

Intermill Land History Consulting (Jessica Intermill)

I am a Minnesotan whose treaty-protected right to live here was created by a promise to protect wild rice. I write because I want to live in a state that keeps its promises.

In 1837, the United States pledged that in exchange for title to the territory, "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians[.]" An 1855 Treaty transferred title of more Anishinaabe land to the United States— including the land holding the Keetac mine— but again safeguarded the right to gather rice from the land and waters. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), attached.

Article VI of the Constitution of the United States makes this treaty promise "the supreme Law of the Land." But the promise is empty if there is no rice to gather, as courts around the country have recognized. E.g., *U.S. v. Washington*, 827 F.3d 836, 851 (9th Cir. 2016), *aff'd* without opinion at 584 U.S. 837. State interference with usufructuary treaty rights violates that treaty. *Id.* at ("The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs.") (citing cases). When Minnesota passed the 10 mg/L sulfate standard more than a generation ago, it committed Minnesota's protection of manoomin, the only species protected by treaty in Minnesota by name.

Today, U.S. Steel wants this agency to renege on the state's behalf for its own profit. But that is not who we are. We keep our promises. So long as Minnesota retains the territorial benefit of these treaty, it has a concomitant obligation to uphold the U.S. end of the bargain. Issuing U.S. Steel a permit to pollute and destroy the species the U.S. "guaranteed" the Anishinaabe the right to gather runs directly contrary to that promise.

The United States and Minnesota owe no debt to out-of-state corporations and international mining conglomerates. But the U.S. did make promises to Indigenous stewards in exchange for ownership of the land that became Minnesota. I ask you to honor the treaties that underlie Minnesota's formation, enforce the 10 mg/L sulfate standard without variance, and require U.S. Steel to clean up its own mess.

Muscogees:

Roly McIntosh,
 Alex. Gillespie,
 Samuel Müller,
 Samuel Perryman,
 John Randam,
 To-me-yo-hola,
 Efi-emathla,
 Chis-co-laco-mici,
 Encotts Harjo,
 Ufalila Harjo.

Osages:

Clermont, the Principal Chief,
 Ka-hi-gair-tanga, the Big Chief,
 Ka-hi-gair-wa-chin-pi-chais, the Mad
 Chief,
 Chan-gais-mon-non, the Horse Thief,

Wa-cri-cha, the Liberal,
 Ta-lais, the Going Deer,
 Chonta-sa-bais, the Black Dog,
 Wa-clum-pi-chais, the Mad Warrior,
 Mi-ta-ni-ga, the Crazy Blanket,
 Wa-ta-ni-ga, the Crazy,
 Hec-ra-ti, the War Eagle,
 Tan-wan-ga-hais, the Townmaker,
 Ha-ha-ga-la, the One they Cry For,
 Chongais-han-ga, the Learned Dog,
 Man-pa-cha, the Brave Man,
 Joseph Staidegais, the Tall Joseph,
 Tais-ha-wa-gra-kim, the Chief Bearer,
 Sa-wa-the, the Dreadful,
 Ca-wa-wa-gu, the One Who Gives Horses,
 U-de-gais-ta-wa-ta-ni-ga, the Crazy Osage.

Witnesses:

Wm. Whistler, Lieutenant-Colonel Sev-
 enth Infantry, commanding.
 B. L. E. Bonneville, captain, Seventh In-
 fantry.
 Francis Lee, captain, Seventh Infantry.
 Jas. R. Stephenson, captain, Seventh In-
 fantry.
 P. S. G. Bell, captain, First Dragoons.
 W. Seawell, captain, Seventh Infantry.
 and secretary to the commissioners.
 S. W. Moore, first lieutenant and adjutant,
 Seventh Infantry.
 Th. H. Holmes, first lieutenant, Seventh
 Infantry.
 R. H. Ross, first lieutenant, Seventh In-
 fantry.

J. H. Bailey, assistant surgeon.
 G. K. Paul, first lieutenant, Seventh In-
 fantry.
 S. G. Simmons, first lieutenant, Seventh
 Infantry.
 J. G. Reed, second lieutenant, Seventh
 Infantry.
 J. M. Wells, second lieutenant, Seventh
 Infantry.
 R. L. Dodge.
 F. Britton, lieutenant, Seventh, U. S.
 Army.
 S. Hardage, Creek interpreter.

(To the Indian names are subjoined marks.)

TREATY WITH THE CHIPPEWA, 1837.

Articles of a treaty made and concluded at St. Peters (the confluence of the St. Peters and Mississippi rivers) in the Territory of Wisconsin, between the United States of America, by their commissioner, Henry Dodge, Governor of said Territory, and the Chippewa nation of Indians, by their chiefs and headmen.

July 29, 1837.

7 Stat., 536.
 Proclamation, June
 15, 1838.

ARTICLE 1. The said Chippewa nation cede to the United States all that tract of country included within the following boundaries:

Land ceded to the
 United States.

Beginning at the junction of the Crow Wing and Mississippi rivers, between twenty and thirty miles above where the Mississippi is crossed by the forty-sixth parallel of north latitude, and running thence to the north point of Lake St. Croix, one of the sources of the St. Croix river; thence to and along the dividing ridge between the waters of Lake Superior and those of the Mississippi, to the sources of the Ocha-sua-sepe a tributary of the Chippewa river; thence to a point on the Chippewa river, twenty miles below the outlet of Lake De Flambeau; thence to the junction of the Wisconsin and Pelican rivers; thence on an east course twenty-five miles; thence southerly, on a course parallel with that of the Wisconsin river, to the line dividing the territories of the Chippewas and Menomonies; thence to the Plover Portage; thence along the southern boundary of the Chippewa country, to the commencement of the boundary line dividing it from that of the Sioux, half a days march below the falls on the Chippewa river; thence with said boundary line to the mouth of Wah-tap river, at its junction with the Mississippi; and thence up the Mississippi to the place of beginning.

Boundaries.

United States to
make the following
payments annually
for twenty years.

ARTICLE 2. In consideration of the cession aforesaid, the United States agree to make to the Chippewa nation, annually, for the term of twenty years, from the date of the ratification of this treaty, the following payments.

1. Nine thousand five hundred dollars, to be paid in money.
2. Nineteen thousand dollars, to be delivered in goods.
3. Three thousand dollars for establishing three blacksmiths shops, supporting the blacksmiths, and furnishing them with iron and steel.
4. One thousand dollars for farmers, and for supplying them and the Indians, with implements of labor, with grain or seed; and whatever else may be necessary to enable them to carry on their agricultural pursuits.
5. Two thousand dollars in provisions.
6. Five hundred dollars in tobacco.

The provisions and tobacco to be delivered at the same time with the goods, and the money to be paid; which time or times, as well as the place or places where they are to be delivered, shall be fixed upon under the direction of the President of the United States.

The blacksmiths shops to be placed at such points in the Chippewa country as shall be designated by the Superintendent of Indian Affairs, or under his direction.

If at the expiration of one or more years the Indians should prefer to receive goods, instead of the nine thousand dollars agreed to be paid to them in money, they shall be at liberty to do so. Or, should they conclude to appropriate a portion of that annuity to the establishment and support of a school or schools among them, this shall be granted them.

Payment to half-
breeds.

ARTICLE 3. The sum of one hundred thousand dollars shall be paid by the United States, to the half-breeds of the Chippewa nation, under the direction of the President. It is the wish of the Indians that their two sub-agents Daniel P. Bushnell, and Miles M. Vineyard, superintend the distribution of this money among their half-breed relations.

Payment of claims
against Indians.

ARTICLE 4. The sum of seventy thousand dollars shall be applied to the payment, by the United States, of certain claims against the Indians; of which amount twenty-eight thousand dollars shall, at their request, be paid to William A. Aitkin, twenty-five thousand to Lyman M. Warren, and the balance applied to the liquidation of other just demands against them—which they acknowledge to be the case with regard to that presented by Hercules L. Dousman, for the sum of five thousand dollars; and they request that it be paid.

Hunting ground.

ARTICLE 5. 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 to the Indians, during the pleasure of the President of the United States.

Treaty binding
when ratified.

ARTICLE 6. This treaty shall be obligatory from and after its ratification by the President and Senate of the United States.

Done at St. Peters in the Territory of Wisconsin the twenty-ninth day of July eighteen hundred and thirty-seven.

Henry Dodge, Commissioner.

From Leech lake:
Aish-ke-bo-ge-koshe, or Flat Mouth,
R-che-o-sau-ya, or the Elder Brother.
Chiefs.

Pe-zhe-kins, the Young Buffalo,
Ma-ghe-ga-bo, or La Trappe,
O-be-gwa-dans, the Chief of the Earth,
Wa-bose, or the Rabbit,
Che-a-na-quod, or the Big Cloud.
Warriors.

From Gull lake and Swan river:
Pa-goo-na-kee-zhig, or the Hole in the
Day,

Songa-ko-mig, or the Strong Ground.
Chiefs.

Wa-boo-jig, or the White Fisher,
Ma-cou-da, or the Bear's Heart.
Warriors.

From St. Croix river:
Pe-zhe-ke, or the Buffalo,
Ka-be-ma-be, or the Wet Month.
Chiefs.

Pa-ga-we-we-wetung, Coming Home Hol-
lowing,
Ya-banse, or the Young Buck,
Kis-ke-ta-wak, or the Cut Ear.
Warriors.

From Lake Courteville:
Pa-qua-a-mo, or the Wood Pecker.
Chief.

From Lac De Flambeau:
Pish-ka-ga-ghe, or the White Crow,
Na-wa-ge-wa, or the Knee,
O-ge-ma-ga, or the Dandy,
Pa-se-quam-jis, or the Commissioner,
Wa-be-ne-me, or the White Thunder.
Chiefs.

From La Pointe, (on Lake Superior):
Pe-zhe-ke, or the Buffalo,
Ta-qua-ga-na, or Two Lodges Meeting,
Cha-che-que-o.
Chiefs.

From Mille Lac:
Wa-shask-ko-kone, or Rats Liver,
Wen-ghe-ge-she-guk, or the First Day.
Chiefs.
Ada-we-ge-shik, or Both Ends of the Sky,
Ka-ka-quap, or the Sparrow.
Warriors.

From Sandy Lake:
Ka-nan-da-wa-win-zo, or Le Brocheux,
We-we-shan-shis, the Bad Boy, or Big
Mouth,
Ke-che-wa-me-te-go, or the Big French-
man.
Chiefs.

Signed in presence of—

Verplanck Van Antwerp, Secretary to
the Commissioner.
M. M. Vineyard, U. S. Sub-Indian
Agent.
Daniel P. Bushnell.
Law. Taliaferro, Indian Agent at St.
Peters.
Martin Scott, Captain, Fifth Regiment
Infantry.
J. Emerson, Assistant Surgeon, U. S.
Army.
H. H. Sibley.

Na-ta-me-ga-bo, the Man that stands
First,
Sa-ga-ta-gun, or Spunk.
Warriors.

From Snake river:
Naudin, or the Wind,
Sha-go-bai, or the Little Six,
Pay-ajik, or the Lone Man,
Na-qua-na-bie, or the Feather.
Chiefs.

Ha-tau-wa,
Wa-me-te-go-zhins, the Little French-
man,
Sho-ne-a, or Silver.
Warriors.

From Fond du Lac, (on Lake Superior):
Mang-go-sit, or the Loons Foot,
Shing-go-be, or the Spruce.
Chiefs.

From Red Cedar lake:
Mont-so-mo, or the Murdering Yell.
From Red lake:
Francois Goumean (a half breed).
From Leech lake:
Sha-wa-ghe-zhig, or the Sounding Sky,
Wa-zau-ko-ni-a, or Yellow Robe.
Warriors.

H. L. Dousman.
S. C. Stambaugh.
E. Lockwood.
Lyman M. Warren.
J. N. Nicollet.
Harmen Van Antwerp.
Wm. H. Forbes.
Jean Baptiste Dubay, Interpreter.
Peter Quinn, Interpreter.
S. Campbell, U. S. Interpreter.
Stephen Bonga, Interpreter.
Wm. W. Coriell.

(To the Indian names are subjoined a mark and seal.)

TREATY WITH THE SIOUX, 1837.

Articles of a treaty, made at the City of Washington, between Joel R. Poinsett, thereto specially authorized by the President of the United States, and certain chiefs and braves of the Sioux nation of Indians.

Sept. 29, 1837.

7 Stat., 538.
Proclamation, June
15, 1838.

ARTICLE 1st. The chiefs and braves representing the parties having an interest therein, cede to the United States all their land, east of the Mississippi river, and all their islands in the said river.

Cession of land to
the United States.

ARTICLE 2d. In consideration of the cession contained in the preceding article, the United States agree to the following stipulations on their part.

Consideration there-
for.

First. To invest the sum of \$300,000 (three hundred thousand dollars) in such safe and profitable State stocks as the President may direct, and to pay to the chiefs and braves as aforesaid, annually, forever, an income of not less than five per cent. thereon; a portion of said interest, not exceeding one third, to be applied in such manner as the President may direct, and the residue to be paid in specie, or in such other manner, and for such objects, as the proper authorities of the tribe may designate.

\$300,000 to be in-
vested for Indians.

Second. To pay to the relatives and friends of the chiefs and braves, as aforesaid, having not less than one quarter of Sioux blood, \$110,000

\$110,000 for persons
of mixed blood.

119 S.Ct. 1187
Supreme Court of the United States

MINNESOTA, et al., Petitioners,
v.
MILLE LACS BAND OF CHIPPEWA
INDIANS et al.

No. 97–1337. | Argued Dec. 2, 1998. | Decided
March 24, 1999.

Mille Lacs Band of Chippewa Indians and individual Band members sued State of Minnesota, its Department of Natural Resources (DNR), and various State officers, seeking declaratory and injunctive relief with respect to hunting, fishing, and gathering rights under 1837 Treaty. The United States was allowed to intervene as plaintiff, and counties and landowners were allowed to intervene as defendants. In first phase of bifurcated trial, the United States District Court for the District of Minnesota, Diane E. Murphy, J., 861 F.Supp. 784, ruled that usufructuary rights reserved to Band under Treaty continued to exist. In second phase of trial, the District Court, Michael James Davis, J., 952 F.Supp. 1362, refused to make further allocation of resources. Appeal was taken. The Eighth Circuit Court of Appeals, Lay, Circuit Judge, 124 F.3d 904, affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) Executive Order of 1850 removing Chippewa Indians from lands previously ceded did not terminate Chippewa usufructuary rights under 1837 Treaty; (2) Mille Lacs Band did not relinquish usufructuary rights when it entered into 1855 Treaty; and (3) Chippewa Indians' usufructuary rights were not extinguished when Minnesota was admitted to the Union, abrogating *Ward v. Race Horse*.

Affirmed.

Chief Justice Rehnquist dissented and filed opinion in which Justices Scalia, Kennedy, and Thomas joined.

Justice Thomas dissented and filed opinion.

West Headnotes (20)

[1]

Indians

➡ Hunting, Fishing, and Similar Rights

Indians

➡ Fishing Rights

Indians

➡ Abrogation, modification, or
relinquishment in general

Executive Order of 1850 removing Chippewa Indians from lands previously ceded to United States did not terminate Chippewa hunting, fishing, and gathering rights under 1837 Treaty, inasmuch as it was not within President's power under Removal Act, 1837 Treaty itself, or any other constitutional or statutory authority to remove Indians without their consent, and, assuming severability standard for statutes applied to Executive Order, invalid portion of Order governing removal was not severable from remainder of Order revoking usufructuary rights. 1837 Treaty with the Chippewa, Art. 1 et seq., 7 Stat. 536; 1830 Removal Act, § 3, 4 Stat. 411.

9 Cases that cite this headnote

[2]

Statutes

➡ Effect of Partial Invalidity;
Severability

Inquiry into whether a statute is severable is essentially an inquiry into legislative intent.

16 Cases that cite this headnote

[3]

Statutes

➡ Effect of Partial Invalidity;
Severability

Under traditional test for severability, unless it is evident that 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.

17 Cases that cite this headnote

[4]

Indians

🔑 Construction and operation

Treaties are to be interpreted liberally in favor of Indians, and treaty ambiguities are to be resolved in their favor.

17 Cases that cite this headnote

[5]

Indians

🔑 Abrogation, modification, or relinquishment in general

Indians

🔑 Abrogation, modification, or relinquishment in general

Mille Lacs Band of Chippewa Indians did not relinquish its rights guaranteed under 1837 Treaty to hunt, fish, and gather on ceded lands when it entered into 1855 Treaty stating that Indians fully and entirely relinquished and conveyed any and all right, title, and interest of whatsoever nature which they might have in lands in question, inasmuch as no part of 1855 Treaty mentioned usufructuary rights, and historical record supported theory that 1855 Treaty was designed to transfer Chippewa land, not to abrogate usufructuary rights. 1837 Treaty with the Chippewa, Art. 1 et seq., 7 Stat. 536; 1855 Treaty with the Chippewa, Art. 1 et seq., 10 Stat. 1166.

15 Cases that cite this headnote

[6]

Indians

🔑 Abrogation, modification, or relinquishment in general

Indians

🔑 Abrogation, modification, or relinquishment in general

To determine whether treaty abrogated rights previously guaranteed to Indians, Supreme Court would look beyond the written words to the larger context that framed the treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties.

14 Cases that cite this headnote

[7]

Indians

🔑 Construction and operation

Indian treaties are interpreted to give effect to the terms as the Indians themselves would have understood them.

11 Cases that cite this headnote

[8]

Indians

🔑 Construction and operation

Review of history and negotiations of agreements is central to the interpretation of Indian treaties.

7 Cases that cite this headnote

[9]

Indians

🔑 Abrogation, modification, or relinquishment in general

Indians

🔑 Abrogation, modification, or relinquishment in general

Hunting, fishing, and gathering rights

guaranteed to Chippewa Indians in 1837 Treaty were not extinguished when Minnesota was admitted to the Union, inasmuch as Minnesota's Enabling Act made no mention of Indian treaty rights, and State of Minnesota did not point to any legislative history describing effect of Act on Indian treaty rights; abrogating *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244. 1837 Treaty with the Chippewa, Art. 1 et seq., 7 Stat. 536; Act of May 11, 1858, § 1 et seq., 11 Stat. 285.

Cases that cite this headnote

[10]

Indians

🔑 Alteration or abrogation in general

Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.

6 Cases that cite this headnote

[11]

Indians

🔑 Alteration or abrogation in general

For Congress to have abrogated Indian treaty rights, 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.

9 Cases that cite this headnote

[12]

States

🔑 New States

Under constitutional principle known as "equal footing doctrine," all states are admitted to the Union with the same

attributes of sovereignty, that is, on equal footing, as the original 13 states.

5 Cases that cite this headnote

[13]

States

🔑 New States

Equal footing doctrine prevents the Federal Government from impairing fundamental attributes of state sovereignty when it admits new states into the Union.

6 Cases that cite this headnote

[14]

Indians

🔑 State regulation in general

Indians

🔑 State regulation in general

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; rather, Indian treaty rights can coexist with state management of natural resources.

7 Cases that cite this headnote

[15]

States

🔑 Environment; nuclear projects

States

🔑 Fish and game

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.C.A. Const. Art. 6,

cl. 2.

within state boundaries.

7 Cases that cite this headnote

7 Cases that cite this headnote

[16]

Indians

🔑 Real Property

Indians

🔑 State regulation

Indians

🔑 State regulation in general

Indian treaty-based usufructuary rights do not guarantee Indians absolute freedom from state regulation.

6 Cases that cite this headnote

[17]

Indians

🔑 State regulation in general

Indians

🔑 State regulation in general

States have authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.

2 Cases that cite this headnote

[18]

Indians

🔑 State regulation in general

Indians

🔑 Abrogation, modification, or relinquishment in general

Indians

🔑 State regulation in general

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

[19]

Indians

🔑 Construction and operation

Indian treaty must be interpreted in light of parties' intentions, with any ambiguities resolved in favor of Indians.

13 Cases that cite this headnote

[20]

Indians

🔑 Alteration or abrogation in general

Indian treaty rights are not impliedly terminated upon statehood.

Cases that cite this headnote

****1189 Syllabus***

*

The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Pursuant to an 1837 Treaty, several Chippewa Bands ceded land in present-day Minnesota and Wisconsin to the United States. The United States, in turn, guaranteed to the Indians certain hunting, fishing, and gathering rights on the ceded land "during the pleasure of the President of the United States." In an 1850 Executive Order, President Taylor ordered the Chippewa's removal from the ceded territory and revoked their usufructuary rights. The United States ultimately abandoned its removal policy, but its attempts to acquire Chippewa lands continued. An 1855 Treaty set aside lands as reservations for the Mille Lacs Band, but made no mention of, among other things,

whether it abolished rights guaranteed by previous treaties. Minnesota was admitted to the Union in 1858. In 1990, the Mille Lacs Band and several members sued Minnesota, its Department of Natural Resources, and state officials (collectively State), seeking, among other things, a declaratory judgment that they retained their usufructuary rights and an injunction to prevent the State's interference with those rights. The United States and several counties and landowners intervened. In later stages of the case, several Wisconsin Bands of Chippewa intervened and the District Court consolidated the Mille Lacs Band litigation with the portion of another suit involving usufructuary rights under the 1837 Treaty. The District Court ultimately concluded that the Chippewa retained their usufructuary rights under the 1837 Treaty and resolved several resource allocation and regulation issues. The Eighth Circuit affirmed. As relevant here, it rejected the State's argument that the 1850 Executive Order abrogated the usufructuary rights guaranteed by the 1837 Treaty, concluded that the 1855 Treaty did not extinguish those privileges for the Mille Lacs Band, and rejected the State's argument that, under the "equal footing doctrine," Minnesota's entrance into the Union extinguished any Indian treaty rights.

Held: The Chippewa retain the usufructuary rights guaranteed to them by the 1837 Treaty. Pp. 1197–1206.

(a) The 1850 Executive Order was ineffective to terminate Chippewa usufructuary rights. The President's power to issue an Executive Order must stem either from an Act of Congress or from the Constitution *173 itself. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S.Ct. 863, 96 L.Ed. 1153. The Court of Appeals concluded that the 1830 Removal Act did not authorize the removal order, and no party challenges that conclusion here. Even if the 1830 Removal Act did not *forbid* the removal order, it did not authorize the order. There is no support for the landowners' claim that the 1837 Treaty authorized the removal order. The Treaty made no mention of removal, and the issue was not discussed during treaty negotiations. The Treaty's silence is consistent with the United States' objectives in negotiating the Treaty: the purchase of Chippewa land. The State argues that, even if the order's removal portion was invalid, the treaty privileges were nevertheless revoked because the invalid removal order was severable from the portion of the order

revoking **1190 usufructuary rights. Assuming, *arguendo*, that the severability standard for statutes—whether the legislature would not have taken the valid action independently of the invalid action, *e.g.*, *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062—also applies to Executive Orders, the historical evidence indicates that President Taylor intended the 1850 order to stand or fall as a whole. That order embodied a single, coherent policy, the primary purpose of which was the Chippewa's removal. The revocation of usufructuary rights was an integral part of this policy, for the order tells the Indians to "go" and not to return to the ceded lands to hunt or fish. There is also little historical evidence that the treaty privileges themselves—rather than the Indians' presence—caused problems necessitating revocation of the privileges. Pp. 1197–1200.

(b) The Mille Lacs Band did not relinquish its 1837 Treaty rights in the 1855 Treaty by agreeing to "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." That sentence does not mention the 1837 Treaty or hunting, fishing, and gathering rights. In fact, the entire 1855 Treaty is devoid of any language expressly mentioning usufructuary rights or providing money for abrogation of those rights. These are telling omissions, since federal treaty drafters had the sophistication and experience to use express language when abrogating treaty rights. The historical record, purpose, and context of the negotiations all support the conclusion that the 1855 Treaty was designed to transfer Chippewa land to the United States, not terminate usufructuary rights. *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 105 S.Ct. 3420, 87 L.Ed.2d 542, distinguished. Pp. 1200–1203.

(c) The Chippewa's usufructuary rights were not extinguished when Minnesota was admitted to the Union. Congress must clearly express an intent to abrogate Indian treaty rights, *174 *United States v. Dion*, 476 U.S. 734, 738–740, 106 S.Ct. 2216, 90 L.Ed.2d 767, and there is no clear evidence of such an intent here. The State concedes that Minnesota's enabling Act is silent about treaty rights and points to no legislative history describing the Act's effect on such rights. The State's reliance on *Ward v.*

Race Horse, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244, is misplaced. The Court's holding 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, *id.*, at 507, 16 S.Ct. 1076, has been qualified by this Court's later decisions. The first part of the *Race Horse* holding—that the treaty rights conflicted irreconcilably with state natural resources regulation such that they could not survive Wyoming's admission to the Union on an "equal footing" with the 13 original States—rested on a false premise, for this Court has subsequently made clear that a tribe's treaty rights to hunt, fish, and gather on state land can coexist with state natural resources management, see, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823. Thus, statehood by itself is insufficient to extinguish such rights. *Race Horse*'s alternative holding—that the treaty rights at issue were not intended to survive Wyoming's statehood—also does not help the State here. There is no suggestion in the 1837 Treaty that the Senate intended the rights here to terminate when a State was established in the area; there is no fixed termination point contemplated in that Treaty; and treaty rights are not impliedly terminated at statehood, e.g., *Wisconsin v. Hitchcock*, 201 U.S. 202, 213–214, 26 S.Ct. 498, 50 L.Ed. 727. Pp. 1203–1206.

124 F.3d 904, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C.J., filed a dissenting opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined, *post*, p. 1206. **1191 THOMAS, J., filed a dissenting opinion, *post*, p. 1212.

Attorneys and Law Firms

John L. Kirwin, St. Paul, MN, for petitioners.

Randy V. Thompson, Minneapolis, MN, for respondents John W. Thompson, et al.

Marc D. Slonim, Seattle, WA, for respondents Mille Lacs Band of Chippewa Indians, et al.

Barbara B. McDowell, for respondent the United States.

Opinion

*175 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 *176 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:

***177** “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 ****1192** 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.*

***178** 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 ***179** 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 Chippewa 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 ****1193** 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, Apr. 2, 1850)) (describing circular prepared to notify Indians of Executive Order); App. ***180** 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 disaster. 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 to 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 ***181** 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 Chippewa *[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 **1194 Herriman to Gorman, Nov. 10, 1853); see also Plaintiffs' *182 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. *183 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 *184 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 ****1195** 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 ***185** 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.

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.

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. 784 (1994). Specifically, as relevant ***186** 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 ****1196** 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 plaintiffs² 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.

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.

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 Treaties. Two Minnesota landowners intervened as defendants,³ and the District *187 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.

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.

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.

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 *188 Wildlife v. Klamath Tribe*, 473 U.S. 753, 105 S.Ct. 3420, 87 L.Ed.2d 542 (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, 16 S.Ct. 1076, 41 L.Ed. 244 (1896), **1197 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 Court of Appeals for the Seventh Circuit's 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 dism'd and cert. denied *sub nom.*

Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 464 U.S. 805, 104 S.Ct. 53, 78 L.Ed.2d 72 (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. 915, 118 S.Ct. 2295, 141 L.Ed.2d 156 (1998).

II

[¹¹] 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 *189 or from the Constitution itself.' " 124 F.3d, at 915 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S.Ct. 863, 96 L.Ed. 1153 (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 *190 treaties with Indian tribes in 1837⁴—**1198 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 pinewoods located on it; the letter contains no reference to removal of the Chippewa. *Ibid.* 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.

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”).

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 *191 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 (C.A.9 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.

[2] [3] The inquiry into whether a statute is severable is essentially an inquiry into legislative intent. *Regan v. Time, Inc.*, 468 U.S. 641, 653, 104 S.Ct. 3262, 82 L.Ed.2d 487 (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, 52 S.Ct. 559, 76 L.Ed. 1062 (1932). See also *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987); *Regan v. Time, Inc.*, *supra*, at 653, 104 S.Ct. 3262. 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 *192 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).

**1199 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 *193 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 the 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.

^[4] 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 *194 order, and the Executive Order, embodying as it did one coherent policy, is inseverable.⁵ We do not **1200 mean to suggest that a President, now or in the future, cannot revoke *195 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.

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 1208–1209 (dissenting opinion). 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 in favor of the Indians, *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675–676, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979), and treaty ambiguities to be resolved in their favor, *Winters v. United States*, 207 U.S. 564, 576–577, 28 S.Ct. 207, 52 L.Ed. 340 (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 1209–1210. 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, 28 S.Ct. 207; see also *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (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.

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”).

III

¹⁵¹ 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 elsewhere.” 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 *196 ... secured to them by the treaty of June 16, 1820”).⁶ See, e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970) (rejecting argument that language in Treaty had special meaning when United States was competent to state that meaning more clearly).

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

¹⁶¹ ¹⁷¹ 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 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, 63 S.Ct. 672, 87 L.Ed. 877 (1943); see also *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999). 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 *1201 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, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979); *United States v. Winans*, 198 U.S. 371, 380–381, 25 S.Ct. 662, 49 L.Ed. 1089 (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 *197 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.*

*198 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 **1202 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 *199 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.

***200** 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 interpreted liberally in favor of the Indians, *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S., at 675–676, 99 S.Ct. 3055; *Choctaw Nation v. United States*, 318 U.S., at 432, 63 S.Ct. 672, and that any ambiguities are to be resolved in their favor, *Winters v. United States*, 207 U.S. 564, 576–577, 28 S.Ct. 207, 52 L.Ed. 340 (1908). See also *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (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, 105 S.Ct. 3420, 87 L.Ed.2d 542 (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, 105 S.Ct. 3420. 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 ****1203** 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 ***201** 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, 105 S.Ct. 3420. 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, 105 S.Ct. 3420. 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, 105 S.Ct. 3420. 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, 105 S.Ct. 3420. 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, 105 S.Ct. 3420.

^[8] *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 ***202** 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 fundamental 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 167, 119 S.Ct. 662. 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

[9] [10] [11] 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, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986); see also *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S., at 690, 99 S.Ct. 3055; ***1204** *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (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 ***203** to resolve that conflict by abrogating the treaty.” *United States v. Dion*, *supra*, at 740, 106 S.Ct. 2216. 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, 16 S.Ct. 1076, 41 L.Ed. 244 (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, 16 S.Ct. 1076 (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.

[12] [13] 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, 31 S.Ct. 688, 55 L.Ed. 853 (1911). As relevant here, it prevents the Federal Government from impairing ***204** fundamental attributes of state sovereignty when it admits new States into the Union. *Id.*, at 573, 31 S.Ct. 688. 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,” 163 U.S., at 516, 16 S.Ct. 1076—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.

[14] [15] [16] [17] [18] 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.*, *supra*, 99 S.Ct. 3055; see also *Antoine v. Washington*, 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (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, 40 S.Ct. 382, 64 L.Ed. 641 (1920); *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976); *United States v. Winans*, 198 U.S., at 382–384, 25 S.Ct. 662; *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 23 L.Ed. 846 (1876). See also *Menominee Tribe v. United States*, *supra*, at 411, n. 12, 88 S.Ct. 1705. 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 ****1205** rights do not guarantee the Indians "absolute freedom" from state regulation. *Oregon Dept. of Fish and Wildlife v. Klamath *205* *Tribe*, 473 U.S., at 765, n. 16, 105 S.Ct. 3420. 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, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S., at 682, 99 S.Ct. 3055; *Antoine v. Washington*, *supra*, at 207–208, 95 S.Ct. 944. 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

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, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985). *Post*, at 1211. 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 1205–1206. See 473 U.S., at 773, n. 23, 105 S.Ct. 3420. 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, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

[19] 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' 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 ***206** to justify any differences in state regulatory authority. Moreover, as Justice THOMAS acknowledges, *post*, at 1213 (dissenting opinion), the starting point for any analysis of 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, 28 S.Ct. 207. There is no evidence that the Chippewa understood any fine legal distinctions between rights and privileges. Moreover, under Justice THOMAS' 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.” 163 U.S., at 515, 16 S.Ct. 1076. 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, 16 S.Ct. 1076; see *id.*, at 514–515, 16 S.Ct. 1076.

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 1211. But the “temporary and precarious” language in *Race Horse* is too broad to be useful in ****1206** distinguishing rights that survive statehood from those that do not. In *Race* ***207** *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, 16 S.Ct. 1076. 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.

^[20] 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, 16 S.Ct. 1076. 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, 16 S.Ct. 1076. 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, 26 S.Ct. 498, 50 L.Ed. 727 (1906); *Johnson v. Gearlds*, 234 U.S. 422, 439–440, 34 S.Ct. 794, 58 L.Ed. 1383 (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 ***208** over natural 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 1204–1205. 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.

CHIEF JUSTICE REHNQUIST, with whom Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, dissenting.

The Court holds that the various Bands of Chippewa Indians retain a usufructuary right granted to them in an 1837 Treaty. To reach this result, the Court must successively conclude that: (1) an 1850 Executive Order explicitly revoking the privilege as authorized by the 1837 Treaty was unlawful; (2) an 1855 Treaty under which certain Chippewa Bands ceded “all” interests to the land does not include the treaty right to come onto the land and hunt; and (3) the admission of Minnesota into the Union in 1858 did not terminate the discretionary hunting privilege, despite established precedent of this Court to the contrary. Because I believe that each one of these three conclusions is demonstrably wrong, I dissent.

I

I begin with the text of the Treaty negotiated in 1837. In that Treaty, the Chippewa ceded land to the United States in exchange for specified consideration. Article 1 of the Treaty describes the land ceded by the Chippewa to the United States. Article 2 of the 1837 Treaty provides:

*209 “In consideration of the cession aforesaid, the United States agree to make to **1207 the Chippewa nation, annually, for the term of twenty years, from the date of the ratification of this treaty, the following payments.

“1. Nine thousand five hundred dollars, to be paid in money.

“2. Nineteen thousand dollars, to be delivered in goods.

“3. Three thousand dollars for establishing three blacksmiths shops, supporting the blacksmiths, and furnishing them with iron and steel.

“4. One thousand dollars for farmers, and for supplying them and the Indians, with implements of labor, with grain or seed; and whatever else may be necessary to enable them to carry on their agricultural pursuits.

“5. Two thousand dollars in provisions.

“6. Five hundred dollars in tobacco.

“The provisions and tobacco to be delivered at the same time with the goods, and the money to be paid; which time or times, as well as the place or places where they are to be delivered, shall be fixed upon under the direction of the President of the United States.

“The blacksmiths shops to be placed at such points in the Chippewa country as shall be designated by the Superintendent of Indian Affairs, or under his direction.

“If at the expiration of one or more years the Indians should prefer to receive goods, instead of the nine thousand dollars agreed to be paid to them in money, they shall be at liberty to do so. Or, should they conclude to appropriate a portion of that annuity to the establishment and

support of a school or schools among them, this shall be granted them.” 7 Stat. 536–537.

Thus, in exchange for the land cessions, the Chippewa agreed to receive an annuity payment of money, goods, and the implements necessary for creating blacksmith’s shops and farms, for a limited duration of 20 years.

*210 Articles 3 and 4 of the Treaty deal with cash payments to persons not parties to this suit, but Article 5 is involved here. As the Court notes, there was some discussion during the treaty negotiations that the Chippewa wished to preserve some right to hunt in the ceded territory. See *ante*, at 1191. The United States agreed to this request to some extent, and the agreement of the parties was embodied in Article 5 of the Treaty, which provides that:

“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 to the Indians, during the pleasure of the President of the United States.” 7 Stat. 537.

As the Court also notes, the Chippewa were aware that their right to come onto the ceded land was not absolute—the Court quotes the statement of Governor Dodge to the Chippewa 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.’ ” *Ante*, at 1191; App. 46 (1837 Journal of Treaty Negotiations).

Thus, the Treaty by its own plain terms provided for a *quid pro quo*: Land was ceded in exchange for a 20-year annuity of money and goods. Additionally, the United States granted the Chippewa a quite limited “privilege” to hunt and fish, “guarantied ... during the pleasure of the President.” Art. 5, 7 Stat. 537.

II

In 1850, President Taylor expressly terminated the 1837 Treaty privilege by Executive Order. The Executive Order provides:

“The privileges granted temporarily to the Chippewa 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 *211 lands, the rivers and the lakes included in the territory ceded' by that treaty to 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.

In deciding that this seemingly ironclad revocation was not effective as a matter of law, the Court rests its analysis on four findings. First, the Court notes that the President's **1208 power to issue the order must stem either from an Act of Congress or the Constitution itself. Second, the Court determines that the Executive Order was a "removal order." Third, the Court finds no authority for the President to order the Chippewa to remove from the ceded lands. And fourth, the Court holds that the portion of the Executive Order extinguishing the hunting and fishing rights is not severable from the "removal order" and thus also was illegal. I shall address each of these dubious findings in turn.

The Court's first proposition is the seemingly innocuous statement that a President's Executive Order must be authorized by law in order to have any legal effect. In so doing, the Court quotes our decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), which held that President Truman's seizure of the steel mills by Executive Order during the Korean War was unlawful. However, the Court neglects to note that treaties, every bit as much as statutes, are sources of law and may also authorize Executive actions. See *Dames & Moore v. Regan*, 453 U.S. 654, 680, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981). In *Dames & Moore*, we noted that where the President acts with the implied consent of Congress in his Executive actions, "he exercises not only his own powers but also those delegated by Congress," and that such an action was entitled to high deference as to its legality. *Id.*, at 668, 101 S.Ct. 2972. This case involves an even stronger case for deference to Executive power than *Dames & Moore*, in which Presidential power under an Executive agreement was impliedly authorized by Congress, because the Executive Order in this *212 case was issued pursuant to a Treaty ratified by the advice and consent of the Senate, and thus became the supreme law of the land. See U.S. Const., Art. VI; *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937). The Court's contrary conclusion is simply wrong.

The Court's second assumption is that the Executive Order was a "removal order"—that its primary purpose was the removal of the Chippewa. This assumption rests upon scattered historical evidence that, in the Court's view, "[t]he officials charged with implementing this order understood it primarily as a removal order, and they proceeded to implement it accordingly." *Ante*, at 1192–1193. Regardless of what the President's remote frontier agents may have thought, the plain meaning of the *text* of President Taylor's order can only support the opposite conclusion. The structure of the Executive Order is not that of a removal order, with the revocation of the hunting privileges added merely as an afterthought. Instead, the first part of the order (not to mention the bulk of its text) deals with the extinguishment of the Indians' privilege to enter onto the lands ceded to the United States and hunt. Only then (and then only in its final five words) does the Executive Order require the Indians to "remove to their unceded lands." App. to Pet. for Cert. 565 (Exec. Order, Feb. 6, 1850).

If the structure and apparent plain meaning of the Executive Order reveal that the order was primarily a revocation of the privilege to hunt during the President's pleasure, what then should we make of the fact that the officials charged with "implementing" the order viewed their task as primarily effecting removal? The answer is simple. First, the bulk of the Executive Order that terminates the hunting privilege was self-executing. Second, while the President could terminate the legal right (*i.e.*, the privilege to enter onto the ceded lands and hunt) without taking enforcement action, a removal order *would* require actual implementation. The historical evidence cited by the Court is best *213 understood thus as an implementation of President Taylor's unequivocal (and legally effective) termination of the usufructuary privileges. But while the removal portion may have required implementation to be effective, this cannot turn the Executive Order into a "removal order." And even if the President's agents viewed the order as a removal order (a proposition for which the historical evidence is far more ambiguous than the Court admits), their interpretation is not binding on this Court; nor should it be, since the agents had nothing to do with the bulk of the order which terminated the treaty privileges.

**1209 The Court's third finding is that the removal portion of the order is invalid because

President Taylor had no authority to order removal. Although the Court sensibly concludes that the Removal Act of 1830 is inapplicable to this case, it then curiously rejects the notion that the 1837 Treaty authorizes removal, largely on the grounds that “[t]he Treaty makes no mention of removal.” *Ante*, at 1197. The Court is correct that the Treaty does not *mention* removal, but this is because the Treaty was essentially a deed of conveyance—it transferred land to the United States in exchange for goods and money. After the Treaty was executed and ratified, the ceded lands belonged to the United States, and the only real property interest in the land remaining to the Indians was the privilege to come onto it and hunt during the pleasure of the President. When the President terminated that privilege (a legal act that the Court appears to concede he had a right to make, *ante*, at 1199), he terminated the Indians’ right to come onto the ceded lands and hunt. The Indians had no legal right to remain on the ceded lands for that purpose, and the removal portion of the order should be viewed in this context. Indeed, the Indians then had no legal rights at all with respect to the ceded lands, in which all title was vested in the United States. And this Court has long held that the President has the implied power to administer the public lands. See, e.g., *United States v. Midwest *214 Oil Co.*, 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1915). Dealing with persons whose legal right to come onto the lands and hunt had been extinguished would appear to fall squarely under this power. Whether the President chose to enforce his revocation through an order to leave the land or the ambiguous lesser “measures to make sure that the Chippewa were not hunting, fishing, or gathering” proposed by the Court, *ante*, at 1199 n. 5, is not ours to second-guess a century and a half later. Indeed, although the Court appears to concede that the President had the power to enforce the revocation order, it is difficult to imagine what steps he could have taken to prevent hunting other than ordering the Chippewa not to come onto the land for that purpose. The ceded lands were not a national park, nor did the President have an army of park rangers available to guard Minnesota’s wildlife from Chippewa poachers. Removal was the only viable option in enforcing his power under the Treaty to terminate the hunting privilege. Thus, in my view, the final part of the Executive Order discussing removal was lawful.¹

¹ The Court’s assumption that “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,” *ante*, at 1200, n. 5, illogically confuses the difference between executive authority and a principle of treaty construction. The principle of *Winters v. United States*, 207 U.S. 564, 567–577, 28 S.Ct. 207, 52 L.Ed. 340 (1908), and *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992), that ambiguities in treaties are to be resolved in favor of the Indians, is only relevant to determining the intent of the *parties to a treaty* (that is the United States and the Indian tribe), and stems from the idea that in determining the intent of the parties, Indian tribes should be given the benefit of the doubt as against the United States in cases of ambiguous treaty provisions because of the United States was presumptively a more sophisticated bargainer. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). But the determination of whether the President has power to enforce his revocation by removal is irrelevant to the intent of the parties to the treaty (the United States and the Chippewa in this case) and presents instead an issue of separation of powers (between the President and the Congress).

215** The fourth element essential to today’s holding is the conclusion that if the final part of the Executive Order requiring removal were not authorized, the bulk of the order would fail as not severable. Because this is the first time we have had occasion to consider the severability of Executive Orders, the Court first assumes that the standards for severability of statutes also apply to the severability of Executive Orders. Next, the Court determines to seek the “legislative intent” of President Taylor in issuing the order. *Ante*, at 1198. And finally, the Court concludes that President Taylor would not have issued the Executive Order in the absence of a removal provision, because the 1850 order embodied a coherent policy of Indian removal. As noted above, this approach to the Executive Order stands it on its head—the order *first* extinguishes the *1210** hunting privilege and only then—in its last five words—orders removal.

But even if I were to assume that the President were without authority to order removal, I would conclude that the removal provision is severable from that terminating the treaty privileges. There is no dispute that the President had authority under

the 1837 Treaty to terminate the treaty privileges. We have long held that “[w]hen the President acts pursuant to an express or implied authorization from Congress, ... the executive action ‘would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.’ ” *Dames & Moore v. Regan*, 453 U.S., at 668, 101 S.Ct. 2972 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S., at 637, 72 S.Ct. 863 (Jackson, J., concurring)). Against this deferential standard, the Court musters little more than conjecture and inference, reinforced by its upside-down reading of the Executive Order’s plain text. Not only does the Court invert the plain meaning of the Executive Order, it inverts the proper standard of review. Given the deference we are to accord this valid action made pursuant to a treaty, the order’s termination of ***216** the treaty privileges should be sustained unless the Chippewa are able to clearly demonstrate that President Taylor would *not* have terminated them without a removal order. But there is no such evidence, and in the absence of evidence challenging the “strongest of presumptions and the widest latitude of judicial interpretation” that we are required to afford President Taylor’s actions, we have only the Court’s misguided excursion into historiographical clairvoyance. Accordingly, I would conclude, if necessary, that the termination portion of the Executive Order is severable.

Rather than engage in the flawed analysis put forward by the Court, I would instead hold that the Executive Order constituted a valid revocation of the Chippewa’s hunting and fishing privileges. Pursuant to a Treaty, the President terminated the Indians’ hunting and fishing privileges in an Executive Order which stated, in effect, that the privilege to come onto federal lands and hunt was terminated, and that the Indians move themselves from those lands.

No party has questioned the President’s power to terminate the hunting privilege; indeed, the only other evidence in the record of a President’s intent regarding the Executive Order is a 1938 letter from President Franklin Roosevelt to one of the Chippewa, in which he stated his understanding that the Indians had “temporarily” enjoyed “the right to hunt and fish on the area ceded by them until such right was revoked by the President” in the 1850 Executive Order. App. to Pet. for Cert. 575 (letter from President Roosevelt to Whitebird,

Mar. 1, 1938). President Roosevelt went on to add that since the right to hunt and fish was terminated in 1850, the Chippewa “now have no greater right to hunt or fish on the ceded area ... than do the other citizens of the State. Therefore, the Indians who hunt or fish ... are amenable to the State game laws and are subject to arrest and conviction [f]or violation thereof.” *Id.*, at 576.

***217** President Roosevelt’s letter reflects the settled expectations of the President, in whose office the discretion to terminate the privilege granted in Article 5 of the 1837 Treaty was vested, that the 1850 Executive Order was a valid termination of the treaty privileges. And because the 1837 Treaty, in conjunction with the Presidential power over public lands, gave the President the power to order removal in conjunction with his termination of the hunting rights, the Court’s severability analysis is unnecessary. In sum, there is simply no principled reason to invalidate the 150-year-old Executive Order, particularly in view of the heightened deference and wide latitude that we are required to give orders of this sort.

III

Although I believe that the clear meaning of the Executive Order is sufficient to resolve this case, and that it is unnecessary to address the Court’s treatment of the 1855 Treaty and the 1858 admission of Minnesota to the Union, I shall briefly express my strong disagreement with the Court’s analysis on these issues also.

****1211** As the Court notes, in 1855, several of the Chippewa Bands agreed, in exchange for further annuity payments of money and goods, to “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 now have in, and to any other lands in the Territory of Minnesota or elsewhere.” 10 Stat. 1166. The plain meaning of this provision is a relinquishment of the Indians of “all” rights to the land. The Court, however, interprets this provision in a manner contrary to its plain meaning by first noting that the provision does not mention “usufructuary” rights. It argues, citing examples, that since the United States “had the sophistication and experience to use express language for the abrogation of treaty

rights,” *ante*, at 1200, but did not mention the 1837 Treaty rights in drafting this *218 language,² it perhaps did not intend to extinguish those rights, thus creating an interpretation at odds with the Treaty’s language. Then, using our canons of construction that ambiguities in treaties are often resolved in favor of the Indians, it concludes that the Treaty did not apply to the hunting rights.

² One notices the irony that where the President chose to explicitly eliminate the 1837 Treaty rights, the Court finds this specificity subsumed in the “removal order,” and invalidates it as well.

I think this conclusion strained, indeed. First, the language of the Treaty is so broad as to encompass “all” interests in land possessed or claimed by the Indians. Second, while it is important to the Court that the Treaty “is devoid of any language expressly mentioning—much less abrogating—usufructuary rights,” *ibid.*, the definition of “usufructuary rights” explains further why this is so. Usufructuary rights are “a real right of limited duration on the property of another.” See Black’s Law Dictionary 1544 (6th ed.1990). It seems to me that such a right would fall clearly under the sweeping language of the Treaty under any reasonable interpretation, and that this is not a case where “even ‘learned lawyers’ of the day would probably have offered differing interpretations of the [treaty language].” Cf. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 677, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). And third, although the Court notes that in other treaties the United States sometimes expressly mentioned cessions of usufructuary rights, there was no need to do so in this case, because the settled expectation of the United States was that the 1850 Executive Order had terminated the hunting rights of the Chippewa. Thus, rather than applying the plain and unequivocal language of the 1855 Treaty, the Court holds that “all” does not in fact mean “all.”

*219 IV

Finally, I note my disagreement with the Court’s treatment of the equal footing doctrine, and its apparent overruling *sub silentio* of a precedent of

103 years’ vintage. In *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896), we held that a Treaty granting the Indians “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 the Indians on the borders of the hunting districts,” did not survive the admission of Wyoming to the Union since the treaty right was “temporary and precarious.” *Id.*, at 515, 16 S.Ct. 1076.

But the Court, in a feat of jurisprudential legerdemain, effectively overrules *Race Horse sub silentio*. First, the Court notes that Congress may only abrogate Indian treaty rights if it clearly expresses its intent to do so. Next, it asserts that Indian hunting rights are not irreconcilable with state sovereignty, and determines that “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.” *Ante*, at 1205. And finally, the Court hints that *Race Horse* rested on an incorrect premise—that Indian rights were inconsistent with state sovereignty.

Without saying so, this jurisprudential bait-and-switch effectively overrules *Race Horse*, a case which we reaffirmed as recently as 1985 in *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985). *Race Horse* held merely that treaty rights which were only “temporary and precarious,” as opposed to those which were “of such a nature as to imply their perpetuity,” do not survive statehood.³ *220 163 U.S., at 515, 16 S.Ct. 1076. Here, the hunting privileges were clearly, like those invalidated in *Race Horse*, temporary and precarious: The privilege was only guaranteed “during the pleasure of the President”; the legally enforceable annuity payments themselves were to terminate after 20 years; and the Indians were on actual notice that the President might end the rights in the future, App. 78 (1837 Journal of Treaty Negotiations).

³ The Court maintains that this reading of *Race Horse* is overbroad and would render any right created by operation of federal law “temporary and precarious.” *Ante*, at 1205. Nothing could be further from the truth. The outer limit of what constitutes a “temporary and precarious” right is not before the Court (nor, since *Race*

Horse is apparently overruled, will it ever be), but the hunting privileges granted in *Ward* and by the 1837 Treaty in this case reveal themselves to be “temporary and precarious” by their plain text: The privilege in *Race Horse* ended upon occupation of the hunting districts or the outbreak of hostilities, while the privilege in this case lasted only during the pleasure of the President. Both rights were temporary and precarious, as neither was guaranteed, either expressly or impliedly, in perpetuity.

Perhaps the strongest indication of the temporary nature of the treaty rights is presented unwittingly by the Court in its repeated (and correct) characterizations of the rights as “usufructuary.” As noted *supra*, at 1211, usufructuary rights are by definition “of limited duration.” Black’s Law Dictionary, *supra*, at 1544. Thus, even if the Executive Order is invalid; and even if the 1855 Treaty did not cover the usufructuary rights: Under *Race Horse*, the temporary and precarious treaty privileges were eliminated by the admission of Minnesota to the Union on an equal footing in 1858. Today the Court appears to invalidate (or at least substantially limit) *Race Horse*, without offering any principled reason to do so.

V

The Court today invalidates for no principled reason a 149-year-old Executive Order, ignores the plain meaning of a 144-year-old treaty provision, and overrules *sub silentio* a 103-year-old precedent of this Court. I dissent.

Justice THOMAS, dissenting.

I join THE CHIEF JUSTICE’s dissent, but also write separately because contrary to the majority’s assertion, in dicta, *221 *ante*, at 1204–1205, our prior cases do not dictate the conclusion that the 1837 Treaty curtails Minnesota’s regulatory authority.

As the Court has ruled today that the Chippewa retain the privilege to hunt, fish, and gather on the land they ceded in the 1837 Treaty, the question of the scope of the State’s regulatory power over the Chippewas’ exercise of those privileges assumes

great significance—any limitations that the Federal Treaty may impose upon Minnesota’s sovereign authority over its natural resources exact serious federalism costs. The questions presented, however, do not require the Court to decide whether the 1837 Treaty limits the State’s regulatory authority in any way. All that they require is a judgment as to whether the usufructuary privileges at issue survive three potentially extinguishing events: President Taylor’s 1850 Executive Order, the 1855 Treaty, and Minnesota’s admission to the Union in 1858.

The Court nevertheless offers the following observation:

“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.*” *Ante*, at 1204 (emphases added).

In light of the importance of this federalism question, the Court should not pass on it, even in dicta, without the benefit of the parties’ briefing and argument. But as the Court has done so, I think it important to explain my disagreement with the italicized propositions.

****1213** The plain language of the 1837 Treaty says nothing about territorial, let alone future state, regulation. The historical evidence that the Court reviews, *ante*, at 1191–1192, to the extent that it is relevant, is likewise silent as to whether the Chippewa expected to be subject to any form of regulation ***222** in the exercise of their reserved treaty privileges. The historical evidence certainly indicates that the Chippewa desired the privilege of access to the land they were ceding. But the 1837 Journal of Treaty Negotiations does not show that the Chippewa demanded access to the land on any particular terms. See App. 70–78.

Indeed, the Court retreats from its assertion that the 1837 Treaty gave the Chippewa an unlimited right to hunt, fish, and gather free from regulation when it states: “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.” *Ante*, at 1205. If the 1837 Treaty gives the Chippewa a right to be free from state

regulation, why may Minnesota impose any regulations, reasonable and necessary or otherwise? The Court's answer to that question is that our prior decisions have established that Indians never have " 'absolute freedom,' " *ibid.*, from state regulation, no matter what a treaty might say; rather, Indians' hunting, fishing, and gathering activities are limited by those state regulations which are necessary for ensuring the conservation of natural resources.

To be sure, Indians do not have absolute freedom from state regulation of their off-reservation activities. Indeed, the general rule is that the off-reservation activities of Indians are subject to a State's nondiscriminatory laws, absent express federal law to the contrary. See, e.g., *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 765, n. 16, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335, n. 18, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). The majority, however, overlooks the fact that the scope of a State's regulatory authority depends upon the language of the treaty in question. At a *minimum*, States may issue and enforce those regulations of Indians' off-reservation usufructuary activities that are necessary in the interest of conservation. Our decisions suggest that state regulatory authority is so limited when, with *223 the treaty in question, the Indians reserved a *right* to fish, hunt, or gather on ceded lands. But it is doubtful that the so-called "conservation necessity" standard applies in cases, such as this one, where Indians reserved no more than a *privilege* to hunt, fish, and gather.

The conservation necessity standard appears to have its origin in *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942). In the 1859 Treaty with the Yakima Indians, the Yakima reserved " 'the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.' " *Id.*, at 683, 62 S.Ct. 862 (quoting 12 Stat. 953). The Court held that Washington State had the "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish*," but that the Treaty foreclosed "the state from charging the Indians a fee of the kind in question." 315 U.S., at 684, 62 S.Ct. 862 (emphasis added). Its conclusion was driven by the language of the Treaty as well as the report of the treaty negotiations and what it revealed to be the

Yakimas' understanding of the Treaty—to preserve their right "to hunt and fish *in accordance with the immemorial customs of their tribes*." *Ibid.* (emphasis added).¹ Subsequent decisions evaluating state regulation by the conservation necessity standard similarly focused upon the language of the Treaty or agreement at issue and the Indians' understanding of the Treaty as revealed by the historical evidence. See *Washington v. Washington State Commercial Passenger **1214 Fishing Assn.*, 443 U.S. 658, 665–669, 674–685, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (recognizing that the Court had construed the same Treaty language several times before, and emphasizing *224 the historical background against which the Treaty at issue was signed); *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 395, 397, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) (involving treaty language almost identical to that at issue in *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), and *Tulee, supra*); see also *Antoine v. Washington*, 420 U.S. 194, 206, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975) (favorably comparing the somewhat different language of the agreement at issue with the language of the Treaties at issue in *Winans* and *Puyallup*). Most important, all the cases that the majority cites in support of the proposition that States may enforce against Indians in their exercise of off-reservation usufructuary activities only those regulations necessary for purposes of conservation, *ante*, at 1204–1205, involved the same or substantially similar treaty language reserving a *right* to hunt or fish. And all but *Antoine* also provided that the Indians could exercise their reserved rights at the usual and accustomed places.

¹ A prior case interpreting the same 1859 Treaty held that the language fixed in the land an easement for the Yakima so that they could cross private property to fish in the Columbia River. *United States v. reserved r*, 198 U.S. 371, 381–382, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). But the Court also wrote that the Treaty did not "restrain the State unreasonably, *if at all*, in the regulation of the right." *Id.*, at 384, 25 S.Ct. 662 (emphasis added).

In *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 36 S.Ct. 705, 60 L.Ed. 1166 (1916), the Court considered significantly different language. The Big Tree Treaty of 1797, as the agreement was known, provided that the Seneca were to retain "the *privilege* of fishing and hunting on the said

tract of land” conveyed by the agreement. 7 Stat. 602 (emphasis added); see also 241 U.S., at 562, 36 S.Ct. 705 (quoting the reservation clause). The Court characterized the Senecas’ claim as one “sought to be maintained in derogation of the sovereignty of the State.” *Ibid.* In rejecting such a claim, it stated:

“[I]t can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to *225 reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather we are of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands *in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised.*” *Id.*, at 563–564, 36 S.Ct. 705 (emphasis added).

The only fair reading of *Kennedy* is that the Treaty reserved for the Seneca a privilege in common with all persons to whom the State chose to extend fishing and hunting privileges. The Court did not indicate that the Treaty limited New York’s regulatory authority with respect to the Seneca in any way. See *id.*, at 564, 36 S.Ct. 705 (the treaty privilege was subject to “that necessary power of appropriate regulation, *as to all those privileged*, which inhered in the sovereignty of the State over the lands where the privilege was exercised” (emphasis added)). Of course, then, what was “appropriate” state regulation as applied to non-Indians was “appropriate” regulation as applied to the Seneca. Cf. *Puyallup Tribe*, *supra*, at 402, n. 14, 88 S.Ct. 1725 (“The measure of the legal propriety of [regulations that are to be measured by the conservation necessity standard] is ... distinct from the federal constitutional standard concerning the scope of the police power of a State”).²

2 As already noted, *supra*, at 1213, the Court has said that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–149, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (State of New Mexico permitted to tax off-reservation activities of Tribe as they would any non-Indians). In support of that proposition in *Mescalero*, the Court cited the *Puyallup Tribe* and *Tulee* decisions, but not *Kennedy*. A possible explanation is that the Treaties at issue in *Puyallup Tribe* and *Tulee* provided express federal law to the contrary, while the Treaty in *Kennedy* did not.

****1215 *226** The 1837 Treaty at issue here did not reserve “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory” like those involved in *Tulee* and *Puyallup Tribe*. Rather, it provided:

“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 to the Indians, during the pleasure of the President of the United States.” 1837 Treaty with the Chippewa, 7 Stat. 537 (emphasis added).

This language more closely resembles the language of the Big Tree Treaty at issue in *Kennedy*. Although Minnesota’s regulatory authority is not at issue here, in the appropriate case we must explain whether reserved treaty *privileges* limit States’ ability to regulate Indians’ off-reservation usufructuary activities in the same way as a treaty reserving *rights*.³ This is especially true with respect to the privileges reserved by the Chippewa in the 1837 Treaty, which, as THE CHIEF JUSTICE explains, *ante*, at 1212 (dissenting opinion), were clearly of a temporary and precarious nature.

3 Various representatives of the United States have previously taken the position that treaty rights are “more substantial vested rights than treaty reserved privileges.” Holt, Can Indians Hunt in National Parks?, 16 Env’tl. L. 207, 236–238 (1986) (citing letters from the Department of Agriculture, Department of the Interior, and the Department of Justice to that effect).

119 S.Ct. 1187, 143 L.Ed.2d 270, 67 USLW 4189,
29 Env'tl. L. Rep. 20,557, 99 Cal. Daily Op. Serv.
2104, 1999 Daily Journal D.A.R. 2735, 12 Fla. L.
Weekly Fed. S 162

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Kelly Applegate, Mille Lacs DNR
1/24/25

- Need to educate about treaty rights
 - Off-res also important
 - Mille Lacs took a stand before, will it again?
- Want to be public face? Talk to council.
- Co-management of 1837 territory now
- Manoomin fits under Wild Life and Plants committee; managed by GLIFWC
 - Want backing of other tribes since they also have a stake in ceded territory
 - And it's a council decision
- Michael: usufruct is from aboriginal title (which is a bigger deal in CA)

United States of America; Suquamish Indian Tribe ; Sauk–Suiattle Tribe ; Stillaguamish Tribe ; Hoh Tribe ; Jamestown S’Klallam Tribe; Lower Elwha Band of Klallams; Port Gamble Band Clallam; Nisqually Indian Tribe; Nooksack Indian Tribe; Skokomish Indian Tribe ; Squaxin Island Tribe; Upper Skagit Indian Tribe; Tulalip Tribes; Lummi Indian Nation ; Quinault Indian Nation; Suquamish Indian Tribe ; Puyallup Tribe; Confederated Tribes and Bands of the Yakama Indian Nation ; Quileute Indian Tribe; Makah Indian Tribe; Swinomish Indian Tribal Community ; Muckleshoot Indian Tribe, Plaintiffs–Appellees

v.State of Washington, Defendant–Appellant.

No. 13–35474

United States Court of Appeals, Ninth Circuit.

Argued and Submitted October 16, 2015 Seattle, Washington

Filed June 27, 2016

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[*841]

of Fishermen's Associations and Institute for Fisheries Resources.

Before: William A. Fletcher and Ronald M. Gould, Circuit Judges, and David A. Ezra,* District Judge.

OPINION

W. FLETCHER, Circuit Judge:

In 1854 and 1855, Indian tribes in the Pacific Northwest entered into a series of treaties, now known as the “Stevens Treaties,” negotiated by Isaac I. Stevens, Superintendent of Indian Affairs and Governor of Washington Territory. Under the Stevens Treaties (“Treaties”) at issue in this case, the tribes relinquished large swaths of land west of the Cascade Mountains and north of the Columbia River drainage area, including the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas (collectively, the “Case Area”), in what is now the State of Washington. In exchange for their land, the tribes were guaranteed a right to off-reservation fishing, in a clause that used

essentially identical language in each treaty. The “fishing clause” guaranteed “the right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory.”

In 2001, pursuant to an injunction previously entered in this long-running litigation, twenty-one Indian tribes (“Tribes”), joined by the United States, filed a “Request for Determination”—in effect, a complaint—in the federal district court for the Western District of Washington. The Tribes include the Suquamish Indian Tribe, Jamestown S’Klallam, Lower Elwha Band of Klallams, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk–Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribes, Lummi Indian Nation, Quinalt Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Makah Indian Tribe, Swinomish Indian Tribal Community, and the Muckleshoot Indian Tribe. The Tribes contended that Washington State (“Washington” or “the State”) had violated, and was continuing to violate, the Treaties by building and maintaining culverts that prevented mature salmon from returning from the sea to their spawning grounds; prevented smolt (juvenile salmon) from moving downstream and out to sea; and prevented very young salmon from moving freely to seek food and escape predators. In 2007, the district court held that in building and maintaining these culverts Washington had caused the size of salmon runs in the Case Area to diminish and that Washington thereby violated its obligation under the Treaties. In 2013, the court issued an injunction ordering Washington to correct its offending culverts.

We affirm the decision of the district court.

I. Historical Background

For over a hundred years, there has been conflict between Washington and the Tribes over fishing rights under the Treaties. We recount here some of the most salient aspects of this history.

When white settlers arrived in the Washington territory in the second half of the nineteenth century, many settled on riparian land and salt-water shoreline. [*842]

Even though the majority of these settlers were not themselves fishermen, they blocked access to many of the Tribes’ traditional fishing sites. By the end of the century, white commercial fishermen were catching enormous quantities of salmon, first on the Columbia River and then in Puget Sound as well, supplying large-scale canneries.

In 1894, L. T. Erwin, the United States Indian Agent for the Yakimas, complained that whites had blocked access to the Indians’ “accustomed fisheries” on the Columbia River: “[I]nch by inch, [the Indians] have been forced back until all the best grounds have been taken up by white men, who now refuse to allow them to fish in common, as the treaty provides.” *Report of the Secretary of the Interior, 1894* (3 vols., Washington, D.C., 1894, II, 326). In 1897, D. C. Govan, the Indian Agent for the Tulalips on Puget Sound reported that “the Alaska Packing Company and other cannery companies have practically appropriated all the best fishing grounds at Point Roberts and Village Point, where the Lummi Indians have been in the habit of fishing from time immemorial.” *Annual Reports of the Department of the Interior, 1897: Report of the Commissioner of Indian Affairs* (Washington, D.C., 1897, 297). In 1905, Charles Buchanan, the new Indian Agent for the Tulalips, complained, “The tremendous development of the fisheries by traps and by trust methods of consolidation, concentration, and large local development are seriously depleting the natural larders of our Indians and cutting down their main reliance for support and subsistence. Living for them is becoming more precarious year by year.” *Annual Reports of the Department of the Interior, 1905: Indian Affairs* (Washington, D.C., 1906, Part I, 362). During this period, “[t]he superior capital, large-scale methods, and aggressiveness of whites ... quickly led to their domination of the prime fisheries of the region.” Donald L. Parman, *Inconstant Advocacy: The Erosion of Indian Fishing Rights in the Pacific Northwest*, 53 *Pacific Hist. Rev.* 163, 167 (1984).

The United States Supreme Court first addressed the conflict over fisheries in *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The Winans brothers had acquired land at a prime Yakima fishing site on the Washington side of the Columbia River. See Michael C. Blumm and James Brunberg, *‘Not Much Less Necessary ... Than the Atmosphere They Breathed’: Salmon, Indian Treaties, and the Supreme Court—a Centennial Remembrance of United States v. Winans and Its Enduring Significance*, 46 *Nat. Resources J.* 489, 523 (2006). Under an exclusive license from the State, the Winanses operated “fish wheels” at the site. Fish wheels were essentially mechanized dip nets “capable of catching salmon by the ton.” *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 679, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). The Winanses refused to allow the Yakimas to cross over or to camp on their land in order to fish at the site.

The Yakimas had signed one of the Stevens Treaties in 1855. The United States brought suit against the Winanses on the Yakimas’ behalf. The Supreme Court held that the land owned by the Winanses, previously conveyed by patent from the government, was by virtue of the treaty subject to an easement allowing access to the Yakimas’ “usual and accustomed” fishing site. The Court held, further, that the State could not license the Winanses to “construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does.” *Winans*, 198 U.S. at 382, 25 S.Ct. 662. See also [*843] *Seufert Bros. Co. v. United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919) (holding that the Yakimas had rights under the treaty on the Oregon, as well as the Washington, side of the river).

In 1915, Charles Buchanan, still the Indian Agent for the Tulalips, complained to the Washington legislature of the diminished supply of salmon and the harsh application of Washington's fish and game laws against the Indians. He wrote:

[M]ore recently, the use of large capital, mechanical assistance, numerous great traps, canneries, etc., and other activities allied to the fishery industry, have greatly lessened and depleted the Indians' natural sources of food supply. In addition thereto the stringent and harsh application to Indians of the State game and fish laws have made it still and increasingly precarious for him to procure his natural foods in his natural way.

Rights of the Puget Sound Indians to Game and Fish, 6 Wash. Hist. Quart. 109, 110 (Apr. 1915).

The next year, the Washington Supreme Court upheld the sort of “stringent and harsh application ... of game and fish laws” of which Buchanan complained. In *State v. Towessnute*, 89 Wash. 478, 154 P. 805, 806 (1916), a member of the Yakima Nation named Towessnute was charged with off-reservation fishing without a license in a manner forbidden by state law. Towessnute defended on the ground that he was fishing in the traditional manner at one the Yakimas' usual and accustomed places, and that he was entitled to do so under the treaty at issue in *Winans*. *Id.* Characterizing the treaty as a “dubious document,” *id.* the Washington Supreme Court rejected the defense:

The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent, ever regard the aborigines as other than mere occupants ... of the soil.

Id. at 807. The Court read the Supreme Court's holding in *Winans* as requiring easements across private land, but at the same time as endorsing the authority of the state, through the exercise of its “police power,” to enact regulatory laws restricting Indian fishing rights. *Id.* at 809. See also *State v. Alexis*, 89 Wash. 492, 154 P. 810 (1916) (holding the same under the Stevens Treaty with the Lummi Tribe in Puget Sound).

Much traditional Indian fishing was done with traps and nets in rivers, catching mature salmon when they returned to their native habitat to spawn. White commercial fishermen, by contrast, often fished in salt water, using equipment that most Indians could not afford and catching both mature and immature salmon. Beginning in the early 1900s, the State regulated the salmon fishery in Puget Sound in such a way that Indians who fished in rivers were increasingly unable to exercise their off-reservation treaty right to fish in their usual and accustomed places and in their traditional manner. For example, in 1907 the Washington legislature forbade all off-reservation fishing above the tide line—by whites and Indians alike—except by hook and line. Wash. Sess. Laws Ch. 247, Sec. 2 (1907).

In 1934, Washington voters adopted Initiative 77, a measure that limited off-reservation commercial fishing to certain portions of Puget Sound and banned the use of fixed gear, such as the “pound net, fish trap, fish wheel, scow fish wheel, set net, or any fixed appliance,” to catch salmonids. Init. Measure No. 77, State of Wash. Voting Pamphlet 5 (Nov. 6, 1934). According to a report commissioned by the federal Bureau of Indian Affairs, the passage of Initiative 77 “constituted a serious blow to [*844] the Indian fishing being carried on at usual and accustomed grounds”:

[D]ue to their extremely limited financial means, [the Indians'] gear necessarily must be obtainable at a minimum of expense. Generally speaking, the Indians are unable to finance the purchase of other more expensive gear and operating equipment, the use of which was not entirely outlawed. In order to continue to provide the necessities of life, the Indians, as a result of the above conservation statute, were literally forced to confine their fishing with such gear to reservation waters. The fact that such was the situation led to considerable agitation in the Pacific Northwest and especially in the [S]tate of Washington looking to the further curtailment of the Indians' commercial fishery.

Edward Swindell, *Report on Source, Nature and Extent of Fishing, Hunting, and Miscellaneous Rights of Certain Indian Tribes in Washington and Oregon* 95 (1942).

In subsequent years, the State continued to assert authority to regulate off-reservation fishing by Indians, including authority to require purchase of fishing licenses. In 1939, Sampson Tulee, a Yakima Indian, was criminally charged with off-reservation commercial fishing with a dip net on the Columbia River without a state license. Citing *Towessnute* and *Alexis*, the Washington Supreme Court affirmed the conviction as a valid exercise of the State's police powers. *Washington v. Tulee*, 7 Wash.2d 124, 109 P.2d 280, 287 (1941) (“Washington enjoys to the full the exercise of its police powers.”). The United States Supreme Court reversed. The Court held that while the State had the power, consistent with the treaty, to regulate fishing by both Indians and non-Indians to the degree “necessary for the conservation of fish,” the exaction of a license fee “cannot be reconciled with a fair construction of the treaty.” *Tulee v. Washington*, 315 U.S. 681, 684–85, 62 S.Ct. 862, 86 L.Ed. 1115 (1942).

After *Tulee*, state officials continued to enforce restrictions on off-reservation fishing by Puget Sound Indians, even when that fishing was conducted at the Indians' usual and accustomed places:

Over the years the state fish and game authorities have asserted that Indian treaty-protected fishing exists only on the reservations, and have acted to enforce this position. Injunctions against off-reservation fishing by Indians of the Nisqually, Puyallup, and Muckleshoot tribes have been obtained and enforcement actions carried out even while the injunctions are being contested in the courts. Arrests of fishermen and confiscation of gear have seriously hampered the Indians. Valuable gear held by the state as evidence can effectively put the fisherman out of business during several runs of fish, even though he may eventually win his case.

Walter Taylor, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians* 60 (1970). As a result of the State's hostility to off-reservation fishing, the Indians' share of the overall catch was relatively small. For example, from 1958 through 1967, the shares of the total salmon catch in Puget Sound were 6% for Indian fishing, 8.5% for sports fishing, and 85.5% for commercial fishing. *Id.* at 123, 126.

Beginning in the early 1960s, the State substantially increased its enforcement against off-reservation fishing in Puget Sound. See generally Bradley G. Shreve, "From Time Immemorial": *The Fish-in Movement and the Rise of Intertribal Activism*, 78 Pacific Hist. Rev. 403, 411–15 (2009). In response, in 1964 the National Indian Youth Council organized a large [*845] demonstration in Olympia to demand that the State acknowledge their treaty fishing rights. See *Uncommon Controversy*, *supra*, at 107–13. During the 1960s and early 1970s, in what came to be called the "fish wars," some Indians fished openly and without licenses in "fish-ins" to bring attention to the State's prohibitions against off-reservation fishing. State reaction to the "fish-ins" sometimes led to violence. See, e.g., Associated Press, "Shots Fired, 60 Arrested in Indian-Fishing Showdown," *Seattle Times*, Sept. 9, 1970; Alex Tizon, "The Boldt Decision / 25 Years—The Fish Tale That Changed History," *Seattle Times*, Feb. 7, 1999 (describing the State's "military-style campaign," employing "surveillance planes, high-powered boats and radio communications," as well as "tear gas," "billy clubs," and "guns").

In 1970, in an effort to resolve the persistent conflict between the State and the Indians, the United States brought suit against the State on behalf of the Tribes. The dispute now before us is part of that litigation.

II. Anadromous Fisheries and Washington's Barrier Culverts

Anadromous fish, such as salmon, hatch and spend their early lives in fresh water, migrate to the ocean to mature, and return to their waters of origin to spawn. Washington is home to several anadromous fisheries, of which the salmon fishery is by far the most important. Before the arrival of white settlers, returning salmon were abundant in the streams and rivers of the Pacific Northwest. Present-day Indian tribes in the Pacific Northwest eat salmon as an important part of their diet, use salmon in religious and cultural ceremonies, and fish for salmon commercially.

Roads often cross streams that salmon and other anadromous fish use for spawning. Road builders construct culverts to allow the streams to flow underneath roads, but many culverts do not allow fish to pass easily. Sometimes they do not allow fish passage at all. A "barrier culvert" is a culvert that inhibits or prevents fish passage. Road builders can avoid constructing barrier culverts by building roads away from streams, by building bridges that entirely span streams, or by building culverts that allow unobstructed fish passage.

Four state agencies are responsible for building and managing Washington's roads and the culverts that pass under them: Washington State Department of Transportation ("WSDOT"), Washington State Department of Natural Resources ("WSDNR"), Washington State Parks and Recreation Commission ("State Parks"), and Washington Department of Fisheries and Wildlife ("WDFW"). Of these, WSDOT, the agency responsible for Washington's highways, builds and maintains by far the most roads and culverts.

III. Earlier Proceedings

In 1970, the United States, on its own behalf and as trustee for Pacific Northwest tribes, sued Washington in federal court in the Western District of Washington. The United States sought declaratory and injunctive relief based on the fishing clause of the Treaties. *United States v. State of Washington*, 384 F.Supp. 312, 327–28 (W.D. Wash. 1974) ("*Washington I*"). In what has come to be known as the "Boldt decision," District Judge George H. Boldt divided the case into two phases. Phase I was to determine what portion, if any, of annually harvestable fish were guaranteed to the Tribes by the fishing clause. Phase II was to determine whether the fishing clause extends to hatchery fish, and whether it requires Washington to prevent environmental [*846] degradation within the Case Area.

In Phase I, Judge Boldt held that the phrase "the right of taking fish ... in common with all citizens" gives the Tribes the right to take up to fifty percent of the harvestable fish in the Case Area, subject to the right of non-treaty fishers to do the same. *Id.* at 343. The Supreme Court affirmed in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) ("*Fishing Vessel*"). The Court specified that fifty percent was a ceiling rather than a

floor, and that the fishing clause guaranteed “so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.” *Id.* at 686, 99 S.Ct. 3055. In accordance with its standard practice of interpreting Indian treaties in favor of the tribes, the Court interpreted the clause as promising protection for the tribes' supply of fish, not merely their share of the fish. The Court wrote:

Governor Stevens and his associates were well aware of the “sense” in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent.

Id. at 676, 99 S.Ct. 3055.

In 1976, the United States initiated Phase II of the litigation, asking for a declaratory judgment clarifying the Tribes' rights with respect to the “hatchery fish” issue and to the “environmental” issue. *United States v. State of Washington*, 506 F.Supp. 187, 194 (W.D. Wash. 1980) (“*Washington II*”). The district court held, first, that hatchery fish must be included in determining the share of fish to which the Tribes are entitled. *Id.* at 197. It held, second, that the Tribes' right to “a sufficient quantity of fish to satisfy their moderate living needs” entailed a “right to have the fishery habitat protected from man-made despoliation.” *Id.* at 208, 203.

Sitting en banc, we affirmed in part and vacated in part. *United States v. State of Washington*, 759 F.2d 1353 (9th Cir. 1985) (en banc) (“*Washington III*”). We affirmed the district court's decision that hatchery fish must be included in determining the share of salmon to be allocated to the Tribes:

The hatchery programs have served a mitigating function since their inception in 1895. They are designed essentially to replace natural fish lost to non-Indian degradation of the habitat and commercialization of the fishing industry. Under these circumstances, it is only just to consider such replacement fish as subject to treaty allocation. For the tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries, would be an inequity and inconsistent with the Treaty.

Id. at 1360 (citations omitted).

We vacated the court's decision on the environmental issue. We held that the issue was too broad and varied to be resolved in a general and undifferentiated fashion, and that the issue of human-caused environmental degradation must be resolved in the context of particularized disputes. We wrote:

We choose to rest our decision in this case on the proposition that issuance of the declaratory judgment on the environmental issue is contrary to the exercise of sound judicial discretion. The legal standards that will govern the State's precise obligations and duties under [*847] the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.

Id. at 1357. Although we vacated the district court's decision with respect to the environmental issue, we made clear that we were not absolving Washington of environmental obligations under the fishing clause. We concluded the section of our opinion devoted to the environmental issue by emphasizing that Washington “is bound by the treaty.” *Id.*

Judge Boldt's 1974 decision authorized the parties to invoke the continuing jurisdiction of the district court to resolve disputes “concerning the subject matter of this case.” *Washington I*, 384 F.Supp. at 419; see also *United States v. Washington*, 573 F.3d 701, 705 (9th Cir. 2009). For such disputes, the court directed the parties to “file with the clerk of this court ... a ‘Request for Determination’ setting forth the factual nature of the request and any legal authorities and argument which may assist the court, along with a statement that unsuccessful efforts have been made by the parties to resolve the matter, whether a hearing is required, and any factors which bear on the urgency of the request.” *Washington I*, 384 F.Supp. at 419.

In 2001, the Tribes filed a Request for Determination (“Request”), seeking “to enforce a duty upon the State of Washington to refrain from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced.” The Tribes sought a permanent injunction from the district court “requiring Washington to identify and then to open culverts under state roads and highways that obstruct fish passage, for fish runs returning to or passing through the usual and accustomed grounds and stations of the plaintiff tribes.”

The United States joined the Tribes' Request, seeking a declaration from the court that:

The right of taking fish secured to the plaintiff tribes in the Stevens Treaties imposes a duty upon the State of Washington to refrain from degrading the fishery resource through the construction or maintenance of culverts under State owned roads and highways in a way that deprives the Tribes of a moderate living from the fishery.

The State has violated and continues to violate the duty owed to the plaintiff tribes under the Stevens Treaties through the operation and maintenance of culverts which reduce the number of fish that would otherwise return to or pass through the Tribes' usual and accustomed fishing grounds and stations to such a degree as would deprive the Tribes of the ability to earn a moderate living from the fishery.

The United States sought a permanent injunction that would require Washington “within five years of the date of judgment (or such other time period as the Court deems necessary and just)” to “repair, retrofit, maintain, or replace” culverts that “degrade appreciably” the passage of fish.

Washington and the defendant state agencies (collectively “Washington” or “the State”) answered by declaring that there is “no treaty-based right or duty of fish habitat protection as described” in the Request. In the alternative, Washington emphasized that some of its barrier culverts pass under highways funded in part by the United States, and that these highways were “designed according to standards set or approved” by the Federal Highway Administration, leading Washington to believe that its culverts complied with the Treaties. Further, Washington asserted [*848] that the United States and the Tribes have built and maintained barrier culverts on their own lands within the Case Area. Washington asserted that the United States “has a duty to take action on its own lands so as not to place on the State of Washington an unfair burden of complying with any such treaty-based duty.”

Washington also made a “cross-request”—in effect, a counterclaim—against the United States seeking a declaration that the United States has violated its own duty to the Tribes under the Treaties, and seeking an injunction that would require the United States to modify or replace its own barrier culverts. The district court dismissed the cross-request on the ground that the United States had not waived its sovereign immunity. The court later denied Washington's request to file an amended cross-request on the additional ground that Washington did not have standing. It wrote, “[T]he State may not assert a treaty-based claim on behalf of the Tribes. ... The decision as whether and when to assert that claim against the United States is for the Tribes alone.”

The district court granted summary judgment in favor of the Tribes and the United States, concluding that the dispute involved the kind of “concrete facts” that were lacking in *Washington III*. The court held, first, that “the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon [Washington] to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.” It held, second, that “the State of Washington currently owns and operates culverts that violate this duty.”

The district court conducted a bench trial in 2009 and 2010 to determine the appropriate remedy. After failed efforts to reach a settlement, the court issued both a Memorandum and Decision and a Permanent Injunction. In its Memorandum and Decision, issued in 2013, the court found that Governor Stevens had assured the Tribes that they would have an adequate supply of salmon forever. The court wrote:

During the negotiations leading up to the signing of the treaties, Governor Isaac Stevens and other negotiators assured the Tribes of their continued access to their usual fisheries. *Governor Stevens assured the Tribes that even after they ceded huge quantities of land, they would still be able to feed themselves and their families forever. As Governor Stevens stated, “I want that you shall not have simply food and drink now but that you may have them forever.”*

(Emphasis added.)

The court found that salmon stocks in the Case Area have declined “alarmingly” since the Treaties were signed, and “dramatically” since 1985. The court wrote, “A primary cause of this decline is habitat degradation, both in breeding habitat (freshwater) and feeding habitat (freshwater and marine areas) One cause of the degradation of salmon habitat is ... culverts which do not allow the free passage of both adult and juvenile salmon upstream and downstream.” The “consequent reduction in tribal harvests has damaged tribal economies, has left individual tribal members unable to earn a living by fishing, and has caused cultural and social harm to the Tribes in addition to the economic harm.”

The district court entered a Permanent Injunction on the same day it issued its Memorandum and Decision. The court ordered the State, in consultation with the Tribes and the United States, to prepare within six months a current list of all state-owned barrier culverts within the Case [*849] Area. It ordered WSDNR, State Parks, and WDFW to correct all their barrier culverts on the list by the end of October 2016. It ordered WSDOT to correct many of its barrier culverts within seventeen years, and to correct the remainder only at the end of the culverts' natural life or in connection with independently undertaken highway projects. We provide a more detailed description of the injunction below.

IV. Standard of Review

We review de novo dismissals for want of jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007). We also review de novo a grant or denial of summary judgment. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 652 (9th Cir. 2002). We review permanent injunctions under three

standards: we review factual findings for clear error, legal conclusions de novo, and the scope of the injunction for abuse of discretion. *Id.* at 653.

V. Discussion

Washington objects to the decision of the district court on a number of grounds. It objects to the court's interpretation of the Stevens Treaties, contending that it has no treaty-based duty to refrain from building and maintaining barrier culverts; to the overruling of its waiver defense; to the dismissal of its cross-request against the United States; and to the injunction. We take the State's objections in turn.

A. Washington's Duty under the Treaties

The fishing clause of the Stevens Treaties guarantees to the Tribes a right to engage in off-reservation fishing. It provides, in its entirety:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however* , That they shall not take shell fish from any beds staked or cultivated by citizens.

Fishing Vessel , 443 U.S. at 674, 99 S.Ct. 3055 (emphasis in original). Washington concedes that the clause guarantees to the Tribes the right to take up to fifty percent of the fish available for harvest, but it contends that the clause imposes no obligation on the State to ensure that any fish will, in fact, be available.

In its brief to us, Washington denies any treaty-based duty to avoid blocking salmon-bearing streams:

[T]he Tribes here argue for a treaty right that finds no basis in the plain language or historical interpretation of the treaties. On its face, the right of taking fish in common with all citizens does not include a right to prevent the State from making land use decisions that could incidentally impact fish. Rather, such an interpretation is contrary to the treaties' principal purpose of opening up the region to settlement.

Brief at 27–28. At oral argument, Washington even more forthrightly denied any treaty-based duty. Washington contended that it has the right, consistent with the Treaties, to block every salmon-bearing stream feeding into Puget Sound:

The Court: Would the State have the right, consistent with the treaty, to dam every salmon stream into Puget Sound?

Answer: Your honor, we would never and could never do that. ...[*850]

The Court: ... I'm asking a different question. Would you have the right to do that under the treaty?

Answer: Your honor, the treaty would not prohibit that[.]

The Court: So, let me make sure I understand your answer. You're saying, consistent with the treaties that Governor Stevens entered into with the Tribes, you could block every salmon stream in the Sound?

Answer: Your honor, the treaties would not prohibit that[.]

Oral Argument at 1:07–1:45, October 16, 2015.

The State misconstrues the Treaties.

We have long construed treaties between the United States and Indian tribes in favor of the Indians. Chief Justice Marshall wrote in the third case of the Marshall Trilogy, “The language used in treaties with the Indians should never be construed to their prejudice.” *Worcester v. Georgia* , 31 U.S. 515, 582, 6 Pet. 515, 8 L.Ed. 483 (1832). “If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.” *Id.*

Negotiations for the Stevens Treaties were conducted in the Chinook language, a trading jargon of only about 300 words. *Fishing Vessel* , 443 U.S. at 667 n. 10, 99 S.Ct. 3055. The Treaties were written in English, a language the Indians could neither read nor write. Because treaty negotiations with Indians were conducted by “representatives skilled in diplomacy,” because negotiators

representing the United States were “assisted by ... interpreter[s] employed by themselves,” because the treaties were “drawn up by [the negotiators] and in their own language,” and because the “only knowledge of the terms in which the treaty is framed is that imparted to [the Indians] by the interpreter employed by the United States,” a “treaty must ... be construed, not according to [*851] the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.” *Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 44 L.Ed. 49 (1899). “[W]e will construe a treaty with the Indians as [they] understood it, and as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which looks only to the substance of the right, without regard to technical rules.” *United States v. Winans*, 198 U.S. 371, 380, 25 S.Ct. 662, 49 L.Ed. 1089 (1905) (internal quotation marks omitted). “[W]e look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (internal quotation marks omitted).

The Supreme Court has interpreted the Stevens Treaties on several occasions. In affirming Judge Boldt's decision, the Court wrote:

[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. “[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.” *Jones v. Meehan*, 175 U.S. 1, 11 [20 S.Ct. 1, 44 L.Ed. 49]. This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor. *Tulee v. Washington*, 315 U.S. 681 [62 S.Ct. 862, 86 L.Ed. 1115] [1947]; *Seufert Bros. Co. v. United States*, 249 U.S. 194 [39 S.Ct. 203, 63 L.Ed. 555] [1919]; *United States v. Winans*, 198 U.S. 371 [25 S.Ct. 662, 49 L.Ed. 1089] [1905]. See also *Washington v. Yakima Indian Nation*, 439 U.S. 463, 484 [99 S.Ct. 740, 58 L.Ed.2d 740] [1979].

Fishing Vessel, 443 U.S. at 675–76, 99 S.Ct. 3055.

Washington has a remarkably one-sided view of the Treaties. In its brief, Washington characterizes the “treaties' principal purpose” as “opening up the region to settlement.” Brief at 29. Opening up the Northwest for white settlement was indeed the principal purpose of the United States. But it was most certainly not the principal purpose of the Indians. Their principal purpose was to secure a means of supporting themselves once the Treaties took effect.

Salmon were a central concern. An adequate supply of salmon was “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *Winans*, 198 U.S. at 381, 25 S.Ct. 662. Richard White, an expert on the history of the American West and Professor of American History at Stanford University, wrote in a declaration filed in the district court that, during the negotiations for the Point–No–Point Treaty, a Skokomish Indian worried aloud about “how they were to feed themselves once they ceded so much land to the whites.” Professor White wrote, to the same effect, that during negotiations at Neah Bay, Makah Indians “raised questions about the role that fisheries were to play in their future.” In response to these concerns, Governor Stevens repeatedly assured the Indians that there always would be an adequate supply of fish. Professor White wrote that Stevens told the Indians during negotiations for the Point Elliott Treaty, “I want that you shall not have simply food and drink now but that you may have them forever.” During negotiations for the Point–No–Point Treaty, Stevens said, “This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? ... This paper secures your fish. Does not a father give food to his children?” *Fishing Vessel*, 443 U.S. at 667 n. 11, 99 S.Ct. 3055 (ellipsis in original).

The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise. The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them. They reasonably understood that they would have, in Stevens' words, “food and drink ... forever.” As the Supreme Court wrote in *Fishing Vessel*:

Governor Stevens and his associates were well aware of the “sense” in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, [*852] and the Governor's promises that the treaties would *protect that source of food and commerce* were crucial in obtaining the Indians' assent. It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter should be excluded from their ancient fisheries, and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any *meaningful use* of their accustomed places to fish.

Id. at 676–77, 99 S.Ct. 3055 (citations and internal quotation marks omitted) (emphases added).

Even if Governor Stevens had not explicitly promised that “this paper secures your fish,” and that there would be food “forever,” we would infer such a promise. In *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the treaty creating the Fort Belknap Reservation in Montana did not include an explicit reservation of water for use on the reserved lands, but the Supreme Court inferred a reservation of water sufficient to support the tribe. The purpose of the treaty was to reserve land on which the Indians could become farmers. Without a reservation of water, the “lands were arid, and ... practically valueless.” *Id.* at 576, 28 S.Ct. 207. “[B]etween two inferences, one of which would support the purpose of the agreement and the other impair or defeat it,” the Court chose the former. *Id.* at 577, 28 S.Ct. 207.

Similarly, in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), the Klamath Tribe in Oregon had entered into an 1854 treaty under which it relinquished 12 million acres, reserving for itself approximately 800,000 acres. The treaty promised that the tribe would have the right to “hunt, fish, and gather on their reservation,” *id.* at 1398, but contained no explicit reservation of water rights. A prime hunting and fishing area on the reservation was the Klamath Marsh, whose suitability for hunting and fishing depended on a flow of water from the Williamson River. A primary purpose of the treaty was to “secure to the Tribe a continuation of its traditional hunting and fishing” way of living. *Id.* at 1409. Because game and fish at the Klamath Marsh depended on a continual flow of water, the treaty's purpose would have been defeated without that flow. In order to “support the purpose of the agreement,” *Winters*, 207 U.S. at 577, 28 S.Ct. 207, we inferred a promise of water sufficient to ensure an adequate supply of game and fish. *Adair*, 723 F.2d at 1411.

Thus, even if Governor Stevens had made no explicit promise, we would infer, as in *Winters* and *Adair*, a promise to “support the purpose” of the Treaties. That is, even in the absence of an explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a “moderate living” to the Tribes. *Fishing Vessel*, 443 U.S. at 686, 99 S.Ct. 3055. Just as the land on the Belknap Reservation would have been worthless without water to irrigate the arid land, and just as the right to hunt and fish on the Klamath Marsh would have been worthless without water to provide habitat for game and fish, the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish.

In *Washington III*, we vacated the district court's declaration of a broad and undifferentiated obligation to prevent environmental degradation. We did not dispute that the State had environmental obligations, but, in the exercise of discretion under the Declaratory Judgment Act, we declined to sustain the sweeping declaratory judgment issued by the district court. We wrote, “The legal standards that will govern the State's precise obligations and [*853] duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.” *Washington III*, 759 F.2d at 1357.

We concluded:

The State of Washington is bound by the treaty. If the State acts for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty as interpreted by past decisions, it will be subject to immediate correction and remedial action by the courts. In other instances, the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute.

Id. There is no allegation in this case that in building and maintaining its barrier culverts the State has acted “for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty.” The consequence of building and maintaining the barrier culverts has been to diminish the supply of fish, but this consequence was not the State's “primary purpose or object.” The “measure of the State's obligation” therefore depends “on all the facts presented” in the “particular dispute” now before us.

The facts presented in the district court establish that Washington has acted affirmatively to build and maintain barrier culverts under its roads. The State's barrier culverts within the Case Area block approximately 1,000 linear miles of streams suitable for salmon habitat, comprising almost 5 million square meters. If these culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon would be produced every year. Many of these mature salmon would be available to the Tribes for harvest.

Salmon now available for harvest are not sufficient to provide a “moderate living” to the Tribes. *Fishing Vessel*, 443 U.S. at 686, 99 S.Ct. 3055. The district court found that “[t]he reduced abundance of salmon and the consequent reduction in tribal harvests has damaged tribal economies, has left individual tribal members unable to earn a living by fishing, and has caused cultural and social harm to the Tribes in addition to the economic harm.” The court found, further, that “[m]any members of the Tribes would engage in more commercial and subsistence salmon fisheries if more fish were available.”

We therefore conclude that in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties.

B. Waiver by the United States

In the district court, Washington asserted a defense of “waiver and/or estoppel” based on action and inaction by the United States that, according to Washington, led the State to believe that its barrier culverts did not violate the Treaties. On appeal, Washington has dropped its estoppel argument, pressing only its waiver argument.

Washington alleged in the district court that WSDNR had developed, in consultation with the United States, a 1999 “Forest and Fish Report” that contemplated a fifteen-year schedule for “remediation of fish problems on forest roads” under the control of WSDNR. Washington alleged that it “reasonably concluded that by approving or failing to object to the State’s 15-year remediation schedule for forest roads, the NMFS [National Marine Fisheries Service] had determined that the schedule satisfied any treaty obligation.” [*854]

Washington also alleged, with respect to “many” of the culverts under the control of WSDOT, that the culverts are “in highways funded in part by the United States,” and that “[t]hese highways were designed according to standards set or approved by the Federal Highway Administration (FHWA) and its predecessors.” Washington alleged that it “reasonably concluded that by approving or failing to object to the State’s culvert design and maintenance, the FHWA had determined that the design and maintenance satisfied any treaty obligation.” Washington further alleged that the Army Corps of Engineers, in administering the Clean Water Act, and the NMFS and U.S. Fish & Wildlife Service, in administering the Endangered Species Act, issued permits to, or failed to object to, WSDOT culverts, and that Washington reasonably relied on their action and inaction to conclude that it had satisfied any treaty obligations.

The United States may abrogate treaties with Indian tribes, just as it may abrogate treaties with fully sovereign nations. However, it may abrogate a treaty with an Indian tribe only by an Act of Congress that “clearly express[es an] intent to do so.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). Congress has not abrogated the Stevens Treaties. So long as this is so, the Tribes’ rights under the fishing clause remain valid and enforceable. The United States, as trustee for the Tribes, may bring suit on their behalf to enforce the Tribes’ rights, but the rights belong to the Tribes.

The United States cannot, based on laches or estoppel, diminish or render unenforceable otherwise valid Indian treaty rights. See, e.g., *Cramer v. United States*, 261 U.S. 219, 234, 43 S.Ct. 342, 67 L.Ed. 622 (1923) (where Indians had treaty rights to land, leasing of the land to a non-Indian defendant “by agents of the government was ... unauthorized and could not bind the government; much less could it deprive the Indians of their rights”); *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998) (“[L]aches or estoppel is not available to defeat Indian treaty rights.”) (quoting *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983)); and *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) (“No defense of laches or estoppel is available to the defendants here for the Government[,] as trustee for the Indian Tribe, is not subject to those defenses.”). The same is true for waiver. Because the treaty rights belong to the Tribes rather than the United States, it is not the prerogative of the United States to waive them.

Washington argues the above line of cases has been “called in doubt” by *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005). Brief at 42. We disagree. Suit was brought in *Sherrill* by the Oneida Indian Nation (“OIN”), whose lands once comprised six million acres in central New York State. In 1788, in the Treaty of Fort Schuyler, OIN reserved 300,000 acres of its tribal land and ceded the rest to New York. Two years later, Congress passed the Indians Trade and Intercourse Act (the “Nonintercourse Act”), which required federal approval for the sale of tribal land. New York largely ignored the law and in the following years obtained large quantities of tribal land through treaties with OIN. The United States did little to stop these transactions; indeed, its agents took an active role in encouraging Oneidas to move west. By 1838, Oneidas had sold all but 5,000 acres of their reserved lands. By 1920, their ownership had dwindled to 32 acres. [*855]

In 1985, the Supreme Court held that the sale of OIN lands had been unlawful, and that the OIN was entitled to monetary compensation for these sales. See *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). In 1997 and 1998, OIN purchased on the open market two parcels of land, located within the boundaries of its ancestral reservation, that had been sold to a non-Indian in 1807. OIN claimed tribal sovereign status for the purchased parcels, including the sovereign right to be free of local property taxes. In *Sherrill*, the Court held against OIN, writing that “the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue.” 544 U.S. at 203, 125 S.Ct. 1478.

The case before us is radically different from *Sherrill*. The question in our case is not whether, as in *Sherrill*, a tribe has sovereignty over land within the boundaries of an abandoned reservation. The Tribes have not abandoned their reservations. Nor is the question whether, as in *Sherrill*, the Tribes have acted to relinquish their rights under the Treaties. The Tribes have done nothing to authorize the State to construct and maintain barrier culverts. Nor, finally, is the question whether, as in *Sherrill*, to allow the revival of disputes or claims that have long been left dormant. As described above, Washington and the Tribes have been in a more or less continuous state of conflict over treaty-based fishing rights for over one hundred years.

C. Washington's Cross-Request

Washington asserted a “cross-request” (in effect, a counterclaim) based on the United States' construction and maintenance of barrier culverts on its own land. Washington contended that if its barrier culverts violate the Treaties, so too do the United States' barrier culverts. Washington contended that an injunction requiring it to correct its barrier culverts, while leaving undisturbed those of the United States, imposed a disproportionate and therefore unfair burden on the State. Washington sought an injunction that would require the United States “to fix and thereafter maintain all culverts built or maintained by [the United States] ... before the State of Washington is required to repair or remove any of its culverts.”

The district court struck the cross-request and subsequently denied Washington's motion to amend. It did so on two grounds. First, it held that Washington's cross-request was barred by sovereign immunity. Second, it held that Washington did not have standing to assert treaty rights belonging to the Tribes. We agree with both grounds.

1. Sovereign Immunity

The United States enjoys sovereign immunity from unconsented suits. However, when the United States files suit, consent to counterclaims seeking offset or recoupment will be inferred. *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970). Washington contends that the injunction it seeks against the United States is “recoupment.” We disagree.

The Tenth Circuit has set forth three criteria that must be satisfied for a recoupment claim:

To constitute a claim in recoupment, a defendant's claim must (1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim.

Berrey v. Asarco Inc., 439 F.3d 636, 645 (10th Cir. 2006) ; see *Fed. Deposit Insur. Corp. v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994). We adopt these criteria as our [*856] own, and make explicit that the remedy (the “amount”) sought by the United States and by the defendant in recoupment must be monetary.

It is implicit in the use of the word “amount” in *Berrey*'s third criterion that a recoupment claim is a monetary claim. A claim for recoupment, if successful, can reduce or eliminate the amount of money that would otherwise be awarded to the plaintiff. It cannot result in an affirmative monetary judgment in favor of the party asserting the claim: “Although a counterclaim may be asserted against a sovereign by way of set off or recoupment to defeat or diminish the sovereign's recovery, no affirmative relief may be given against a sovereign in the absence of consent.” *Agnew*, 423 F.2d at 514 ; see also *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 511, 60 S.Ct. 653, 84 L.Ed. 894 (1940) (“[A] defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim.”); *Black's Law Dictionary* 1466 (10th ed. 2009) (“Recoupment: 1. The getting back or regaining of something, esp. expenses. 2. The withholding, for equitable reasons, of all or part of something that is due. ... 3. Reduction of a plaintiff's damages because of a demand by the defendant arising out of the same transaction. ... 4. The right of a defendant to have the plaintiff's claim reduced or eliminated because of the plaintiff's breach of contract or duty in the same transaction.”). The parties have cited no case, and we have found none, in which the term recoupment has been applied to non-monetary relief such as an injunction.

Washington's cross-request for an injunction thus does not qualify as a claim for recoupment and is barred by sovereign immunity.

2. Standing

Washington seeks an injunction requiring the United States to correct its barrier culverts on the ground that the United States is bound by the Treaties in the same manner and to the same degree as the State. Washington is, of course, correct that the United States is bound by the Treaties. Indian treaty rights were “intended to be continuing against the United States ... as well as against the state[.]” *Winans*, 198 U.S. at 381–82, 25 S.Ct. 662. Our holding that Washington has violated the Treaties in building and maintaining its barrier culverts necessarily means that the United States has also violated the Treaties in building and maintaining its own barrier culverts.

However, any violation of the Treaties by the United States violates rights held by the Tribes rather than the State. The Tribes have not sought redress against the United States in the proceeding now before us.

D. Injunction

The district court held a trial in 2009 and 2010 to determine the appropriate remedy for Washington's violation of the Treaties. At the time of trial, there were 1,114 state-owned culverts in the Case Area. At least 886 of them blocked access to “significant habitat,” defined as 200 linear meters or more of salmon habitat upstream from the culvert to the first natural passage barrier.

More barrier culverts were identified or constructed within the Case Area after 2009. The court estimated in its 2013 Memorandum and Decision that at the then-current rate of remediation, all of the barrier culverts under the control of WSDNR, State Parks, and WDFW would be corrected by October 31, 2016. The great majority of barrier culverts, however, were under WSDOT's control. In 2009, when trial began, there were 807 identified WSDOT barrier culverts. Additional [*857] WSDOT barrier culverts were constructed or identified after that date.

In 1997, WDFW and WSDOT reported to the Washington State legislature that WSDOT culverts blocked 249 linear miles of stream, comprising over 1.6 million square meters of salmon habitat, which they estimated was sufficient to produce 200,000 adult salmon per year. Based on WDFW records, the district court found that at the time of trial, state-owned barrier culverts in the Case Area blocked access to approximately 1,000 miles of stream, comprising almost 5 million square meters of salmon habitat.

The district court issued a permanent injunction in 2013, on the same day it issued its Memorandum and Decision. The court ordered the State, in consultation with the Tribes and the United States, to prepare within six months a current list of all state-owned barrier culverts within the Case Area. The court ordered that identification of a culvert as a “barrier” be based on the methodology specified in the Fish Passage Barrier and Surface Water Diversion Screening and Prioritization Manual (“Assessment Manual”) published by WDFW in 2000. The court ordered WSDNR, State Parks, and WDFW to provide fish passage through all their barrier culverts on the list by October 31, 2016—the date by which these three agencies were already expected to complete correction of their barrier culverts.

For barrier culverts under the control of WSDOT, the injunction was more nuanced. In Paragraph 6 of the injunction, the court ordered WSDOT to provide, within seventeen years of the date of the order, and “in accordance with the standards set out in this injunction,” fish passage for each barrier culvert with more than 200 linear meters of salmon habitat upstream to the first natural passage barrier. In Paragraph 7, the court ordered WSDOT to replace existing barrier culverts above which there was less than 200 linear meters of accessible salmon habitat only at the “end of the useful life” of the culverts, or sooner “as part of a highway project.” In Paragraph 8, the court allowed WSDOT to defer correction of some of the culverts described in Paragraph 6. Deferred culverts can account for up to ten percent of upstream habitat from the culverts described in Paragraph 6. WSDOT's choice of which culverts to defer is to be made in consultation with the Tribes and the United States. The court specified that the choice of culverts could be guided by the “Priority Index” methodology described in the WDFD Assessment Manual. That methodology uses cost as a permissible factor in determining priority. Assessment Manual at 55. Culverts deferred under Paragraph 8 are to be replaced on the more lenient schedule specified in Paragraph 7.

In Paragraph 9, the district court ordered that the State

shall design and build fish passage at each barrier culvert on the List in order to pass all species of salmon at all life stages at all flows where the fish would naturally seek passage. In order of preference, fish passage shall be achieved by (a) avoiding the necessity for the roadway to cross the stream, (b) use of full span bridge, (c) use of the “stream simulation” methodology ... which the parties to this proceeding have agreed represents the best science currently available for designing culverts that provide fish passage and allow fluvial processes. Nothing in this injunction shall prevent the [State] from developing and using designs other than bridges or stream simulation in the future if the [State] can demonstrate that those future designs provide equivalent or better fish passage and fisheries habitat [*858] benefits than the designs required in this injunction.

In Paragraph 10, the court provided that the State may deviate from the design standards specified in Paragraph 9 in cases of emergency or where “extraordinary site conditions” exist. The court specified that it would “retain continuing jurisdiction ... for a sufficient period to assure that the [State] compl[ies] with the terms of this injunction.”

Washington declined to participate in the formulation of the injunction on the ground that it had not violated the Treaties and that, therefore, no remedy was appropriate. Washington now objects on several grounds to the injunction that was formulated without its participation. Washington specifically objects (1) that the injunction is too “broad,” Brief at 50; (2) that the district court did not “defer to the State's expertise,” *id.* at 54; (3) that the court did not properly consider costs and equitable principles, *id.* at 57; (4) and that the injunction “impermissibly and significantly intrudes into state government operations.” *Id.* at 63. Finally, Washington objects that its four specific objections support a contention that the court's injunction is inconsistent with “federalism principles.” *Id.* at 47, 65. We consider the State's objections in turn.

1. Breadth of the Injunction

Washington contends in its brief that “[t]he Tribes *presented no evidence* that state-owned culverts are a significant cause of the decline [in salmon]. ... Despite that *complete failure of proof*, the district court found that state-owned culverts ‘have a significant total impact on salmon production.’ ” Brief at 50 (emphasis in original). Washington contends, further, that the district court “ordered replacement of nearly every state-owned barrier culvert within the case area without any specific showing that

those culverts have significantly diminished fish runs or tribal fisheries, or that replacing them will meaningfully improve runs.”
Id.

Washington misrepresents the evidence and mischaracterizes the district court's order.

Contrary to the State's contention, the Tribes presented extensive evidence in support of the court's conclusion that state-owned barrier culverts have a significant adverse effect on salmon. The 1997 report prepared for the Washington State Legislature by two of the defendants in this case, WDFW and WSDOT, stated, “Fish passage at human made barriers such as road culverts is one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington.” The report concluded:

A total potential spawning and rearing area of 1,619,839 m² (249 linear miles) is currently blocked by WSDOT culverts on the 177 surveyed streams requiring barrier resolution; this is enough wetted stream area to produce 200,000 adult salmonid annually. These estimates would all increase when considering the additional 186 barriers that did not have full habitat assessments.

The report recommended that state funding be supplied to remove “all barriers” under the control of the State:

Planning is underway for resolution of at least seven more barriers during the 1997–99 biennium using dedicated funds, and to resolve all barriers in the next two or three decades. ... Estimated cost is about \$40 million, with resultant benefits exceeding \$160 million.

Based on later WDFW figures, the district court found that at the time of trial state-owned barrier culverts in the Case Area blocked access to approximately 1,000 linear miles of stream, comprising [*859] almost 5 million square meters of salmon habitat. These figures, taken together with the 1997 figures supplied by WDFW and WSDOT, indicate that the total habitat blocked by state-owned barrier culverts in the Case Area is capable of producing several times the 200,000 mature salmon specified in the 1997 report.

Witnesses at trial repeatedly described benefits to salmon resulting from correction of barrier culverts. One example is evidence presented by Mike McHenry, habitat program manager for the Lower Elwha Klallam Tribe. In his written testimony, McHenry described several studies. One was a 2003 study of culvert removal projects on the Stillaguamish River that opened up 19 linear kilometers of salmon habitat. According to the study, over 250 adult coho salmon were observed spawning in the newly accessible habitat in each of the two years immediately after the completion of the projects. Based on his own experience as habitat manager for the tribe, McHenry wrote that removal of barrier culverts on the Lower Elwha River had had a similar effect. In McHenry's view, “The systematic correction of barrier culverts is an important place to focus restoration efforts.” He wrote, further, “The correction of human caused barriers is generally recognized as the second highest priority for restoring habitats used by Pacific salmon (following the protection of existing functional habitats).”

In his live testimony, McHenry stated that his tribe had corrected seventeen of thirty-one barriers in a particular watershed:

McHenry: Because when we did the watershed assessment, we found that there were 50 miles of historically active stream that salmon could access in this watershed, and fully half that mileage was blocked by culverts of various ownerships. So to us, we applied our scientific knowledge and recommendations from the literature which indicated that when you're going to restore a place like this, you need to go after the barriers first.

The Court: In your expert opinion, that was the biggest bang for your buck?

McHenry: Yes.

Another example is the live testimony of Lawrence Wasserman, environmental policy manager for the Swinomish Indian Tribal Community. He testified that culvert remediation provides substantial benefits:

There's an immediate access and immediate benefit to additional habitat when we replace a culvert

If you compare that to having to plant trees, shade, it can take 10, 20, 50 years to get the trees large enough

... We have a high confidence in design. By and large, we know how to fix culverts. ... So we have a high confidence compared to many other more experimental restoration activities.

It's fairly easy to monitor. If there were no fish there before, [then] we open a culvert and we can count fish[.] ...

A critical factor is that there's minimal impacts on adjacent land use or land owners. ... [I]t's relatively infrequent where there needs to be a condemnation of other people's land or asking people to sell their land. ...

...It's cost effective. There have been some studies that have shown that, really, compared to other kinds of restoration activities, the cost per smolt produced is relatively low[.] ...

And finally, we get benefits with a broad sweep of culvert repairs. We get a very broad geographic distribution of benefits, and the cumulative effects can accrue across a variety of watersheds.[*860]

It is true, as the evidence at trial showed, that correction of barrier culverts is only one of a number of measures that can usefully be taken to increase salmon production in the Case Area. It is also true that the benefits of culvert correction differ depending on the culvert in question. For example, Paul Wagner, manager of the culvert correction program for WSDOT, presented evidence in 2013 identifying 817 WSDOT barrier culverts blocking 937 linear miles of stream habitat in the Case Area. Wagner's evidence showed that correction of the 314 culverts blocking the most habitat would open up 655 of the 937 miles of total habitat. Correcting the 232 culverts blocking the least habitat would open up only 95 miles. Those 95 miles of habitat constitute 10.1 percent of the total habitat blocked by the 817 barrier culverts. The 232 culverts blocking those 95 miles constituted 28.4 percent of the total barrier culverts.

The district court's injunction took into account the facts that culvert correction is not the only factor in salmon recovery; that some culverts block more habitat than others; and that some culverts are more expensive to correct than others. The court ordered correction of high-priority culverts—those blocking 200 linear meters or more of upstream habitat—within seventeen years. For low-priority culverts—those blocking less than 200 linear meters of upstream habitat—the court ordered correction only at the end of the useful life of the existing culvert, or when an independently undertaken highway project would require replacement of the culvert. Further, recognizing the likelihood that accelerated replacement of some high-priority culverts will not be cost-effective, the court allowed the State to defer correction of high-priority culverts accounting for up to ten percent of the total blocked upstream habitat, and to correct those culverts on the more lenient schedule of the low-priority culverts. Wagner's evidence indicates that if the sole criterion for choosing deferred culverts is the amount of blocked habitat, there will be approximately 230 deferred culverts. If cost of correction of particular culverts is added as a criterion, there will be a somewhat smaller number of deferred culverts.

In sum, we disagree with Washington's contention that the Tribes “presented no evidence,” and that there was a “complete failure of proof,” that state-owned barrier culverts have a substantial adverse effect on salmon. The record contains extensive evidence, much of it from the State itself, that the State's barrier culverts have such an effect. We also disagree with Washington's contention that the court ordered correction of “nearly every state-owned barrier culvert” without “any specific showing” that such correction will “meaningfully improve runs.” The State's own evidence shows that hundreds of thousands of adult salmon will be produced by opening up the salmon habitat that is currently blocked by the State's barrier culverts. Finally, we disagree with Washington's contention that the court's injunction indiscriminately orders correction of “nearly every state-owned barrier culvert” in the Case Area. The court's order carefully distinguishes between high- and low-priority culverts based on the amount of upstream habitat culvert correction will open up. The order then allows for a further distinction, to be drawn by WSDOT in consultation with the United States and the Tribes, between those high-priority culverts that must be corrected within seventeen years and those that may be corrected on the more lenient schedule applicable to the low-priority culverts.

2. Deference to the State's Expertise

Washington contends that the district court made a clearly erroneous finding [*861] of fact, concluding that correction of human-caused barriers is the highest priority in habitat restoration. It contends, further, that this finding led the court to ignore the expert testimony presented by both the State and the Tribes. Washington wrote in its brief:

The State has concluded—and the Tribes agree—that a comprehensive approach to preserving and restoring salmon runs is the most productive and cost-effective The district court concluded, however, that “correction of human-caused barriers is recognized as the highest priority for restoring salmon habitat in the Case Area.” On that basis, the court ordered injunctive relief focused solely on culverts, even though the cost of the injunction will likely reduce funding available for other salmon restoration efforts. The court's finding was clearly erroneous, and its approach was an abuse of discretion.

In concluding that fixing culverts is “the highest priority for restoring salmon habitat in the Case Area,” the court cited the declaration of tribal expert Mike McHenry. Mr. McHenry said no such thing.

Brief at 54–55.

Washington is mistaken. It is true that the district court made the factual finding to which Washington objects. Citing McHenry's evidence, the court wrote, “The correction of human-caused barriers is recognized as the highest priority for restoring salmon habitat in the Case Area.” But the court's finding is amply supported by the record. With respect to restoring habitat (as distinct from *preserving* habitat, which has a higher priority), McHenry wrote that it is “generally recognized” that the correction of human-caused barriers is the highest priority. Further, McHenry testified that “you need to go after the barriers first” because that

is the “biggest bang for the buck.” Wasserman testified to the same effect, saying that “there’s an immediate access and immediate benefit to additional habitat when we replace a culvert”; that “it’s cost effective” compared to “other kinds of restoration activities”; and that “the cumulative effects can accrue across a variety of watersheds.”

It is also true that the district court’s injunction “focused solely on culverts” and did not order other remedies. But it is appropriate that the injunction should have done so. The court was acutely conscious of the fact that, while barrier culverts are an important cause of the decline of salmon in the Case Area, they are not the only cause. It wrote, “*A primary cause of this decline is habitat degradation One cause of the degradation of salmon habitat is blocked culverts[.]*” (Emphasis added.) However, because the only treaty violation alleged in this litigation was Washington’s barrier culverts, the court acted appropriately in ordering only the correction of these culverts. As the court wrote, “The scope of this subproceeding includes only those culverts that block fish passage under State-owned roads.”

Contrary to Washington’s contention, the district court had a sophisticated record-based understanding of the various causes of the decline of salmon in the Case Area, of what could be achieved by the correction of state-owned barrier culverts, and of the limitations on what could be achieved by culvert correction. The court’s injunction is carefully crafted to reflect that understanding.

3. Costs and Equitable Principles

Washington contends that the district court’s injunction fails properly to take costs into account, and that its injunction is inconsistent with equitable principles.[*862]

a. Costs

Washington writes in its brief that correction of WSDOT barrier culverts will cost approximately \$1.88 billion over the course of the seventeen-year schedule ordered by the court, or “roughly \$117 million per year of the injunction.” (Using Washington’s own estimates, a correct calculation is actually \$110.6 million per year rather than \$117 million.) Washington’s estimated total cost is based on an assumption of 817 corrected culverts, at an average correction cost of \$2.3 million per culvert.

Washington’s cost estimates are not supported by the evidence. Washington contended at trial, as it now contends to us, that the average cost to replace a WSDOT barrier culvert would be \$2.3 million. But the district court did not accept this estimate. The court found that “the actual cost of construction for twelve WSDOT stream simulation culvert projects completed prior to the 2009 trial ranged from \$413,000 to \$1,674,411; the average cost for the twelve was \$658,639 each.” In 2013, the State submitted a declaration from WSDOT official Wagner listing thirty-one culvert correction projects completed state-wide since October 2009. Of these, twenty-four used either a stream simulation design or a bridge. The declaration stated that the average cost for each these twenty-four projects was \$1,827,168, not \$2,300,000 as the State now contends. The district court noted that even Wagner’s lower figure could not be confirmed because cost data was missing for eight of the twenty-four projects.

There are additional reasons to disregard the State’s estimate of total cost. First, Washington assumes that all 817 of the state-owned barrier culverts will be corrected on the seventeen-year schedule. This is demonstrably incorrect. According to the State’s own evidence, Paragraph 8 of the injunction will allow the State to defer correction of approximately 230 of the 817 culverts. If cost of barrier correction (rather than merely amount of upstream habitat) is taken into account in deciding which culverts to defer, fewer but more costly culverts will be deferred. Second, and perhaps more important, Washington must eventually correct its barrier culverts, irrespective of the court’s order in this suit. The district court wrote that federal and state law require Washington to correct its barrier culverts “in any case,” and that the only consequence of its order will be an “acceleration of barrier correction.” The net costs imposed on Washington by the injunction are thus not the full costs of barrier correction, but rather only the “marginal costs attributable to an accelerated culvert correction schedule.”

Finally, we note that a portion of WSDOT’s funding for correcting its barrier culverts will come from the United States. The court wrote, “[T]he state expects to receive over \$22,000,000 for fish passage barrier projects from the federal government in the years 2011 to 2017. Of this amount, \$15,813,000 is expected in the 2013–2015 biennium.”

b. Equitable Principles

Washington makes one specific objection based on equitable principles. It objects that the court abused its discretion in requiring that “the State alone,” rather than State in conjunction with the United States, be “burdened with the entire cost of culvert repair.” Brief at 63. We disagree. The court’s order required correction of only those barrier culverts that were built and maintained by the State. It was not an abuse of discretion to require the State to pay for correction of its own barrier culverts.[*863]

Further, we note more generally that the district court did consider equitable principles, and concluded that those principles favored the Tribes and the citizens of the State. The court wrote:

The Tribes and their individual members have been harmed economically, socially, educationally, and culturally by the greatly reduced salmon harvests that have resulted from State-created or State-maintained fish passage barriers.

This injury is ongoing, as efforts by the State to correct the barrier culverts have been insufficient. ... Remedies at law are inadequate as monetary damages will not adequately compensate the Tribes and their individual members for these harms. ...

The balance of hardships tips steeply toward the Tribes in this matter. The promise made to the Tribes that the Stevens Treaties would protect their source of food and commerce was crucial in obtaining their assent to the Treaties' provisions. ... Equity favors requiring the State of Washington to keep the promises upon which the Tribes relied when they ceded huge tracts of land by way of the Treaties.

...

The public interest will not be disserved by an injunction. To the contrary, it is in the public's interest, as well as the Tribes' to accelerate the pace of barrier correction. All fishermen, not just Tribal fishermen, will benefit from the increased production of salmon. ... The general public will benefit from the enhancement of the resource and the increased economic return from fishing in the State of Washington. The general public will also benefit from the environmental benefits of salmon habitat restoration.

4. Intrusion into State Government Operations

Washington contends that the court's order "impermissibly and significantly intrudes into state government operations." Brief at 63. Washington contends that it "was making great strides in repairing culverts before any federal court intervention," and that "there was no need for the court to issue a detailed and expensive injunction that sets an inflexible and tight schedule for culvert repair." *Id.* at 63–64. Washington implies that the cost of complying with the court's order will oblige the State to cut other important state programs:

[T]he injunction will require the State to devote roughly \$100 million per year more than it otherwise would have to culvert repair. This at a time when the State faces recurring budget shortfalls in the billions of dollars and has already made deep and painful cuts to subsidized health insurance for low income workers, K–12 schools, higher education, and basic aid for persons unable to work.

Id. at 58. We disagree.

The district court disagreed with Washington's contention that there was "no need" for the court to order correction of its barrier culverts. Based on the State's slow rate of barrier correction, the court concluded that "under the current State approach, the problem of WSDOT barrier culverts in the Case Area will never be solved." The district court also disagreed with the Washington's cost estimates. As seen above, Washington's estimate of its cost to comply with the court's order ("roughly \$100 million per year" more than it would otherwise spend) is dramatically overstated.

The district court carefully considered the marginal cost imposed on Washington by its injunction and concluded that the State could comply with the order without [*864] cutting vital state programs. The court relied on a state budget document showing that \$9.9 billion was allocated to the state transportation budget for the 2011–2013 biennium. Of that \$9.9 billion, \$7.88 billion was allocated to WSDOT. Noting the separation of the transportation budget from other state budgets, the court concluded, "The separation of the Transportation Budget from the Operating and Capital Budgets ensures that money will not be taken from education, social services, or other vital State functions to fund culvert repairs."

5. Federalism Principles

Washington contends, based on the four specific objections just reviewed, that the district court's injunction violates principles of federalism. Washington asserts four principles of federalism:

First, the remedy must be no broader than necessary to address the federal law violation. Second, courts must grant deference to a state's institutional competence and subject matter expertise. Third, courts must take cost into consideration and not substitute their budgetary judgment for that of the state. And finally, relief must be fashioned so that it is the least intrusive into state governmental affairs. The district court's injunction here contravenes all of these principles.

Blue Brief at 49. We will not quarrel here with these principles, stated at this level of generality. However, for the reasons given above, we have concluded that the district court's injunction violates none of them.

Further, a federalism-based objection to an injunction enforcing Indian treaty rights should not be viewed in the same light as an objection to a more conventional structural injunction. Washington cites two Supreme Court cases in support of its federalism objection—*Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) (structural injunction requiring reform of the Philadelphia police department), and *Horne v. Flores*, 557 U.S. 433, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009) (structural injunctions requiring Arizona to comply with Equal Educational Opportunities Act of 1974). However, Washington fails to cite the Supreme Court case directly on point—*Fishing Vessel*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979)—in which the Court affirmed detailed injunctions requiring Washington to comply with the very Treaties at issue in this case.

The district court in *Fishing Vessel* had entered a series of detailed injunctions implementing its holding that the Treaties entitled the Tribes to take up to fifty percent of harvestable salmon in any given year. Washington strenuously resisted, with the result that the district court effectively took over much of the State's management of the salmon fishery. Washington objected both to the district court's interpretation of the Treaties, and to the court's intrusion into its affairs. The Supreme Court affirmed the district court's holding on the meaning of the Treaties. It then rejected, in no uncertain terms, federalism-based objections to the injunctions enforcing the Treaties:

Whether [Washington] Game and Fisheries may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful. But the District Court may prescind that problem by assuming direct supervision of the fisheries if state recalcitrance or state-law barriers should be continued. *It is therefore absurd to argue ... both that the state agencies may not be ordered to implement the decree and also that the District Court may not itself issue detailed remedial orders as a substitute for state supervision.* [*865]

Fishing Vessel, 443 U.S. at 695, 99 S.Ct. 3055 (emphasis added).

6. Modification of the Injunction

It is possible that changing or newly revealed facts or circumstances will affect the fairness or efficacy of an injunction. In the case before us, the district court has ordered that many of WSDOT's high-priority barrier culverts be corrected over the course of seventeen years, and that the remainder be corrected only at the end of the culvert's natural life or when road work undertaken for independent reasons would in any event require replacement of the culvert. It is possible that, during this extended period, changed or newly revealed facts or circumstances will justify a modification of the injunction. The district court should not hesitate to modify its injunction if this proves to be the case. As the Supreme Court wrote in *System Federation No. 91 v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961), “a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.” See also *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 380–81, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). In affirming the judgment entered by the district court in this case, we emphasize that the flexibility inherent in equity jurisdiction allows the court, if changed or newly revealed facts or circumstances warrant, to modify its injunction accordingly.

Conclusion

In sum, we conclude that in building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties. The United States has not waived the rights of the Tribes under the Treaties, and has not waived its own sovereign immunity by bringing suit on behalf of the Tribes. The district court did not abuse its discretion in enjoining Washington to correct most of its high-priority barrier culverts within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons.

AFFIRMED.

* The Honorable David A. Ezra, District Judge for the U.S. District Court for the District of Hawai'i, sitting by designation.