removed from
Indian sovereignty, reducing tribal lands to 48 million acres by 1934.

In response to the failures of the allotment policy, Congress enacted the Indian Reor-
ganization Act of 1934, Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984, 984 (codified as
amended at 25 U.S.C. §§ 461-479 (1983)), which attempted to revitalize tribal govern-
ment based on written constitutions and open elections. The required elections and at-
tendant political activity differ markedly from traditional Indian decisionmaking by
consensus, and the Act has been criticized for imposing non-Indian ideas on tribal cul-
tures. See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 46 (1971); G. GROSSMAN,
supra, at 8-11. By this process, extending over a number of years, virtually all the land in
the Northwest Territory was taken from the Indian people. See Note, Minnesota Chippewas:

42. See Treaty with the Chippewa, July 29, 1837, United States-The Chippewa Na-
tion, art. V, 7 Stat. 491 ("The privilege of hunting, fishing, and gathering the wild rice,
upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to
the Indians during the pleasure of the President of the United States.").
reservations, access to traditional rice beds was requested. For example, an Indian agent with the Lake Superior band reported the following to the Bureau of Indian Affairs:

The Indians at this place are disappointed and sore with regard to the boundary lines of their reserve (made according to the treaty of September 30, 1854). They state that the “Rice lakes” (Perch Lake and others of its vicinity) which were to be included in their reservation have been entirely overlooked and left out, and they are unwilling to relinquish their claim to them. These lakes lie a few miles south of the present reserve, and abound in fish and wild rice, which constitute the principal subsistence of these Indians, and their attachment to them is very strong. . . . They wished me to say to their Great Father that they are willing to give up a large portion of the land contained in the present reserve if he will attach to the remainder the coveted lakes.43

The confiscation of Ojibway land through treaties made lands readily available to settlement and changed traditional methods of harvesting wild rice. The immigrants brought with them a culture and a form of social and economic organization that differed radically from those of the Ojibway people. Thus, any exploitation of the wild rice crop or habitat by the settlers necessarily carried the potential for seriously disrupting the foundation of Ojibway life.

The coming of European civilization to the Land of Mahnomen dramatically altered the wild rice habitat in two ways: Indian land was confiscated for agricultural and commercial development and watercourses were altered to aid land development. Settlement meant not only confiscation of American Indian territory, but a dramatic reduction of the area in which wild rice could be found. Draining projects destroyed wild rice beds to provide agricultural land and building sites for growing communities.44 Although watercourse alterations were designed to control floods and improve navigation, they resulted in the destruction of many wild rice beds in the slowly moving streams and lakes that feed into the Mississippi River. Among the “stream management” projects carried out over the decades by the United States Corps of Engineers (the COE), were the widening and channeling of stream beds and the construction of a series of locks and dams to regulate river flow and cut down the flood damage to developed areas bordering on

43. A. JENKS, supra note 11, at 1097 (quoting INDIAN AFFAIRS REPORT 48 (1858)).
the river.45

The early activities of the COE significantly affected the wild rice habitat. The raising of lake levels drowned much of the lake beds, and dredging along the banks of the Upper Mississippi destroyed plants.46 Indian people have long been critical of what they consider unnecessary destruction of lake beds and have called for a return to Indian management of the streams, rivers, and lakes in the wild rice country.47

Lake Winnibigoshish in the Chippewa National Forest illustrates the changes wrought by immigration and the COE's activities. The lake was well known to the Ojibway as a major wild rice habitat. The slow-moving Mississippi coursed through the lake and created ideal conditions for the growth of the plants. For perhaps centuries, the lake was an important site for the annual Wild Rice Harvest Festival. With the arrival of Europeans, settlements along the lake and river shores began the destruction of wild rice beds. The COE then built a dam at the outlet which stabilized the flow of the river through the lake but also raised the water level and changed the quality of the water. Today, wild rice har-

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45. Lock and Dam No. 1 is located on the Mississippi River at Minneapolis, 385 river miles downstream from the headwaters in Itasca State Park. Many prime wild rice areas are located at the same latitude as the park. It takes more than three weeks, on the average, for water from the headwaters to reach Lock and Dam No. 1; between the two lie a number of small dams that were built by the United States Army Corps of Engineers (the COE) after the mid-1800's. Several small dams were constructed in 1884 and 1885. Pine and Big Sandy dams were constructed in 1896 and the Gull Lake Dam Reservoir in 1912. Interview with Fremont H. Jewell, Dept. of the Army, St. Paul Dist., Corps of Engineers in St. Paul, Minnesota (Oct. 28, 1981) (on file at Hamline Univ. School of Law, St. Paul, Minn.). The initial purpose of these dams was to improve navigation on the river during the summer months when water levels are low. Thus, the dams turned the lakes through which the Mississippi flows into reservoirs to hold back water from the spring thaws until it was needed in the summer. Navigation was not improved, but flood waters were controlled. The present lock and dam system from Minneapolis to the south was constructed, starting in 1929, with the construction of Lock and Dam No. 1 ("Ford Motor Co. Dam") below and "downstream" from St. Anthony Falls in Minneapolis. It serves the dual purpose of regulating river flow and ameliorating flood damage. Id. Nevertheless, the high levels of water continued to be maintained in the upper lakes. In addition, beginning in 1908, the COE devoted considerable time and money to dredging and widening the Mississippi to maintain stream flow as an aid to navigation. These activities were abandoned in 1960; since then, obstructions that probably decrease the water level have accumulated in the river. Id.

46. Interview with Madge Sam, Member of the Mille Lacs Lake Band, Minnesota Chippewa Tribe, and Community Health Representative, Mille Lacs Indian Reservation, at Mille Lacs Indian Reservation (Aug. 1977) (taped interview on file at Hamline University School of Law, St. Paul, Minn.).

47. Id.
vests at the lake are a fraction of those in earlier days.\textsuperscript{48} No rice stands remain on the main body of the lake.

There is no historical evidence that any concern was expressed or action was taken to preserve and protect the wild rice beds. At least two factors may be responsible for this omission: the rice was abundant and growing consumer demand had not yet emerged. Inasmuch as the persons most concerned with wild rice were Indian people who had no political power, their concerns went largely unheeded.\textsuperscript{49} Indian people today are faced with the same situation.

\textbf{D. The Gourmet Mystique: From Food Staple in the Lake Country to Food Exotica in the City}

Early explorers\textsuperscript{50} were dependent for survival upon the Indian people. Moreover, they shared some of the Indians' traditional ways. When the explorers were introduced to Mahnomen, they named it "wild rice" and quickly adopted it as a food staple.

The settlers who followed the explorers also learned of the food value of wild rice from the Indian people. In parts of northern Minnesota, farming is difficult because of the short growing season and thin topsoil. Due to these conditions, wild rice gathering became an important means of securing additional food for the early settlers who followed the traditional Indian method of harvesting.

The ready availability of wild rice and its value as a food interested many non-Indian people in the harvest. The knowledge of wild rice spread to increasing numbers of non-Indians. Eventually, a modest consumer demand for the cereal developed among non-Indian people who neither lived in the wild rice area nor participated in the harvest.\textsuperscript{51} What had been a source of food for

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} Many early settlers came from Finland, and Indian people referred to those who lived close to the land and participated in the wild rice harvest as "Findians." Interview with Ronald Libertus, Wild Rice Director of the State of Minnesota Dep't of Natural Resources, in St. Paul, Minn. 32-33 (Nov. 30, 1981) (on file at Hamline University School of Law, St. Paul, Minn.). For the "Findians" as well as other non-Indians, the annual wild rice harvest provided a significant cache of food for the long northern Minnesota winters. Many non-Indian people who participated in the annual harvest attest to its significance as an important source of food. For example, one former wild ricer explained that for 20 years the wild rice harvested provided a plentiful food supply for the winter. Interview with Fred Phipps, Resident of Kego Township, Cass County, Minn. (located in Leech Lake Reservation) (July 29, 1982) (on file at Hamline University School of Law, St. Paul, Minn.).

\textsuperscript{51} The wild rice was so plentiful in the early part of the twentieth century that non-
Indian and non-Indian people in the wild rice areas became a delicious curiosity for which those living elsewhere were willing to pay.

The demand for wild rice in the cities, towns, and villages spawned by the European civilization led some Indian people, now largely confined to reservation land, to sell some of their harvest to supplement their meager incomes. Indian sale of wild rice also reflected the shift in their circumstances from subsistence based on the land to a dependence on the economy of the settlers. Wild rice, because of its abundance and food value, became an important economic avenue for the European incursion on Ojibway culture. The conquest of the Indian people and the confiscation of their lands had placed them at the bottom of the social and economic order of the new culture. Some Indian people suffered the ambiguities of life between cultures. The role of wild rice as a source of income supplement weakened its traditional mystique. Although the cultural significance of wild rice continued, it was altered by the economic plight of the Indian people brought on by European civilization. The reduced number of ricing beds intensified pressure on the remaining natural beds.

Dependence on the income potential of wild rice led Indian people to step up criticism of the failure of state and federal government activities to protect the wild rice areas. According to one Indian account, after the Indian Reorganization Act of 1934, supervision was offered, protection was not:

[T]he State of Minnesota [wanted] to supervise everything about wild rice so [they] asked our permission. The state also promised the tribes they would take care of the water levels. The state had an idea that the water levels had a lot to do with growing wild rice. Our people don't believe it. Nature takes care of the water level without using a pencil. So, the state was saying, we will make sure that the water tables are okay, and in return, we supervise. That was the deal. The tribes discussed it for about four or five days. Before it came to a vote, the seven reservations tabled the question—tabled it INDEFINITELY! The tribes didn't want state supervision. Then the state promised the Indians that we would never have to pay more than 25 cents per couple to harvest wild rice. However, there was no

Indian wild rice harvesters often gave wild rice to friends and relatives as holiday gifts. Interview with Fred Phipps, supra note 50. No doubt this led, in part, to the spread of knowledge about wild rice to areas far removed from the wild rice beds, and thus contributed to the development of a consumer market for wild rice among non-Indian people.

obligation on the part of the Commissioner's Office. The agreement was made by a state representative for the commissioner. I happened to be the interpreter of that discussion, so I know just about everything that took place.

The state also wanted non-Indians to be able to purchase licenses for harvesting wild rice. This license would cost more than the one for Natives. Obviously, the state was anxious to supervise wild rice despite the fact that we had tabled the issue indefinitely. Despite our action, the executive committees of the tribes established by the Reorganization Act of 1934 decided to give the state authority. The state used the executive committees to 'power-off' the tribes. The state took advantage of the Reorganization Act to overrule our general council.53

State supervision was slow in coming. Although harvesting with machinery and wanton destruction of wild rice plants were prohibited,54 the increasing numbers of non-Indian harvesters added to the earlier damaging incursions on the wild rice beds.55 It was not until non-Indian harvesters outnumbered Indian harvesters56 that the state acted to preserve the remaining wild rice beds by

53. Interview with Thomas J. Shingobe, supra note 32. Thomas Shingobe's comments reflect the continuing conflict between the federally constituted Reservation Business Committees established under federal law relating to reservations and the traditional tribal governments.

In Shingobe's words:

Prior to 1934, the Native Americans supervised all wild rice harvesting. They done their own supervising because the Bureau of Indian Affairs nor the government, nor the state, had any interest in wild rice. This was true off reservations and on reservations because that was before the white man realized the 'vital mental' of wild rice. After they learned that wild rice carried a very high vitamin in the diet of a human being, they began to want to harvest rice fields. The tribes from the beginning didn't agree to allow non-Natives to participate in picking wild rice because Natives claim that the planet was made by the Creator for the natives of this part of the world. The only non-Natives to pick wild rice were just sneakers. Greeds, in other words.

Id. at 7-8.

Shingobe commented further:

In my times we usually had plenty of rice. It was nothing to walk into a tepee and there would be 15 or 20 flour sacks full of wild rice. Stacked up. Finished wild rice. And there'd be still maybe 10 or 15 bags to be finished out there in the yard in big piles. It looked like little haystacks piled up and covered with birchbark. The Natives never finished harvesting rice to the end. They left the seed for the birds. They never forgot the birds, especially ducks, blackbirds and crows. They shared. The Objibways was a great people to share. Not only to my daughter or my father or my mother or my grandfather, but they shared with the whole tribe.

Id. at 17.

55. Interview with Madge Sam, supra note 46.
56. F. Edman, supra note 33, at 60.
regulating the method and season of the harvest. The federal government, considering action to protect the wild rice crop, empowered the COE to examine the effects of the lock and dam system on the Mississippi Headwaters area and wild rice habitat. A federally funded study was undertaken to prepare an environmental management plan for the Sherburne National Wildlife Refuge in Minnesota and an ecological study of the existing wild rice beds and their role in the overall ecology of the refuge.

Today, approximately 3500 American Indian families harvest wild rice each year in Minnesota and Wisconsin. As a member of the Mille Lacs Band of the Minnesota Chippewa Tribe observed, "the Indians attempt to pass on the method of ricing to grandchildren."

While it may be true that compared to the number of non-Indian harvesters, the percentage of Indian harvesters is declining each year, the available statistics do not mean that the Indian people's reliance on wild rice is diminishing. Further, the statistics on wild rice licenses are somewhat misleading because Indians no longer need state licenses to harvest rice on reservations and the statistics cited are based on DNR records and not tribal records. It stands to reason, however, that more non-Indians would seek licenses in recent years because harvesting wild rice has become a profitable enterprise.

As consumer knowledge of wild rice expanded, so did the demand. This has made wild rice a potentially important cash crop.

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57. The first significant state wild rice legislation was passed in 1939. See Act of Apr. 13, 1939, ch. 231, 1939 Minn. Laws 321 (currently codified at MINN. STAT. §§ 84.09-15 (1982)). Ostensibly the legislation sought to preserve the Indian people's interest in wild rice. See infra text accompanying notes 118-25.

58. Interview with Carl W. Stephan, Project Manager, Headwaters Area, Dept. of the Army, St. Paul Dist., Corps of Engineers in St. Paul, Minn. (Oct. 28, 1981) (on file at Hamline Univ. School of Law, St. Paul, Minn.). The results of this federal government study can be found in The Mississippi River Headwaters Lakes in Minnesota Feasibility Study (Sept. 1982) (available at the Army Corps of Engineers Library, St. Paul Office and in most public libraries) [hereinafter cited as Feasibility Study].

59. This research was completed by the Fannucchi Research team and includes a study of the environmental impact of human harvesting, supra note 5. See infra text accompanying notes 188-96.

60. F. EDMAN, supra note 33, at 61.

61. Interview with Madge Sam, supra note 46. Many try to collect as much rice as possible and sell the extra rice to buy school clothes for their children. Id.

62. According to a Minnesota Resources Commission, about 75 percent of the licenses to harvest wild rice are bought by non-Indians. F. EDMAN, supra note 33, at 61. In 1982, 7300 ricing permits were sold. Leschak, Taming Wild Rice, CORP. REP. MINN., Nov. 1983, at 78-79.
Although the Department of Agriculture does not categorize wild rice as a cash crop in Minnesota, it is of significant value to certain classes of people within the state. In 1964, the Nett Lake and White Earth reservations in Minnesota accounted for approximately 69,620 pounds of the 1,285,000 pounds of wild rice harvested from all the natural stands in the state.63

Unquestionably, wild rice is a major crop for the American Indian as well as non-Indian groups. The traditional mystique based on Mahnomen as the bounty of nature that sustained life, however, is being overrun by a mystique based on wild rice as a gourmet food. This new mystique of wild rice surfaced during the 1950's. What had been a staple in the diet of the Ojibway people came to be regarded as a delicacy by non-Indian gourmets. The attraction for the gourmet stems from the perceived exotic quality of wild rice as a part of the traditional culture of Indian people.64 Thus, the gourmet mystique is a non-Indian perception of the traditional mystique. The food became known as an "American Indian Delicacy." The adjective "wild" attached to "rice" no doubt played a large part in creating its exotic appeal.

The emergence of the gourmet mystique was reflected in the increasing price of wild rice. This led to an increase in its cash crop potential. Eventually, harvesters who previously had sold only small amounts while keeping most for themselves, were visited by people desiring to purchase wild rice for greater distribution.65

When Indian people began to sell wild rice to supplement their incomes, the food's appeal spread in the local non-Indian communities and then beyond. A processing and distribution structure developed to serve the growing demand of non-Indian gourmet customers. In the 1950's, the increasing demand led to a dramatic increase in price from $1.00 to $4.00-$5.00 per pound. Consumers

63. E. OELKE, W. ELLIOTT, M. KERNKAMP & D. NOETZEL, COMMERCIAL PRODUCTION OF WILD RICE 3 (Agricultural Extension Serv., Univ. of Minn. Extension Folder #284, 1973). An alternative and perhaps more realistic way of looking at the reservation yield of wild rice is by acreage. As of 1983, the DNR estimated that the Leech Lake Reservation has about 6000 acres of rice (with 100 pounds of green rice per acre in a "good" year); Nett Lake, 2000-4500; White Earth, 3000; and Fond du Lac, 1000. This accounts for a large percentage of the lake rice harvest in the state. Last year, 600 residents on the Nett Lake Ojibway reservation harvested more than 100,000 pounds of rice. Leschak, supra note 62, at 82.

64. This non-Indian perception continues, notwithstanding the fact that much of the rice today is harvested from paddies by mechanical means. Interview with Ronald Libertus, supra note 50, at 55-56.

65. Id.
who envisioned Indian people in canoes harvesting the rice in the traditional way were willing to pay the premium to place this "wild delicacy" on their tables for festive occasions. Word of this exotic food spread across the country. Soon low-income non-Indians also began harvesting crops. Wild rice was sent to markets on the east and west coasts. In 1984, it sold for as much as $12.00 per pound in New York City as compared to $3.50 per pound in Minnesota. Today, investment in and expansion of the wild rice harvest are attractive economic ventures.

The market for wild rice soon caught the attention of entrepreneurs in Minnesota. Some of them were already engaged in processing and distributing wild rice purchased from individual harvesters. Others began applying the genius of the industrial revolution and modern marketing techniques to the cultivation of this exotic plant. For them, wild rice had a powerful new mystique: the possibility of wealth derived from the mechanical harvesting of enormous paddies of wild rice.

E. Commercialization: Technology and the Development of Domesticated (Paddy) Rice

Aspiring wild rice entrepreneurs had to overcome several problems to dominate wild rice harvesting and production. Although the commercial potential of wild rice depended in part on its traditional mystique, commercialization posed a serious threat to traditional Ojibway culture and the economic security of Indian people living between two cultures. This threat gave rise to the continuing controversy over wild rice management.

The gourmet mystique stimulated the cash crop potential of wild rice. Many non-Indian entrepreneurs were attracted to wild rice harvesting because of its profit potential. For them, the crop's potential as a commercial venture fired their imaginations and fueled efforts to find ways to domesticate and mechanize wild rice cultivation.

66. It was reported in 1983 that:
A typical retail price for wild rice in northern Minnesota is about $5 a pound, but the local price is probably the lowest in any retail market. Once the rice leaves Minnesota, it can fetch as much as $20 a pound in specialty outlets. The average retail price? 'I don't think anyone knows for sure,' says the DRN's [sic] Bob Hodge.

Leschak, supra note 62, at 80. In a recent article quoting Associate Professor James Percich from the University of Minnesota, the price in Minnesota was reported "as low as $3.50." Jones, The American Scene, GOURMET, May 1984, at 76, 138.
The commercialization of wild rice paralleled the development of appropriate technology and marketing practices. Commercialization included mechanical processing, large-scale packaging and distribution, mechanical harvesting, and development of the paddy variety to permit organized cultivation of wild rice. The mechanical processing equipment was developed and operated by distributors of processed rice. It permitted the large-scale screening by size and parching of "green rice" into finished rice. Initially, the processor-distributor purchased green rice, which had been harvested by hand according to the requirement of state law, put it through the finishing operations, and resold it in wholesale and retail markets. Small processing plants, built with capital from non-Indians and, in most cases, owned and operated by non-Indians, sprang up in the 1950's and 1960's. The plants handled large amounts of rice comparatively quickly. One innovative processor in 1972, for example, was reported to be capable of parching one thousand pounds of rice per hour.

Another step in commercialization was the development of packaging operations and distribution networks. A number of processor-distributors competed with each other for a time. For the most part, they were non-Indian entrepreneurs. Eventually, a handful of distributors controlled by non-Indians gained domination in the market. A distribution/processing company owned and operated by the Nett Indian Reservation also played a secondary but important role. These distributors bought the "green rice" that was harvested from lakes as well as the harvests from paddies. After the crops were processed and packaged, the finished product was sold under a variety of labels in specialty shops and supermarkets.

These organized systems made serious inroads on the informal network of small harvesters and processors, many of whom were
Indian people, who earlier were accountable for most of the wild rice that was sold to consumers. Their informal market had provided them with supplemental income; now, the informality of their operations was such a great disadvantage that many stopped selling. In fact, during the 1960's, a number of small and marginal processors suspended or closed their operations. Those who survived that period, however, experienced a boon with mechanized harvesting, and the development of paddy rice, which insured large harvests.

The successful application of technology to parching, together with modern packaging and distribution practices, meant that processing capacity far exceeded the volume of wild rice harvested by traditional methods. Consequently, processors and other entrepreneurs with access to research capital soon turned to experimenting with mechanical harvesters. At the same time, a few people began to investigate the possibility of domesticating and cultivating wild rice. The first experimental machines were developed before the advent of research on paddy rice. They were designed for use in harvesting the lake crop. The early machines significantly damaged wild rice beds and, in large part, were the reason for the 1939 state legislation regulating harvesting methods. Because these harvesters were so damaging to the lake crop, the legislation prohibited their use on the lake crop. Eventually a mechanical harvester was developed that could be used for paddy grown rice. The final step in commercialization was the successful domestication of wild rice cultivated in privately owned paddies.

73. Burnson, supra note 67, at 50.
74. Mr. Julien Davis of Aitkin, Minnesota spent $100,000 and as he put it, “failed where the rest failed . . . . If we had understood then about rototilling, water control, and dry land harvesting, the whole program of paddy rice would have been advanced by ten years.” Burnson, supra note 67, at 46. Mr. Algot Johnson, a retired contractor, pioneered in building earthen dam and drainage systems and in developing non-shattering strains of wild rice. Id.
75. See infra notes 80-84 and accompanying text.
77. Id. § 3, 1939 Minn. Laws at 322 (currently codified at MINN. STAT. § 84.111 (1982)).
78. When growing wild rice in paddies appeared practical, some of the processors and early growers worked on harvesters for use in paddies. Mr. Carroll Stimson built his own thresher mounted on a standard flatbottom boat and propelled by an outboard motor. Mr. Leonard Furuseth of Thief River Falls, Minnesota, designed and built a lightweight harvester which ran on track type treads and cut a twenty foot wide path through the paddy. This enabled him to harvest fifty acres daily, without excessive damage to the rice stands. Burnson, supra note 67, at 47. One cultivator manufactured and marketed his
Despite the lack of official recognition of wild rice as a cash crop, these steps transformed wild rice into an agricultural crop, while further weakening the traditional mystique. Indian tribes also began cultivating paddy rice while continuing to harvest the lake crop. The commercial incursions on the old ways threatened the economic security of Indian people who were dependent on the lake crop for supplemental income. The result was the current controversy surrounding the management of lake and paddy crops.

III. THE CONTEMPORARY LAKE RICE/PADDY RICE CONTROVERSY

The single most important development in the commercialization of wild rice, and the most threatening to the interests of Indian people who harvest annual lake crops, is the recent development of paddy rice. This development seriously jeopardizes the economic security afforded by the lake crop. Once prized, the lake crop is now a minor part of the total wild rice harvest. Thus paddy rice became the focus of the contemporary controversy over wild rice which first surfaced during the 1981 Minnesota legislative session. To fully understand the legislation and its prospects for successfully dealing with this problem, an examination of paddy rice in the contemporary controversy is necessary.

A. The Domestication of Wild Rice

True to its English name, wild rice has not been easily domesticated. Among the most significant factors in the development of paddy rice has been the research and development at the University of Minnesota. Virtually all the scientific work directed to the development of paddy rice has been conducted by the University’s Agricultural Experiment Station in St. Paul. Five departments...
engaged in rice research, ranging from plant pathology to processing methods, have concentrated solely on paddy rice. The justification for this concentration is unclear.

The University contends that any improvement in paddy rice will benefit the natural stands, yet the University is committed to conducting studies only on grains that will become field crops. Characteristics of field crops include harvests and control of acreage by fertilizers and sprays. The University has not worked on developing a grain that must be harvested by hand. The University also is funding the construction of a processing machine that will separate immature kernels from the remaining rice. In addition, there has been some crossbreeding of wild rice to increase its yield and adapt it to mechanized cultivation.

A major difficulty was "shattering," the tendency of the grain to break off if not harvested immediately before maturity. All common grains once had this shattering quality; years of development, however, resulted in strains that could be harvested simultaneously, facilitating mechanical harvesting techniques. Thus, the University sought to develop a paddy rice that is consistently non-shattering with stronger stems that will withstand storms. Another goal was a seed that matures as early as possible, making it less susceptible to disease and insects.

The University was not alone in its desire to domesticate wild rice. Algot Johnson, a private citizen, had become concerned by the high prices of wild rice and the number of Indian people who were harvesting the grain in such quantities that the natural stands were being destroyed. Johnson noticed that when wild rice stands were trampled down, wild fowl left the areas in search of other feeding grounds. He believed the solution to this destruction would be the development of a domesticated crop that could be grown commercially by non-Indians in paddy fields and the assignment of the right to harvest the natural wild rice to Indian people.

80. Telephone interview with Dr. Landis Boyd, former Director of the Experimental Station, University of Minnesota (Aug. 1977).
82. Davids, Wild Rice—it's being tamed, DYNAMIC MATURITY, Nov. 1976, at 36, 37.
In 1959, the University began keeping seeds of non-shattering plants, which were found in the Algot Johnson paddy near Waskish, Minnesota. In 1963, with perseverance and the help of the University of Minnesota, Algot Johnson produced the seed from some non-shattering plants found in his fields.\(^8\)\(^3\) The paddy rice that was developed was not a hybrid, but rather a selection.\(^8\)\(^4\) This breakthrough led to the recognition of the economic potential for commercially grown paddy rice.

Paddy rice can be grown in paddies similar to those found in the white rice paddies of Louisiana. Non-shattering varieties have made it possible to harvest up to 350 pounds per acre, compared to 100 pounds per acre from natural stands.\(^8\)\(^5\) Furthermore, because paddy rice growers can anticipate yields, they can maintain better control over the market. For example, unprocessed rice from the natural stands has fluctuated in price from $0.30 to $2.35 per pound. Paddy rice growers without special growing and harvesting techniques, except for mechanical harvesters, are able to insure that they will never receive less than $1.10, and often as high as $2.50 per pound on a long-term contract. Growers who use improved mechanical and crop control techniques are convinced that any fluctuation from $2.50 in the market price will be very slight.\(^8\)\(^6\)

Prices must be viewed in perspective. The investment for equipment is substantial, as are the sundry farming costs. The lowest

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\(^8\)\(^3\) "In three years of experimental work in shattering seed Mr. Johnson reports that the first year they (Johnson and the University of Minnesota) produced 26 pounds of seed, 25 percent of it shattering; the second year, 1,000 pounds, 10 percent shattering; the third year, 15,000 pounds, 2 percent shattering." F. Edman, supra note 33, at 65; see also Davids, supra note 82, at 39.

\(^8\)\(^4\) Special selected seeds are called "varieties." When a farmer decides to grow wheat, for instance, he decides what type of seed to buy based on the variety. "Technically, a variety is a subdivision of a species" and the various varieties "are distinguishable from one another by agronomic traits such as yield, disease, insect resistance and grain quality." J. Martin, W. Leonard & D. Stamp, supra note 7, at 404-05. In Minnesota, a farmer has at least 18 varieties (including Era, Olag, Chris, and Protar) of hard red spring wheat from which to select.

Variatel names are sometimes added to the species name to make a trinomial, but ordinary crop varieties are given a common name. Classification of agricultural varieties has done much to standardize variety names. The American Society of Agronomy has adopted a rule to use a single short word for a variety (cultivar) name, and the variety is not to be named after a living person. Id. at 18. The Agronomy Society registers properly named improved varieties of several field crops. Id. at 19.

\(^8\)\(^5\) "The Manomin Development Corporation, using a technique of bagging the heads, showed an average yield per acre of 1,775 pounds of clean, matured dried rice." F. Edman, supra note 33, at 65.

\(^8\)\(^6\) Id. at 67.
estimate of production costs hovers around $400 per acre. Yet, even with such expenses, the paddy rice producers association views paddy rice as an important new cash crop for Minnesota, especially in northern areas where few cash crops are possible. For example, it is estimated that from 1940 to 1973 the wholesale value of wild rice harvested increased from $500,000 to $5,000,000. This rise in value represented an increase in production from 90,000 pounds in 1968, to 3,740,000 pounds in 1972. One authority predicted the possible development of 50,000 acres in Minnesota, which would produce approximately 65,000,000 pounds of wild rice per year, a potential twenty-fold increase in the present wild rice crop. With such a development, a significant cash crop potential would exist. At a wholesale price of $2.50 per pound, the predicted quantity of paddy rice would yield $162,500,000.

One potential disadvantage to the successful development of domesticated wild rice is that an easily harvested, large crop will cause the market price to drop. If the state is interested in developing a cash crop, however, a large, reliable supply would be essential. Large rice marketing companies require more rice than the lakes of Minnesota can supply. In contrast, natural lake rice is often of the small batch variety. Further, the natural wild rice supply is inconsistent; the yield fluctuates greatly. Large food handlers want to be assured of certain amounts before they invest in creating a demand for the product, increasing the likelihood that they will rely on larger rice marketing companies and domesticated wild rice.

Some observers see paddy rice development as a natural course of events. The author of one study of wild rice wrote:

87. Id. at 68.
89. G. Rossmann, supra note 88, at 19. The year 1972 represented a high water mark. This is partly due to rice’s particular susceptibility to blackbirds, rust, and droughts. It is also very expensive to establish new paddies because the cost of land in Minnesota rose from $10 per acre in 1963 to $100 per acre in 1973. “[T]he average total paddy harvest in the past five years [1978-1983] has been between 2 million and 2.5 million pounds.” Leschak, supra note 62, at 79.
90. G. Rossmann, supra note 88, at 32 (quoting Dr. William Hueg, who made this prediction in 1973). Dr. Hueg was the Director of the Agricultural Experiment Station at the University of Minnesota, St. Paul, Minnesota.
91. Telephone interview with Dr. Landis Boyd, supra note 80.
92. Id.
There is no doubt that this grain which long was a staple of the Indian diet is being exploited by the white man. To take the attitude of some sociologists and welfare agents that 'the rice should be left to the Indian' is to close the eyes to facts. Once the white man tasted the grain it was no longer left to him—it became a delight of anyone's diet. So the white man will eventually domesticate the grain! To curb the trend by stubborn, lethargic, do-nothingness will be to lose the business to another state with vision and the will to prosper its agricultural community.

If the Indian is to be raised to a level of equality, respectability and become a self-supporting part of Minnesota economy, it is criminal neglect to let him waste his heritage and make no effort to better the one natural resource that is uniquely his. The Nett Lake tribe, to take one area as an example, could with proper management of their lands, be a proud asset of the state, totally self-supporting, and devoid of any reason to fear the cultivation of wild rice by their neighbors, whose skins are prone to sunburn.93

Some tribes have decided that the potential for making money by growing paddy rice should not be ignored. Leech Lake, Nett Lake,94 and Red Lake Indian reservations applied for and received federal grants for the development of paddy rice.95

B. The Role of Paddy Rice in the Controversy

The recent development of paddy rice farming holds promise as a major cash crop, not only in Minnesota, but in a few other states as well.96 Even at current levels of production, paddy farms provide major competition to individual wild rice harvesters, many of whom are Indian people of modest means who rely on the annual

93. F. Edman, supra note 33, at app. vii. The cited material is from a report on the Wild Rice Research at Wilderness Valley Farms, which quoted from a report prepared for the project under the direction of Commissioner Armando DeYoannes of the Iron Range Resources and Rehabilitation Commission. Cf. Leschak, supra note 62, at 82 (recent developments on Nett Lake Reservation).

94. Nett Lake is also known as Bois Lake.

95. F. Edman, supra note 33, at 59. The Leech Lake Reservation received a $50,000 grant from the Office of Economic Opportunity to expand wild rice production, processing, and marketing; the Red Lake Reservation received a $10,000 grant from the Bureau of Indian Affairs for experimental paddy development; and the Nett Lake Reservation received a $12,000 grant from the Upper Great Lakes Commission for a paddy rice demonstration project.

harvest to supplement their incomes. The competition has sparked a controversy over whether the wild rice and paddy rice grown in Minnesota should be managed as separate crops to preserve the gourmet consumer market.

Despite optimistic predictions, many people, for a variety of reasons, oppose an aggressive approach to the development of paddy rice. Some fear that if paddy rice were grown in more states, as is already occurring in California, Minnesota would lose its current monopoly on wild rice because of the special habitat necessary for lake rice. Others view the development of paddy rice as a danger to the economy and livelihood of Indian people, and they object to the use of state money to develop paddy rice that is marketed as wild rice. They ask, "What's going to happen to our unemployed people and the Indians who harvest this wild rice by hand? What are they going to do?"

One approach to meeting this concern and preserving the market for the lake crop, despite paddy rice development, is separate labeling of wild rice products so that consumers can distinguish between products containing natural lake rice and those containing paddy rice. This approach, first initiated unsuccessfully by Indian people in the late 1970's, and ultimately successful in 1981, was based on the belief that taste and color markedly differentiate the stands of lake and paddy rice, thus making each unique. Paddy rice is a uniform color because harvesting is accomplished at one time. Natural wild rice is variegated in color because it is

97. Cain, supra note 96, at 5, col. 1; Leschak, supra note 62, at 83; Rigert, supra note 96. As of 1983, not all agree that there is reason for such fears. Nancy Tetrack, a spokeswoman for the International Wild Rice Association, welcomes the competition from California. She speaks only of paddy rice market competition, however, not the problems of the Indians and the effects of such competition on naturally grown rice. See Leschak, supra note 62, at 83.

98. F. EDMAN, supra note 33, at 77 (quoting testimony of Kenneth Morgan of the Minnesota Wild Rice Harvesters Association before the Minnesota Resources Commission on Aug. 11, 1967).


100. Interview with Art Gahbow, Business Manager, Mille Lacs Indian Reservation Business Committee, at Mille Lacs Indian Reservation (Aug. 1977) (taped interview on file at Hamline University School of Law, St. Paul, Minn.). This is much in dispute. The two rices are genetically identical. Many claim, however, that, because paddy rice growers use chemicals, the rice tastes differently. Paddy rice is a uniform color because harvesting is accomplished at one time. Natural wild rice is variegated in color because it is harvested periodically at different stages of ripeness. See infra text accompanying notes 104-06.

101. See supra note 100; infra notes 104-06.
harvested periodically at different stages of ripeness. 102 According to the Indian people, these differences in taste and color are so important that many will not eat paddy rice. 103

A vigorous dispute has arisen over the nature, extent and importance of the differences between lake and paddy rice. This dispute was prominent in the hearings on the labeling legislation in the 1981 Minnesota state legislative session.

There are few horticultural differences between lake rice and paddy rice. 104 Paddy rice is exactly the same genus and species as naturally grown lake rice. 105 The major difference is the non-shattering character which makes paddy rice more adaptable to the mechanical system of harvesting. 106

When viewed in the context of processing and cooking, however, important differences emerge between lake and paddy rice. The color variation in lake and paddy rice is due to processing methods, not genetic differences. At the time of harvest, both are dark; the lighter or darker color found after curing is a result of how much of the outer black layer of the kernel is removed. This layer is permeable to water; the more hull that is left on the grain, the longer the cooking time required. Lake rice is generally processed by smaller processors who process each batch of grain to taste and generally turn out a lighter colored product. Larger processors handle all paddy rice in the same way and thus achieve a product that is uniform in color and length.

C. The Role of the State in the Controversy

Minnesota has played a significant role in the history of wild rice in the twentieth century through legislation, regulation, and research. These activities have led to the piecemeal development of a de facto policy on wild rice management. The state's future

102. See supra note 100.
103. Indian people also distinguish between lake and river rice.
104. *Zizania aquatica* is the scientific name for wild rice under the binomial system of nomenclature. The system, devised by Carl Linnaeus, classifies plants by their genus (*Zizania*) and species (*aquatica*). C. LINNAEUS, SPECIES PLANTARUM (1733). “A species is a group of plants that bear a close resemblance to each other. . . . Nearly every crop plant comprises a distinct species of the same genus.” J. MARTIN, W. LEONARD & D. STAMP, supra note 6, at 18.
105. E.g., KERNKAMP & KROLL, WILD RICE DISEASES IN MINNESOTA 3 (Misc. Report 125, Apr. 1974) (Univ. of Minn. Agricultural Experiment Station).
course of action will determine the extent to which wild rice remains a source of economic security for Indian people.

The state's early role in wild rice regulation came before the emergence of the gourmet mystique and commercialization. It represented an attempt to preserve lake crops by requiring the use of traditional Indian harvesting methods. Favoring the Indian people at that time through protective legislation was not controversial because there was no apparent economic consequence for the non-Indian majority. Now, however, the economic consequences could be considerable for the non-Indian majority, and for several paddy rice farmers in particular. As a result, there has been a recent shift—ostensibly for good reasons such as the development of the state's agricultural economy—from supporting the Indian people's conception of wild rice management to favoring the entrepreneurs whose activities threaten the traditions and economic security of American Indians. Thus, the state seems to be following the classic colonial pattern of exploiting an indigenous population for the economic benefit of the non-indigenous majority. To delineate the contemporary controversy over wild rice, an examination of the statutory regulation of wild rice and the research activity of the state-funded Institute of Agriculture at the University of Minnesota follows.

1. Minnesota Statutory Regulations

Benevolent paternalism of European settlers toward Indian people characterized the legislation enacted in Minnesota in 1939. This legislation was modified in subsequent sessions of the state legislature.

The first Minnesota statutes regarding the harvesting of natural stands of wild rice on public waters were the product of the combined efforts of a newly elected state representative in the 1939 legislative session, Joseph Prifrel, Jr., and Chief Madison from a northern band of the Ojibway. Chief Madison had approached Representative Prifrel and asked if he "was interested in helping to preserve one of the important factors for the life of the Indian." Non-Indians were coming to the wild rice areas to harvest rice

107. See Statutory Appendix, infra at 797-804.
108. Id.
110. Interview with Joseph Prifrel, Jr., in St. Paul, Minnesota (Aug. 9, 1977) (on file at Hamline Univ. School of Law, St. Paul, Minn.).
with machinery that did not “allow rice seeds to drop back into the water for re-seeding. The rice plant was not being allowed to reactivate and was being destroyed.” Prifrel agreed to sponsor the bill and took Chief Madison “down to the Attorney General’s office where they drafted the bills. Madison sat down and made out all the requirements he thought should go into the bill.” According to Representative Prifrel, the purpose of the bill was “to protect the native food from destruction by new mechanical methods being brought in. . . . It was a question of protecting certain rights of the Indians on the reservation that were being disregarded.”

Prifrel and Madison encountered strong opposition to the bill among the wholesale buyers of wild rice who supported mechanical harvesting. In Representative Prifrel’s words, the wholesale buyers did not “care whether it would destroy the rice or not. They were interested in the money they got from the rice. It was quite a battle.”

When the bill reached the legislative hearing stage the arguments turned to modernization of the harvesting process. The major contention of opponents of the wild rice legislation was that nothing can stand in the way of progress. According to this argument, the machine was here to stay and Americans could do nothing to stop its advance. Several University researchers testified on behalf of the Indians to establish that wild rice, if it is to reproduce, must be harvested in a certain manner. This testimony was unexpected; Representative Prifrel had not requested it.

The prerequisites for harvesting wild rice in natural stands were first delineated in legislation adopted in 1939. The law was substantially the same as the current codification, which gives Indian people exclusive harvesting rights on all public waters within the original boundaries of the Minnesota reservations and specifies that non-Indian people cannot take rice from any reservation un-

111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
116. Id.
117. Id.
less they live there. The express purpose of this grant is to discharge a moral obligation to Minnesota Indians and also to prevent them from becoming "relief charges." Other sections address the mechanics of harvesting wild rice and are designed to fulfill the statute's other purpose: to meet the "emergency" created by the "recent development of careless, wasteful, and despoiling methods of harvesting . . . ." The law details the permissible size and kind of boat, implements, and hours for harvesting. Additional regulations are left to the discretion of the Commissioner of Natural Resources. The commissioner is authorized to appoint a "Director of Wild Rice Harvest" who can make recommendations for wild rice management. For example, the commissioner can set the harvest date, special opening dates for specific stands, list closed stands, and determine rest days.

The 1939 legislation required harvesters' licenses, which were issued only to Minnesota residents. A license was also required for buyers. In 1981, the cost of licenses was raised from $4.00 to $10.00 for residents. Dealer's licenses now cost $70.00 for the first 500,000 pounds and $250.00 for any purchase over 500,000 pounds. The regulations were enforced by game wardens or the DNR enforcement division. Any violation of the wild rice law was and continues to be a misdemeanor.

2. State Funded Research on Paddy Rice

In recent years, the state's primary activity related to wild rice has been the substantial funding of research at the University of

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120. Id. § 84.10.
121. Id. § 84.09.
122. Id.
123. Id. § 84.111, subd. 1 (hand-propelled with "a top width of not more than 36 inches and a length of not more than 18 feet . . . .").
124. Id. § 84.111, subd. 3 (nothing mechanical and only a hand-operated flail not over 30 inches in length). But see id. § 84.111, subd. 5 (person holding fee title to all property surrounding public waters not within original Indian reservation may use mechanical harvesting devices).
125. Id. § 84.111, subd. 4 (unlawful to harvest between 3 p.m. and 9 a.m. except as otherwise expressly permitted in writing or regulations of the Commissioner).
126. Id. §§ 84.14, subds. 3, 4, 84.15, subd. 1.
128. Id. § 8, 1939 Minn. Laws at 323.
130. Act of Apr. 13, 1939, ch. 231, § 16, 1939 Minn. Laws 321, 324-25 (codified at MINN. STAT. § 84.14, subd. 6 (1982)).
Minnesota Institute of Agriculture. This research has been central to the successful domestication of wild rice and to paddy rice production. These developments simultaneously contributed to commercialization and threatened the Indian people's continued dependence on wild rice as an important income supplement.

Both Algot Johnson and the director of the University's Agricultural Experiment Station engaged in paddy rice development and were key figures in the early lobbying for funds to support research on paddy rice. During the 1965 and 1967 legislative sessions, they were unsuccessful; but, in 1969, additional pressure from wild rice producers in northern Minnesota led legislators to specifically earmark $75,000 per year for wild rice research and development at the University of Minnesota. In 1973, the legislature increased the annual appropriation to $105,000. Recently, the legislature refused to appropriate special funds for wild rice research, but the University continued to underwrite wild rice projects. In 1976, the University of Minnesota spent approximately $725,000 on wild rice research in comparison to $620,000 for corn research. Other states support research on corn, but no other state subsidizes research on wild rice other than minor sums allotted by universities for research on rice processing.

IV. RECENT DEVELOPMENTS IN THE CONTINUING CONTROVERSY OVER WILD RICE MANAGEMENT

After passage of the 1939 legislation regulating wild rice harvesting in Minnesota, a conservation officer in the Minnesota Department of Natural Resources was appointed as the "Wild Rice Director" on an informal basis for between four to six months per

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131. See generally supra note 4. The University of Minnesota Department of Agronomy and Plant Genetics has been actively studying wild rice domestication since the early 1940's. In 1963, Dr. Paul Yagya and Mr. Edwin Brooks began hybridizing shatter resistant strains of wild rice that would withstand mechanical harvesting techniques and produce larger yields. Recent research has focused in such areas as: chemical and salinity treatments to influence seed dormancy and germination periods; fertility, disease, and insect control; and harvesting and processing techniques. Largely as a result of this research and development, domesticated wild rice production in Minnesota increased from 900 acres and 90,000 pounds in 1968 to 14,000 acres and 4,300,000 pounds in 1980. See E. Oelke, Introduction, in WILD RICE PRODUCTION IN MINNESOTA, UNIVERSITY OF MINNESOTA, AGRICULTURAL EXTENSION SERVICE 5 (Extension Bull. 464, 1982).

132. G. ROSSMAN, supra note 88, at 23; see also F. EDMAN, supra note 33, at 76-79.

133. G. ROSSMAN, supra note 88, at 23.

134. Telephone interview with Dr. Landis Boyd, supra note 80.

135. Id.

136. Id.
year. The duties of the director were added to the existing duties of the officer assigned to the task with no additional compensation. Although disputes continued over the management of water levels that affected the natural wild rice beds, the Wild Rice Director had a relatively low profile.

For many years, implementation of the wild rice regulations was carried out by Paul Krueger, a conservation officer who viewed this task as a “labor of love.” He was widely respected by people engaged in wild rice harvesting and was viewed as seeking to protect both the crop and the traditional method of harvesting.

In the late 1970’s, shortly after wild rice was beginning to show great commercial potential, Mr. Krueger relinquished his duties. Since then, largely because of the increasing development of paddy rice and the additional factors discussed in the following sections, the lake rice/paddy rice conflict has been made public.

137. Interview with Ronald Libertus, supra note 50, at 12-14.
138. Id. at 4-5.
139. Id.
140. Id.
141. For example, rising concern over the inroads that paddy rice was making upon traditional harvesting began to appear in reports contained in a variety of newspaper articles. Rigert, supra note 96; Burnson, Superlative wild rice season anticipated, Brainerd Daily Dispatch, Aug. 10, 1980, at 6, col. 1; Burnson, 1978 Wild Rice Crop a Disaster, Pilot Independent, Aug. 31, 1978, at 1, col. 1 [hereinafter cited as 1978 Disaster]. About this time, judicial proceedings were initiated by two Indian tribes in an effort to enforce the remnants of sovereignty that were contained in various treaty provisions with the United States. E.g., Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165 (1977); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (N.D. Me.), aff’d, 528 F.2d 370 (1st Cir. 1975).

In Minnesota, one member of the Indian community engaged in ricing on the Mississippi River without a state permit. When prosecuted, he challenged the application of regulatory provisions to him on the ground that he had the right to undertake ricing without a permit under provisions of various treaties with the Chippewa Indians. State v. Keezer, 292 N.W.2d 714 (1980), cert. denied, 450 U.S. 930, reh’g denied, 450 U.S. 1035 (1981). For a discussion of Keezer, see Note, Treaty Interpretation—Off-Reservation Rights—Chippewa Indians Retain No Off-Reservation Right to Harvest Wild Rice Without Minnesota License, State v. Keezer, 292 N.W.2d 714 (Minn. 1980), 4 HAMLINE L. REV. 373 (1980). In addition, the Minnesota Attorney General’s Office instituted antitrust proceedings against some paddy growers. This was ultimately settled out of court by way of stipulation. In State v. United Wild Rice, Inc., No. 28043 (Dist. Ct. Itasca County 1981), the parties by stipulation, consented to a judgment which: 1) enjoined United Wild Rice (UWR) from monopolizing or attempting to monopolize wild rice markets; 2) required that individual members be allowed to withdraw their shares of the cooperative inventory of UWR; 3) limited the current and future bargaining contracts with members to two years; 4) enjoined UWR from purchasing in excess of 500,000 pounds of green wild rice from non-members for 1982 and 1.2 million pounds for 1983; 5) limited the month end finished wild rice inventories of UWR; and 6) required payment of $25,000 from UWR to the state. Id. at 2-4.
Of particular interest are the regulations promulgated since 1977, the 1981 labeling legislation which specifically addresses the lake rice/paddy rice conflict, and recent research into wild rice and its ecology. These developments provide the basis of our suggestions for the future management of wild rice as a resource.


When Paul Krueger resigned as Wild Rice Director in 1977, he was replaced by another officer, Earl Lhotka. Shortly after assuming his duties, Mr. Lhotka announced that he intended to "deregulate" the wild rice harvest. Deregulation did not change the mandated methods of harvest; rather it set the season for the wild rice harvest and specified the permitted dates and times of the harvest. It may also have reflected a deemphasis on protection of the natural lake crop in light of developments in paddy rice research. Apparently, the rationale behind deregulation was to permit harvesting only the mature plant. The director assumed that people simply would not harvest rice before it ripened.

The results of deregulation were almost disastrous in 1977. Harvesters, including many non-Indians who were drawn to the activity because of the rise in commercial price, entered the rice beds while the grain was still green and destroyed much of the harvest. The 1977 yield was one-half million pounds, one of the lowest in many years. There was a similar result in 1978 when less than three-quarters of a million pounds of rice were harvested. Indian people were outraged by the destruction of the natural wild rice beds in 1977 and 1978.

During this time, Ronald Libertus, an enrolled member of the Leech Lake Band of Minnesota Chippewa Tribe, was serving as the liaison between the state and the Leech Lake Band on tribal relations matters. Mr. Libertus, a long-time wild rice harvester raised on the Leech Lake Reservation, expressed his concern and

142. See infra text accompanying notes 215-20.
143. Interview with Ronald Libertus, supra note 50, at 8.
144. Id.
145. Id. at 9.
146. This theory is sometimes referred to as the "blueberry theory." Both blueberries and rice should be picked only when they are ripe and no longer green. Id.
147. Id. at 9-10.
148. Id. at 10.
149. Id. at 11.
150. Id. at 8.
that of the Indian people to the recently appointed Commissioner of the Minnesota Department of Natural Resources, Joseph Alexander. After taking the matter under advisement, Commissioner Alexander appointed Mr. Libertus as Wild Rice Director, following the practice that had begun with the 1939 legislation. Since then, Mr. Libertus has served as Wild Rice Director for part of each year in addition to his duties in the DNR.

Ronald Libertus did not reinstitute the regulations in effect before the disastrous two-year experiment with deregulation. He took note of the increasing pressure of commercialization upon the traditional methods of wild rice harvesting, the natural beds, and the reliability of lake rice as a traditional source of supplemental income. Mr. Libertus formulated a regulatory program within existing statutory authorization to preserve the traditional importance of the lake crop. He established a Wild Rice Advisory Committee made up of people from throughout the state who had previously harvested wild rice in the traditional way. The committee included significant representation from a number of Indian communities and non-Indian people.

After travelling throughout the state and consulting with members of the Wild Rice Advisory Committee as well as others, Mr. Libertus proposed a regulatory scheme for the 1979 harvest. The regulations were adopted and promulgated by the DNR on July 31, 1979, as an “Order of the Commissioner.”

151. Id. at 10-12. Commissioner Alexander had previously served as a long-time conservation officer in the DNR.

152. Id. at 12.

153. Id.

154. Id. at 14-17.

155. Id.

156. Regulations for Harvesting Wild Rice During 1979, Commissioner’s Order 2034, Minn. Dept. of Natural Resources (1979) [hereinafter cited as Order No. 2034].

Certain provisions of the Order reflected recent litigation between the Leech Lake Band and the state. It was this litigation which led to the appointment of Ronald Libertus as the liaison between the state and the band for tribal relations.

In Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971), the court declared that plaintiff Indians have the right to hunt, fish, and gather wild rice on public lands and waters of the Leech Lake Reservation free of Minnesota game and fish laws. Id. at 1006. According to Professor Bernard P. Becker of William Mitchell College of Law, who represented the Leech Lake Band, this litigation “lived many lives.” Telephone interview with Bernard P. Becker, Professor of Law, William Mitchell College of Law (Nov. 23, 1983). Following this decision there were numerous challenges to the consent judgment reached between the state and the Indians. The issues of fishing, hunting, and ricing rights in the Leech Lake area were litigated again in state court in State v. Forge, 262 N.W.2d 341 (Minn. 1977), appeal dismissed, 435 U.S. 919.
August 27, the predicted date of the ripening of the rice, as the opening date of the harvest.\textsuperscript{157} The predicted date was too early, however, and the order was severely criticized.\textsuperscript{158} The criticism was unfounded because the order authorized the Wild Rice Director and other agents of the commissioner\textsuperscript{159} to "alter the days and the hours of harvest on any public waters by posting notice thereof at major entrances to the waters affected no less than 12 hours prior to the time such alterations [were] to take effect."\textsuperscript{160} Several lakes with special problems were not opened by the order; instead, notices were posted on the shores at the lakes' major entrances by Deputy Directors of the Harvest at least forty-eight hours prior to the opening.\textsuperscript{161}

The new regulations still were unsatisfactory to many persons concerned with wild rice, and criticism continued.\textsuperscript{162} Much of the dissatisfaction came from people engaged in commercial wild rice operations. The extent of the criticism was evidence of the significant inroads on the traditional wild rice market made by paddy rice growers and processors.\textsuperscript{163}

In 1980, after further consultation, Mr. Libertus recommended an alternative to the 1979 system. A 1980 Order of the Commissioner of the Department of Natural Resources\textsuperscript{164} contained several innovations, especially the use of Deputy Directors of the Wild Rice Harvest. The order vested authority in authorized agents of the commissioner to carry out restrictions on the timing of the harvest and provided for shared authority for setting the opening date. The 1980 Order did not specify an opening date; it took a new approach:

The opening date for the harvesting of wild rice shall be no
earlier than August 1, and no later than September 30 of any year . . . . [E]xcept as provided by Section 10 of this Order, the opening date, days and hours of harvest shall be established by the wild rice director in writing no less than 72 hours prior to the opening thereof and shall be publicly announced by the issuance of a news release made available to news services and radio and television.165

The order governing the wild rice harvest has remained in effect since its initial promulgation. Although the quoted section applies to all public waters in the state, public waters within the boundaries of Indian reservations are subject to the regulations and opening date as determined and announced by the Wild Rice Committee of each Reservation Business Committee. Members of the committees are appointed Deputy Directors of the Wild Rice Harvest under the 1980 Order and empowered to establish opening dates as well as restrictions on ricing pursuant to the order.166 The order also acknowledges the authority of the Reservation Business Committee to require a reservation permit as well as a state license to harvest wild rice on the Leech Lake Reservation.167

In addition to the new provisions added by the 1980 Order, the character of the order was markedly different from the 1979 Order. Because the order was undated, it became a standing order of the commissioner. In accordance with the standing order, the opening of the 1980 wild rice harvest season, August 15, was announced in a press release issued August 11, 1980. The news release also contained the specific dates and the hours during which harvesting would be permitted.168

Again in 1981, a news release was issued under the commissioner’s standing order to open the harvest.169 One innovation in the 1981 news release, however, was the opening of the season on the “free waters in Itasca County” on August 17 and the prohibition of harvesting in the rest of the state until August 27.170 Included was a cautionary note that the opening of the season in the remainder of the state might be delayed beyond August 27 if the

165. Id. § 2.
166. Id. § 10, subds. 2-4.
167. Id. § 11. This special treatment of the Leech Lake Indian Reservation reflects the litigation which occurred between the band and Minnesota. See supra note 156.
170. Id.
rice was not sufficiently ripe for harvest.\textsuperscript{171} This innovation in the 1981 press release reflected the historic experience of traditional ricers: not only does rice ripen sequentially in a particular bed, but it ripens at different times in different parts of the state.\textsuperscript{172} In 1982 and 1983 the same procedure was followed: the commissioner issued a news release specifying flexible restriction procedures tailored to individual conditions in individual lake beds.\textsuperscript{173} This system has proved successful in terms of the harvest yield,\textsuperscript{174} although it has continued to attract criticism from commercial ricing operators.\textsuperscript{175}

\textbf{B. The 1981 Labeling Legislation}

The lake rice/paddy rice controversy which was made public in 1977 reached the state legislature in 1981. At the center of the controversy was a bill that sought to preserve traditional lake crops by requiring paddy rice to be labeled a domestic crop.\textsuperscript{176} The disagreement between the bill's proponents and opponents boiled down to a dispute between people interested in preserving the lake crop, largely Indian people, and the commercial developers of paddy rice.\textsuperscript{177} The question was whether a distinction could be made between lake and paddy rice.\textsuperscript{178} Claims were made that despite identical genes, different labeling was justified because they differed in coloration, taste, and the particular characteristics of the plants that were selected from among the natural crop for propagation on paddies.\textsuperscript{179} Many people claimed that the differences could be attributed to the traditional method of processing which was used for much of the lake grown crop.\textsuperscript{180}

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\textsuperscript{171} Id. \textsuperscript{172} Interview with Ronald Libertus, supra note 50, at 6, 36-37. \textsuperscript{173} Wild Rice Harvesting Season News Release, Minn. Dept. of Natural Resources (Aug. 18, 1982). The News Release provided that "wild rice beds in many lakes and streams will not be ripe when the season opens August 25 and some of these lakes may be further restricted by local conservation officers. Wild rice beds covered by special restrictions will be posted at public access sites." Id. \textsuperscript{174} According to Ronald Libertus there was a bumper crop in 1980 of between 2 1/2 to 3 million pounds. Interview with Ronald Libertus, supra note 50, at 25. \textsuperscript{175} Dawson, supra note 162; Rigert, supra note 162. \textsuperscript{176} Act of May 21, 1981, ch. 249, § 1, 1981 Minn. Laws 1044, 1044 (codified at MINN. STAT. § 30.49 (1982)). \textsuperscript{177} The Paddy Rice Labeling Act: Hearings on H.F. 756 Before the Agriculture Comm., Minn. Legis., 72nd Sess. (Apr. 8, 1981). \textsuperscript{178} Id. \textsuperscript{179} Id. \textsuperscript{180} Interview with Ronald Libertus, supra note 50.
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The decisive vote in favor of the legislation was taken in a senate committee after a cooking demonstration by Ronald Libertus; paddy rice was compared with lake rice which had been processed in the traditional way.\footnote{Id.} The bill was approved on May 21, 1981, and became effective January 1, 1982.\footnote{Id.} The brief language of the bill specifies the following:

All wild rice which is planted or cultivated and which is offered for wholesale or retail sale in this state shall be plainly and conspicuously labelled as "paddy grown" in letters of a size and form prescribed by the commissioner. Any person who sells wild rice at wholesale or retail which is not labelled as required by this section is guilty of a misdemeanor.\footnote{Id.}

The bill was passed as an amendment to the Minnesota Statutes relating to the powers of the Commissioner of Agriculture, rather than those of the Commissioner of Natural Resources.\footnote{Id.} Accordingly, it is the agriculture commissioner's duty to implement the bill. As of Spring 1984, such implementation had not yet been undertaken by the Commissioner of Agriculture.\footnote{Id.} Whether the legislation will preserve a market for lake rice by recognizing the distinction between paddy and lake rice remains to be seen.

\section*{C. New Research in Wild Rice and Its Ecology}

Wild rice research historically has been devoted to two major concerns: investigating the horticulture of the plant\footnote{Dr. John B. Moyle, one of the nations leading aquatic biologists and a 40-year veteran of wild rice research, has studied the chemical, physical, and sociological factors of wild rice stand development. He has worked closely with the Minnesota DNR as a special technical advisor to the Director in regulating the seeding, cultivation, harvesting, and processing of wild rice. Unfortunately, the Wild Rice Director's program has been organized under the Fish and Game Division of the DNR and has not received separate funding earmarked for natural stand conservation and development. See Moyle, Wild Rice in Minnesota, 8 J. WILDLIFE MGMT. 177 (1944); Moyle & Krueger, Wild Rice in Minnesota, CONSERVATION VOLUNTEER, Nov.-Dec. 1964, at 30; J. MOYLE, WILD RICE-SOME NOTES, COMMENTS AND PROBLEMS (Dept. of Conservation, Div. of Game & Fish, Special Pub. #47) (prepared for a seminar on wild rice, Dept. of Agronomy & Plant Genetics, Univ. of Minn., St. Paul, Nov. 1967); see also Grava, Wild Rice Fertilization Research, in MINNESOTA WILD RICE RESEARCH 1982, at 1 (Jan. 20, 1983) (University of Minnesota Agricultural} and re-
searching a non-shattering variety for propagation in paddies, which would be useful to the commercial cultivation, harvesting, and distribution of wild rice. The research occasionally touches on, but is not primarily devoted to, implications for management of the lake rice crop in a larger ecological context. Research relating the human harvest to the importance of wild rice as a food source for animals has been undertaken only in recent years. Not only is the focus of the new research broader, but the sponsor has changed. The earlier research was carried out primarily by state government or the state-supported Institute of Agriculture at the University of Minnesota. The broader ecological research has been sponsored by the federal government through the Department of the Interior (the Department) and the COE.

Under the auspices of the Department, a team of researchers undertook to develop a resource management policy for the Sherburne Wildlife Sanctuary, which is located approximately fifty miles north of the Minneapolis-St. Paul metropolitan area. As part of the study, the team was commissioned in 1979 to specifically study the stands of native wild rice on several bodies of water located within the sanctuary. Although the amount of lake rice found there is relatively small compared to the state's total supply, the Department undertook the study as part of its general statutory mandate to consider the impact of its management policies on all aspects of the environment within its jurisdiction. The primary research was conducted by Genevieve and William Fannucchi, who were graduate students at the College of Natural Resources, University of Wisconsin-Stevens Point.

The Fannucchis' final reports were completed in December


188. G. Fannucchi, supra note 5; W. Fannucchi, supra note 5.

189. G. Fannucchi, supra note 5; W. Fannucchi, supra note 5.


191. G. Fannucchi, supra note 5; W. Fannucchi, supra note 5.
1983. They examined the effect of the human harvest of wild rice on the ability of the grain to propagate itself and feed the small animals and birds dependent upon the lake crop. In short, they concentrated on wild rice ecology within the larger environmental context in which animals, including humans, affect the environment. The Fannucchis' reports were based upon data gathered during the 1980 and 1981 growing seasons.

The Fannucchis' research suggests that a management policy can be developed to permit both propagation and human harvesting of wild rice stands, while preserving the capacity of the stands to serve as food sources for dependent animals. The results indicate that without such a policy, there is a danger that unrestricted wild rice harvesting by humans might seriously impair the capacity of the rice stand to remain an important food source for dependent animals and, in extreme cases, to propagate itself.

In addition to the research sponsored by the Department, the COE, pursuant to its duty under applicable environmental statutes, has undertaken a complete study of its management policies relating to the Upper Mississippi Headwaters. Because of the environmental mandate now applicable to all federal agencies, the study by the COE ranges far beyond its traditional preoccupation with the management of waterways for navigational purposes. Completed in September 1983, the study provided extensive findings that may be used to formulate management policy decisions for water levels in the Mississippi headwaters. Because these waters support many lake rice stands and affect contiguous lakes that also have stands of lake rice, the COE's study could be of great importance to the future of wild rice. The problem of lake and river level management has been a source of significant and continuing controversy between Indian people and the

192. See G. Fannucchi, supra note 5; W. Fannucchi, supra note 5.
194. W. Fannucchi, supra note 5, at 4-7, 15, 28-33.
195. G. Fannucchi, supra note 5, at iii; W. Fannucchi, supra note 5, at iii.
196. See G. Fannucchi, supra note 5, at 26-31; W. Fannucchi, supra note 5, at 29-33.
200. Although the Mississippi River Headwater Lakes Feasibility Study, supra note 58, is exhaustive, according to Carl W. Stephan, planning division of the COE, it is a "negative report," which means that the COE decided to recommend no changes. Telephone interview with Carl W. Stephan, Project Manager (Nov. 16, 1983).
government.201

V. TOWARD A COMPREHENSIVE STATE POLICY FOR WILD RICE MANAGEMENT

A. Summary of Trends: The State’s De Facto Management Policy

The effect of European settlement upon wild rice production can be seen in several general trends. The area of lake ricing has been reduced, fewer Indian people harvest rice, and a substantial proportion of the available rice is harvested by non-Indians. The growth of non-Indian participation in all phases of wild rice cultivation paralleled the increase in the economic value of the crop. With the growth of non-Indian control over processing and distributing facilities, Indian people’s participation in the annual wild rice harvest changed dramatically. Indian people who now harvest wild rice are often significantly dependent on the processors and distributors.

Minnesota’s paternalistic regulation soon shifted to the support of paddy rice developers. In the past, the conflict between Indian and non-Indian people seemed to be external to the state agricultural economy. Hence, it was relatively easy for state government, in theory if not in practice, to come out on the side of Indian people. With the development of paddy rice by non-Indians and its increasing significance to the state agricultural economy as a cash crop, however, an economic rivalry was created. To date, the state has supported the commercial development side of the rivalry. The Indian people do not benefit significantly from the state’s current position. The problem posed for the future is whether a rationale can be established for rechanneling governmental support to Indian people. The growing economic stakes in paddy rice development may obstruct the realignment of state power.202

State management of the wild rice season has been controversial

201. See, e.g., supra text accompanying notes 44-47. Mr. Stephan, supra note 200, emphasized that the Indian water rights findings, Feasibility Study, supra note 58, at F-11 app., led to the following proposals: 1) “the parties should mutually agree on a recommended lake level plan in the Leech Lake growing season that would be identified as a ‘conservation’ plan for the Mississippi River Headwaters Study.” 2) “A 6 year base data study should be initiated to collect future information on Leech Lake rice production . . . .” For a complete description of the above proposals and the rationale behind them, see id. at F-1 to -14 app.

from the outset. Two points of controversy have emerged in recent years: the timing of the ricing season\(^{203}\) and the state's exclusive control over harvest decisions.\(^{204}\) Indian people, on occasion, have maintained that their sovereign power over ricing cannot be altered by the state.\(^{205}\) This argument was unsuccessfully raised as a defense in a criminal prosecution recently decided by the Minnesota Supreme Court.\(^{206}\) Nevertheless, further invasion by non-Indians into the management of the wild rice crop followed the experimentation in varietal selection that ultimately led to the development of paddy rice farming. Acknowledgment of the Indian people's interests in wild rice is not evident.

Paddy rice is almost certain to become the chief source of wild rice in the future if present trends continue. The change in harvesting techniques made possible by paddy rice farming has reduced the labor requirements. Consequently, paddy rice farming can be expected to attract significant capital investment. Unquestionably, investors will come from the non-Indian community because the American Indian community, for the most part, does not have sufficient resources to invest in paddy rice farming. Thus, the current economic disadvantage of the American Indian community in the wild rice market is likely to worsen.

The upshot of these trends is that the wild rice harvest is being taken over by the non-Indian community and Indian people are being threatened with further displacement. Although the old order that prevailed before European settlement cannot be recaptured, the history of the devastation of American Indian culture and society can be the basis for recognizing a contemporary responsibility. This recognition can ensure that Indian people are not driven out of wild ricing as they were driven off their lands. In addition, awareness of a continuing responsibility may serve as the impetus for providing the necessary economic assistance to enable Indian people's full participation in paddy rice production by fa-

\(^{203}\) Burnson, 1978 Disaster, supra note 141, at 1, col. 1; Dawson, supra note 162.


cilitating the establishment of their own paddy rice projects.\textsuperscript{207}

\textbf{B. Unresolved Issues in Wild Rice Management}

Since the first Europeans settled on Indian land, controversy has surrounded the annual harvest of wild rice. The issues in the controversy have changed over time and currently center on the mechanization and commercialization of wild rice production. Some old issues remain unresolved and dominate the current controversy.

The old issues include those relating to treaty rights. For example, in a recent case, a claim was made under a treaty provision.\textsuperscript{208} Notwithstanding such treaty claims, Minnesota's right to regulate the wild rice crop is now firmly established, although, at some future date, it may be subject to modification by federal law.\textsuperscript{209} The right of organized Indian tribes to license and regulate the gathering of wild rice within the boundaries of Indian reservations also is established.\textsuperscript{210} Finally, at least for the present, the issue of permissible harvesting methods has been resolved; the lake crop is not threatened by mechanization.

Perhaps the longest standing issue concerns the management of water levels in the Mississippi Headwaters. The issue arose near the turn of the century when the COE began regulating water levels and continues to mark the relations between Indian people and the federal government.

Another unresolved issue is the continuing problem, recently thrust into the spotlight by new state regulatory policies, of determining the opening date of the wild rice season. Although in recent years temporary solutions have satisfied some of the complaints, the policy behind the "Libertas Regulations"\textsuperscript{211} has not had a significant scientific foundation in the broader environmental context, as recommended by some of the recent research.\textsuperscript{212}

Finally, and perhaps most importantly, the continuing dispute

\begin{itemize}
  \item \textsuperscript{207} Such a project might include Indian owned and operated paddy rice fields as presently found on the Leech Lake Reservation, or a cottage-industry in lake rice harvesting and processing assisted by the state. \textit{See infra} text accompanying notes 215-20.
  \item \textsuperscript{209} U.S. CONST art. VI, § 2 (supremacy clause).
  \item \textsuperscript{211} \textit{See supra} text accompanying notes 154-75.
  \item \textsuperscript{212} \textit{See supra} text accompanying notes 188-96.
\end{itemize}
over the questions of whether and how to construct a scheme for the differential treatment of the lake and paddy rice crops remains unresolved. The labeling legislation of the 1981 session has not yet been implemented.\textsuperscript{213} If implemented, the question would remain whether the lake rice market would be preserved as an important source of supplemental income for the Indian people dependent upon it.

These unresolved issues suggest that the wild rice controversy will continue until governmental initiatives lead to a comprehensive resource management policy that deals with the various interests at stake, or until one of the interests succeeds in dominating wild rice cultivation, processing, and distribution. The issues illustrate that the fundamental problem is the failure of the state to clarify its role and take a clear position on wild rice management.

The state's role in the wild rice issue is fraught with ambiguities and contradictions. On the one hand, state agencies follow a paternalistic policy in protecting some Indian rights vis-a-vis wild rice. On the other hand, these and other agencies facilitate, without restriction, the development of industrial techniques which expand the commercial potential of paddy rice. Paddy rice is primarily produced and sold by non-Indian people, and thus poses a serious threat to Indian people dependent upon lake crops to supplement their meager incomes.

\textbf{C. Wild Rice as a Natural Resource and Agricultural Crop: Suggestions for the Development of a Comprehensive State Management Policy}

The unresolved issues relating to wild rice and the current controversy over the developing paddy rice enterprise can be resolved by a comprehensive state resource management policy. This policy should be based upon sound ecological research examining the position of wild rice in relation to the animals dependent upon it as a food source, the Indians who harvest it to feed themselves and their families, the Indians and non-Indians who harvest it for its income potential, and those who cultivate and produce it as a cash crop. These competing uses need not be regarded as mutually exclusive. Accommodating them, however, will require a management policy that is rooted in a sound ecological understanding of the larger environment of wild rice production. The policy must

\textsuperscript{213} See supra text accompanying notes 176-85.
take into account not only ecological principles, but the social consequences to the commercial growers and those dependent upon the lake crop for income supplementation.

To accomplish this broad goal, Minnesota should reexamine the bases of its current wild rice legislation. Wild rice is a product that distinguishes Minnesota, as wines distinguish France and California. Wild rice production and marketing is worthy of special protection and promotion. To protect and promote wild rice, the state should adopt a comprehensive management policy including: (1) promotional labeling; (2) ecologically based resource management; (3) centralized authority for policy implementation; and (4) legal initiatives under existing federal law. These four elements provide a comprehensive approach for the resolution of the wild rice controversy and its associated problems. Since the state has played an important role in the past, it should continue to do so in the future. Indeed, each of the four elements of the policy requires comprehensive management and vigorous advocacy by the state government.

I. Promotional Labeling

The state should aid distributors of lake grown wild rice to cultivate and captivate the gourmet market. It is clear that gour-
mands know the difference between wild mushrooms and commercially grown mushrooms. A similar distinction should be recognized for lake rice and commercially grown paddy rice. Although of the same species, they are distinct in color, preparation time, and taste. The best solution is not to rely upon the Commissioner of Agriculture to decide whether "paddy grown" indicia on labels are conspicuous, and to spot-check retail outlets for violations of the state labeling legislation. Rather, the most effective solution would be for the state to give special labels to wild rice distributors which certify the product as "Minnesota Lake Grown Wild Rice."

Such a proposal is not entirely new to Minnesota. In the mid-1970's, a joint project sponsored by the Governor's Rural Development Council and the University of Minnesota Agricultural Extension Service developed a special cheese culture. Selected dairy farmers received information on running a small family cheese processing plant by using a special culture. The dairy farm-based processing model is similar to European concepts to promote "cottage industries." The product is "Minnesota Farmstead Cheese."

In 1977, the legislature fixed the requirements for labeling the cheese from the specially selected dairies. No cheese may be labeled "Minnesota Farmstead Cheese" unless it is manufactured within the state and "on the same farm on which the milk is produced that is used in the manufacture." A dairy farmer wishing to market cheese produced from the special culture must apply for a permit authorizing the use of the name "Minnesota Farmstead Cheese."

2. Ecologically Based Resource Management

In addition to the recommendation for promotional support, wild rice resource management must rest on a sound ecological basis. This should include methods for harvest and water level management that are developed and regulated to harmonize with human and environmental interactions. This kind of regulation may require imposing restraints upon the procedures used by com-

216. MINN. STAT. § 30.49 (1982).
217. AGRICULTURAL EXTENSION SERV.: UNIV. OF MINN., MINNESOTA FARMSTEAD CHEESE 2 (n.d.).
218. MINN. STAT. § 32.486 (1982). For a facsimile of a label, see Fig. 1, infra p. 804.1.
219. Id. § 32.486, subd. 1.
220. Id. § 32.486, subd. 3.
mercial wild rice harvesters. The research recently concluded by the federal team at the Sherburne Wildlife Sanctuary is a promising and important first step in developing the scientific base necessary to develop a comprehensive management policy. Additional studies should investigate the variations in wild rice environments within Minnesota.

3. Centralized Authority for Policy Implementation

Concurrent authority for developing and implementing policy for wild rice management is shared by the DNR and the Department of Agriculture. To assure uniformity in implementation, the state legislature should create a single authority to implement the policy and make necessary modifications. Serious consideration should be given to combining all wild rice functions of the DNR and the Department of Agriculture under a separate Director of Wild Rice Resource Management. Combined centralized resource management responsibility could aid in securing development of a policy supporting wild rice both as a natural resource (the lake crop) and as an agricultural cash commodity (the paddy crop) without sacrificing either for the other. Ideally, the director's authority should be independent of both departments. If such independence is impracticable, it may be possible to create a joint authority. Shared authority would draw upon the resources of both departments, under one full-time director, who should report directly to the Governor on matters concerning wild rice. One drawback of this approach is its potential for conflict with decentralized tribal control. Diverse interests could be accommodated by ensuring that the tribal authorities participate in wild rice governance with the centralized authority.

4. Legal Initiatives Under Existing Federal Legislation

Not all problems concerning wild rice can be confined within state boundaries. California growers have developed paddy grown wild rice221 and have flooded the market with rice labeled “wild rice.”222 The proposed comprehensive management policy cannot fully deal with this threat. The state, however, could play an im-

221. Leschak, supra note 62, at 83. Gibbs Wild Rice, from Deer River, Minnesota, took paddy rice production out of the state and cultivated and harvested it in northern California in 1983. Eventually the company hopes to plant 2000 acres of paddy rice in California. Id.; see also supra note 91.

222. Leschak, supra note 62, at 83.
portant role as an advocate for wild rice harvesters and protect the market for lake rice under common and federal law.

Several existing legal remedies might prevent the commercial growers in other states from marketing paddy rice as natural lake wild rice. To prevent growers and distributors from claiming their paddy rice is natural lake grown wild rice, an association of lake rice distributors or the state\(^{223}\) could bring an action alleging misrepresentation.\(^{224}\) Such an approach would be expensive, however.

A less costly method would be to urge the Federal Trade Commission (FTC) to initiate a charge under the Federal Trade Commission Act\(^{225}\) (FTCA). Under the FTCA, anyone can register a protest by writing a letter setting "forth the alleged violation of law with such supporting information as is available, and the name and address of the person or persons complained of."\(^{226}\) Complainants are not parties in FTC actions,\(^{227}\) but in unfair competition cases, parties may apply to intervene in the proceedings.\(^{228}\) The FTC acts only upon cases that will further the "interest of the public."\(^{229}\)

The FTC uses a cost/benefit analysis to determine "public interest." The analysis consists of three factors: (1) the scope as measured by geographical size and dollar amount; (2) the seriousness of impact on consumers and other competitors; and (3) the estimated cost of resolving the complaint.\(^{230}\) To prompt action by the FTC, complainants should maximize these three factors. If Minnesota were to file a complaint representing all wild rice harvesters and producers, the likelihood of initiating FTC action would be greatly enhanced.

The suggestion to register a complaint with the FTC is made

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\(^{223}\) Harvesters and distributors of Minnesota lake wild rice should consider incorporating as a non-profit cooperative association as did the Farmstead Cheese makers. The Cheese Association found that it could centralize billing, buy insurance (some markets refuse to sell products not covered by liability insurance), and arrange for the shipping of cheese. *See Minnesota Farmstead Cheese*, supra note 217, at 19-20.

\(^{224}\) Restatement (Second) Torts app. § 552D (1981) (misrepresentation by sellers of chattels to public).


\(^{226}\) 16 C.F.R. § 2.2(b) (1983).

\(^{227}\) Id. § 2.2(c).


\(^{229}\) Id.

with a cautionary note. The FTC is concerned primarily with the negative effects of false advertising on consumers, especially those who have little opportunity to make alternate purchases or do comparison shopping. The FTC would probably consider wild rice as an upscale commodity because economically advantaged people usually buy the product. The FTC could refuse to initiate an order for this reason alone.231

If the FTC took no action because of the economic prosperity of wild rice buyers, it may overlook the importance of accurate advertising and labeling for the urbanized American Indian community. Consider the following information related to the authors by a law clerk for the American Indian Center in St. Paul, Minnesota.232 Before the 1982 Thanksgiving holidays, a food store donated what they thought was naturally grown wild rice to be distributed without cost to the American Indians who frequented the community center. After receiving inquiries and checking with the distributor, it was discovered the rice was paddy grown. The Indians refused to take the free rice, even though it meant their children might go hungry, because the paddy rice offended their cultural and religious sensibilities. Labeling the paddy rice as wild rice was analogous to misrepresenting non-kosher food as kosher.

The FTC is only one governmental agency that might aid the wild rice distributor. The Federal Food and Drug Administration (FDA), acting under the Food and Drug Control Act233 (FDCA), also offers some hope of protection. In the current political atmosphere of deregulation, a petition to the FDA for an opinion letter is most likely to produce immediate but limited action.234 The ideal opinion letter would set a standard of identity excluding paddy grown wild rice from the same category as naturally grown wild rice. The petition requesting the opinion letter must show that the issue is one of broad applicability.235 If an opinion letter answer is unfavorable, it is nonetheless binding.236 Absent specific regulations to the contrary, however, the statements of a govern-

231. S. Kanwit, supra note 230, § 2.15.
235. Id. § 10.85(a)(2)(iv).
236. Opinion letters, however, have no binding legal effect on the government agency. 40 Fed. Reg. 22962 (May 27, 1975).
ment employee do not bind the government and represent only the best judgment of the employee.

If the opinion letter fails to produce the desired result, concerted action must be taken to challenge it. Petitioning the agency, relying on FDCA provisions which state that any "interested persons" and "persons who will be adversely affected" have the right to request agency action, may accomplish better results. The state or lake rice association would have the burden of showing sufficient justification to regulate the types of rice sold as "wild rice."

The requirements for justifying regulation of a product are found in the FDCA and corresponding regulations. Petitioners must show that the request for a food standard will "promote honesty and fair dealing in the interest of consumers." To establish this, it must be shown that the consumer actually relies upon the word "wild" to connote undomesticated lake rice. If the FDA agrees that consumers are misled, it will promulgate a new food standard under the FDCA and applicable regulations.

VI. CONCLUSION

For many years, the traditional cultural and social significance of wild rice for Indian people has been threatened. Recently, the viability of wild rice as a supplemental income source for Indian people has also been threatened. Industrialization and commercialization of wild rice production have produced these threats and caused a clash of interests. The clash is primarily between Indian and non-Indian cultures. A comprehensive resource management policy rooted in sound environmental principles, and accommodating the ecological and social concerns of the competing cultures, would offer a partial resolution. In addition, revising and implementing state labeling procedures and using existing federal legislation would be beneficial.

Failure to take action increases the possibility that the state will develop biased policies supporting the commercialization of paddy rice. Such policies could only result in the continued erosion of wild rice harvesting as an important source of income for Indian
people and the further destruction of the traditional mystique of wild rice. The policy adopted by Minnesota will determine the ultimate resolution of this culture clash. The exploitation of Indian people has placed their future welfare and rights in the hands of a dominant non-Indian culture. Benevolent paternalism by the state is not the answer. The solution is a comprehensive policy that respects the traditional mystique of wild rice and the contemporary economic importance of wild rice to all Minnesota citizens.
### STATUTORY APPENDIX
#### MINNESOTA WILD RICE LEGISLATION

| Act of Apr. 25, 1931, ch. 373, 1931 Minn. Laws 480. | Minnesota’s first wild rice law. | § 1: Wild rice not to be harvested with machinery.  
§ 2: Wanton destruction of wild rice plants unlawful.  
§ 3: Violation of sections 1 or 2 is a misdemeanor. |
§ 3: Boats used to harvest must be propelled by hand and have a top width of not more than 30 inches.  
§ 4: Required license to harvest.  
§ 6: License fees set at $50.00.  
§ 7: Nonresidents denied right to obtain a license.  
§ 8: Required wholesale dealers to obtain license and pay a $5.00 fee.  
§ 9: Unlawful to harvest “green rice,” which was defined as “wild rice containing more than 15 percent of grain still in the milk . . . .”  
§ 10: Outlawed harvesting at night.  
§ 11: Authorized Commissioner of Conservation to appoint a Director of the Wild Rice Harvest. Director to be paid $300.00 per year and empowered to designate the harvest season.  
§ 12: Authorized commissioner to restrict or prevent harvest on public waters.  
§ 13: “Family” defined as the “immediate family.”  
§ 15: Director of Game and Fish is not restricted by provisions of this Act.  
§ 16: Established penalties for violations including a misdemeanor penalty. |
Act of Apr. 14, 1941, ch. 217, 1941 Minn. Laws 435 (revised at MINN. STAT. §§ 84.10-15, 97.033, 98.153, 98.156 (1941)).


§ 1: Extended date for Indians' exclusive right to harvest on certain reservations to 11/1/43.

§ 2: Changed top width for harvest craft from 30 to 36 inches and set length at not more than 16 feet.

§ 3: Added provision prohibiting possession of illegally harvested wild rice.

§ 4: Added provision vesting ownership of rice on public waters in state.

§ 5: Provided for agents for sale of licenses to be located near each rice bed.

§ 6: Added provision that no license shall be required for wholesalers on the first 500 pounds of rice purchased.

§ 7: Changed "green rice" to "immature rice," defined as 15% or more grains adhering to any portion of stalk.

§ 8: Increased salary for harvest director from $300.00/yr. to $200.00/mo. for such periods as commissioner designates pay; pay for assistants.

§ 9: Changed definition of "family" to include legal guardian and wards.

Extended date for Indians' exclusive right to harvest on certain reservations until 11/1/45.


Extended date for Indians' exclusive right to harvest on certain reservations until 11/1/47. Added Leech Lake and Fond Du Lac reservations.

Amending Minn. Stat. §§ 84.10, 98.46, subs. 1, 3 (1945).

Repealing Minn. Stat. §§ 84.11-13 (1945).


Amending Minn. Stat. § 98.46, subs. 1(7), 3(3) (1945).

Adding Minn. Stat. § 98.46, subs. 8-9.


Amending Minn. Stat. § 84.15 (1945).

§ 1: Made permanent Indians’ exclusive right to harvest on certain reservations.

§ 2: Required anyone over the age of 16 to pay license fee of $1.00 and required a $5.00 license fee for each boat used to harvest wild rice.

§ 3: Established resident and nonresident rice sellers or processors who sell to anyone but consumers to purchase license for $50.00.

§ 6: Repealed restrictions on watercraft, on harvest, sale, etc. of immature rice, and nighttime harvest.

§ 1: Allowed individual and family to harvest under $1.00 license fee and waived licensing for old age assistance recipients and immediate family. Added $50.00 license fee for anyone who sells imported wild rice.

§ 3: Prohibited use of motorboats and all boats over 36 inches wide and 16 feet long, and any mechanical device to harvest rice other than flails not over 30 inches long and weighing not over one pound.

§ 4: Prohibited harvesting of wild rice between the hours of 6 p.m. and 8 a.m. Prohibited the use of any pole, for propelling boats, which was not forked at the end with each fork less than 12 inches long.

Extended commissioner’s power to restrict harvest where effect otherwise may be to “endanger its effective use as a natural food for waterfowl.”
Act of Apr. 21, 1951, ch. 671, 1951 Minn. Laws 1124.

Amending MINN. STAT. §§ 84.14, 98.46, subds. 3, 18(1) (1949).

§ 1: Provided commissioner may appoint Director of Wild Rice Harvest and director may be paid salary not more than $250.00 a month.

§ 2: Provided for issuance of harvest identification cards to old age assistance recipients and members of immediate family.

§ 3: Established dealer's license fee of: $100.00 if amount bought, sold, or processed exceeds 50,000 pounds; $50.00 if the amount is between 10,000 and 50,000 pounds; or $15.00 if amount is less than 10,000 pounds. Raw rice weight shall govern.


Amending MINN. STAT. § 98.50, subd. 4 (1949).

Adding MINN. STAT. § 98.46, subd. 18(2)-(5).

Application for license made upon oath. Licensees required to keep a book or record of rice purchases, sales, and processing. Provided for supplemental licensing for those who exceed licensed limits. False statements punishable as misdemeanor under MINN. STAT. § 97.55.


Amending MINN. STAT. § 97.49, subd. 5 (1949).

Provided authority to commissioner to appoint agents within state for issuance of licenses.


Amending MINN. STAT. § 98.50, subd. 5 (1953).

Adding MINN. STAT. § 98.50, subd. 8.

§ 1: Provided for issuance of harvest identification cards to old age assistance recipients and members of immediate family.

§ 2: Provided for issuance of harvest identification cards to old age assistance recipients and members of immediate family.

§ 3: Established dealer's license fee of: $100.00 if amount bought, sold, or processed exceeds 50,000 pounds; $50.00 if the amount is between 10,000 and 50,000 pounds; or $15.00 if amount is less than 10,000 pounds. Raw rice weight shall govern.

Table: Provided authority to commissioner to appoint agents within state for issuance of licenses.

Provided for all fines and forfeitures of bail for violations of wild rice laws to be paid to the county treasurer in the county in which prosecution was commenced.

§ 1: Provided for issuance of harvest identification cards to old age assistance recipients and members of immediate family.

§ 2: Provided for issuance of harvest identification cards to old age assistance recipients and members of immediate family.

§ 3: Established dealer's license fee of: $100.00 if amount bought, sold, or processed exceeds 50,000 pounds; $50.00 if the amount is between 10,000 and 50,000 pounds; or $15.00 if amount is less than 10,000 pounds. Raw rice weight shall govern.
| Act of Mar. 8, 1957, ch. 85, 1957 Minn. Laws 98. | Adding MINN. STAT. § 84.15, subd. 2. | Provided for commissioner's harvest of not more than 10,000 pounds per year for purposes of research, experimentation, and reseeding of public and reservation waters. |
| Act of Mar. 25, 1959, ch. 129, 1959 Minn. Laws 163. | Amending MINN. STAT. § 84.14, subd. 1 (1957). | § 1: Vested harvest director with power to specify days and hours for harvest on open waters and portions of waters which may be harvested. |
| | Adding MINN. STAT. § 84.14, subd. 2. | § 2: Commissioner authorized, upon advice of director, to list waters open for harvest and rotate opening of beds to allow for reseeding. |
| Act of Apr. 24, 1959, ch. 445, 1959 Minn. Laws 586. | Amending MINN. STAT. § 84.111, subd. 1 (1957). | Regulated watercraft for harvest to no longer than 18 feet and with a top width of no more than 36 inches. Required smooth round bottom and sides with no ridges or protrusions on the watercraft. |
| Act of Apr. 24, 1959, ch. 684, 1959 Minn. Laws 1271. | Adding MINN. STAT. § 84.111, subds. 3-4. | § 1: Provided that it is unlawful to use machines for harvesting other than a flail not longer than 30 inches or over one pound weight. Unlawful to harvest in public waters between 3 p.m. and 9 a.m. |
| | Amending MINN. STAT. §§ 84.14, subds. 2-3, 98.46, subds. 3, 18 (1957). | § 2: Director may appoint committee to assist enforcing harvest laws. Notice of season published 5 days in advance and posted at each bed at least 24 hours before opening. |
| | | § 3: Required $3.00 license fee for residents and permitted persons under 16 years to harvest without a license. |
| | | § 4: Required $150.00 fee for purchase, sale, or processing over 50,000 pounds per year; $100.00 fee for purchase, sale, or processing over 25,000 pounds per year; $50.00 fee for purchase, sale, or processing over 5000 pounds per year; $15.00 fee for purchase, sale, or processing below 5000 pound per year. |

§ 1: Increased watercraft length to 18 feet.


§ 2: Repealed watercraft and equipment limits.


Authorized Director of Civil Service and Commissioner of Administration to establish salary for Director of Wild Rice Harvest.


§ 1: Provided that committee appointed by director to be in unclassified service to state and serve without compensation. Authorized committee to enforce harvest laws in same manner as game wardens.

§ 2: Provided that commissioner's orders need not address days and hours of harvest but opening days and hours shall be published and posted at rice bed not less than 48 hours before opening. Commissioner may alter days and hours of harvest after established if published and posted not less than 12 hours before opening.

§ 3: Enunciated policy in setting days and hours of harvest designed to obtain optimum quality and quantity of harvest consistent with adequate reseeding of wild rice beds.

Adding MINN. STAT. § 84.14, subd. 6.

§ 4: Violation of any provisions of MINN. STAT. § 84.14 constitutes a misdemeanor.
| Act of April 14, 1969, ch. 129, 1969 Minn. Laws 203. | Repealing Minn. Stat. § 98.50, subd. 8 (1965). | § 2: Repealed provision allowing commissioner to appoint agents to sell licenses and retain 8% of the proceeds as a commission. |

Specified wild rice growing in Beltrami County within Red Lake Game Preserve as “agricultural” and authorized county board to sell such lands with approval of Commissioner of Conservation.

New enactment. Recognized the rights of the Leech Lake Band of Chippewa Indians to gather wild rice on the Leech Lake Indian reservation and exempted members of this band from requirements of the commissioner. Established system of special licenses for persons not members of the Minnesota Chippewa Tribe to harvest wild rice; revenue from licensing to be credited to Leech Lake Band account.


Amending MINN. STAT. § 84.14, subd. 1 (1971). Person whom commissioner appoints as wild rice director need no longer be a “man.”


Amending MINN. STAT. § 84.14, subd. 1 (1974). Deleted provision allowing commissioner to establish director’s salary and benefits.

Act of May 17, 1979, ch. 104, 1979 Minn. Laws 146.

Amending MINN. STAT. § 98.46, subd. 18 (1978). Deleted provision delineating processors of wild rice and eliminated processors’ reporting requirements.


New enactment. Requiring that all wild rice planted or cultivated, and which is offered for wholesale or retail sale in Minnesota, be labeled as “paddy grown.” Commissioner of Agriculture to specify size and form of letters. Violation is a misdemeanor.


Amending MINN. STAT. § 98.46, subds. 3, 18 (1980). License fees for residents raised from $4.00 to $10.00 and dealer’s license fees raised: from $50.00 to $70.00 for selling up to 50,000 pounds of wild rice; from $200.00 to $250.00 for dealers selling over 50,000 pounds.
FIGURE 1
Facsimile of Minnesota Farmstead Cheese Promotional Label

Minnesota Farmstead Gouda
Natural Raw Milk

Semi-soft Natural Cheese  Aged at least 60 days
Produced only on Minnesota Dairy Farms