Nos. 97-1337, 97-1356, and 97-1357

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

COUNTY OF AITKIN, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

JOHN W. THOMPSON, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
MARTIN W. MATZEN
ELIZABETH ANN PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the usufructuary rights guaranteed to the Chippewa Indians on aboriginal lands that they ceded to the United States by an 1837 Treaty were terminated by the operation of the equal footing doctrine when Minnesota was admitted to statehood in 1858.

2. Whether an 1855 Treaty, in which one of the respondent Chippewa Bands, the Mille Lacs Band, relinquished "all right, title, or interest" in and to its remaining lands other than those set aside for its Reservation, extinguished that Band's usufructuary rights under the 1837 Treaty.

3. Whether an Executive Order issued in 1850, which ordered the involuntary removal of the Chippewa from the lands ceded by the 1837 Treaty, extinguished their usufructuary rights with respect to those lands.

4. Whether the various respondent Chippewa Bands are precluded, as a result of their participation in proceedings before the Indian Claims Commission, from asserting their usufructuary rights under the 1837 Treaty.

5. Whether the Chippewa Indians' exercise of usufructuary rights under the 1837 Treaty should be limited by the "moderate living" doctrine of *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaties, statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1337

STATE OF MINNESOTA, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

No. 97-1356

COUNTY OF AITKIN, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

No. 97-1357

JOHN W. THOMPSON, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-73) is reported at 124 F.3d 904. The opinions of the district court are reported at 853 F. Supp. 1118 (*Mille*

Lacs I) (Pet. App. 351-418), 861 F. Supp. 784 (*Mille Lacs II*) (Pet. App. 212-350), and 952 F. Supp. 1362 (*Mille Lacs III*) (Pet. App. 74-163). Additional opinions of the district court (Pet. App. 164-211 and 419-481) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1997. A petition for rehearing was denied on November 17, 1997. Pet. App. 7. The petition for a writ of certiorari in No. 97-1337 was filed and docketed on February 17, 1998, the day after a federal holiday. The petitions for a writ of certiorari in No. 97-1356 and No. 97-1357 were filed on February 17, 1998, and docketed on February 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns whether the Chippewa Indians' rights to hunt, fish, and gather wild rice on aboriginal tribal lands—"usufructuary" rights expressly preserved by a treaty ceding those lands to the United States—were subsequently relinquished by the Tribe or abrogated by the United States. The same rights under the same treaty were before the Seventh Circuit in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341, cert. denied, 464 U.S. 805 (1983), which concluded, consistent with the Eighth Circuit's decision in this case, that the Chippewa Indians continued to possess those rights.

1. The lands involved in this case are the Minnesota portion of a tract, totalling more than 13 million acres, that the Chippewa Indians ceded to the United States by the Treaty of July 29, 1837, 7 Stat. 536 (Pet.

App. 484).[1] (The remainder of the tract, which lies in Wisconsin, was the subject of *Lac Courte Oreilles Band*.) The 1837 Treaty provided that "[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 [*sic*] to the Indians, during the pleasure of the President of the United States." Art. 5, 7 Stat. 537. The Treaty contained no provision for the removal of the Indians from the ceded lands.

On February 6, 1850, President Taylor issued an Executive Order that stated, in pertinent part:

> 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 * * * are hereby revoked; and all of the said Indians remaining on the land ceded aforesaid, are required to remove to their unceded lands.

Pet. App. 253.

The United States did not attempt to forcibly remove the Chippewa from the ceded lands. The government did, however, seek to induce the Indians to relocate by moving the Chippewa agency, where the Indians received their annuity payments, to unceded lands some distance from the ceded lands. Pet. App.

---

[1] All "Pet. App" citations refer to the appendix to the petition in No. 97-1337. The petition in No. 97-1337 is cited as "Minn. Pet.," the petition in No. 97-1356 as "County Pet.," and the petition in No. 97-1357 as "Thompson Pet."

257. But the Chippewa remained on the ceded lands. And, in 1851, the Acting Secretary of the Interior suspended the removal effort. *Id.* at 260-261. It was never resumed. *Id.* at 264.

In 1854, the United States negotiated a treaty that provided for the cession to the United States of all of the remaining lands occupied by the Lake Superior Chippewa east of the Mississippi and established reservations for the Chippewa Bands within the lands ceded by the 1837 Treaty and by a second treaty negotiated in 1842. Treaty of Sept. 30, 1854, 10 Stat. 1109. The 1854 Treaty reserved the signatory Bands' right to hunt and fish on the newly ceded lands. The respondent Fond du Lac and Wisconsin Bands of Chippewa Indians were parties to the 1854 Treaty; respondent Mille Lacs Band was not.

The United States negotiated a second treaty in 1855 to acquire additional lands of the Chippewa, including the Mille Lacs Band. Treaty of Feb. 22, 1855, 10 Stat. 1165. Article I of the 1855 Treaty, after ceding all of the Bands' right, title, and interest in a tract with defined boundaries, went on to state that

> the 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 now have in, and to, any other lands in the Territory of Minnesota or elsewhere.

10 Stat. 1166. Article II of the 1855 Treaty established the Mille Lacs Reservation within the territory ceded by the 1837 Treaty. 10 Stat. 1166-1167. The 1855 Treaty made no mention of usufructuary rights.

2. In 1990, the Mille Lacs Band and several of its members filed suit in federal district court against the State of Minnesota, seeking a declaratory judgment that they continued to possess usufructuary rights with respect to the Minnesota portion of the lands ceded in the 1837 Treaty. They also sought an injunction against the State's interference with those rights. The United States intervened as a plaintiff, and nine Minnesota counties and six individual landowners intervened as defendants.

The court bifurcated the case into two phases: the first was to determine whether, and to what extent, the Chippewa retained usufructuary rights on the ceded lands, while the second was to determine how any such rights were to be exercised. In 1994, the court concluded, after a trial on the first phase, that "the privilege guaranteed to the Chippewa of hunting, fishing, and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded to the United States by the treaty of 1837 continues to exist." Pet. App. 350. The court specifically held that those rights were not extinguished by the 1850 Executive Order or the 1855 Treaty. See *id.* at 304-334.

The court then allowed several Wisconsin Bands of Chippewa to intervene as plaintiffs. The State moved for summary judgment against the Wisconsin Bands, arguing, *inter alia*, that their usufructuary rights had been extinguished by the 1854 Treaty. The State also argued that the Wisconsin Bands were collaterally estopped from asserting their usufructuary rights claims as a result of their participation in previous litigation before the Court of Claims and the Indian Claims Commission. The court denied the State's motion. Pet. App. 164-211.

The Fond du Lac Band, and several of its members, had filed a separate suit in 1992, seeking a declaration that they retained the usufructuary rights conferred by the 1837 Treaty and the 1854 Treaty. In 1996, the district court held that the Fond du Lac Band continued to possess its usufructuary rights under both treaties. Pet. App. 419-481.

The Fond du Lacs suit was consolidated with the Mille Lacs suit for the second phase of the case. The State and the Bands stipulated to a Conservation Code and Management Plan to regulate the exercise of usufructuary rights under the 1837 Treaty. The district court also resolved certain other issues that remained in dispute, concluding, among other things, that the defendants had demonstrated no need for an allocation of the resources on the ceded land. Pet. App. 128-152.

3. The State, together with the intervening counties and landowners, appealed. The court of appeals affirmed on all issues. Pet. App. 1-73.

First, the court concluded that the Chippewa's usufructuary rights were not validly extinguished by the 1850 Executive Order, which purported to revoke those rights and to require the removal of the Chippewa from the ceded lands. Pet. App. 21-31. The court explained that President Taylor had no authority to order the removal of the Chippewa without their consent, because Congress had authorized the President only to convey lands west of the Mississippi to "such tribes or nations of Indians as *may choose* to exchange the lands where they now reside, and remove there." Act of May 28, 1830, ch. 148, § 1, 4 Stat. 412 (emphasis added). Accordingly, because "Congress required consent for removal, and the Bands did not consent, then President Taylor had no authority for

his 1850 Executive Order of removal." Pet. App. 27. The court further determined that the portion of the Executive Order mandating removal of the Chippewa was not severable from the portion revoking their usufructuary rights, finding "no evidence that revocation of usufructuary rights would have been made independently of the removal mandate." *Id.* at 29-30. The court therefore held that "the entire 1850 Executive Order is invalid." *Id.* at 31.[2]

Second, the court of appeals held that the 1854 Treaty, which set aside certain lands as reservations for the Wisconsin Bands and the Fond du Lac Band (but not the Mille Lacs Band) in exchange for their cession of title to other lands, did not extinguish those Bands' usufructuary rights under the 1837 Treaty. Pet. App. 31-34. The court concluded that the present case is legally and factually distinguishable from *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339, 357-358 (1941), which held that a Tribe's acceptance of a reservation "amounted to a relinquishment of any tribal claims to lands * * * outside that reservation." The court explained that, whereas the Indians' claim in *Santa Fe* was based on aboriginal title, the Chippewa's claim here is based on rights reserved under the 1837 Treaty. Pet. App. 33. The court also found the evidence to be "overwhelming that neither party intended the 1854 Treaty to disturb usufructuary rights." *Id.* at 34.

Third, the court of appeals held that the 1855 Treaty, which created a reservation for the Mille

---

[2] The court of appeals did not address the district court's several alternative grounds for finding that the 1850 Executive Order did not validly revoke the Chippewa's usufructuary rights. Pet. App. 31 n.25.

Lacs Band on some of the lands ceded by the 1837 Treaty, did not extinguish that Band's rights to fish, hunt, and gather wild rice on the rest of those lands. Pet. App. 34-39. The court declined to construe the Band's relinquishment of "any and all right, title and interest" in and to "any other lands in the Territory of Minnesota" as extending to the usufructuary rights reserved under the 1837 Treaty. *Id.* at 35. The court noted that those rights were not mentioned in the 1855 Treaty or in the negotiations that produced it. *Id.* at 37. And the court found ample support in the record for the district court's factual findings that neither the Band nor the United States had intended the 1855 Treaty to extinguish those rights. *Ibid.* The court concluded that a contrary result was not required by *Oregon Department of Fish & Wildlife* v. *Klamath Tribe*, 473 U.S. 753 (1985), which held that a Tribe had relinquished its right to hunt and fish on certain reservation lands when it ceded all "claim, right, title and interest" in those lands. Pet. App. 38. The court explained that the usufructuary rights in *Klamath* were "exclusive and *on-reservation* rights, and thus logically extinguished with a relinquishment of a portion of the reservation," whereas the usufructuary rights in this case are "*non-exclusive* and *off-reservation* rights" that were reserved by treaty prior to the creation of the reservation. *Id.* at 39.

Fourth, the court of appeals concluded that the Wisconsin Bands and the Fond du Lac Band were not collaterally estopped, as a result of their participation in *Mole Lake Band* v. *United States*, 126 Ct. Cl. 596 (1953), from litigating whether they retain a right to fish, hunt, and gather wild rice on the lands ceded by the 1837 Treaty. Pet. App. 39-45. The court held that

collateral estoppel did not apply because the Bands' usufructuary rights under the 1837 Treaty were not "actually litigated" in the Court of Claims. *Id.* at 43-44.

Fifth, the court of appeals held that the Wisconsin Bands and the Mille Lacs Band likewise were not collaterally estopped as a result of their participation in proceedings before the Indian Claims Commission seeking compensation for lands ceded under the 1837 Treaty. Pet. App. 45-51. The court rejected the argument that the Commission's award, which compensated the Bands based on the highest and best use of those lands, subsumed the value of the Bands' usufructuary rights. The court concluded that the Commission's silence with respect to usufructuary rights could not be given the same effect in this case as in *Klamath*, *supra*, reasoning that the Commission would not have "extinguished an important body of rights bargained for and explicitly reserved in a treaty without any mention of those rights." *Id.* at 50.

Sixth, the court of appeals held that the Bands' usufructuary rights under the 1837 Treaty were not extinguished, sub silentio, under the equal footing doctrine when Minnesota was admitted to statehood in 1858. Pet. App. 52-59. The court, while applying the analysis of *Ward* v. *Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), reached a different result on several grounds. The court reasoned that, whereas the hunting rights in those cases were "temporary" because they could be exercised only so long as the lands at issue remained unoccupied and within the ownership of the United States, the usufructuary rights in this case are of a

"continuing" nature not tied to ownership of the lands. Pet. App. 55 & n.42. The court also concluded, relying on this Court's decisions in *United States* v. *Winans*, 198 U.S. 371 (1905), and *Tulee* v. *Washington*, 315 U.S. 681 (1942), that the United States' agreement in the 1837 Treaty to preserve the Chippewa's usufructuary rights on the ceded lands "does not offend the State's sovereignty." Pet. App. 58. The court further held that Congress must clearly express its intent to abrogate Indian treaty rights, and that no such expression of congressional intent to abrogate the Chippewa's rights under the 1837 Treaty was contained in the Act of Congress admitting Minnesota to statehood. *Id.* at 59.

Seventh, the court of appeals rejected the argument that the "moderate living doctrine," as articulated in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), should be applied to limit the Chippewa's exercise of usufructuary rights under the 1837 Treaty. Pet. App. 59-67. The court explained that the moderate living doctrine is not implicated unless, as in *Fishing Vessel*, a natural resource is determined to be so scarce that it must be apportioned between treaty and non-treaty users: "The moderate living doctrine does not establish a *right* to apportionment, but is rather a part of the *method* of apportionment once a court has determined that division of a resource is necessary." Pet. App. 67 (citing *Fishing Vessel*, 443 U.S. at 685-686). The court concluded that no showing had been made that "any resource at issue is in ecological danger," and thus in need of apportionment between the Chippewa and other users. *Id.* at 65. The court noted that the State and the Chippewa had agreed to a Conservation

Code and Management Plan, which would restrict the Band's hunting, fishing, and gathering on the ceded lands covered by the 1837 Treaty, and that the State had conceded that "under the Code, there was no danger of depletion of resources." *Ibid.*

Finally, the court of appeals, rejecting the Bands' cross-appeal, affirmed the district court's holding that, because the 1837 Treaty does not confer a right of access to land, the Bands' members may exercise their rights only on public lands and on private lands that are open to public hunting, fishing, and gathering generally and indiscriminately. Pet. App. 70-72.

ARGUMENT

The court of appeals' decision involves nothing more than the application of settled law to the particular facts and circumstances of this case. It does not conflict with any decisions of this Court, other courts of appeals, or the Minnesota Supreme Court. Indeed, the Seventh Circuit reached the same result in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341, cert. denied, 464 U.S. 805 (1983), which sustained the Chippewa's usufructuary rights under the same treaty. No more reason exists in this case than in *Lac Courte Oreilles Band* for this Court to grant plenary review.

1. The State initially contends (Minn. Pet. 10-15) that the decision below conflicts with *Ward* v. *Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), in holding that the Bands' usufructuary rights under the 1837 Treaty were not abrogated when Minnesota was admitted to the Union on an equal footing with other States. The Eighth Circuit applied the same legal standard to petitioners' equal footing

claim as did this Court in *Race Horse* and the Tenth Circuit in *Repsis*. However, because the facts and circumstances of this case are different from those of *Race Horse* and *Repsis*, the court correctly reached a different conclusion.

This Court explained in *Race Horse* that, when an Indian Tribe possesses treaty rights with respect to lands not yet within any State, whether those rights continue to exist after statehood depends upon their character: The Tribe's rights survive if they "are of such a nature as to imply their perpetuity," as opposed to being "temporary and precarious." *Race Horse*, 163 U.S. at 515; accord *Repsis*, 73 F.3d at 988. The Tribes' treaty rights in *Race Horse* and *Repsis* "to hunt upon the unoccupied lands of the United States" were held to be "temporary" in nature. 163 U.S. at 515; 73 F.3d at 991.

The court of appeals applied *Race Horse*'s continuing/temporary distinction in this case. But the court concluded that the Chippewa's treaty rights to "hunt[], fish[] and gather[] the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" were intended by the parties to be "continuing rights." Pet. App. 55. The court contrasted the rights at issue here with those in *Race Horse* and *Repsis*, which would terminate, by their terms, as soon as the lands were no longer "unoccupied" or owned by the United States. Such a fact-specific determination, which turns on the particular text and history of the 1837 Treaty, does not warrant review by this Court. See *Repsis*, 73 F.3d at 988 (recognizing that whether Indian treaty rights have survived statehood under *Race Horse* requires examination of "the literary and historical context of the treaty").

The court of appeals' decision is consistent, moreover, with this Court's post-*Race Horse* decisions. The Court has recognized, for example, that the Yakima Indians' treaty right to "tak[e] fish at all usual and accustomed places" survived Washington's admission to the Union. *United States* v. *Winans*, 198 U.S. 371, 382-384 (1905); see *Tulee* v. *Washington*, 315 U.S. 681, 684 (1942) (*Winans* held that the treaty "conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area"). The Court emphasized that the Yakima's fishing rights were reserved by, not granted to, the Indians in the treaty. See *Winans*, 198 U.S. at 381 ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."). It was "surely * * * within the competency" of the federal government, said the Court, "to secure to the Indians such a remnant of the great rights they possessed." *Id.* at 384. The Court added that such a reservation of rights would not "restrain the State unreasonably, if at all," in its regulation of its natural resources. *Ibid.* Similarly, the court of appeals recognized here that the Chippewa's reservation of the right to fish, hunt, and gather on the lands ceded by the 1837 Treaty "does not offend the State's sovereignty," because "the Bands' rights can be reconciled with the State's regulation of the natural resources within its borders." Pet. App. 58.[3] See also *Antoine* v. *Washington*, 420

[3] The continuing vitality of *Race Horse*'s rationale has been questioned by courts and commentators. See, *e.g.*, *Holcomb* v. *Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013, 1014 n.3 (9th Cir. 1967) ("[T]he strict holding of *Ward* v.

U.S. 194, 205-206 (1975) ("Congress exercised its plenary constitutional powers to legislate those federally protected rights, * * * * [which] so preserved may, of course, not be qualified by the State") (internal quotation marks omitted).[4]

Moreover, notwithstanding *Race Horse*, this Court has made clear over the past century that hunting regulations are an appropriate subject of federal legislation and treaty making, and that the federal government's exercise of such power in any given State does not place that State on an unequal footing. For example, in *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 (1976), the Court rejected a claim that federal regulation of wild horses and burros, pursuant to the Property Clause, impermissibly intruded "on the sovereignty, legislative authority, and police power of

---

Race Horse has been modified by implication in subsequent decisions."); *State* v. *Tinno*, 497 P.2d 1386, 1393 n.6 (Idaho 1972) ("*Race Horse* and the theory it posited have been entirely discredited by the Supreme Court") (citing *United States* v. *Winans*, and *Tulee* v. *Washington*, *supra*); R.N. Clinton, et al., *American Indian Law* 820 (3d ed. 1991) ("*Winans* clearly rejected the view that the equal footing doctrine limits the exercise of treaty-guaranteed off-reservation hunting and fishing rights.").

[4] In *Antoine*, unlike in *Race Horse*, the State was admitted into the United States two years *before* the federal agreement that reserved the Indians' hunting rights. 420 U.S. at 200. This Court has recognized, however, that the question with regard to the equal footing doctrine is not whether a federal law relating to Indians was enacted before or after a State's admission, but rather whether that federal law violates the State's sovereignty. *Johnson* v. *Gearlds*, 234 U.S. 422, 439 (1914). In *Antoine*, the Supreme Court held that the federal agreement reserving Indian hunting rights did not violate Washington's sovereignty.

the State." When legislating regarding federal lands, the Court explained, Congress's enactments "necessarily override[] conflicting state laws under the Supremacy Clause." *Id.* at 543; see generally *Missouri* v. *Holland*, 252 U.S. 416, 432-435 (1920) (holding that exercise of Article II treaty power as a basis for federal authority over wildlife does not offend 10th Amendment).

2. Petitioners next contend (Minn. Pet. 15-20; County Pet. 15-17) that the court of appeals' conclusion that the 1855 Treaty between the United States and certain Chippewa Bands, including respondent Mille Lacs Band, did not revoke those Bands' usufructuary rights under the 1837 Treaty conflicts with *Oregon Department of Fish & Wildlife* v. *Klamath Tribe*, 473 U.S. 753 (1985). As the court of appeals recognized (Pet. App. 39), however, this case does not involve a "situation * * * analogous" to *Klamath Tribe*.

The court of appeals began its analysis of petitioners' claims regarding the 1855 Treaty by examining, and affirming, the district court's factual findings, which were based on its "careful examination of the historical record established at trial." Pet. App. 35-38. The district court had determined that "(1) the government did not intend for the 1855 Treaty to extinguish the usufructuary rights reserved in the 1837 Treaty, (2) the Chippewa did not intend to give up their 1837 Treaty privilege and they did not understand the 1855 Treaty to have that effect, and (3) both the Band and the United States believed that the 1837 Treaty rights continued to exist after the 1855 Treaty was signed." *Id.* at 35-36 (citations omitted). In affirming those findings, the court of appeals noted "the absence of any mention of the 1837 Treaty or its

usufructuary rights in the 1855 Treaty or its negotiation process," as well as "the lack of evidence that the parties intended to extinguish these rights." *Id.* at 37.

Petitioners nonetheless contend that the 1855 Treaty must, as a matter of law, be construed as extinguishing the signatory Bands' usufructuary rights under the 1837 Treaty. They base that argument solely on the Bands' relinquishment in the 1855 Treaty of "any and all right, title and interest * * * which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere," other than the lands set aside for their reservation. Art. I, 10 Stat. 1166. According to petitioners, because the Court construed similar language in *Klamath* as abrogating the Indians' usufructuary rights, the same result must obtain here.

Klamath did not address the present question whether a treaty in which a Tribe generally conveys to the United States its "right, title and interest" in and to "any * * * lands"—other than the lands being set aside as its reservation—must be construed as implicitly extinguishing the usufructuary rights that the Tribe had expressly reserved by treaty on certain lands previously conveyed to the United States. The issue in *Klamath* was whether, when a Tribe ceded "all [its] claim, right, title and interest in and to" a particular piece of land, the Tribe implicitly reserved its right to hunt and fish on that land. 473 U.S. at 753. The Court's decision in *Klamath*, like the court of appeals' decision here, turned on the text and historical context of the particular agreements at issue. See 473 U.S. at 755 (noting that decision was based on "the terms of the 1901 Cession Agreement," "the predecessor 1864 Treaty," and "certain other events

in the history of the Tribe"). The Court concluded that the Klamath Tribe's usufructuary rights, which had been granted to them by the 1864 Treaty that created its reservation, were meant to exist only "within the limits of the reservation." *Id.* at 766. The Court reached that conclusion based on the treaty's provisions stating that (i) the Tribe's fishing rights extended only to "the streams and lakes included in said reservation," (ii) the Tribe's gathering rights extended only "within [the reservation's] limits," and (iii) the Tribe's rights were "exclusive," which would not "be possible on lands open to non-Indians." *Id.* at 767 (quoting Treaty of Oct. 14, 1864, 16 Stat. 708). Accordingly, when the Tribe ceded certain of its reservation lands to the United States in 1901, the Tribe no longer retained any rights to hunt and fish on those lands, because those rights "did not exist independently of the reservation itself." *Id.* at 768.

The Chippewa's usufructuary rights on the lands subject to the 1837 Treaty, in contrast, exist independently of the ownership status of those lands. The Chippewa ceded title to the lands in the 1837 Treaty, while expressly reserving the right to hunt, fish, and gather wild rice on the lands. Moreover, while the Klamath's usufructuary rights were exclusive, and thus could not exist on lands removed from the reservation, the Chippewa's usufructuary rights were not exclusive. It was understood that the Chippewa could not exclude others from the lands ceded by the 1837 Treaty. Nothing in *Klamath* required the court of appeals, in a case involving different agreements and different historical circumstances, to hold that the 1855 Treaty extinguished the Chippewa's rights under the 1837 Treaty. Indeed, *Klamath* recognizes (473 U.S. at 765-766 & nn. 16, 17) that "Indians may

enjoy special hunting and fishing rights that are independent of any ownership of land," such as those recognized to exist in *Antoine*, *supra*; *Winans*, *supra*; and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

The State contends (Minn. Pet. 16) that the usufructuary rights here, like those in *Klamath*, were tied to land title, because the 1837 Treaty did not specify that the rights could be exercised "at all usual and accustomed places," as did the treaties in some of the Court's cases, and instead reserved the rights on all lands ceded by the 1837 Treaty. *Klamath* did not suggest, however, that usufructuary rights may be severed from land title only if they are to be exercised at "usual and accustomed places." To the contrary, *Klamath* cited *Antoine*, *supra*, and *Kennedy* v. *Becker*, 241 U.S. 556 (1916)—in each of which the Tribe retained hunting and fishing rights on lands ceded to the United States without reference to "usual and accustomed places"—as examples of rights that are independent of land ownership. See 473 U.S. at 765-766 & nn. 16, 17. The State's proposed distinction between the usufructuary rights here, which were reserved in a "geographic area," and rights reserved at "usual and accustomed places" thus has not been recognized by this Court or any court of appeals. And such a distinction would be an unlikely basis for a rule of law in any event, since the phrase "usual and accustomed places" describes "geographic areas."

Finally, petitioners' arguments based on the 1855 Treaty, if accepted by the Court, would have little practical effect even in this case, much less in any other case. Those arguments are directed at the usu-

fructuary rights only of the Mille Lacs Band, and not of the other respondent Chippewa Bands, which were not parties to the 1855 Treaty.

3. Petitioners also challenge the court of appeals' conclusion that the 1850 Executive Order, which purported to order the removal of the Chippewa from the lands ceded under the 1837 Treaty and to revoke their rights to hunt, fish, and gather wild rice on those lands, was invalid in its entirety. The court held that the removal provision was invalid because Congress, in the Act of May 28, 1830, ch. 148, 4 Stat. 411, had authorized such removal only with a Tribe's consent, which had not been secured from the Chippewa. The court further held, based on the historical record, that the removal provision was so "integral to the entire Order" that it could not be severed. Pet. App. 29.

a. The State does not dispute that President Taylor had no authority to issue the portion of the Executive Order directing the removal of the Chippewa from the ceded lands without their consent. Nor does the State dispute that the court of appeals applied the proper severability test, based on *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932), to determine whether the invalidity of one provision of the Executive Order (*i.e.*, the provision ordering the Chippewa's involuntary removal from the ceded lands) defeated the validity of the other provision (*i.e.*, the provision revoking the Chippewa's usufructuary rights). The State nonetheless seeks review of the court of appeals' application of that severability test to the particular Executive Order at issue here. But asserted errors involving "the misapplication of a properly stated rule of law"

ordinarily do not warrant the Court's review. Sup. Ct. R. 10.

The State contends (Minn. Pet. 21-22) that the court of appeals should have held that the revocation provision was valid, independent of the removal provision, because the 1837 Treaty permitted the President "to terminate the Chippewa's hunting and fishing rights at his pleasure." The court of appeals rejected that argument, without reaching the question of the extent of the President's authority under the 1837 Treaty with regard to the Chippewa's usufructuary rights,[5] applying the severability test that the State concedes is the correct one. The court concluded (Pet. App. 28-29) that, although the Order contained two provisions that "seem separate," they could not be severed, because the historical record established that "[t]he purpose of the Order was to mandate removal, and this purpose was integral to the entire Order." The provision revoking the Indians' usufructuary rights was included merely "to encourage removal." *Id.* at 29. It is well-established that when "it is evident the legislature would not have enacted one [clause of a statute] without the other—as when the two things provided are

---

[5] Petitioners argue here, as they did below, that the 1837 Treaty gave the President unfettered discretion to revoke the Chippewa's usufructuary rights at any time and any reason. See Minn. Pet. 21-22; County Pet. 13-14; Thompson Pet. 17-18. As noted in the text, however, the court of appeals found it unnecessary to resolve that issue, given its ruling that the Order's revocation provision, whether or not it would have been valid standing alone, could not be severed from the invalid removal provision. There is no reason for this Court to grant certiorari to decide issues of treaty construction that the court of appeals did not reach.

necessary parts of one system—that the whole act will fall with the invalidity of one clause." *Huntington* v. *Worthen*, 120 U.S. 97, 102 (1887).

b. The counties, although not the State or the landowners, contend (County Pet. 11-15) that the courts below were barred by the separation of powers doctrine from considering whether the 1850 Executive Order was valid. But this Court has recognized that courts may, in appropriate circumstances, assess the validity of Presidential action that is alleged to exceed the authority granted by Congress or the Constitution. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *Cole* v. *Young*, 351 U.S. 536, 557-558 & n.20 (1956); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

The counties' argument is predicated, moreover, on a mischaracterization of this case an involving "a judicial challenge against a President who terminated treaty provisions" (County Pet. 12), such as that involved in *Goldwater* v. *Carter*, 444 U.S. 996 (1979) (granting petition, vacating judgment, and remanding for dismissal).[6] The respondent Bands brought this action to *confirm* their rights under the 1837 Treaty, not to terminate the Treaty or to invalidate the 1850 Executive Order. It was petitioners who asserted the Executive Order as a defense to the Bands' treaty claims. The counties cite no authority holding that the federal courts, in actions properly within their jurisdiction, cannot adjudicate the scope or validity of

---

[6] No conflict exists between this case and *Goldwater* v. *Carter*, *supra*. That case, which involved a dispute between co-equal Branches of the federal government over the power to terminate a treaty, raised complex separation-of-powers and foreign policy issues that are absent here.

Executive Orders raised in support of, or in opposition to, a party's claim.

c. The district court also held (Pet. App. 319-321) that the 1850 Executive Order, even if valid, had been repealed by implication. The district court reasoned that the federal government not only did not enforce the Executive Order, but also took action inconsistent with it, such as by establishing reservations for the Bands on the very lands from which they were to have been removed under the Order. The court of appeals did not reach that (or any other) alternative ground given by the district court for holding that the 1850 Executive Order did not revoke the Bands' usufructuary rights. *Id.* at 31 n.25; see *id.* at 312-316 (addressing other grounds for decision). Accordingly, even if petitioners were to prevail on their challenge to the court of appeals' ruling on the validity of the revocation provision of the Executive Order, other grounds would remain available to the court on remand to conclude that the Bands' usufructuary rights survived the Executive Order.[7]

4. The landowner petitioners contend (Thompson Pet. 24-25) that the Bands are barred, by principles of res judicata and collateral estoppel, from asserting

---

[7] The Eighth Circuit's ultimate conclusion on the Executive Order issue is consistent with that of the Seventh Circuit in *Lac Courte Oreilles*, 700 F.2d at 361-362, which held that the 1850 Executive Order was invalid because it exceeded the scope of, *inter alia*, the 1837 Treaty, which the Seventh Circuit construed as authorizing the revocation of the Chippewa's rights only if the Indians misbehaved. See also *State* v. *Gurnoe*, 192 N.W.2d 892, 900 (Wis. 1972) (concluding that 1850 Executive Order "was never effective," and thus did not extinguish Chippewa's fishing rights, because Chippewa continued to reside and exercise fishing rights on ceded lands).

their usufructuary rights claims because they could have asserted such claims in earlier proceedings in the Indian Claims Commission (ICC). The landowners' claims are without merit, present no conflict with the decisions of this Court or other courts of appeals, and involve no question of recurring significance.

The court of appeals did not address any res judicata issue, observing that "the State abandoned its res judicata defense" (Pet. App. 44 n.36), and apparently not perceiving the landowners to have preserved one. No viable res judicata defense could exist here in any event. The doctrine of res judicata, or claim preclusion, bars only those claims that could have been asserted in prior litigation between the same parties or their privies. *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979). None of the defendants in this case were parties, or in privity with parties, to the ICC proceedings.

Nor are the Bands' usufructuary rights claims barred by the doctrine of collateral estoppel, or issue preclusion, which applies only to "an issue of fact or law, actually litigated and resolved by a valid final judgment." *Baker* v. *General Motors Corp.*, 118 S. Ct. 657, 664 n.5 (1998). As the court of appeals recognized (Pet. App. 46-48), those claims were neither litigated nor resolved in the ICC proceedings.

The landowners also contend (Thompson Pet. 26-27) that the Bands' usufructuary rights were extinguished by the ICC award, which compensated the Bands for the lands ceded by the 1837 Treaty based on their "highest and most valuable uses." They contend that under *Klamath*, *supra*, the value of the Bands' usufructuary rights was necessarily subsumed within the ICC award—notwithstanding that

those rights were not put at issue in the ICC proceedings or mentioned in the ICC's lengthy opinion. The court of appeals properly rejected that argument based on the "crucial distinctions" between *Klamath* and this case. Pet. App. 50. As noted above, the Court was concerned in *Klamath* with the construction of the 1901 Agreement, which ceded to the United States "all [the Tribe's] claim, right, title and interest in and to" certain lands, without any mention of its usufructuary rights. The Court declined to read into the Agreement an implicit reservation of those rights. At the end of its opinion, the Court observed that an ICC award of additional compensation for those lands—which likewise contained no reference to usufructuary rights—"is entirely consistent with our interpretation of the 1901 Agreement." 473 U.S. at 774. The ICC's silence here is equally consistent with the court of appeals' construction of the 1837 Treaty as preserving the Chippewa's usufructuary rights. It cannot be supposed that the ICC would have "extinguished an important body of rights bargained for and explicitly reserved in a treaty without any mention of those rights." Pet. App. 50.

The landowners further contend (Thompson Pet. 29) that the court of appeals' decision conflicts in this regard with decisions of the Ninth Circuit, which supposedly hold that "when Bands receive damages from the ICC for all inadequacies in the cession of Indian title, the Bands were paid for any hunting or fishing rights." But they cite no Ninth Circuit case that even states that purported rule, much less that

applies it in circumstances akin to those here.[8] To the contrary, the Ninth Circuit appears to agree that, where a Tribe has ceded title to certain lands while reserving the right to use those lands for certain purposes, an ICC award of additional compensation for those lands does not automatically extinguish the Tribe's reserved rights. See, *e.g.*, *Swim* v. *Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (where Tribes ceded lands to United States while reserving grazing rights on those lands, and Tribe later sought additional compensation for those lands in ICC, court declined to construe general language of ICC settlement as encompassing Tribe's grazing rights).

5. The counties present a final question (County Pet. i) as to "[w]hether a federal court may decline to apply this Court's 'moderate living' doctrine," citing *Fishing Vessel*, *supra*. As the court of appeals explained (Pet. App. 67), however, this Court imposed

---

[8] The landowners cite *United States* v. *Dann*, 873 F.2d 1189 (9th Cir.), cert. denied, 493 U.S. 890 (1989), and *United States* v. *Pend Oreille County P.U.D. No. 1*, 926 F.2d 1502, 1508 (9th Cir.), cert. denied, 502 U.S. 956 (1991), neither of which addressed treaty-reserved usufructuary rights. The landowners' two remaining cases involve usufructuary rights but do not state the rule asserted. In *Western Shoshone National Council* v. *Molini*, 951 F.2d 200, 202-203 (9th Cir. 1991), cert. denied, 506 U.S. 822 (1992), the court held that an ICC award constituted compensation for all rights under the treaty at issue, because no treaty had granted the rights claimed. The court specifically distinguished the 1837 Treaty at issue here, which explicitly reserved hunting, fishing, and gathering rights. *Id.* at 203 (citing *Lac Courte Oreilles Band*, 700 F.2d at 355-358). Finally, in *Wahkiakum Band* v. *Bateman*, 655 F.2d 176 (9th Cir. 1981), an unratified treaty was found not to have protected the asserted aboriginal fishing rights, which were held extinguished by a 1912 statute. No ICC proceedings were at issue.

restrictions on the Tribes' treaty-based fishing rights in *Fishing Vessel* only after concluding that a "resource [*i.e.*, fish] has now become scarce." 443 U.S. at 669. In contrast, the court of appeals determined (Pet. App. 65), as a matter of fact, that "no danger of depletion of resources" exists here, because those resources are adequately protected under the Conservation Code and Management Plan entered into between the State and the Chippewa. The court of appeals therefore determined that no need existed, as in *Fishing Vessel*, for a judicial allocation of resources between Indian and non-Indian users. Accordingly, because this case does not arise in the same context of "scarce natural resources" (443 U.S. at 685) as did *Fishing Vessel*, the two cases do not conflict. Nor have the counties demonstrated any other legal error in this aspect of the court of appeals' decision.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
MARTIN W. MATZEN
ELIZABETH ANN PETERSON
Attorneys

MAY 1998