No. 17-532

In The Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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ADDITIONAL *AMICI CURIAE*

Bad River Band of the Lake Superior
Tribe of Chippewa (Wisconsin)

Bay Mills Indian Community (Michigan)

Fond du Lac Band of Lake Superior Chippewa (Minnesota)

Grand Traverse Band of Ottawa
and Chippewa Indians (Michigan)

Great Lakes Indian Fish and Wildlife
Commission (Michigan, Minnesota and Wisconsin)

Lac Courte Oreilles Band of Lake Superior
Chippewa Indians (Wisconsin)

Lac du Flambeau Band of Lake Superior
Chippewa Indians (Wisconsin)

Little River Band of Ottawa Indians (Michigan)

Keweenaw Bay Indian Community (Michigan)

Mille Lacs Band of Ojibwe (Minnesota)

Mole Lake Sokaogon Chippewa Community (Wisconsin)

Red Cliff Band of Lake Superior
Chippewa Indians (Wisconsin)

Sault Ste. Marie Tribe of Chippewa Indians (Michigan)

St. Croix Chippewa Indians of Wisconsin (Wisconsin)

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INTEREST OF *AMICI CURIAE*[1]

The National Congress of American Indians (NCAI) is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native villages. Since 1944, NCAI has advised tribal, state and federal governments on a range of Indian issues, including the relevance and legal interpretation of treaties reserving off-reservation hunting, fishing and gathering rights and the regulation of such reserved rights under this Court's conservation-necessity standard. The additional *amici* listed on the inside cover of this brief comprise an intertribal organization and individual tribes, all of whom hold off-reservation hunting, fishing and gathering rights under pre-statehood treaties. The additional *amici* recognize federal and state authority to regulate the exercise of such rights under the conservation-necessity standard, but, in cooperation with the Federal Government and the States, have elected to adopt and enforce their own ordinances to conserve natural resources. *Amici* have a direct and substantial interest in the preservation of pre-statehood off-reservation hunting, fishing and gathering rights and in the reconciliation of such rights with federal and state interests in conservation.

[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than *amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of *amicus* briefs.

SUMMARY OF ARGUMENT

In the decision below, the District Court for Wyoming's Fourth Judicial District interpreted this Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The Wyoming District Court acknowledged that *Mille Lacs* had rejected the holding in *Ward v. Race Horse*, 163 U.S. 504 (1896), that hunting rights secured to an Indian tribe in a pre-statehood treaty are terminated at statehood under the equal footing doctrine. Pet. App. 23. However, the Wyoming District Court read *Mille Lacs* to leave intact an alternative holding from *Race Horse* under which such rights are not intended to survive statehood if they are subject to termination upon the happening of a clearly contemplated event—even where, as here, the clearly contemplated event itself is unrelated to statehood. *See* Pet. App. 23-24.

This brief addresses the Wyoming District Court's clearly-contemplated-event standard and shows that it is based on a misreading of *Mille Lacs* and is inconsistent with more than a century of this Court's decisions. First, it is contrary to the plain language of the Crow Treaty at issue in this case. Like the Chippewa Treaty at issue in *Mille Lacs*, the Crow Treaty "itself defines the circumstances under which the rights would terminate," *Mille Lacs*, 526 U.S. at 207, and statehood is not among them. The implication of additional, unrelated circumstances under which the rights would terminate (such as statehood) rewrites the treaty in defiance of rules of construction applicable to all treaties and statutes.

Second, as the *Mille Lacs* Court held, *Race Horse*'s alternative holding that the Senate did not intend the hunting right in the Bannock Treaty to survive statehood—even though the Treaty itself did not say so—"was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources and thus that Congress (the Senate) could not have intended the rights to survive statehood." *Id*. at 207-08. However, as the *Mille Lacs* Court explained, that was a "false premise," which had been rejected in more than a century of this Court's cases. *Id.* at 204. Those cases make clear that the States share sovereign authority over natural resources with the Federal Government, and that, when the Federal Government exercises one of its enumerated powers—including but not limited to its powers to make treaties and regulate commerce with the Indian tribes and to make laws regarding its property and territory—it does not infringe on the sovereign rights of the States. Thus, there is no basis on which to infer that the Senate intended the rights to terminate upon statehood.

Third, as the *Mille Lacs* Court also explained, *id.* at 204-05, this Court has reconciled Indian off-reservation treaty rights with state interests in natural resources through the conservation-necessity doctrine. Under that doctrine, states may regulate the exercise of off-reservation Indian hunting, fishing and gathering rights when they can demonstrate that such regulation, as applied to Indians, is reasonable and necessary to preserve natural resources. The

experience of the *amici* tribes in Michigan, Wisconsin and Minnesota, described in detail below, demonstrates that, although demanding, the conservation-necessity standard has worked extremely well in practice: it has led to effective tribal regulation of hunting, fishing and gathering by tribal members and cooperative agreements among Tribes, States and the Federal Government that have *improved* the management of natural resources for the benefit of Indians and non-Indians alike. There is no reason to believe that recognition of the Crow Tribe's hunting rights will lead to any different result: either the Tribe will adopt and enforce its own regulations to conserve natural resources (likely in cooperation with the State) or the State will retain the authority to regulate the exercise of the right upon making a proper showing under the conservation-necessity doctrine (something it has not done in this case).

Under these circumstances, it is not enough that the hunting right in the Crow Treaty was tied to *some* "clearly contemplated" event; unless that event was inextricably linked with statehood itself, there is no basis on which to imply that either party to the Treaty intended the treaty right to terminate upon *statehood*—as opposed to upon occurrence of a "clearly contemplated" event actually identified in the Treaty. As the *Mille Lacs* Court held, "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207. And, absent a clear link to statehood, the Wyoming court's clearly-contemplated-event standard is no different than the "temporary and precarious" standard

rejected in *Mille Lacs* because it is not "useful as a guide to whether treaty rights were intended to survive statehood." *Id.* at 207.

ARGUMENT

I. IN ADOPTING ITS CLEARLY-CONTEMPLATED-EVENT STANDARD, THE WYOMING DISTRICT COURT MISREAD *MILLE LACS*.

Article 4 of the Treaty with the Crow Indians, 15 Stat. 649 (1868), provides that the Indians:

> shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

In the decision below, Wyoming District Court held that, in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), the Tenth Circuit conclusively determined that this right was terminated when Wyoming was admitted to the Union. Pet. App. 10-18.

The Wyoming District Court recognized that *Repsis* was largely based on *Race Horse*, which interpreted identical language in a treaty with the Bannock Indians. Pet. App. 21. And, the Wyoming District Court acknowledged that *Race Horse*'s holding that Wyoming's admission to the Union "was inconsistent with the rights granted in the treaty" under the equal

footing doctrine "has subsequently been rejected by numerous cases." *Id*.

However, the Wyoming District Court asserted that *Race Horse* also found that the hunting right was "'temporary and precarious' in nature" and "'essentially perishable, and intended to be of a limited duration.'" *Id*. (*quoting Race Horse*, 163 U.S. at 510, 515). According to the Wyoming District Court, despite the rejection of *Race Horse*'s reliance on the equal footing doctrine in many cases, "the 'temporary and precarious' doctrine remained alive and well." *Id*.

In so holding, the Wyoming District Court relied on this Court's decision in *Mille Lacs*. According to the Wyoming District Court, although *Mille Lacs* "again rejected the equal footing doctrine of *Race Horse*," it "acknowledged that the *Race Horse* court had 'also announced an alternative holding: The treaty rights at issue were not intended to survive Wyoming's statehood.'" Pet. App. 23 (*quoting Mille Lacs*, 526 U.S. at 206). The Wyoming District Court acknowledged *Mille Lacs'* holding that "'[t]he 'temporary and precarious' language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not,'" but asserted that the *Mille Lacs* Court "did not completely reject the temporary and precarious doctrine." *Id*. (*quoting Mille Lacs*, 626 U.S. at 206).

According to the Wyoming District Court, the *Mille Lacs* Court "affirmed the concept that certain treaties, like the one in *Race Horse*, were intended to terminate upon the happening of a 'clearly contemplated' event."

Pet. App. 24 (*quoting Mille Lacs*, 526 U.S. at 207). According to the Wyoming District Court, because *Mille Lacs* "affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a 'clearly contemplated event,'" *Repsis*'s reliance on *Race Horse* to hold that hunting rights such as those in the Crow Treaty were intended to terminate at statehood remained conclusive in this case. *Id*.

In *Mille Lacs*, this Court concluded that the usufructuary rights secured in a pre-statehood Chippewa treaty were not intended to terminate at statehood. In addition to noting that the treaty did not tie the termination of those rights to a clearly contemplated event, the Court explained that the treaty expressly identified the circumstance under which the rights would terminate, and that circumstance was not linked to statehood. 526 U.S. at 207. In addition, the Court explained that *Race Horse*'s alternate holding that the pre-statehood Bannock hunting right was intended to terminate on statehood was based on the premise that Indian hunting rights are incompatible with state sovereignty. *Id*. at 207-08. However, as the Court also explained, that was a false premise, which had been rejected in more than a century of this Court's post-*Race Horse* decisions. *Id.* at 204.

The Wyoming District Court did not mention either of these aspects of this Court's decision in *Mille Lacs*. As a result and as discussed in detail below, its clearly-contemplated-event standard is based on a

misreading of *Mille Lacs* and is inconsistent with more than a century of this Court's decisions.

II. THE CROW TREATY EXPRESSLY IDENTIFIES THE CIRCUMSTANCES UNDER WHICH THE HUNTING RIGHT TERMINATES AND STATEHOOD IS NOT AMONG THEM.

Under Article 4 of the Crow Treaty, the Indians:

> have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

This Article expressly identifies the circumstances under which the hunting right terminates, and statehood is not among them. The existence of express provisions for termination of the right that are not tied to statehood demonstrates that the parties did *not* intend the right to terminate upon statehood. *See Mille Lacs*, 526 U.S. at 207.

The first circumstance under which the Crow hunting right terminates is when the lands are no longer "unoccupied lands of the United States." Because the United States was under no obligation to either relinquish or provide for the occupation of its lands upon statehood, this circumstance was not tied to statehood.

Although title to public lands was and is an important component of state sovereignty, the Federal

Government chose to exercise its constitutional authority to retain title to public lands in the western Territories when they were admitted to the Union. *See* U.S. Const. art. IV, § 3, cl. 2 (authorizing but not requiring Congress "to dispose of . . . the Territory or other Property belonging to the United States," and also authorizing Congress to "make all needful Rules and Regulations respecting" such Territory and Property); *United States v. Texas*, 339 U.S. 707, 716 (1950) ("[s]ome States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil").

This Court has never questioned the Federal Government's authority to retain title to public lands upon statehood and (unlike the beds and banks of navigable waters) has not treated the retention of such lands as implicating the equal footing doctrine. *See Texas*, 339 U.S. at 716. To the contrary, it has made clear that the United States "*can withhold or reserve the land . . . indefinitely.*" *Light v. United States*, 220 U.S. 523, 536 (1911) (emphasis added); *see also United States v. Oregon*, 295 U.S. 1, 14, 27-28 (1935) (unlike the beds of navigable waters, Court does not presume Congress conveyed public lands to a State upon statehood); *Scott v. Lattig*, 227 U.S. 229, 244 (1913) (same); *United States v. Gratiot*, 39 U.S. 526, 537-38 (1840) (upholding continued application of law authorizing United States to lease lead mines in Territory after it became part of the State of Illinois).

Because the United States was not obligated to (and in fact did not) relinquish its ownership of public lands or provide for their immediate occupation upon Wyoming's statehood, the first circumstance identified in the Crow Treaty in which the hunting right terminates—when the lands are no longer the "unoccupied lands of the United States"—is not tied to statehood.

The second circumstance is when "game" is no longer "found" on the unoccupied lands of the United States. There is nothing in this language that is tied to statehood, and it is difficult to imagine that either the Crow Tribe or the United States assumed that the presence of game on the unoccupied lands of the United States would come to an end at statehood, if ever. Notably, 128 years after Wyoming became a State, game can still be found on the lands within the Bighorn National Forest, as the facts of this case attest.

The third and final circumstance expressed in the Crow Treaty under which the hunting right terminates is when "peace" no longer "subsists among the whites and Indians on the borders of the hunting districts." Again, there is nothing in this language that is tied to statehood. To the contrary, under this provision the hunting right continues during peaceful relations among whites and Indians on the borders of the hunting districts, relations that are in no way foreclosed by Wyoming's admission to the Union.

In sum, none of the circumstances expressly identified in the Crow Treaty under which the hunting

right would terminate is tied to statehood.[2] Thus, just as the presence of an express condition in the 1837 Chippewa Treaty that was unrelated to statehood led the *Mille Lacs* Court to reject the proposition that the Senate intended the Treaty's usufructuary rights to terminate on statehood, 526 U.S. at 207, so here the presence of express conditions on the hunting right in the Crow Treaty that are unrelated to statehood leads to the conclusion that the Senate did not intend the Crow Tribe's hunting right to terminate on statehood.

Rules of construction applicable to all treaties and statutes reinforce this conclusion. First, the inclusion of express conditions in an instrument normally precludes the implication of additional, unrelated conditions. *See*, *e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)") (*quoting* A. Scalia & B. Garner, Reading Law 107 (2012)); *accord O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

Second, it is a cardinal rule that courts cannot "rewrite" or "remake" a treaty, nor ignore the plain

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[2] *See Race Horse*, 163 U.S. at 518 (Brown, J., dissenting) ("The fact that the territory of Wyoming would ultimately be admitted as a State must have been anticipated by Congress, yet the right to hunt was assured to the Indians, not until this should take place, but so long as game may be found upon the lands, and so long as peace should subsist on the borders of the hunting districts.").

meaning of a treaty's text. *E.g.*, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (treaties "cannot be rewritten or expanded beyond their clear terms"); *accord Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) ("[I]t is not our role to 'rewrite' the 1882 Act in light of this subsequent demographic history."); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (Court cannot "disregard clear language simply on the view that . . . Congress 'must have intended' something broader.").

Third, Indian treaty rights cannot be impaired absent "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 740 (1986). The *Mille Lacs* Court cited this rule and noted that the Act admitting Minnesota to the Union "provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act." 526 U.S. at 202-03. The same is true here.

These basic rules of construction reinforce the *Mille Lacs* Court's holding that, where, as here, a treaty expressly identifies the circumstances under which usufructuary rights will terminate, the Senate intended the rights to terminate upon the happening of the *stated* conditions and did not intend them to terminate upon the happening of other *unstated* conditions such as statehood.

III. THE STATE'S INTERESTS IN NATURAL RESOURCES PROVIDE NO BASIS ON WHICH TO IMPLY THAT THE CROW HUNTING RIGHT TERMINATED AT STATEHOOD.

In the absence of an express provision for termination at statehood, the *Race Horse* Court held that the Bannock hunting rights "were *impliedly* repealed by Wyoming's statehood Act." *Mille Lacs*, 526 U.S. at 207 (emphasis added). As the *Mille Lacs* Court explained, this decision "was informed by [the *Race Horse*] Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources and thus that Congress (the Senate) could not have intended the rights to survive statehood." *Id*. at 207-08. "But," as the *Mille Lacs* Court further explained, "Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources." *Id*. at 208; *see id.* at 204-05. The *Mille Lacs* Court's holding, and the substantial post-*Race Horse* precedent on which it was based, foreclose any attempt to find an implied repeal of the Crow Tribe's hunting right upon Wyoming's admission to the Union.

There is no doubt about "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource," such as the State's wildlife. *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979) (internal quotations omitted). "States have broad trustee and police powers over wild animals within their jurisdictions." *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). Those powers are, however, subject to an important limitation: they "exist only 'in so

far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.'" *Id*. (*quoting Geer v. Connecticut*, 161 U.S. 519, 528 (1896)).

Accordingly, the States' regulatory authority over wildlife is limited by federal constitutional provisions, such as the Commerce Clause (*see Hughes*, 441 U.S. at 329-36) and the Privileges and Immunities Clause (*see Toomer v. Witsell*, 334 U.S. 385, 396-99 (1948); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 385-86 (1978)). In addition, and most relevant here, the Supremacy Clause limits state power to regulate wildlife when the Federal Government legitimately exercises one of its enumerated powers to enter into treaties or make laws and regulations concerning wildlife. *See Kleppe*, 426 U.S. at 543 (Wild Free-Roaming Horses and Burros Act); *Hunt v. United States*, 278 U.S. 96, 100 (1928) (Federal regulation authorizing thinning of deer population in violation of State law).

This principle is fully applicable to limitations on state authority to regulate wildlife arising from a treaty with an Indian tribe. In *United States v. Winans*, the Court held that an Indian treaty securing the "right of taking fish at all usual and accustomed places" and "of erecting temporary buildings for curing them" gave the Indians "a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned." 198 U.S. 371, 381 (1905). The Court explained that the "right was intended to be continuing against the United States and

its grantees as well as against the state and its grantees." *Id*. at 381-82.

In so holding, the Court rejected the contention "that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission to the Union." *Id.* at 382. Notwithstanding the importance of the State's interests, "the power of the United States, while it held the country as a territory, to create rights which would be binding on the states" had been settled in *Shively v. Bowlby*, 152 U.S. 1 (1894). *Winans*, 198 U.S. at 383. As the *Winans* Court explained:

> The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places."

Id. at 384.[3]

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[3] The *Winans* Court adopted the views expressed by Justice Brown in his *Race Horse* dissent:

> Not doubting for a moment that the preservation of game is a matter of great importance, I regard the preservation of the public faith, even to the helpless Indian, as a matter of much greater importance. If the position of the court be sound, this treaty might have been abrogated the next day by the admission of Wyoming as a state, and what might have been done in this case might be done in the case of every Indian tribe

Winans left open the permissible scope of state regulation of the treaty right, noting only that the right does not "restrain the state unreasonably, if at all, in the regulation of the right." *Id*. The Court returned to that question in *Tulee v. Washington*, 315 U.S. 681 (1942). "Relying on its broad powers to conserve fish and game within its borders," the State claimed the right to impose nondiscriminatory license fees on Indian fishermen, while Tulee, a member of the Yakama Tribe, asserted the State had no authority to regulate his exercise of the treaty right at all. *Id.* at 683-84. The Court found that "the state's construction of the treaty [was] too narrow" and Tulee's construction "too broad"; instead, it held that, "while the treaty leaves the state with 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, it forecloses the state from charging the Indians a fee of the kind in question here." *Id*. at 684 (footnote omitted). *Tulee* thus reaffirmed that restrictions on state authority to regulate wildlife that result from a treaty with an Indian tribe, just as those that result from another exercise of the Federal Government's enumerated powers, do not impair the sovereign rights of the States.

> within our boundaries. There is no limit to the right of the state, which may in its discretion prohibit the killing of all game, and thus practically deprive the Indians of their principal means of subsistence.

Race Horse, 163 U.S. at 518 (Brown, J., dissenting).

This Court has enforced pre-statehood treaties reserving Indian hunting, fishing and gathering rights in other cases, with no suggestion that the limitations they imposed on state authority to regulate wildlife impermissibly impaired the States' sovereign authority. *See*, *e.g.*, *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 48 (1973) (holding State prohibition on Indian net fishing violated treaty fishing right and remanding for apportionment of fishing opportunity between Indian and non-Indian fishermen). This Court has also affirmed the Federal Government's authority to reserve water (a critically important natural resource) for Indian lands, explicitly rejecting arguments that such reservations impair state sovereignty. *See Arizona v. California*, 373 U.S. 546, 597-98 (1963) (Congress' broad power to reserve water is not limited by the equal footing doctrine); *Winters v. United States*, 207 U.S. 564, 577 (1908) (rejecting equal footing argument and holding the "power of the [Federal] government to reserve the waters [in an agreement with an Indian tribe] and exempt them from appropriation under the state laws is not denied, and could not be").

This Court reached the same result in other contexts involving important state interests. As the *Mille Lacs* Court held:

> [T]here 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.

526 U.S. at 207 (emphasis in original) (*citing Wisconsin v. Hitchcock*, 201 U.S. 202, 213-14 (1906); *Johnson v. Gearlds*, 234 U.S. 422, 439-40 (1914)).

In *Wisconsin v. Hitchcock*, the State asserted that tribal members' treaty right to land "until they were required to surrender it by the President of the United States" was terminated by Wisconsin's admission to the Union. 201 U.S. at 213. In *Dick v. United States*, 208 U.S. 340, 352-53 (1908), the State contended that a tribe's right to the protection of federal liquor laws for 25 years under a pre-statehood agreement with the United States was terminated by Idaho's admission to the Union. And in *Johnson v. Gearlds*, the State maintained that a tribe's treaty right to the protection of federal liquor laws "until otherwise provided by Congress" was terminated by Minnesota's admission to the Union. 234 U.S. at 435. These cases certainly involved traditional and important state interests—interests in title to public lands and regulation of liquor—which are analogous to state interests in regulating wildlife. And *Dick* involved a right that, on its face, would terminate upon the happening of a "clearly contemplated" event—the passage of 25 years. *Cf.* Pet. App. 24 (Wyoming District Court's adoption of "clearly contemplated" event standard for implied termination at statehood). However, in each case, the Court firmly rejected the argument that these pre-statehood rights had been terminated by implication at statehood. Instead, applying ordinary principles of construction, the rights were deemed to terminate if and when the

stated condition was met. The same result should obtain here.

IV. THIS COURT'S CONSERVATION-NECESSITY DOCTRINE RECONCILES OFF-RESERVATION HUNTING, FISHING AND GATHERING RIGHTS WITH STATE INTERESTS AND CREATES INCENTIVES FOR TRIBES TO CONSERVE NATURAL RESOURCES IN CO-OPERATION WITH FEDERAL AND STATE AGENCIES.

A. The Conservation-Necessity Standard.

As discussed above (at 16), in *Tulee*, this Court held that a treaty securing the "right of taking fish" left the State "with 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." 315 U.S. at 684. The Court further developed this standard in later cases involving the same treaty right. For example, in *Puyallup Tribe v. Department of Game*, the Court held that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, *provided the regulation meets appropriate standards and does not discriminate against the Indians*." 391 U.S. 392, 398 (1968) (emphasis added). And in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, the Court held that "[a]lthough nontreaty fishermen might be subjected to any reasonable state fishing regulation

serving any legitimate purpose, *treaty fishermen are immune from all regulation save that required for conservation*." 443 U.S. 658, 682 (1979) (emphasis added).

In *Antoine v. Washington*, the Court applied the conservation-necessity standard to an agreement securing the "right to hunt and fish in common with all other persons on lands not allotted to [the] Indians." 420 U.S. 194, 196 (1975). The Court held that *Puyallup*'s "appropriate standards" requirement "means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure *and* that its application to the Indians is necessary in the interest of conservation." 420 U.S. at 207 (citations omitted) (emphasis in original). The Court held that state regulation was inappropriate in that case because the State of Washington (like the State of Wyoming here) had not established "that applying the ban on out-of-season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer." *Id.* Thus, as the United States has recognized in this matter, the conservation-necessity standard is a "demanding" one for the State to meet. U.S. Cert. *Amicus* Br. 21.

Nevertheless, as this Court explained in *Mille Lacs*:

> [The] "conservation necessity" standard accommodates both the State's interest in management of its natural resources and . . . 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.

526 U.S. at 205 (footnote omitted). For this reason as well, there is no basis on which to impute a counter-textual intent to the parties to the Crow Treaty or to the Senate in ratifying the Treaty, in which the treaty hunting right would be extinguished at statehood even though the Treaty itself did not say so.

B. Tribal Regulation and Cooperative Management.

Under the conservation-necessity doctrine, states may not regulate the exercise of Indian usufructuary rights if the tribes adopt and enforce their own regulations, which are adequate to provide for conservation of the resources.[4] As a result, the doctrine creates a strong incentive for tribes to adopt and enforce their own regulations, typically in close cooperation with federal and state wildlife managers. The experience of the *amici* tribes in Michigan, Wisconsin and Minnesota illustrates that this has led to effective tribal

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[4] *E.g.*, *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 839 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 668 F. Supp. 1233, 1241-42 (W.D. Wis. 1987); *United States v. Washington*, 384 F. Supp. 312, 340-42 (W.D. Wash. 1974), *substantially aff'd*, 520 F.2d 676 (9th Cir. 1975).

self-regulation and improved natural resources management for all concerned.

In these three states, Tribes, States and the Federal Government have developed and implemented model codes and entered into consent decrees and other agreements that promote consistent natural resources management and regulation. Notably, many of the agreements provide orderly dispute resolution processes that make judicial intervention in State-Tribal disputes the exception rather than the rule.

The midwestern tribes' treaty rights in Michigan, Minnesota and Wisconsin were extensively litigated during the 1970s, 1980s and 1990s. But out of the crucible of contentious litigation, the Tribes and States forged working relationships based on mutual respect for each other's authority and shared concern for conserving natural resources. A similar result is likely here.

1. Great Lakes Fishing Rights in Michigan.

In April 1973, the United States filed suit against the State of Michigan to protect the right to fish in the Great Lakes under an 1836 treaty with various Ottawa and Chippewa tribes. *United States v. Michigan*, 471 F. Supp. 192, 203 (W.D. Mich. 1979), *aff'd in part and modified in part*, 653 F.2d 277 (6th Cir. 1981). In the treaty, which paved the way for Michigan statehood in 1837, the Tribes ceded portions of the Great Lakes and millions of acres of land in Michigan's upper and lower peninsulas, while stipulating for "the right of hunting

on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." *Id.* at 212-13. In 1979, the district court held that the Tribes retained the right to fish in portions of the Great Lakes ceded in the Treaty. *Id.* at 216. In 1985, after extensive negotiations conducted under the framework of the conservation-necessity doctrine, *see* 653 F.2d at 279, the parties reached an agreement regarding management and allocation of the Great Lakes fishery, which was adopted by the district court and remained in effect for 15 years. *United States v. Michigan*, 424 F.3d 438, 441 (6th Cir. 2005). A second Consent Decree negotiated by five tribes, the State of Michigan and the United States, was entered on August 7, 2000, and is effective through 2020. *Id.*[5]

To ensure conservation of the Great Lakes fisheries, the Tribes formed an inter-tribal organization (today known as the Chippewa Ottawa Resources Authority or CORA). Exercising authority delegated by the Tribes, CORA promulgated Great Lakes fishing regulations applicable to all of the Tribes, and assists in their enforcement.[6] Pursuant to the 2000 Decree, Federal, State and Tribal representatives meet regularly

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[5] Stipulation and Order (Consent Decree), *United States v. Michigan*, No. 2:73-CV-26 (W.D. Mich. Aug. 9, 2000), ECF No. 1458.

[6] Chippewa Ottawa Resource Authority, *Commercial, Subsistence and Recreational Fishing Regulations for the 1836 Treaty Ceded Waters of Lakes Superior, Huron, and Michigan* (rev'd April 3, 2017), *available at* http://www.1836cora.org/wp-content/uploads/2017/04/CORA-Regulations-Revised-April-3-2017.pdf.

to evaluate the condition of the resources and adjust harvest limits as appropriate.

2. Hunting, Fishing and Gathering Rights in Wisconsin.

In the late 1970s, the Lac Courte Oreilles Band of Lake Superior Chippewa sued the State of Wisconsin to confirm the continued existence of the Tribes' off-reservation hunting, fishing and gathering rights under 1837 and 1842 treaties with the United States. The Seventh Circuit held that those reserved rights continue to exist. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 365 (7th Cir. 1983), *appeal dismissed and cert. denied sub nom. Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 464 U.S. 805 (1983). Subsequent litigation regarding the scope and regulation of those rights occurred in the *Voigt* case throughout the 1980s.

At the same time, the Wisconsin Tribes created a Voigt Intertribal Task Force to negotiate with the State to implement the Tribes' reserved rights. Both the Tribes and the State came under intense pressure from non-Indian protesters who, fearing that tribal off-reservation fishing would harm the resource, sought to "portray[ ] the Indians as undeserving of the rights that they had preserved by treaty" and to "perpetuat[e] the idea that [the Indians] were lazy and wasteful and lacking in respect for conserving nature" to "justify the efforts to prevent tribal members from exercising those rights." *Lac du Flambeau Band of Lake Superior*

Chippewa Indians v. Stop Treaty Abuse-Wisconsin, 843 F. Supp. 1284, 1294 (W.D. Wis.), *aff'd*, 41 F.3d 1190 (7th Cir. 1994). Unfortunately, Wyoming's portrayal of Mr. Herrera's elk hunt in this case takes a similar approach. *See* Opp. Cert. at 7-8.

In Wisconsin, due to the efforts of the Voigt Intertribal Task Force, the Tribes and the State, the regulatory issues were largely resolved among the parties. In 1991, the district court entered a final judgment adopting a series of stipulations agreed to by the Tribes and Wisconsin to regulate tribal treaty rights on off-reservation ceded lands—a judgment that neither side appealed. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321, 324 (W.D. Wis. 1991). Those stipulations included a model conservation code conforming to the *Voigt* court orders and providing for "an orderly system for tribal control and regulation of hunting, fishing and gathering on the off-reservation lands ceded by the Tribe[s] in the [1837 and 1842 Treaties]." Voigt Model Off-Reservation Conservation Code § 1.03(1) (rev'd April 2018).[7]

The Voigt model code sets minimum standards for tribal regulation of off-reservation treaty rights through a robust enforcement scheme. *Id.*, ch.4 (enforcement). Each tribe that exercises 1837 and 1842 treaty rights in Wisconsin must enact a code no less restrictive than the model code as its own tribal

[7] *Available at* www.glifwc.org/Regulations/VoigtModelCode.2018.internal.links.pdf.

conservation law. The codes are enforced by conservation officers employed by the Great Lakes Indian Fish and Wildlife Commission (GLIFWC)[8] and the State of Wisconsin. The State recognizes the authority of GLIFWC's officers and has enacted laws to support their efforts. *See, e.g.*, Wis. Stat. § 175.41.

The model code is not static; the Voigt Intertribal Task Force (now part of GLIFWC and consisting of members from eleven Michigan, Minnesota and Wisconsin Chippewa tribes) continues to oversee and continually assess tribal natural resources policy and biological information, set intertribal harvest quotas, and recommend changes to the model code.[9] Nor is the State shut out from the process; the *Voigt* stipulations remain in force and require the parties to make good faith efforts to communicate regarding their respective

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[8] GLIFWC comprises eleven Chippewa tribes in Michigan, Minnesota and Wisconsin and, among other things, coordinates regulatory activities across the tribes' shared 1837 and 1842 Treaty areas. *See* www.glifwc.org (last visited Aug. 29, 2018). GLIFWC biologists and resource specialists perform resource assessments and monitor and evaluate harvests, while GLIFWC conservation wardens help enforce tribal ceded territory conservation codes. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 707 F. Supp. 1034, 1050-51, 1054 (W.D. Wis. 1989); U.S. Dep't of the Interior, *Casting Light Upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territory* at 21 (1991).

[9] *Chippewa Intertribal Agreement Governing Resource Management and Regulation of Off-Reservation Treaty Rights in the Ceded Territory*, Section 5: Task Force Responsibilities (n.d.), *available at* https://www.glifwc.org/Recognition_Affirmation/Intertribal_CoManagement_Agreement.pdf.

regulations, and to review the stipulations and model code regularly.

In part due to effective tribal regulation of off-reservation rights, fears of irreparable harm to the resources did not come true. In 2009, the Wisconsin Legislature recognized the Tribes' and GLIFWC's "important role . . . in the preservation and protection of the natural resources of the ceded territory." 2009 Wis. Senate J. Res. 40 (June 30, 2009).[10] In 2013, a committee consisting of federal, state and tribal agencies concluded that the status of the off-reservation walleye fishery in Wisconsin had not changed significantly since 1991, when the committee concluded that the resource was healthy and tribal exercise of reserved fishing rights had not harmed the resource. U.S. Dep't of the Interior, *Fishery Status Update in the Wisconsin Treaty Ceded Waters* at 1, 20 (6th ed. 2013).[11]

In many instances, tribal, state and federal cooperation has produced demonstrable benefits for all concerned. For example, tribal, state and federal partners worked together for many years to restore wild rice in the 1837 and 1842 ceded territories in northern Wisconsin. As evidence of their success, between 2006 and 2013, nearly a quarter of all wild rice harvested off-reservation (by both Indian and non-Indian

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[10] *Available at* https://docs.legis.wisconsin.gov/2009/related/enrolled/sjr40.

[11] *Available at* https://www.glifwc.org/publications/pdf/FisheryStatus2013.pdf.

harvesters) has come from waters seeded through cooperative interagency restoration efforts.[12]

A similar effort has led to the restoration of elk in northern Wisconsin. In 1995, 25 elk were released into the Chequamegon National Forest near Clam Lake, Wisconsin, following a welcoming song and pipe ceremony by a Chippewa spiritual leader. The Wisconsin Department of Natural Resources, U.S. Forest Service, Chippewa tribes, and GLIFWC collaborated over the ensuing years to foster and enhance the elk population. Populations were monitored, augmented with elk from Kentucky and moved around the elk range to increase the size and genetic diversity of the population.[13] The herd has now grown to a level that will allow a hunting season this fall. The Wisconsin Elk Advisory Committee—comprised of State, GLIFWC and Tribal biologists—has agreed upon a quota to be divided among state and tribal hunters. Tribal regulations governing the hunt are being negotiated with Wisconsin pursuant to a regular stipulation review process that has been in place since 2011.

The Tribes and Wisconsin returned to court to adjudicate a *Voigt* dispute only once in the last 25 years. After the Seventh Circuit held that a prohibition on

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[12] GLIFWC, *Admin. Rep. 15-06, Manoomin (Wild Rice) Abundance and Harvest in Northern Wisconsin in 2013* (May 2015), *available at* https://data.glifwc.org/archive.bio/Administrative%20Report%2015-6.pdf.

[13] *Elk (omashkooz in Ojibwe) Returning to Ceded Territory*, Mazina'igan (GLIFWC, Odanah, WI), Fall 2017 at 12-13, *available at* http://www.glifwc.org/Mazinaigan/Fall2017/index.html?page=12.

night hunting in the 1991 decree could be re-opened, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 769 F.3d 543 (7th Cir. 2014), the parties focused on the "adequacy of [the tribes'] proposed regulatory scheme," which was approved by the district court with a minor modification. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, No. 74-cv-313-bbc, 2015 U.S. Dist. LEXIS 139294, at *4, 18-19 (W.D. Wis. Oct. 13, 2015).

3. Hunting, Fishing and Gathering Rights in Minnesota.

In 1990, the Mille Lacs Band sued Minnesota, alleging that the State had violated the Band's hunting, fishing and gathering rights under an 1837 Treaty (the same Treaty that had been at issue in the *Voigt* litigation). Six Wisconsin Ojibwe bands who were also successors to the 1837 Treaty later intervened and the case was consolidated with a parallel case brought by the Fond du Lac Band.

In September 1994, the district court held that the Bands' 1837 treaty rights continued to exist. *Mille Lacs*, 861 F. Supp. at 841. Thereafter, building on the stipulations and model code developed in the *Voigt* case, the Bands and Minnesota negotiated a series of protocols to coordinate harvest management and resource assessment in the Minnesota ceded territory, and the Bands developed a model Conservation Code, Commissioner's Orders and Management Plans to regulate their members' harvests. *Mille Lacs Band of*

Chippewa Indians v. Minnesota, 952 F. Supp. 1362, 1366-67 (D. Minn. 1997). The Bands, the State and the United States agreed that upon implementation of these measures the application of various state laws to the Bands would "not be necessary for conservation." *Id.* at 1367. In entering final judgment, district court ordered the State and the Bands to "fairly, uniformly and diligently enforce the conforming Band conservation codes," and to "work cooperatively" and "make good faith efforts" to coordinate enforcement activities. *Id.* at 1397. The parties to the *Mille Lacs* litigation have had no occasion to return to court since final judgment was entered (and ultimately affirmed by this Court) some 20 years ago.

4. Inland Hunting, Fishing and Gathering Rights in Michigan.

The resolution of tribal claims to inland hunting, fishing and gathering rights in Michigan under the 1836 Treaty provides a telling bookend to Midwest treaty rights litigation. When the State of Michigan initiated litigation asserting that those rights no longer existed, the parties were able to build on the working relationship they had developed through the 1985 and 2000 Great Lakes Consent Decrees, as well as the experiences of the Tribes and States in Wisconsin and Minnesota, to resolve all issues regarding the existence, scope and regulation of inland rights under the 1836 Treaty by agreement. *See* Mich. Dep't of Natural Resources (DNR), *2007 Inland Consent Decree FAQs* at

1.[14] The 2007 Inland Consent Decree provides for tribal regulation of Indian hunting, fishing and gathering subject to specific limitations in the Decree. *Id.* at 2-3. In negotiating the 2007 Decree, the State recognized that because (as in this case) "tribal hunting and fishing is for personal subsistence use and not commercial use[, it] has a limited effect on the resources in question." *Id*. at 2. According to Michigan's DNR:

> In the 1836 treaty-ceded territory, the DNR and the tribes coordinate research and assessment activities, restoration, reclamation, and enhancement projects, and regularly consult and exchange information with one another. These cooperative efforts and sharing of information have led to a high degree of transparency among the State and tribes. The Inland Consent Decree also defines harvest levels for various species, which ensures the availability of sufficient resources for tribal and non-tribal fishers and hunters in the future.

Id. By all measures, the 2007 Decree has worked well. There has been no dispute under the Decree that has led the parties to return to court since it was entered in 2007.

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[14] *Available at* https://www.michigan.gov/documents/dnr/2007_Inland_Consent_Decree_FAQs_9.28.17_604502_7.pdf (last visited Sept. 4, 2018) (discussing Consent Decree, *United States v. Michigan*, No. 2:73-CV-26 (W.D. Mich. Nov. 5, 2007), ECF No. 1799).

5. Gathering Rights within National Forests.

Not all co-management agreements result from litigation. In 1998, the GLIFWC member tribes and the Eastern Region of the United States Forest Service concluded a Memorandum of Understanding (MOU) that governs the Tribes' gathering rights on four National Forests within the 1836, 1837 and 1842 ceded territories. *See* MOU Regarding Tribal—USDA Forest Service Relations on National Forest Lands within the Ceded Territory in Treaties of 1836, 1837, and 1842 (March 2012).[15] The MOU implements treaty-guaranteed wild plant gathering rights under a model "off-reservation gathering code" and provides that tribal regulations can be no less restrictive than the model code without the Forest Service's consent. *Id.* at 11-12. The MOU also provides for collaboration between the Forest Service and the Tribes through knowledge exchanges and shared research, to promote ecosystem management that sustains and restores native plant communities. *Id*. at 6-7.

In sum, in the experience of *amici*, the conservation-necessity doctrine has created powerful incentives for Tribes to develop and enforce their own conservation regulations in close cooperation with States and the Federal Government. As Tribes have done so, States have moved from hostility to tribal treaty rights to

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[15] *Available at* https://www.fs.fed.us/spf/tribalrelations/documents/agreements/mou_amd2012wAppendixes.pdf. The National Forests covered by the MOU include the Chequamegon-Nicolet in Wisconsin, and the Hiawatha, Huron-Manistee and Ottawa in Michigan.

acceptance and recognition of tribal natural resources regulation—all to the benefit of the natural resources themselves. There is no reason to expect any different result here; either the Crow Tribe will adopt and enforce its own regulations to conserve natural resources (likely in cooperation with the State of Wyoming), or the State will retain the authority to regulate the exercise of the right upon making a proper showing under the conservation-necessity doctrine. Indeed, as noted in the Crow Tribe's amicus brief, the Tribe already enacted a Joint Resolution of the Tribe's legislative and executive branches and stands ready to work with Wyoming on this issue.

V. CONCLUSION

The Wyoming District Court misread the *Mille Lacs* decision to stand for the proposition that, as long as termination of a pre-statehood hunting right is tied to *some* "clearly contemplated" event, the right terminates at statehood. Pet. App. 24. To the contrary, as the *Mille Lacs* decision and the substantial body of precedent on which it relied makes clear, unless the "clearly contemplated" event itself is tied to statehood, there is no basis on which to imply that the Senate intended the treaty right to terminate upon statehood—as opposed to upon occurrence of the "clearly contemplated" event actually identified in the treaty. The implied addition of another unrelated condition violates all rules of construction, including the cardinal rule that the treaties cannot be re-written, expanded or contracted beyond their plain meaning. *See supra* Part I.

The contrary holding in *Race Horse* was based on a mistaken conception of state sovereignty over natural resources. As *Winans* and its progeny make clear, States share authority over natural resources with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, including the power to make treaties with Indian tribes. *See supra* Part II. There is, therefore, no basis on which to imply that the Senate did not intend an Indian treaty right to survive statehood simply because the treaty provided the right would terminate upon *some other* clearly contemplated event. As the *Mille Lacs* Court squarely held, "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207.

The Wyoming District Court's clearly-contemplated-event standard is also inconsistent with this Court's conservation-necessity doctrine. As the *Mille Lacs* Court explained, that doctrine reconciled Indian treaty rights to harvest natural resources with the States' important interests in those resources. And, as the experience of the *amici* tribes makes clear, that doctrine has worked well in practice and fostered *improved protections* for and the *enhancement* of natural resources for the benefit Indians and non-Indians. *See supra* Part III.

Finally, absent a clear link to statehood, the Wyoming District Court's clearly-contemplated-event standard is no different than the "temporary and precarious" standard rejected in *Mille Lacs* because it is not "useful as a guide to whether treaty rights were intended to survive statehood." 526 U.S. at 207.

Accordingly, the judgment of the Wyoming District Court should be reversed.

Respectfully submitted,

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