SUPREME COURT OF THE UNITED STATES

No. 97–1337

MINNESOTA, ET AL., PETITIONERS *v.* MILLE LACS BAND OF CHIPPEWA INDIANS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[March 24, 1999]

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1837, the United States entered into a Treaty with several Bands of Chippewa Indians. Under the terms of this Treaty, the Indians ceded land in present-day Wisconsin and Minnesota to the United States, and the United States guaranteed to the Indians certain hunting, fishing, and gathering rights on the ceded land. We must decide whether the Chippewa Indians retain these usufructuary rights today. The State of Minnesota argues that the Indians lost these rights through an Executive Order in 1850, an 1855 Treaty, and the admission of Minnesota into the Union in 1858. After an examination of the historical record, we conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty.

I

A

In 1837, several Chippewa Bands, including the respondent Bands here, were summoned to Fort Snelling (near present-day St. Paul, Minnesota) for the negotiation of a

treaty with the United States. The United States representative at the negotiations, Wisconsin Territorial Governor Henry Dodge, told the assembled Indians that the United States wanted to purchase certain Chippewa lands east of the Mississippi River, lands located in present-day Wisconsin and Minnesota. App. 46 (1837 Journal of Treaty Negotiations). The Chippewa agreed to sell the land to the United States, but they insisted on preserving their right to hunt, fish, and gather in the ceded territory. See, *e.g.*, *id.*, at 70, 75–76. In response to this request, Governor Dodge stated that he would "make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them." *Id.*, at 78. To these ends, the parties signed a treaty on July 29, 1837. In the first two articles of the 1837 Treaty, the Chippewa ceded land to the United States in return for 20 annual payments of money and goods. The United States also, in the fifth article of the Treaty, guaranteed to the Chippewa the right to hunt, fish, and gather on the ceded lands:

> "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [*sic*] to the Indians, during the pleasure of the President of the United States." 1837 Treaty with the Chippewa, 7 Stat. 537.

In 1842, many of the same Chippewa Bands entered into another Treaty with the United States, again ceding additional lands to the Federal Government in return for annuity payments of goods and money, while reserving usufructuary rights on the ceded lands. 1842 Treaty with the Chippewa, 7 Stat. 591. This Treaty, however, also contained a provision providing that the Indians would be "subject to removal therefrom at the pleasure of the President of the United States." Art. 6, *id.*, at 592.

In the late 1840's, pressure mounted to remove the Chippewa to their unceded lands in the Minnesota Territory. On September 4, 1849, Minnesota Territorial Governor Alexander Ramsey urged the Territorial Legislature to ask the President to remove the Chippewa from the ceded land. App. 878 (Report and Direct Testimony of Dr. Bruce M. White) (hereinafter White Report). The Territorial Legislature complied by passing, in October 1849, "Joint Resolutions relative to the removal of the Chippewa Indians from the ceded lands within the Territory of Minnesota." App. to Pet. for Cert. 567 (hereinafter Joint Resolution). The Joint Resolution urged:

> "[T]o ensure the security and tranquility of the white settlements in an extensive and valuable district of this Territory, the Chippewa Indians should be removed from all lands within the Territory to which the Indian Title has been extinguished, and that the privileges given to them by Article Fifth [of the 1837 Treaty] and Article Second [of the 1842 Treaty] be revoked." *Ibid.*

The Territorial Legislature directed its resolution to Congress, but it eventually made its way to President Zachary Taylor. App. 674 (Report and Direct Testimony of Professor Charles E. Cleland) (hereinafter Cleland Report). It is unclear why the Territorial Legislature directed this resolution to Congress and not to the President. One possible explanation is that, although the 1842 Treaty gave the President authority to remove the Chippewa from that land area, see 1842 Treaty with the Chippewa, Art. 6, 7 Stat. 592, the 1837 Treaty did not confer such authority on the President. Therefore, any action to remove the Chippewa from the 1837 ceded lands would require congressional approval. See App. 674 (Cleland Report).

The historical record provides some clues into the impetus behind this push to remove the Chippewa. In his

statement to the Territorial Legislature, Governor Ramsey asserted that the Chippewa needed to be removed because the white settlers in the Sauk Rapids and Swan River area were complaining about the privileges given to the Chippewa Indians. *Id.*, at 878 (White Report). Similarly, the Territorial Legislature urged removal of the Chippewa "to ensure the security and tranquility of the white settlements" in the area. App. to Pet. for Cert. 567 (Joint Resolution). The historical evidence suggests, however, that the white settlers were complaining about the Winnebago Indians, not the Chippewa, in the Sauk Rapids area. See App. 671–672 (Cleland Report). There is also evidence that Minnesotans wanted Indians moved from Wisconsin and Michigan to Minnesota because a large Indian presence brought economic benefits with it. Specifically, an Indian presence provided opportunities to trade with Indians in exchange for their annuity payments, and to build and operate Indian agencies, schools, and farms in exchange for money. The presence of these facilities in an area also opened opportunities for patronage jobs to staff these facilities. See *id.*, at 668–671; *id.*, at 1095 (White Report). See also *id.*, at 149–150 (letter from Rice to Ramsey, Dec. 1, 1849) ("Minnesota would reap the benefit [from the Chippewa's removal]– whereas now their annuities pass via Detroit and not one dollar do our inhabitants get"). The District Court concluded in this case that "Minnesota politicians, including Ramsey, advocated removal of the Wisconsin Chippewa to Minnesota because they wanted to obtain more of the economic benefits generated by having a large number of Indians residing in their territory." 861 F. Supp. 784, 803 (Minn. 1994).

Whatever the impetus behind the removal effort, President Taylor responded to this pressure by issuing an Executive Order on February 6, 1850. The order provided:

"The privileges granted temporarily to the Chip-

> pewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837, 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the treaty with them of October 4th 1842, of hunting on the territory which they ceded by that treaty, 'with the other usual privileges of occupancy until required to remove by the President of the United States,' are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands." App. to Pet. for Cert. 565.

The officials charged with implementing this order understood it primarily as a removal order, and they proceeded to implement it accordingly. See Record, Doc. No. 311, Plaintiffs' Exh. 88 (letter from Brown to Ramsey, Feb. 6, 1850); App. 161 (letter from Ramsey to Livermore, Mar. 4, 1850). See also 861 F. Supp., at 805 (citing Plaintiffs' Exh. 201 (letter from Livermore to Ramsey, April 2, 1850)) (describing circular prepared to notify Indians of Executive Order); App. 1101–1102 (White Report) (describing circular and stating that "the entire thrust" of the circular had to do with removal).

The Government hoped to entice the Chippewa to remove to Minnesota by changing the location where the annuity payments– the payments for the land cessions– would be made. The Chippewa were to be told that their annuity payments would no longer be made at La Pointe, Wisconsin (within the Chippewa's ceded lands), but, rather, would be made at Sandy Lake, on unceded lands, in the Minnesota Territory. The Government's first annuity payment under this plan, however, ended in disas-

ter. The Chippewa were told they had to be at Sandy Lake by October 25 to receive their 1850 annuity payment. See B. White, The Regional Context of the Removal Order of 1850, §6, pp. 6–9– 6–10 (Mar. 1994). By November 10, almost 4,000 Chippewa had assembled at Sandy Lake to receive the payment, but the annuity goods were not completely distributed until December 2. *Id.*, at 6–10. In the meantime, around 150 Chippewa died in an outbreak of measles and dysentery; another 230 Chippewas died on the winter trip home to Wisconsin. App. 228–229 (letter from Buffalo to Lea, Nov. 6, 1851).

The Sandy Lake annuity experience intensified opposition to the removal order among the Chippewa as well as among non-Indian residents of the area. See *id.*, at 206–207 (letter from Warren to Ramsey, Jan. 21, 1851); *id.*, at 214 (letter from Lea to Stuart, June 3, 1851) (describing opposition to the order). See also Record, Doc. No. 311, Plaintiffs' Exh. 93 (Michigan and Wisconsin citizens voice their objections to the order to the President). In the face of this opposition, Commissioner of Indian Affairs Luke Lea wrote to the Secretary of the Interior recommending that the President's 1850 order be modified to allow the Chippewa "to remain for the present in the country they now occupy." App. 215 (letter from Lea to Stuart, June 3, 1851). According to Commissioner Lea, removal of the Wisconsin Bands "is not required by the interests of the citizens or Government of the United States and would in its consequences in all probability be disastrous to the Indians." *Ibid.* Three months later, the Acting Commissioner of Indian Affairs wrote to the Secretary to inform him that 1,000 Chippewa were assembled at La Pointe, but that they could not be removed from the area without the use of force. He sought the Secretary's approval "to suspend the removal of these Indians until the determination of the President upon the recommendation of the commissioner is made known to this office." *Id.*, at 223–

224 (letter from Mix to Graham, Aug. 23, 1851). Two days later, the Secretary of the Interior issued the requested authorization, instructing the Commissioner "to suspend the removal of the Chippeway *[sic]* Indians until the final determination of the President." *Id.*, at 225 (letter from Abraham to Lea, Aug. 25, 1851). Commissioner Lea immediately telegraphed the local officials with instructions to "[s]uspend action with reference to the removal of Lake Superior Chippewas for further orders." *Ibid.* (telegram from Lea to Watrous, Aug. 25, 1851). As the State's own expert historian testified, "[f]ederal efforts to remove the Lake Superior Chippewa to the Mississippi River effectively ended in the summer of 1851." *Id.*, at 986 (Report of Alan S. Newell).

Although Governor Ramsey still hoped to entice the Chippewa to remove by limiting annuity payments to only those Indians who removed to unceded lands, see *id.*, at 235–236 (letter from Ramsey to Lea, Dec. 26, 1851), this plan, too, was quickly abandoned. In 1853, Franklin Pierce became President, and he appointed George Manypenny as Commissioner of Indian Affairs. The new administration reversed Governor Ramsey's policy, and in 1853, annuity payments were once again made within the ceded territory. See, *e.g.*, Record, Doc. No. 311, Plaintiffs' Exh. 119, p. 2 (letter from Gorman to Manypenny, Oct. 8, 1853); Plaintiffs' Exh. 122 (letter from Herriman to Gorman, Nov. 10, 1853); see also Plaintiffs' Exh. 120 (letter from Wheeler to Parents, Oct. 20, 1853). As Indian Agent Henry Gilbert explained, the earlier "change from La Pointe to [Sandy Lake] was only an incident of the order for removal," thus suggesting that the resumption of the payments at La Pointe was appropriate because the 1850 removal order had been abandoned. App. 243 (letter from Gilbert to Manypenny, Dec. 14, 1853).

In 1849, white lumbermen built a dam on the Rum River (within the Minnesota portion of the 1837 ceded

Territory), and the Mille Lacs Band of Chippewa protested that the dam interfered with its wild rice harvest. This dispute erupted in 1855 when violence broke out between the Chippewa and the lumbermen, necessitating a call for federal troops. In February 1855, the Governor of the Minnesota Territory, Willis Gorman, who also served as the ex officio superintendent of Indian affairs for the Territory, wrote to Commissioner Manypenny about this dispute. In his letter, he noted that "[t]he lands occupied by the timbermen have been surveyed and sold by the United States and the Indians have no other treaty interests *except hunting and fishing.*" *Id.*, at 295–296 (letter of Feb. 16, 1855) (emphasis added). There is no indication that Commissioner Manypenny disagreed with Governor Gorman's characterization of Chippewa treaty rights. In June of the same year, Governor Gorman wrote to Mille Lacs Chief Little Hill that even if the dam was located within the Mille Lacs Reservation under the 1855 Treaty, the dam "was put there long before you had any rights there except to hunt and fish." Record, Doc. No. 163, Plaintiffs' Exh. 19 (letter of June 4, 1855). Thus, as of 1855, the federal official responsible for Indian affairs in the Minnesota Territory acknowledged and recognized Chippewa rights to hunt and fish in the 1837 ceded Territory.

On the other hand, there are statements by federal officials in the late 19th century and the first half of the 20th century that suggest that the Federal Government no longer recognized Chippewa usufructuary rights under the 1837 Treaty. See, *e.g.*, App. 536–539 (letter from Acting Commissioner of Indian Affairs to Heatwole, Dec. 16, 1898); *id.*, at 547–548 (letter from Commissioner of Indian Affairs Collier to Reynolds, Apr. 30, 1934); App. to Pet. for Cert. 575–578 (letter from President Roosevelt to Whitebird, Mar. 1, 1938). But see, *e.g.*, App. 541 (letter from Meritt to Hammitt, Dec. 14, 1925) (Office of Indian Affairs

noting that "[a]pparently, . . . there is merit in the claims of the Indians" that they have hunting and fishing rights under the 1837 Treaty); Additional Brief for United States in *United States* v. *Thomas*, O. T. 1893, No. 668, pp. 2–3 (with respect to the 1842 Treaty, arguing that no executive order requiring Chippewa removal had ever been made).

Although the United States abandoned its removal policy, it did not abandon its attempts to acquire more Chippewa land. To this end, in the spring of 1854, Congress began considering legislation to authorize additional treaties for the purchase of Chippewa lands. The House of Representatives debated a bill "to provide for the extinguishment of the title of the Chippewa Indians to the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin." Cong. Globe, 33d Cong., 1st Sess., 1032 (1854). This bill did not require the removal of the Indians, but instead provided for the establishment of reservations within the ceded territories on which the Indians could remain.

The treaty authorization bill stalled in the Senate during 1854, but Commissioner of Indian Affairs George Manypenny began to implement it nonetheless. On August 11, he instructed Indian Agent Henry Gilbert to begin treaty negotiations to acquire more land from the Chippewa. Specifically, he instructed Gilbert to acquire "all the country" the Chippewa own or claim in the Minnesota Territory and the State of Wisconsin, except for some land that would be set aside for reservations. App. 264. Gilbert negotiated such a Treaty with several Chippewa Bands, 1854 Treaty with the Chippewa, 10 Stat. 1109, although for reasons now lost to history, the Mille Lacs Band of Chippewa was not a party to this Treaty. The signatory Chippewa Bands ceded additional land to the United States, and certain lands were set aside as reservations for the Bands. *Id.*, Art. 2. In addition, the 1854 Treaty established new hunting and fishing rights in the

territory ceded by the Treaty. *Id.*, Art. 11.

When the Senate finally passed the authorizing legislation in December 1854, Minnesota's territorial delegate to Congress recommended to Commissioner Manypenny that he negotiate a treaty with the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa Indians. App. 286–287 (letter from Rice to Manypenny, Dec. 17, 1854). Commissioner Manypenny summoned representatives of those Bands to Washington, D.C., for the treaty negotiations, which were held in February 1855. See *id.*, at 288 (letter from Manypenny to Gorman, Jan. 4, 1855). The purpose and result of these negotiations was the sale of Chippewa lands to the United States. To this end, the first article of the 1855 Treaty contains two sentences:

> "The Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries, viz: [describing territorial boundaries]. And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." 10 Stat. 1165–1166.

Article 2 set aside lands in the area as reservations for the signatory tribes. *Id.*, at 1166–1167. The Treaty, however, makes no mention of hunting and fishing rights, whether to reserve new usufructuary rights or to abolish rights guaranteed by previous treaties. The Treaty Journal also reveals no discussion of hunting and fishing rights. App. 297–356 (Documents Relating to the Negotiation of the Treaty of Feb. 22, 1855) (hereinafter 1855 Treaty Journal)).

A little over three years after the 1855 Treaty was signed, Minnesota was admitted to the Union. See Act of May 11, 1858, 11 Stat. 285. The admission Act is silent with respect to Indian treaty rights.

B

In 1990, the Mille Lacs Band of Chippewa Indians and several of its members filed suit in the Federal District Court for the District of Minnesota against the State of Minnesota, the Minnesota Department of Natural Resources, and various state officers (collectively State) seeking, among other things, a declaratory judgment that they retained their usufructuary rights under the 1837 Treaty and an injunction to prevent the State's interference with those rights. The United States intervened as a plaintiff in the suit; nine counties and six private landowners intervened as defendants.[1] The District Court bifurcated the case into two phases. Phase I of the litigation would determine whether, and to what extent, the Mille Lacs Band retained any usufructuary rights under the 1837 Treaty, while Phase II would determine the validity of particular state measures regulating any retained rights.

In the first decision on the Phase I issues, the District Court rejected numerous defenses posed by the defendants and set the matter for trial. 853 F. Supp. 1118 (Minn. 1994) (Murphy, C. J.). After a bench trial on the Phase I issues, the District Court concluded that the Mille Lacs Band retained its usufructuary rights as guaranteed by the 1837 Treaty. 861 F. Supp., at 784. Specifically, as

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[1]The intervening counties are Aitkin, Benton, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison, Pine, and Sherburne. The intervening landowners are John W. Thompson, Jenny Thompson, Joseph N. Karpen, LeRoy Burling, Glenn E. Thompson, and Gary M. Kiedrowski.

relevant here, the court rejected the State's arguments that the 1837 Treaty rights were extinguished by the 1850 Executive Order or by the 1855 Treaty with the Chippewa. *Id.*, at 822–835. With respect to the 1850 Executive Order, the District Court held, in relevant part, that the order was unlawful because the President had no authority to order removal of the Chippewa without their consent. *Id.*, at 823–826. The District Court also concluded that the United States ultimately abandoned and repealed the removal policy embodied in the 1850 order. *Id.*, at 829–830. With respect to the 1855 Treaty, the District Court reviewed the historical record and found that the parties to that agreement did not intend to abrogate the usufructuary privileges guaranteed by the 1837 Treaty. *Id.*, at 830–835.

At this point in the case, the District Court permitted several Wisconsin Bands of Chippewa to intervene as plaintiffs[2] and allowed the defendants to interpose new defenses. As is relevant here, the defendants asserted for the first time that the Bands' usufructuary rights were extinguished by Minnesota's admission to the Union in 1858. The District Court rejected this new defense. No. 3–94–1226 (D. Minn., Mar. 29, 1996) (Davis, J.), App. to Pet. for Cert. 182–189.

Simultaneously with this litigation, the Fond du Lac Band of Chippewa Indians and several of its members filed a separate suit against Minnesota state officials, seeking a declaration that they retained their rights to hunt, fish, and gather pursuant to the 1837 and 1854

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[2]The Wisconsin Bands are also respondents in this Court: St. Croix Chippewa Indians of Wisconsin, Lac du Flambeau Band of Lake Superior Chippewas, Bad River Band of Lake Superior Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, Sokaogan Chippewa Community, and Red Cliff Band of Lake Superior Chippewa.

Treaties. Two Minnesota landowners intervened as defendants,[3] and the District Court issued an order, like the order in the Mille Lacs Band case, bifurcating the litigation into two phases. In March 1996, the District Court held that the Fond du Lac Band retained its hunting and fishing rights. *Fond du Lac Band of Chippewa Indians* v. *Carlson*, Civ. No. 5–92–159 (D. Minn., Mar. 18, 1996) (Kyle, J.), App. to Pet. for Cert. 419.

In June 1996, the District Court consolidated that part of the Fond du Lac litigation concerning the 1837 Treaty rights with the Mille Lacs litigation for Phase II. In Phase II, the State and the Bands agreed to a Conservation Code and Management Plan to regulate hunting, fishing, and gathering in the Minnesota portion of the territory ceded in the 1837 Treaty. Even after this agreement, however, several resource allocation and regulation issues remained unresolved; the District Court resolved these issues in a final order issued in 1997. See 952 F. Supp. 1362 (Minn.) (Davis, J.).

On appeal, the Court of Appeals for the Eighth Circuit affirmed. 124 F. 3d 904 (1997). Three parts of the Eighth Circuit's decision are relevant here. First, the Eighth Circuit rejected the State's argument that President Taylor's 1850 Executive Order abrogated the Indians' hunting, fishing, and gathering rights as guaranteed by the 1837 Treaty. The Court of Appeals concluded that President Taylor did not have the authority to issue the removal order and that the invalid removal order was inseverable from the portion of the order purporting to abrogate Chippewa usufructuary rights. *Id.*, at 914–918.

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[3]The landowners who intervened in this suit are Robert J. Edmonds and Michael Sheff. These landowners, along with the six landowners who intervened in the Mille Lacs Band suit, have filed briefs in this Court in support of the State. The counties, too, have filed briefs in support of the State.

Second, the Court of Appeals concluded that the 1855 Treaty did not extinguish the Mille Lacs Band's usufructuary privileges. *Id.*, at 919–921. The court noted that the revocation of hunting and fishing rights was neither discussed during the Treaty negotiations nor mentioned in the Treaty itself. *Id.*, at 920. The court also rejected the State's argument that this Court's decision in *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753 (1985), required a different result. 124 F. 3d, at 921. Third, the court rejected the State's argument that, under the "equal footing doctrine," Minnesota's entrance into the Union extinguished any Indian treaty rights. *Id.*, at 926–929. Specifically, the Court of Appeals found no evidence of congressional intent in enacting the Minnesota statehood Act to abrogate Chippewa usufructuary rights, *id.*, at 929, and it rejected the argument that *Ward* v. *Race Horse*, 163 U. S. 504 (1896), controlled the resolution of this issue, 124 F. 3d, at 926–927.

In sum, the Court of Appeals held that the Chippewa retained their usufructuary rights under the 1837 Treaty with respect to land located in the State of Minnesota. This conclusion is consistent with the Seventh Circuit Court of Appeals' earlier decision holding that the Chippewa retained those same rights with respect to the ceded land located in Wisconsin. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F. 2d 341, appeal dismissed and cert. denied *sub nom. Besadny* v. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 464 U. S. 805 (1983) (Brennan, Marshall, and STEVENS, JJ., would affirm). The Court of Appeals for the Eighth Circuit denied a petition for rehearing and a suggestion for rehearing en banc. The State of Minnesota, the landowners, and the counties all filed petitions for writs of certiorari, and we granted the State's petition. 524 U. S. ___ (1998).

II

We are first asked to decide whether President Taylor's Executive Order of February 6, 1850, terminated Chippewa hunting, fishing, and gathering rights under the 1837 Treaty. The Court of Appeals began its analysis of this question with a statement of black letter law: "'The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.'" 124 F. 3d, at 915 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585 (1952)). The court considered whether the President had authority to issue the removal order under the 1830 Removal Act (hereinafter Removal Act), 4 Stat. 411. The Removal Act authorized the President to convey land west of the Mississippi to Indian tribes that chose to "exchange the lands where they now reside, and remove there." *Id.*, at 412. According to the Court of Appeals, the Removal Act only allowed the removal of Indians who had consented to removal. 124 F. 3d, at 915–916. Because the Chippewa had not consented to removal, according to the court, the Removal Act could not provide authority for the President's 1850 removal order. *Id.*, at 916–917.

In this Court, no party challenges the Court of Appeals' conclusion that the Removal Act did not authorize the President's removal order. The landowners argue that the Removal Act was irrelevant because it applied only to land *exchanges*, and that even if it required consent for such land exchanges, it did not prohibit other means of removing Indians. See Brief for Respondent Thompson et al. 22–23. We agree that the Removal Act did not forbid the President's removal order, but as noted by the Court of Appeals, it also did not authorize that order.

Because the Removal Act did not authorize the 1850 removal order, we must look elsewhere for a constitutional or statutory authorization for the order. In this Court, only the landowners argue for an alternative source of

authority; they argue that the President's removal order was authorized by the 1837 Treaty itself. See *ibid.* There is no support for this proposition, however. The Treaty makes no mention of removal, and there was no discussion of removal during the Treaty negotiations. Although the United States could have negotiated a treaty in 1837 providing for removal of the Chippewa— and it negotiated several such removal treaties with Indian tribes in 1837[4]— the 1837 Treaty with the Chippewa did not contain any provisions authorizing a removal order. The silence in the Treaty, in fact, is consistent with the United States' objectives in negotiating it. Commissioner of Indian Affairs Harris explained the United States' goals for the 1837 Treaty in a letter to Governor Dodge on May 13, 1837. App. 42. In this letter, Harris explained that through this Treaty, the United States wanted to purchase Chippewa land for the pine woods located on it; the letter contains no reference to removal of the Chippewa. *Ibid.*

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[4]See 1837 Treaty with the Saganaw Chippewa, Art. 6, 7 Stat. 530 ("The said tribe agrees to remove from the State of Michigan, as soon as a proper location can be obtained"); 1837 Treaty with the Potawatomie, Art. 1, 7 Stat. 533 ("And the chiefs and head men above named, for themselves and their bands, do hereby cede to the United States all their interest in said lands, and agree to remove to a country that may be provided for them by the President of the United States, southwest of the Missouri river, within two years from the ratification of this treaty"); 1837 Treaty with the Sacs and Foxes, Art. 4, 7 Stat. 541 ("The Sacs and Foxes agree to remove from the tract ceded, with the exception of Keokuck's village, possession of which may be retained for two years, within eight months from the ratification of this treaty"); 1837 Treaty with the Winnebago, Art. 3, 7 Stat. 544–545 ("The said Indians agree to remove within eight months from the ratification of this treaty, to that portion of the neutral ground west of the Mississippi, which was conveyed to them in the second article of the treaty of September 21st, 1832, and the United States agree that the said Indians may hunt upon the western part of said neutral ground until they shall procure a permanent settlement").

Based on the record before us, the proposition that the 1837 Treaty authorized the President's 1850 removal order is unfounded. Because the parties have pointed to no colorable source of authority for the President's removal order, we agree with the Court of Appeals' conclusion that the 1850 removal order was unauthorized.

The State argues that even if the *removal* portion of the order was invalid, the 1837 Treaty privileges were nevertheless revoked because the invalid removal order was severable from the portion of the order revoking Chippewa usufructuary rights. Although this Court has often considered the severability of *statutes*, we have never addressed whether *Executive Orders* can be severed into valid and invalid parts, and if so, what standard should govern the inquiry. In this case, the Court of Appeals assumed that Executive Orders are severable, and that the standards applicable in statutory cases apply without modification in the context of Executive Orders. 124 F. 3d, at 917 (citing *In re Reyes*, 910 F. 2d 611, 613 (CA9 1990)). Because no party before this Court challenges the applicability of these standards, for purposes of this case we shall assume, arguendo, that the severability standard for statutes also applies to Executive Orders.

The inquiry into whether a statute is severable is essentially an inquiry into legislative intent. *Regan* v. *Time, Inc.*, 468 U. S. 641, 653 (1984) (plurality opinion). We stated the traditional test for severability over 65 years ago: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932). See also *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987); *Regan* v. *Time, Inc.*, *supra*, at 653. Translated to the present context, we must determine whether the President would not have revoked

the 1837 Treaty privileges if he could not issue the removal order.

We think it is clear that President Taylor intended the 1850 order to stand or fall as a whole. The 1850 order embodied a single, coherent policy, the predominant purpose of which was removal of the Chippewa from the lands that they had ceded to the United States. The federal officials charged with implementing the order certainly understood it as such. As soon as the Commissioner of Indian Affairs received a copy of the order, he sent it to Governor Ramsey and placed him in charge of its implementation. The Commissioner's letter to Ramsey noted in passing that the order revoked the Chippewa's usufructuary privileges, but it did not discuss implementation of that part of the order. Rather, the letter addressed the mechanics of implementing the *removal* order. Record, Doc. No. 311, Plaintiffs' Exh. 88 (letter from Brown to Ramsey, Feb. 6, 1850). Governor Ramsey immediately wrote to his subagent at La Pointe (on Lake Superior), noting that he had enclosed a "copy of the order of the President *for the removal* of the Chippewas, from the lands they have ceded." App. 161 (letter from Ramsey to Livermore, Mar. 4, 1850) (emphasis added). This letter made no mention of the revocation of Indian hunting and fishing rights. *Id.*, at 161–163. The La Pointe subagent, in turn, prepared a circular to notify the Wisconsin Bands of the Executive Order, but this circular, too, focused on removal of the Chippewa. See 861 F. Supp., at 805 (describing circular).

When the 1850 order is understood as announcing a removal policy, the portion of the order revoking Chippewa usufructuary rights is seen to perform an integral function in this policy. The order tells the Indians to "go," and also tells them not to return to the ceded lands to hunt and fish. The State suggests that President Taylor might also have revoked Chippewa usufructuary rights as a kind of

"incentive program" to *encourage* the Indians to remove had he known that he could not order their removal directly. The State points to no evidence, however, that the President or his aides ever considered the abrogation of hunting and fishing rights as an "incentive program." Moreover, the State does not explain how this incentive was to operate. As the State characterizes Chippewa Treaty rights, the revocation of those rights would not have prevented the Chippewa from hunting, fishing, and gathering on the ceded territory; the revocation of Treaty rights would merely have subjected Chippewa hunters, fishers, and gatherers to territorial, and, later, state regulation. Brief for Petitioners 47, n. 21. The State does not explain how, if the Chippewa were still permitted to hunt, fish, and gather on the ceded territory, the revocation of the Treaty rights would have encouraged the Chippewa to remove to their unceded lands.

There is also no evidence that the Treaty privileges themselves– as opposed to the presence of the Indians– caused any problems necessitating the revocation of those privileges. In other words, there is little historical evidence that the Treaty privileges would have been revoked for some other purpose. The only evidence in this regard is Governor Ramsey's statement to the Minnesota Territorial Legislature that settlers in the Sauk Rapids and Swan River area were complaining about the Chippewa Treaty privileges. But the historical record suggests that the settlers were complaining about the Winnebago Indians, and not the Chippewa, in that area. See App. 671–672 (Cleland Report). When Governor Ramsey was put in charge of enforcing the 1850 Executive Order, he made no efforts to remove the Chippewa from the Sauk Rapids area or to restrict hunting and fishing privileges there. In fact, his attempts to enforce the order consisted primarily of efforts to move Chippewa from the Wisconsin and Michigan areas to Minnesota– closer to the Sauk Rapids and

Swan River settlements. App. 1099–1100 (White Report); *id.*, at 677–678, 1025–1027 (Cleland Report). More importantly, Governor Ramsey and the Minnesota Territorial Legislature explicitly tied revocation of the Treaty privileges to removal. Common sense explains the logic of this strategy: If the legislature was concerned with ensuring "the security and tranquility of the white settlements," App. to Pet. for Cert. 567 (Joint Resolution), this concern was not addressed by merely revoking Indian Treaty rights; the Indians had to be removed.

We conclude that President Taylor's 1850 Executive Order was ineffective to terminate Chippewa usufructuary rights under the 1837 Treaty. The State has pointed to no statutory or constitutional authority for the President's removal order, and the Executive Order, embodying as it did one coherent policy, is inseverable.[5] We do not mean

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[5]THE CHIEF JUSTICE disagrees with this conclusion primarily because he understands the removal order to be a mechanism for enforcing the revocation of usufructuary rights. *Post*, at 6–7. The implicit premise of this argument is that the President had the inherent power to order the removal of the Chippewa from public lands; this premise is flawed. The Chippewa were on the land long before the United States acquired title to it. The 1837 Treaty does not speak to the right of the United States to order them off the land upon acquisition of title, and in fact, the usufructuary rights guaranteed by the Treaty presumed that the Chippewa would continue to be on the land. Although the revocation of the rights might have justified measures to make sure that the Chippewa were not hunting, fishing, or gathering, it does not follow that revocation of the usufructuary rights permitted the United States to remove the Chippewa from the land completely. THE CHIEF JUSTICE's suggestion that the removal order was merely a measure to enforce the revocation of the usufructuary rights is thus unwarranted. It cannot be presumed that the ends justified the means; it cannot be presumed that the rights of the United States under the Treaty included the right to order removal in defense of the revocation of usufructuary rights. The Treaty, the statutory law, and the Constitution were silent on this matter, and to presume the existence of such Presidential power would run counter to the principles that treaties are to be interpreted liberally

to suggest that a President, now or in the future, cannot revoke the Chippewa usufructuary rights in accordance with the terms of the 1837 Treaty. All we conclude today is that the President's 1850 Executive Order was insufficient to accomplish this revocation because it was not severable from the invalid removal order.

III

The State argues that the Mille Lacs Band of Chippewa Indians relinquished its usufructuary rights under the 1855 Treaty with the Chippewa. Specifically, the State argues that the Band unambiguously relinquished its usufructuary rights by agreeing to the second sentence of Article 1 in that Treaty:

> "And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or else-

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in favor of the Indians, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675–676 (1979), and treaty ambiguities to be resolved in their favor. *Winters* v. *United States*, 207 U. S. 564, 576–577 (1908).

THE CHIEF JUSTICE also argues that the removal order ought to be severable from the part of the order purporting to extinguish Chippewa usufructuary rights because of the strong presumption supporting the legality of executive action that has been authorized expressly or by implication. *Post*, at 7. Presumably, THE CHIEF JUSTICE understands the 1837 Treaty to authorize the executive action in question. In this context, however, any general presumption about the legality of executive action runs into the principle that treaty ambiguities are to be resolved in favor of the Indians. *Winters* v. *United States*, *supra*, at 576–577; see also *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 269 (1992). We do not think the general presumption relied upon by THE CHIEF JUSTICE carries the same weight when balanced against the counterpresumption specific to Indian treaties.

where." 10 Stat. 1166.

This sentence, however, does not mention the 1837 Treaty, and it does not mention hunting, fishing, and gathering rights. The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning– much less abrogating– usufructuary rights. Similarly, the Treaty contains no language providing money for the abrogation of previously held rights. These omissions are telling because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights. In fact, just a few months after Commissioner Manypenny completed the 1855 Treaty, he negotiated a Treaty with the Chippewa of Sault Ste. Marie that expressly revoked fishing rights that had been reserved in an earlier Treaty. See Treaty with the Chippewa of Sault Ste. Marie, Art. 1, 11 Stat. 631 ("The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's . . . secured to them by the treaty of June 16, 1820").[6] See, *e.g., Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, 631 (1970) (rejecting argument that language in Treaty had special meaning when United States was competent to state that meaning more clearly).

The State argues that despite any explicit reference to the 1837 Treaty rights, or to usufructuary rights more generally, the second sentence of Article 1 nevertheless abrogates those rights. But to determine whether this language abrogates Chippewa Treaty rights, we look beyond the written words to the larger context that frames

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[6] See also *e.g.*, 1846 Treaty with the Winnebago, Art. IV, 9 Stat. 878 (Government agrees to pay Winnebago Indians $40,000 "for release of hunting privileges, on the lands adjacent to their present home"); 1837 Treaty with the Sacs and Foxes, Art. 2, 7 Stat. 543 (specifically ceding "all the right to locate, for hunting or other purposes, on the land ceded in the first article of the treaty of July 15th 1830").

the Treaty, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation* v. *United States*, 318 U. S. 423, 432 (1943); see also *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. ___, ___ (1999) (slip op., at 9). In this case, an examination of the historical record provides insight into how the parties to the Treaty understood the terms of the agreement. This insight is especially helpful to the extent that it sheds light on how the Chippewa signatories to the Treaty understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675–676 (1979); *United States* v. *Winans*, 198 U. S. 371, 380–381 (1905).

The 1855 Treaty was designed primarily to transfer Chippewa land to the United States, not to terminate Chippewa usufructuary rights. It was negotiated under the authority of the Act of December 19, 1854. This Act authorized treaty negotiations with the Chippewa "for the extinguishment of their title to all the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin." Ch. 7, 10 Stat. 598. The Act is silent with respect to authorizing agreements to terminate Indian usufructuary privileges, and this silence was likely not accidental. During Senate debate on the Act, Senator Sebastian, the chairman of the Committee on Indian Affairs, stated that the treaties to be negotiated under the Act would "reserv[e] to them [*i.e.*, the Chippewa] those rights which are secured by former treaties." Cong. Globe, 33d Cong., 1st Sess., 1404 (1854).

In the winter of 1854–1855, Commissioner Manypenny summoned several Chippewa chiefs to Washington, D. C., to begin negotiations over the sale of Chippewa land in Minnesota to the United States. See App. 288 (letter from Manypenny to Gorman, Jan. 4, 1855). The negotiations

ran from February 12 through February 22. Commissioner Manypenny opened the negotiations by telling the Chippewa chiefs that his goal for the negotiations was to buy a portion of their land, *id.*, at 304 (1855 Treaty Journal), and he stayed firm to this proposed course throughout the talks, focusing the discussions on the purchase of Chippewa land. Indeed all of the participants in the negotiations, including the Indians, understood that the purpose of the negotiations was to transfer Indian land to the United States. The Chief of the Pillager Band of Chippewa stated: "It appears to me that I understand what you want, and your views from the few words I have heard you speak. You want land." *Id.*, at 309 (1855 Treaty Journal) (statement of Flat Mouth). Commissioner Manypenny confirmed that the chief correctly understood the purpose of the negotiations:

> "He appears to understand the object of the interview. His people had more land than they wanted or could use, and stood in need of money; and I have more money than I need, but want more land." *Ibid.*

See also *id.*, at 304 (statement of Hole-in-the-Day, the principal negotiator for the Chippewa: "Your words strike us in this way. They are very short. 'I want to buy your land.' These words are very expressive— very curt").

Like the authorizing legislation, the Treaty Journal, recording the course of the negotiations themselves, is silent with respect to usufructuary rights. The journal records no discussion of the 1837 Treaty, of hunting, fishing, and gathering rights, or of the abrogation of those rights. *Id.*, at 297–356. This silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights as guaranteed by other treaties. It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least

a passing word about the relinquishment.

After the Treaty was signed, President Pierce submitted it to the Senate for ratification, along with an accompanying memorandum from Commissioner Manypenny describing the Treaty he had just negotiated. Like the Treaty and the Treaty journal, this report is silent about hunting, fishing, and gathering rights. *Id.*, at 290–294 (message of the President of the United States communicating a treaty made with the Mississippi, the Pillager, and the Lake Winnibigoshish Bands of Chippewa Indians).

Commissioner Manypenny's memorandum on the 1855 Treaty is illuminating not only for what it did not say, but also for what it did say: The report suggests a purpose for the second sentence of Article 1. According to the Commissioner's report, the Treaty provided for the purchase of between 11 and 14 million acres of Chippewa land within the boundaries defined by the first article. In addition to this defined tract of land, the Commissioner continued, "those Indians (and especially the Pillager and Lake Winnibigoshish bands) have some right of interest in a large extent of other lands in common with other Indians in Minnesota, and which right or interest . . . is also ceded to the United States." *Id.*, at 292. This part of the Commissioner's report suggests that the second sentence of Article 1 was designed not to extinguish usufructuary rights, but rather to extinguish remaining Chippewa *land claims*. The "other lands" do not appear to be the lands ceded by the 1837 Treaty. The Pillager and Lake Winnibigoshish Bands did not occupy lands in the 1837 ceded territory, so it is unlikely that the Commissioner would have described the usufructuary rights guaranteed by the 1837 Treaty as belonging "especially" to those Bands. Moreover, the 1837 Treaty privileges were held in common largely with Chippewa bands in Wisconsin, not with "other Indians in Minnesota." In other words, the second sentence of Article 1

did not extinguish usufructuary privileges, but rather it extinguished Chippewa land claims that Commissioner Manypenny could not describe precisely. See *e.g.*, *id.*, at 317–318 (1855 Treaty Journal) (Pillager negotiator declines to "state precisely what our bands claim as a right"). See also 861 F. Supp., at 816–817.

One final part of the historical record also suggests that the 1855 Treaty was a land purchase treaty and not a treaty that also terminated usufructuary rights: the 1854 Treaty with the Chippewa. Most of the Chippewa Bands that resided within the territory ceded by the 1837 Treaty were signatories to the 1854 Treaty; only the Mille Lacs Band was a party to the 1855 Treaty. If the United States had intended to abrogate Chippewa usufructuary rights under the 1837 Treaty, it almost certainly would have included a provision to that effect in the 1854 Treaty, yet that Treaty contains no such provision. To the contrary, it expressly secures *new* usufructuary rights to the signatory Bands on the newly ceded territory. The State proposes no explanation– compelling or otherwise– for why the United States would have wanted to abrogate the Mille Lacs Band's hunting and fishing rights, while leaving intact the other Bands' rights to hunt and fish on the same territory.

To summarize, the historical record provides no support for the theory that the second sentence of Article 1 was designed to abrogate the usufructuary privileges guaranteed under the 1837 Treaty, but it does support the theory that the Treaty, and Article 1 in particular, was designed to transfer Chippewa land to the United States. At the very least, the historical record refutes the State's assertion that the 1855 Treaty "unambiguously" abrogated the 1837 hunting, fishing, and gathering privileges. Given this plausible ambiguity, we cannot agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights. We have held that Indian treaties are to be inter-

preted liberally in favor of the Indians, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S., at 675–676; *Choctaw Nation* v. *United States*, 318 U. S., at 432, and that any ambiguities are to be resolved in their favor, *Winters* v. *United States*, 207 U. S. 564, 576–577 (1908). See also *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 269 (1992).

To attack the conclusion that the 1855 Treaty does not abrogate the usufructuary rights guaranteed under the 1837 Treaty, the State relies primarily on our decision in *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753 (1985). *Klamath* required this Court to interpret two agreements. In the first agreement, an 1864 Treaty between the United States and several Indian Tribes now collectively known as the Klamath Indian Tribe, the Indians conveyed their remaining lands to the United States, and a portion of this land was set aside as a reservation. *Id.*, at 755. The 1864 Treaty provided that the Tribe had the "'exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits,'" but it provided for no off-reservation usufructuary rights. *Ibid.* (quoting Treaty of Oct. 14, 1864). Due to a surveying error, the reservation excluded land that, under the terms of the Treaty, should have been included within the reservation. Thus, in 1901, the United States and the Tribe entered into a second agreement, in which the United States agreed to compensate the Tribe for those lands, and the Tribe agreed to "'cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to'" the lands erroneously excluded from the reservation. *Id.*, at 760. The Tribe contended that the 1901 agreement had not abrogated its usufructuary rights under the 1864 Treaty with respect to those lands.

We rejected the Tribe's argument and held that it had in

fact relinquished its usufructuary rights to the lands at issue. We recognized that the 1864 Treaty had secured certain usufructuary rights to the Tribe, but we also recognized, based on an analysis of the specific terms of the Treaty, that the 1864 Treaty restricted those rights to the lands within the reservation. *Id.*, at 766–767. Because the rights were characterized as "exclusive," this "foreclose[d] the possibility that they were intended to have existence outside of the reservation." *Id.*, at 767. In other words, "because the right to hunt and fish reserved in the 1864 Treaty was an exclusive right to be exercised within the reservation, that right could not consistently survive off the reservation" on the lands the Tribe had sold. *Id.*, at 769–770. This understanding of the Tribe's usufructuary rights under the 1864 Treaty– that those rights were exclusive, on-reservation rights– informed our conclusion that the Klamath Tribe did not retain any usufructuary rights on the land that it ceded in the 1901 agreement, land that was not part of the reservation. In addition, we noted that there was nothing in the historical record of the 1901 agreement that suggested that the parties intended to change the background understanding of the scope of the usufructuary rights. *Id.*, at 772–773.

Klamath does not control this case. First, the Chippewa's usufructuary rights under the 1837 Treaty existed independently of land ownership; they were neither tied to a reservation nor exclusive. In contrast to *Klamath*, there is no background understanding of the rights to suggest that they are extinguished when title to the land is extinguished. Without this background understanding, there is no reason to believe that the Chippewa would have understood a cession of a particular tract of land to relinquish hunting and fishing privileges on another tract of land. More importantly, however, the State's argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamen-

tal misunderstanding of basic principles of treaty construction. Our holding in *Klamath* was not based *solely* on the bare language of the 1901 agreement. Rather, to reach our conclusion about the meaning of that language, we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words. This review of the history and the negotiations of the agreements is central to the interpretation of treaties. *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S., at ___ (slip op., at 9). As we described above, an analysis of the history, purpose, and negotiations of *this Treaty* leads us to conclude that the Mille Lacs Band did not relinquish their 1837 treaty rights in the 1855 Treaty.

IV

Finally, the State argues that the Chippewa's usufructuary rights under the 1837 Treaty were extinguished when Minnesota was admitted to the Union in 1858. In making this argument, the State faces an uphill battle. Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. *United States* v. *Dion*, 476 U. S. 734, 738–740 (1986); see also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, *supra*, at 690; *Menominee Tribe* v. *United States*, 391 U. S. 404, 413 (1968). There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States* v. *Dion*, *supra*, at 740. There is no such "clear evidence" of congressional intent to abrogate the Chippewa Treaty rights here. The relevant statute—Minnesota's enabling Act—provides in relevant part:

> "[T]he State of Minnesota shall be one, and is hereby declared to be one, of the United States of America,

> and admitted into the Union on an equal footing with the original States in all respects whatever." Act of May 11, 1858, 11 Stat. 285.

This language, like the rest of the Act, makes no mention of Indian treaty rights; it provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act. The State concedes that the Act is silent in this regard, Brief for Petitioners 36, and the State does not point to any legislative history describing the effect of the Act on Indian treaty rights.

With no direct support for its argument, the State relies principally on this Court's decision in *Ward* v. *Race Horse*, 163 U. S. 504 (1896). In *Race Horse*, we held that a Treaty reserving to a Tribe "'the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts'" terminated when Wyoming became a State in 1890. *Id.*, at 507 (quoting Art. 4 of the Treaty). This case does not bear the weight the State places on it, however, because it has been qualified by later decisions of this Court.

The first part of the holding in *Race Horse* was based on the "equal footing doctrine," the constitutional principle that all States are admitted to the Union with the same attributes of sovereignty (*i.e.*, on equal footing) as the original 13 States. See *Coyle* v. *Smith*, 221 U. S. 559 (1911). As relevant here, it prevents the Federal Government from impairing fundamental attributes of state sovereignty when it admits new States into the Union. *Id.*, at 573. According to the *Race Horse* Court, because the Treaty rights conflicted irreconcilably with state regulation of natural resources– "an essential attribute of its governmental existence," *Race Horse*, *supra*, at 516–

the Treaty rights were held an invalid impairment of Wyoming's sovereignty. Thus, those rights could not survive Wyoming's admission to the Union on "equal footing" with the original States.

But *Race Horse* rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. See, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658 (1979); see also *Antoine* v. *Washington*, 420 U. S. 194 (1975). Rather, Indian treaty rights can coexist with state management of natural resources. Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making. U. S. Const., Art. VI, cl. 2. See, *e.g.*, *Missouri* v. *Holland*, 252 U. S. 416 (1920); *Kleppe* v. *New Mexico*, 426 U. S. 529 (1976); *United States* v. *Winans*, 198 U. S., at 382–384; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188 (1876). See also *Menominee Tribe* v. *United States*, *supra*, at 411, n. 12. Here, the 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory free of territorial, and later state, regulation, a privilege that others did not enjoy. Today, this freedom from state regulation curtails the State's ability to regulate hunting, fishing, and gathering by the Chippewa in the ceded lands. But this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians "absolute freedom" from state regulation. *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S., at 765, n. 16. We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.

See *Puyallup Tribe* v. *Department of Game of Wash.*, 391 U. S. 392, 398 (1968); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn., supra*, at 682; *Antoine* v. *Washington, supra*, at 207–208. This "conservation necessity" standard accommodates both the State's interest in management of its natural resources and the Chippewa's federally guaranteed treaty rights. Thus, because treaty rights are reconcilable with state sovereignty over natural resources, statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries.[7]

We do not understand JUSTICE THOMAS to disagree with this fundamental conclusion. *Race Horse* rested on the premise that treaty rights are irreconcilable with state sovereignty. It is this conclusion– the conclusion undergirding the *Race Horse* Court's equal footing holding– that we have consistently rejected over the years. JUSTICE THOMAS's only disagreement is as to the scope of State regulatory authority. His disagreement is premised on a purported distinction between "rights" and "privileges." This Court has never used a distinction between rights and privileges to justify any differences in State regulatory authority. Moreover, as JUSTICE THOMAS acknowledges, *post*, at 4, the starting point for any analysis of

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[7] THE CHIEF JUSTICE asserts that our criticism of *Race Horse* is inappropriate given our recent "reaffirm[ation]" of that case in *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S 753 (1985). *Post*, at 11. Although we cited *Race Horse* in *Klamath*, we did not in so doing reaffirm the equal footing doctrine as a bar to the continuation of Indian treaty-based usufructuary rights. *Klamath* did not involve the equal footing doctrine. Rather, we cited *Race Horse* for the second part of its holding, discussed in the text, *infra*, at 32–34. See 473 U. S., at 773, n. 23. In any event, the *Race Horse* Court's reliance on the equal footing doctrine to terminate Indian treaty rights rested on foundations that were rejected by this Court within nine years of that decision. See *United States* v. *Winans*, 198 U. S. 371, 382–384 (1905).

these questions is the Treaty language itself. The Treaty must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians. *Winters* v. *United States*, 207 U. S., at 576–577. There is no evidence that the Chippewa understood any fine legal distinctions between rights and privileges. Moreover, under JUSTICE THOMAS's view of the 1837 Treaty, the guarantee of hunting, fishing, and gathering privileges was essentially an empty promise because it gave the Chippewa nothing that they did not already have.

The equal footing doctrine was only part of the holding in *Race Horse*, however. We also announced an alternative holding: The Treaty rights at issue were not intended to survive Wyoming's statehood. We acknowledged that Congress, in the exercise of its authority over territorial lands, has the power to secure off-reservation usufructuary rights to Indian Tribes through a treaty, and that "it would be also within the power of Congress to continue them in the State, on its admission into the Union." *Race Horse*, 163 U. S., at 515. We also acknowledged that if Congress intended the rights to survive statehood, there was no need for Congress to preserve those rights explicitly in the statehood Act. We concluded, however, that the particular rights in the treaty at issue there– "the right to hunt on the unoccupied lands of the United States"– were not intended to survive statehood. *Id.*, at 514; see *id.*, at 514–515.

THE CHIEF JUSTICE reads *Race Horse* to establish a rule that "temporary and precarious" treaty rights, as opposed to treaty rights "which were 'of such a nature as to imply their perpetuity,'" are not intended to survive statehood. *Post*, at 11. But the "temporary and precarious" language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not. In *Race Horse*, the Court concluded that the right to hunt on federal lands was temporary because Congress could

terminate the right at any time by selling the lands. 163 U. S., at 510. Under this line of reasoning, any right created by operation of federal law could be described as "temporary and precarious," because Congress could eliminate the right whenever it wished. In other words, the line suggested by *Race Horse* is simply too broad to be useful as a guide to whether treaty rights were intended to survive statehood.

The focus of the *Race Horse* inquiry is whether Congress (more precisely, because this is a treaty, the Senate) intended the rights secured by the 1837 Treaty to survive statehood. *Id.*, at 514–515. The 1837 Treaty itself defines the circumstances under which the rights would terminate: when the exercise of those rights was no longer the "pleasure of the President." There is no suggestion in the Treaty that the President would have to conclude that the privileges should end when a State was established in the area. Moreover, unlike the rights at issue in *Race Horse*, there is no fixed termination point to the 1837 Treaty rights. The Treaty in *Race Horse* contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was "clearly contemplated" when the Treaty was ratified. *Id.*, at 509. By contrast, the 1837 Treaty does not tie the duration of the rights to the occurrence of some clearly contemplated event. Finally, we note that there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood. Treaty rights are not impliedly terminated upon statehood. *Wisconsin* v. *Hitchcock*, 201 U. S. 202, 213–214 (1906); *Johnson* v. *Gearlds*, 234 U. S. 422, 439–440 (1914). The *Race Horse* Court's decision to the contrary– that Indian treaty rights were impliedly repealed by Wyoming's statehood Act– was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natu-

ral resources and thus that Congress (the Senate) could not have intended the rights to survive statehood. But as we described above, Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources. See *supra*, at 31–32. Thus, contrary to the State's contentions, *Race Horse* does not compel the conclusion that Minnesota's admission to the Union extinguished Chippewa usufructuary rights guaranteed by the 1837 Treaty.

Accordingly, the judgment of the United States Court of Appeals for the Eighth Circuit is affirmed.

It is so ordered.