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Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy

Donald L. Burnett Jr.
University of Idaho College of Law, dburnett@uidaho.edu

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ORIGIN AND DIMENSIONS OF THE ISSUE

The nature of legal problems created by the clash between Indian and white cultures in the United States is clearly illustrated by the litigation concerning Indian hunting, fishing and trapping. These pursuits, which formed the core of Indian economic activity for millenia, still underpin the economies of many tribes or bands today; and their central role in the life of the Indian has given them great cultural significance.[1] When the whites came and conquered, expelling the Indian to the distant and often barren reaches of the American earth reserved for him, tribal chiefs were generally assured in treaties and formal agreements[2] that their people could continue to hunt, fish and trap as they had since time immemorial. In this way a central element of Indian life was written into and guaranteed by white man's law.

These special guarantees were necessary because the Indians were a subject people. In *Cherokee Nation v. Georgia*[3] Chief Justice Marshall refused to bar enforcement of Georgia law in Cherokee territory on the basis of the Indians' separate nationhood. He termed the tribe a "domestic dependent nation," and expressed its legal relation to the federal government as that of "ward to guardian." This view was reiterated in *United States v. Kagama*,[4] which extended federal jurisdiction over homocides committed by Indians upon each other on the Hoopa Valley Reservation in California:

> These Indians *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights.[5]

*A.B. Harvard University, 1968, *Magna Cum Laude;* University of Chicago Law School.

[1]A discussion of the key elements of tribal cultures in the various regions of the United States appears in P. FARB, MAN'S RISE TO CIVILIZATION AS SHOWN BY THE NORTH AMERICAN INDIANS FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE (1968), entire.

[2]Treaty-making was discontinued by act of Congress, March 3, 1871, 16 Stat. 544. Formal agreements after that date were embodied in later acts of Congress.

[3]30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831). Marshall later granted the Cherokees immunity from Georgia law in his famous decision in Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832); but he continued to term the tribe a dependent people.

[4]118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed. 228 (1886).

[5]*Id.* at 383.

In the same year, a liberal ruling in *Choctaw Nation v. United States*,[6] increasing the amount of a judgment in favor of the Choctaws for lands ceded in 1830, was based on Indian dependencey:

> (T)he recognized relation between the parties in this controversy . . . is that between a superior and an inferior, whereby the latter is placed under the care and control of the former.[7]

Liberal decisions resulted from liberal construction of Indian rights. In *Worcester* (*supra*, note 3) Justice McLean had declared that "the language used in treaties with the Indians should never be construed to their prejudice."[8] *Kagama* and *Choctaw Nation* adhered to McLean's *dictum*, the latter supplying the following emphasis:

> The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules. . . .[9]

This liberal treatment of the Indian in disputes with the federal government has been reflected by the general reluctance of federal authorities to attempt to regulate Indian taking of fish and game. But there has been no such security from attempted regulation by the states. The principal problem concerning hunting, fishing and trapping rights centers on the relation between the Indian and the states. The courts have confronted a conflict between the states' claims of power to regulate the taking of fish and game within their boundaries and the Indian's claim to immunity from such regulation. Both claims have legal foundation.

The Indian's claim to immunity under the provisions of treaties and formal agreements with Congress after treaties were discontinued rests with Article VI, Cl. 2 of the Constitution, the "supremacy clause:"

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The states' claims to regulatory power are based on their sovereignty. The leading decision in *Geer v. Connecticut*[10] upheld

[6] 119 U.S. 1, 7 S. Ct. 75, 30 L.Ed. 306 (1886).
[7] *Id.* at 28.
[8] 31 U.S. (6 Pet.) at 581.
[9] 119 U.S. at 28.
[10] 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896).

the conviction of a party possessing certain woodcock, ruffed grouse and quail in violation of state game laws. The Supreme Court argued the states' power to regulate hunting, fishing and trapping from two standpoints: first, that since wildlife is the common property of all the citizens of each state, not the subject of private ownership, the people of each state might act to limit or to prohibit the taking of it; second, that the power to regulate the taking of fish and game is to be construed as part of the general police power, which cannot be denied to any sovereign state.

The scope of powers which the state might employ to regulate the taking of wildlife was found to be very wide in *Patsone v. Pennsylvania.*[11] An opinion authored by Justice Holmes affirmed the conviction of an Italian alien for owning and possessing a shotgun contrary to state statute. The law had been enacted to prevent poaching by aliens. According to Holmes:

> (I)t can hardly be disputed that if the lawful object, the protection of wildlife (*Geer v. Connecticut,* 161 U.S. 519), warrants the discrimination, the means adopted for making it effective might also be adopted.[12]

The wide latitude accorded the states in achieving the end of wildlife conservation established a rationale for attempted state regulation of Indian hunting, fishing and trapping. An additional incentive was provided by the slowly expanding scope of state jurisdiction over other Indian crimes. A first step was taken in *United States v. McBratney,*[13] upholding the conviction of a white man for murder committed on the Ute reservation in Colorado. The Supreme Court declared that whenever, upon admission of a state into the Union, Congress had intended to except out of it an Indian reservation or exclusive jurisdiction over a reservation, it had done so expressly.[14] Relying heavily on *McBratney* in *United States v. Draper,*[15] the Supreme Court ruled that Montana courts had jurisdiction over crime committed by non-Indians against non-Indians on the reservation. In the same year the Colorado court broadened McBratney in *People v. Pablo,*[16] upholding the conviction of an Indian who murdered another Indian while off the reservation.

[11]232 U.S. 138, 34 S. Ct. 281, 58 L. Ed. 539 (1914).
[12]*Id.* at 143.
[13]104 U.S. 621, 26 L. Ed. 869 (1881).
[14]As authorities for this proposition the Court cited United States v. Ward, 1 Woolw. 17 (8th Circ. 1863) and The Kansas Indians, 72 U.S. (5 Wall.) 737, 18 L. Ed. 667 (1866). But these were merely cases in which it was held that where express provision *did* exist, Indian lands were exempt. They did not hold that express provision was an absolute prerequisite to exemption. Nevertheless, the trend toward growing state jurisdiction over Indian affairs was so strong that *McBratney* became a landmark case.
[15]164 U.S. 240, 17 S. Ct. 107, 41 L. Ed. 419 (1896).
[16]23 Colo. 134, 46 P. 636 (1896).

Establishment of state jurisdiction over one form of Indian crime made plausible attempts to broaden the range of crimes covered to include violation of fish and game statutes, especially in view of the wide latitude accorded the states in selecting the means by which to regulate the taking of wildlife. The ensuing attempts by state regulation created a tension between state regulatory power and Indian immunity from state regulation under the "supremacy clause."

The main part of this essay analyzes the ways in which the courts have attempted to resolve this tension. But to portray a complete picture of Indian hunting, fishing and trapping law it is necessary to review the more settled areas where the tension does not exist (federal regulation) or where it is not severe (state regulation on reservation or allotted lands). These latter areas pose fewer analytical problems; it is convenient to begin by discussing them summarily.

HUNTING, FISHING AND TRAPPING ON RESERVATION OR ALLOTTED LANDS[17]

Federal Regulation

Federal authorities have restrained, for the most part, from attempting to regulate Indian taking of fish and game on their own lands. This responsibility generally has been left to the tribal councils.[18] In the rare instances of attempted federal regulation, the courts have adhered to the *dictum* in *Choctaw Nation* (supra, note 6), advocating liberal construction of treaty rights in suits against the federal government. They have disallowed federal regulation.

In *Mason v. Sams* [19] it was held that neither the Secretary of the Interior nor the Commissioner of Indian Affairs could propound regulations specifying where on the reservation each member of the Quinaielt tribe of Washington could fish; nor could they impose royalties on the fish caught. *United States v. Cutler*[20] sustained the demurrer of a Shoshone-Bannock Indian to the charge of shoot-

[17]Allotted lands are those held in trust for Indian owners by the Bureau of Indian Affairs. Allotment of lands under this arrangement was initiated by the General Allotment Act of 1887, 26 Stat. 388, amended (1891) 26 Stat. 794 and (1910) 36 Stat. 859; but was discontinued by the Indian Reorganization Act of 1934, 48 Stat. 984.

[18]Opinion of the Solicitor, Department of the Interior. Regulation of hunting and fishing on Wind River Reservation, Wyoming. M. 31480 (filed with 65566-40 Wind River 931).

[19]5 F.2d 255 (E.D. Wash. 1925).

[20]37 F. Supp. 725 (S.D. Idaho 1941).

ing a wild duck on the Idaho reservation after hunting hours for migratory water fowl, established by federal agencies to give effect to federal statute.[21] The court insisted on strict construction of what the Indians granted under the treaty, and liberal construction of the rights they retained:

> (W)hen considering treaties with Indians and Acts of Congress relating to their rights, we should not forget the well-known liberal application of the principle, that grants by them should be regarded "strictissimi juris"; and all uncertainties resolved in their favor.[22]

Only where the treaty or agreement is invalid by reason of direct contradiction with an overriding act of Congress may the Indian lose his immunity to federal regulation. In *Hynes v. Grimes Packing Co.*[23] the Supreme Court refused to recognize any immunity of the Karluk Reservation Indians in Alaska from federal regulation of fishing on the reservation, because the Department of the Interior edict establishing exclusive fishing rights on the reservation discriminated against white interests, in violation of another act of Congress.[24] The broader implication of *Hynes* is that the Indian can be subjected to federal regulation on the reservation despite the provisions of treaties or agreements, whenever Congress expressly so provides.[25]

State Regulation

Case Law. As noted earlier (note 17, *supra*), reservation and allotted lands are held in trust by the federal government (Bureau of Indian Affairs); they are usually under federal or tribal jurisdiction. Consequently, the states have not made vigorous claims to regulatory power in these areas. The tension between Indian rights under the "supremacy clause" and state regulatory power is not severe. The few attempts at regulation have generally been unsuccessful.

In *Selkirk v. Stevens*[26] the Supreme Court of Minnesota first distinguished a hypothetical case of game taken and consumed on the reservation from that of game taken outside the reservation.

[21]Migratory Bird Treaty, August 16, 1916, 39 Stat. 1702.
[22]37 F. Supp. at 725.
[23]337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1948).
[24]The White Act of 1924, 48 U.S.C. 221, 222-224 (elim.).
[25]Hobbs, *Indian Hunting and Fishing Rights*, 32 GEO. WASH. L. REV. at 522 (1964). See also the discussion of Congress' power to modify or abrogate treaties and agreements with subsequent acts, *infra*. (Note that the overriding act of Congres may *precede* an executive order, as in *Hynes*, but must *follow* a treaty or formal agreement.)
[26]72 Minn. 335, 75 N.W. 386, 40 L.R.A. 759 (1898).

The Court acknowledged that the state of Minnesota might have no power to regulate reservation hunting. Three years later, in *State v. Cooney*[27], the Minnesota court expressly exempted hunting for consumption on the reservation from state regulation. In *United States ex. rel. Lynn v. Hamilton*[28] a federal district court in New York removed the consumption restriction. It dismissed an action against two Seneca Indians for fishing with a net on the reservation, holding that they were not subject to the conservation laws of the state. Washington similarly exempted Indians on the reservation when, in *Pioneer Packing Co. v. Winslow*[29], the supreme court of that state affirmed a decision in favor of a purchaser of steelhead from Quinault Indians, who caught the fish in a river running through the reservation.

That this exemption applied to allotted lands as well as the reservation was indicated in *State v. Cloud*[30], holding that the state of Minnesota had no jurisdiction over a member of the Chippewa tribe who trapped a muskrat on his land, held in trust. The Minnesota court broadened this immunity in *State v. Jackson*[31] to cover an Indian hunting on lands not allotted to him, but to a deceased member of the same tribe.

State regulation *has* been extended to reservation or allotted lands if the treaty or formal agreement under which immunity is claimed is not authorized by Congress. Thus, in *Organized Village of Kake, etc. v. Egan, etc.,*[32] the Tlingit Indians of Alaska were denied immunity claimed under agreements with the Army Corps of Engineers and the Forest Service, since these agreements were not Congressionally authorized.[33]

Legislative Attempt to Broaden State Regulatory Powers. In keeping with its policy in the early 1950's, to bring the Indian more completely under the white man's law[34], Congress attempted to broaden the scope of state regulation on reservation of allotted lands, as well as ceded lands. To effect this policy, Congress passed

[27]77 Minn. 518, 80 N.W. 696 (1899).
[28]233 F. 685 (W.D.N.Y. 1915).
[29]159 Wash. 655, 294 P. 557 (1930).
[30]179 Minn. 180, 228 N.W. 611 (1930).
[31]218 Minn. 429, 16 N.W. 2d 752 (1944).
[32]369 U.S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962).
[33]A companion decision, Metlakatla Indian Community, etc. v. Egan, etc., 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962), *allowed* immunity from Alaskan regulation, because the rights claimed were granted by the Secretary of the Interior pursuant to an act of Congress.
[34]"(I)t is the policy of Congress, as rapidly as possible, to make Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States. . . ." H. R. Con. Res. 108, 83d Cong., 1st Sess., 99 CONGRESSIONAL RECORD 9968, 10815 (1953).

Public Law 280 (1953)[35], extending state jurisdiction over Indian affairs in a number of specified states, but exempting hunting, fishing and trapping protected by treaty or formal agreement.[36] In the following year Congress passed the Termination Act of 1954,[37] providing for termination of federal authority and exclusive jurisdiction, on a tribe-by-tribe basis, with the Indians' consent.[38]

Whether the Termination Act, like Public Law 280, exempted Indian hunting, fishing and trapping appeared to be settled in *State v. Sanapaw, et. al.*[39]. The Wisconsin court, basing its decision on the apparent intent on Congress, as expressed in House Concurrent Resolution 108 (*supra,* note 34), held that there was no such exemption. But in *Menominee Tribe of Indians v. United States*[40] (1968), the Supreme Court refused to construe the Termination Act "as a backhanded way of abrogating the hunting and fishing rights of Indians."[41] Public Law 280 had to be considered *in pari materia* with the Termination Act, argued the Court, and the two acts taken together were read to mean that

> although federal supervision of the tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954.[42]

The legislative attempt to extend state regulation over hunting fishing and trapping protected by *treaty* has been blocked by the Supreme Court. The immunity of rights not guaranteed by treaty, but by *formal, statute-embodied agreement,* remains questionable,

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[35]Act of August 15, 1953, 18 U.S.C., Sec. 1162. (This act was given no title; it is commonly known as "P. L. 280.")

[36]This exemption was tested and upheld in Klamath and Madoc Tribes, etc. v. Maison, 139 F. Supp. 634 (D. Ore. 1956). Moreover, the impact of P.L. 280 has been diminished by the "Civil Rights Act" of 1968, 25 U.S.C. Sec. 1301-1341. Sec. 1321 repealed Sec. 7 of P.L. 280 which had authorized state to extend criminal jurisdiction over reservations without tribal consent.

[37]25 U.S.C., Sec. 899.

[38]Wary of domination by the states, few tribes have consented. Those that have done so have been moved by frustration with paternalism in the Bureau of Indian Affairs. COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN (hereinafter referred to as COMMISSION), THE INDIAN, AMERICA'S UNFINISHED BUSINESS (1966), 191.

[39]21 Wis. 2d 377, 124 N.W. 2d 41 (1963), *cert. denied,* 377 U.S. 991, 84 S. Ct. 1911, 12 L. Ed. 2d 1044 (1963).

[40]391 U.S. 404, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968).

[41]*Id.* at 410. The court undoubtedly knew of the hunger among the Menominees which had resulted from the *Sanapaw* decision, permitting regulation of Indian hunting, fishing and trapping to ensure good harvests for white sportsmen. COMMISSION, 204.

[42]*Id.* at 409. Justices Black and Stewart dissented, stating that while Public Law 280 exempted hunting, fishing and trapping, it did so only where a reservation existed; that with termination, the reservation disappeared, and all state fish and game laws became applicable.

since *Menominee* relied in part on the Termination Act's mention only of statutes, not treaties, being superseded. Rights not guaranteed *either* by treaty or statute are almost certainly vulnerable to state regulation if the tribe has accepted termination; and may be vulnerable if the state has extended criminal jurisdiction over the reservation under Public Law 280 with tribal consent.[43]

HUNTING, FISHING AND TRAPPING ON CEDED LANDS[44]

Federal Regulation

The federal government has refrained from attempting to regulate Indian hunting, fishing and trapping on ceded lands, where it does not enjoy exclusive jurisdiction.[45] However, a caveat expressed with regard to reservation or allotted lands applies to ceded lands as well: the federal government has a potential power of regulation if the provision of the treaty or formal agreement under which immunity is claimed is invalid because it contradicts an overriding act of Congress.[46] Nevertheless, with the exception of certain statutory prohibitions concerning national military parks and wildlife preserves[47], the incidence of federal regulation on ceded lands is insignificant.

State Regulation

The extent of Indian immunity from state regulation on ceded lands has been a question for the courts; Congress' apparent attempt in the Termination Act to broaden the scope of state jurisdiction over Indian hunting, fishing and trapping—both on reservation or allotted lands and on ceded lands—was blocked by the *Menominee* decision (*supra*, note 40). Attempting to resolve the question, the courts have confronted directly the tension between

[43]However, the *Metlakatla Indian Community* decision (*supra*, note 33) made it clear that rights acquired by executive order *authorized by Congress* remain immune, even in a Public Law 280 state such as Alaska.

[44]Ceded lands are those relinquished by the Indian to the white man by treaty or formal agreement, usually with hunting, fishing and trapping rights on those lands reserved.

[45]In 1965 the Secretary of the Interior announced his intention to amend Title 25 of the United States Code to include a section containing regulations of off-reservation treaty fishing. Execution and prosecution were to be left to the states. See 30 Fed. Reg. 8969 (1965). But to this writer's knowledge, no official action has been taken.

[46]This caveat is not restricted to land. In the James G. Swan, 40 F. 108 (D.Wash. 1892), Makah Indians, hunting seal from a boat in the Bering Sea were adjudged to have no immunity under a treaty provision protecting hunting rights, because that provision contradicted an act of Congress protecting the seal and giving effect to a conservation treaty with Russia. Recall, however, that *Cutler* (*supra*, note 20) held one who hunted *on the reservation* immune to regulations issued pursuant to another treaty and statute.

[47]See 16 U.S.C., Sec. 414, 415, and 18 U.S.C., Sec. 41, respectively.

the soverign power of the states to regulate the taking of fish and game within their borders and the "supremacy clause," underpinning Indian claims to immunity from state regulation.

Early Decisions: No Immunity. The Removal Act of 1830[48] caused most Indian tribes to be relocated in the West, where states had not yet been formed. Treaties and formal agreements with these tribes generally preceded acts of statehood. The early decisions adopted the view, based in part on *McBratney* (*supra,* note 13), that the acts of admission were acts of Congress which superseded the treaties or formal agreements; that these acts, unless they expressly reserved to the Indian his full hunting, fishing and trapping rights on ceded lands, should be read to invest in the states a sovereign regulatory power. The Indian's rights were, as a result, severely restricted.

This line of argument avoided direct conflict of the states' regulatory power with the "supremacy clause"; it had been well settled that Congress could supersede solemn treaties or formal agreements with subsequent acts.[49] The leading early case applying that principle to Indian treaties was *The Cherokee Tobacco.*[50] The Supreme Court, in a majority decision, ruled that federal revenue laws could be extended to cover tobacco and liquor in Indian country despite a treaty protecting the Indians from such taxation. The majority held that

> a treaty may supersede a prior act of Congress . . . and an act of Congress may supersede a prior treaty. . . . In the cases referred to those principles were applied to treaties with foreign nations. Treaties with Indian nations . . . have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them.[51]

Ward v. Race Horse[52] applied this argument to admission acts in a leading hunting case. A member of the Bannock Tribe on the Fort Hall reservation in Idaho was convicted of shooting illegally seven elk in Wyoming, on land ceded by the Indians in 1863. The treaty of that year assured the Bannocks of "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon."[53] The Supreme Court upheld the conviction:

[48]4 Stat. 411.
[49]There was a hint at this power in the previous discussion of potential federal regulatory power where the immunity claimed conflicts with an overriding act of Congress.
[50]78 U.S. (11 Wall.) 616, 20 L. Ed. 227 (1870).
[51]*Id.* at 621.
[52]163 U.S. 504, 16 S. Ct. 1076, 41 L. Ed. 244 (1896).
[53]KAPPLER, LAWS AND TREATIES II (1904), 1021.

> The power of all the states to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of power. . . . The enabling act declares that the State of Wyoming is admitted on equal terms with the other states.[54]

The admission act, granting Wyoming the full sovereign power enjoyed by other states, superseded the earlier treaty, and freed the state to regulate Indian hunting on ceded lands. Treaty rights afforded the Indian no immunity.

The Supreme Court of Washington soon adopted the *Race Horse* view. *State v. Towessnute*[55] involved a Yakima Indian arrested and convicted of having fished illegally for salmon off the reservation. Upholding the conviction, the court stated that the Yakima treaty could not limit the regulatory power the state acquired upon its admission. In a similar case, *State v. Alexis*,[56] the Washington court affirmed the conviction of a Lummi Indian who claimed immunity under a treaty essentially the same as that involved in Towessnute. Declared the court: "Congress, in making provision for the Indians, could not do it at the expense of the police power of a future state."[57]

New York, in a decision affirmed by the Supreme Court, also took up the state sovereignty argument, modifying slightly that part of it relating to acts of admission. In *New York ex. rel. Kennedy v. Becker*[58] three Senecas were convicted of spear fishing in a stream outside the reservation, but within the bounds of property granted by the Seneca tribe to Robert Morris in a 1797 treaty ratified by the United States Senate. The grant contained a reservation of rights to fish and hunt on the ceded land. The Supreme Court held that when the land passed into private hands, it came under the jurisdiction and sovereignty of the state of New York. Were the state's regulatory powers over this new land area within its borders to be limited by the treaty, New York's sovereignty would not be equal that of other states admitted to the Union. Accordingly, the Court ruled the Senecas subject to "that necessary power of appropriate regulation . . . which inhered in the sovereignty of the state."[59]

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[54]163 U.S. at 514.
[55]89 Wash. 478, 154 P. 805 (1916).
[56]89 Wash. 492, 154 P. 810, 155 P. 1041 (1916).
[57]154 P. at 493.
[58]241 U.S. 556, 36 S. Ct. 705, 60 L. Ed. 1166 (1916).
[59]*Id.* at 563-564.

In 1921 the Washington court expressed some inclination to recognize a degree of Indian immunity from state regulation; but, encouraged by the *Kennedy* decision, it voted four-to-three in *State v. Meninock*[60] to affirm the conviction and fining of several Yakimas for fishing a stream admittedly covered by treaty. In *People v. Chosa*,[60a] the Michigan court also relied heavily on *Kennedy* as it upheld conviction of a Chippewa for illegal trout fishing in a lake within ceded territory. Finally, in *State v. Wallahee*,[61] the court affirmed by a four-to-one vote the conviction of another Yakima for killing a deer in the Cascade Mountain area off the reservation but within the land ceded. There was no doubt of the applicability of the treaty, which also protected hunting. The reasoning of the court represented the final evolution of state sovereignty doctrine:

> (T)he United States government was the sovereign and did not undertake to part with its sovereign rights by the treaty. . . . (T)he Yakima tribe was not an independent nation nor a sovereign entity of any kind, the Indians being mere occupants of the land, and at that time, and ever since were subject to the sovereignty of the United States. . . . (T)hen, and at all times up to statehood, the federal government had the sovereign power to regulate or forbid the taking of game; and within our territorial jurisdiction, that sovereign power passed to the state of Washington when admitted to statehood.[62]

Each of these early decisions disallowing immunity from state regulation pointed up a paradox relating to Congress' ultimate sovereignty. That sovereignty had appeared to afford the Indian protection under the "supremacy clause." But since it also allowed Congress to abrogate treaties and formal agreements, it was susceptible to use against the Indian. It was so used by *Race Horse, Kennedy*, and their progeny. The tension in these cases between the "supremacy clause" and state regulatory power was resolved in favor of the latter.

Countercurrent: Developments in Constitutional and Property Law. While early decisions were being handed down, another set of opinions challenged the superseding act argument of *Race Horse.* In *United States v. Winans*[63] suit was brought in behalf of the Yakimas to enjoin respondents, fishwheel operators holding a state patent, from depriving the Indians of their fishing rights through

[60]115 Wash. 528, 197 P. 641 (1921).
[60a]252 Mich. 154, 233 N.W. 205 (1930).
[61]143 Wash. 117, 255 P. 94 (1927).
[62]255 P. at 95.
[63]198 U.S. 371, 26 S. Ct. 662, 49 L. Ed. 1089 (1905).

the operation of the fish wheel. The Yakimas pointed to their 1855 treaty, which ensured them the exclusive right of taking fish on the reservation, and the right of taking fish at all "usual and accustomed" places "in common" with the citizens of the territory.[64] The Court found that the phrase "in common" did not mean the Indians could be excluded from their "usual and accustomed" places by whites; nor did the state patent permit exclusion. The Court ruled that Congress created rights, including Indian hunting, fishing and trapping rights, while Washington was still a territory, which remained enforceable after statehood. In *United States v. Brookfield Fisheries*,[65] the *Winans* lead was followed, as the United States, again suing on behalf of the Yakimas, obtained an order prohibiting another holder of a state patent from blocking the Indians' access to a small strip of ground along the Columbia River from which the Indians had been accustomed to fishing.

These opinions held that statehood did not terminate federally granted Indian rights in conflict with state powers.[66] The holdings applied to hunting, fishing and trapping disputes a familiar constitutional principle modifying that on which *Race Horse* was based: while Congress can supersede treaties (Indian or non-Indian) with subsequent acts, the rights established under those treaties and agreements can not be extinguished *by implication.* Rights remain enforceable until *expressly rescinded* by Congress.[67]

Admission acts in the early cases contained no specific provisions regarding Indian treaty rights. The court argued that had Congress intended to preserve these rights, it would have done so expressly. The language in Race Horse was typical:

> (T)he enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the state (jurisdiction over Indian hunting, fishing and trapping), but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission.[68]

[64]KAPPLER, *supra*, note 53, at 699.
[65]24 F. Supp. 712 (D.Ore. 1938).
[66]However, the holdings did not quarrel directly with the states' power to regulate the exercise of those rights. The *Winans* court made clear its unwillingness to judge the extent of regulatory power: "Nor does (the right to take fish at all usual and accustomed places) restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." 198 U.S. at 384.
[67]See, e.g., United States v. Payne, 264 U.S. 446, 46 S. Ct. 352, 68 L. Ed. 782 (1924) and Pigeon River Improv. S. and Boom Co. v. Cox, 291 U.S. 138, 54 S. Ct. 361, 78 L. Ed. 695 (1933), holding that intent to abrogate a treaty by statute will not be lightly attributed to Congress. See also United States v. Lee Yen Tai, 185 U.S. 213, 22 S. Ct. 629, 46 L. Ed. 878 (1902) and Cook v. United States, 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641 (1933), holding that the purpose of Congress to abrogate a treaty must be clearly expressed in the statute.
[68]163 U.S. at 515.

The simple fact of admission was taken to mean that Congress was relinquishing all authority to the state. Clearly, the Indian hunting, fishing and trapping rights under treaty had been extinguished by implication. Breaking from the *Race Horse* pattern, and applying the counterprinciple of *express* rescission of treaty rights, *Winans* and *Brookfield* re-established the tension between treaty rights under the "supremacy clause" and state regulatory power. No longer were acts of admission, silent on treaty rights, necessarily to be interpreted as extinguishing those rights which conflicted with the sovereign powers of the new states.

Complementing this pressure to give fuller effect to treaty rights was the growing conviction, expressed in liberal decisions concerning Indian property[69], that original occupancy of the land conferred property rights secure from invasion by the states.[70]

A first step away from state invasion was taken in *Jones v. Meehan*[71]. The Supreme Court held that the descendants of an Indian signatory of a treaty were entitled to the land reserved in that treaty. Indian property rights were transferable between generations without governmental interference.

In *Winans* the Supreme Court stated that the treaty was not a grant of rights to the Indian, but a reservation of those not granted from them.[72] This indicated that the Indian's rights included anything not expressly bargained away in the treaty. *Pioneer Packing v. Winslow*[73] was decided in the same spirit. The Washington court held that the Quinault Indians owned the fish in the Quinault River by the same title and in the same right as they had owned them prior to the treaty, even though the treaty did not certify their ownership. Similarly for formal agreements: it was decided in *State v. Cloud*[74] that the Chippewa Indian had a property

[69]Liberal interpretation of property rights probably was, in part, a recation against the rapacious exploitation by whites, while the General Allotment Act (*supra*, note 17) was in effect, of Indian landholders who did not understand finance and often had no appreciation of the concept of property. COMMISSION, 20.

[70]This conviction may be viewed as a return to the spirit of Marshall's dictum in *Cherokee Nation* (*supra*, note 3): "They are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government." 30 U.S. (5 Pet.) at 16.

[71]175 U.S. 1, 20 S. Ct. 1, 44 L. Ed 49 (1899).

[72]This position is somewhat inconsistent with the holding that Congress could *create* rights binding after statehood. The Court apparently took both views on treaty rights—"granted" and "reserved"—because it had two objectives: to reject the admission-act-as-superseding-act argument, and to establish that the Indian enjoyed unextinguished property rights based on occupancy.

[73]159 Wash. 655, 294 P. 557 (1930).

[74]Note 30, *supra*.

right in the muskrats he trapped on his allotted land, even though the allotment agreement was not explicit on the point.

Finally, *United States, etc. v. Santa Fe and Pacific R.R.*[75] held that occupancy alone established a property right; further, that if Congress were to extinguish that right, it was required to do so expressly, not by implication, and to compenstate the Indian for his loss.[76] The language of *Santa Fe* regarding property rights paralleled that of the constitutional principles underlying *Winans* and *Brookfield,* Indian rights were not extinguishable by implication. Only Congress, by express decree, could terminate them. From two separate quarters, then, came pressure to recognize the sanctity of Indian rights from invasion by parties other than Congress. These new pressures forced reevaluation of the tension between Indian hunting, fishing and trapping rights under the "supremacy clause" and the states' regulatory power. Some degree of Indian immunity from regulation apparently had to be acknowledged.

Later Compromise Decisions: Degrees of Immunity. The courts' response to these pressures was to seek a compromise: to reaffirm the states' power to regulate, but to limit the exercise of that power, allowing the Indian some measure of immunity. The landmark decision suggesting such a compromise was *Tulee v. Washington*[77]. The case involved a Yakima convicted of catching salmon with a net without having first obtained a fishing license as required by state law. The Supreme Court of Washington affirmed the conviction, but the United States Supreme Court reversed, declaring the licensing statute invalid as applied to the Yakimas. The treaty under which protection was sought contained the standard provision, ensuring the Indians' right to fish in ceded areas at "usual and accustomed" places. The Supreme Court held that imposition of the license fee constituted an illegal state tax on the exercise of a right guaranteed by the federal government. This holding diverged from the pattern of the early cases; it declared the Yakimas immune to a regulation which applied to whites. Moreover, the Court added this important *dictum:*

> (T)he treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely

[75]314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941).

[76]That these rights were compensable indicated that the law had begun to turn away from the early notion that the Indian's right was one of mere occupancy terminable at the whim of Congress. Recall the language of the *Wallahee* opinion (*supra,* note 61). See also Spalding v. Chandler, 160 U.S. 394, 16 S. Ct. 360, 40 L. Ed. 469 (1895) and Johnson v. McIntosh, 21 U.S. (8 Wheat.) 542, 5 L. Ed. 681 (1823).

[77]315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115 (1942).

> regulatory nature concerning the time and manner of fishing outside the reservation as are *necessary* for the conservation of fish. . . .[78] (Emphasis supplied.)

Restriction of the state to regulations *necessary* for the preservation of fish represented a significant departure from the previous refusal to acknowledge any degree of Indian immunity. Now the Indian was immune to any fishing regulation which could not be proved necessary to the preservation of the fishery.

The *Tulee dictum* was applied in the holding of *Makah Indian Tribe, et al v. Schoettler, etc.*,[79] that the state could not prohibit the Makahs from net fishing the Hoko River, a "usual and accustomed" place, since the prohibition of nets was not "necessary for the maintenance of the salmon run in the stream."[80] In setting this limitation, the federal district court refused to interpret "necessary" simply as "appropriate"; it applied a more rigorous construction in view of the fact that prohibition of net fishing, as sought by the state, would virtually have eliminated the salmon harvest of the Makahs, many of whom depended upon it for subsistence.[81]

In 1953 the Idaho supreme court boldly established *complete* Indian immunity to state regulation. *State v. Arthur*[82] involved the shooting of a deer out of season, on land ceded by 1855 treaty, by a member of the Nez Perce tribe. The treaty reserved to the tribe the privilege of hunting upon open and unclaimed land. The *Arthur* court dismissed the "necessary" *dictum* of *Tulee* as unnecessary to the *Tulee* holding, and ignored its application by the Washington court in *Makah*. The court focused on the "supremacy clause:"

> Article 6, Cl. 2 of the Federal Constitution expressly declares that the Federal Constitution and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, shall be the supreme law of the land. . . . (T)his in effect holds the application of the (state game) statute in abeyance during the existence of the treaty.[83]

The state was barred from regulating treaty Indian hunting, fishing and trapping on ceded lands.

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[78] *Id.* at 685.
[79] 192 F.2d 224 (9th Circ. 1951).
[80] 192 F.2d at 225.
[81] The court explained that salmon or steelhead on spawning runs in fresh water seldom feed, hence cannot be caught with baited hook, the only feasible alternative to net fishing.
[82] 74 Idaho 251, 261 P.2d 135 (1953). *Cert. denied*, 347 U.S. 937, 74 S. Ct. 627, 98 L. Ed. 1087 (1953).
[83] 261 P.2d at 141.

The impact of *Arthur's* "supremacy clause" argument was felt in Washington when the supreme court of that state, which had usually taken a harder line on Indian rights, came within one vote of adopting the "no regulation" rule. The case, *State v. Satiacum*[84], involved two members of the Puyallup tribe arrested for possession of two salmon and three steelhead caught illegally with nets outside the reservaion. The Puyallups claimed immunity under the tribe's 1855 treaty.One opinion of the court was modeled after *Arthur*. It was supported by four judges, but four others dissented. Their opinion dismissed *Arthur* as an Idaho decision, unnecessary as an authority in view of the ample supply of Washington cases. It then endorsed the *Tulee-Makah* "necessary" rule. The court's chief justice refused to break the tie; defendants were exonerated because the state had not even proven its regulation "necessary."

After Washington had wavered between "necessary regulation and "no regulation," a federal appeals court in Oregon adopted an intermediate position in *Maison v.Confederated Tribes of Umatilla Indian Reservation.*[85] Taking its cue from another *dictum* in *Tulee,* which had described the licensing statute as not "indispensable" to the conservation program, the court declared that

> in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But to establish necessity the state must prove two facts: *first,* that there is a need to limit the taking of fish, *second,* that the particular regulation sought to be imposed "indispensable" to the accomplishment of the needed limitation.[86]

The court explained that regulation of the Indian was to be a last resort. All other options, including firmer regulation of white fishing, had to be exhausted first.

However, the Washington court proceeded to establish a new rule, greatly restricting Indian immunity. The court had been attacked throughout the state for releasing defendants in *Satiacum* in accord with the degree of immunity provided by the "necessary" rule.[87] This time, in *State v. McCoy*[88], the court affirmed the state's power to regulate the taking of fish and game subject only to a *"reasonable and necessary"* limitation. Applying this new rule, the court convicted a Swinomish Indian of net fishing off the reservation during a closed period.

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[84]50 Wash. 2d 513, 314 P.2d 400 (1957).
[85]314 F.2d 169 (9th Circ. 1963). *Cert. denied,* 375 U.S. 829, 84 S. Ct. 73, 11 L. Ed. 2d 60 (1963).
[86]*Id.* at 172.
[87]See Hobbs, *supra,* note 25, at 526.
[88]63 Wash. 2d 521, 387 P.2d 942 (1963).

"Reasonable and necessary"appeared to allow a narrower range of Indian immunity than had the "necessary" guideline. The additional term chosen to create the new rule, "reasonable," generally had been understood to mean "appropriate" in the *Kennedy* sense (*supra,* note 58). In practice, this usually meant those regulations currently in force.[89]

This was confirmed when the new rule was restated by the Washington court[90] and upheld unanimously in 1968 by the United States Supreme Court in *Puyallup Tribe v. Dep't of Game, etc.*[91] The state had been seeking declaratory and injunctive relief against Indian net fishing for salmon and steelhead. Cause was remanded because the injunction sought was too broad, but the trial court was instructed 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. . . . The overriding police power of the State . . . is preserved.[92] (Emphasis supplied.)

To reinforce the impression that the Indian's special rights under treaty were not recognized, the Court closed with an oblique warning "that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'."[93]

The attorneys general of Washington, Oregon and Idaho, who had argued the state's case in the Supreme Court, later concluded that the meaning of *Puyallup* was that "the states can establish limits, seasons, manner and method of fishing, gear restrictions, etc., by proper regulation and in conformity with existing statutes."[94]

But the probable effect of *Puyallup* on later litigation was still unclear. The language chosen augured unfavorably for the Indian, as it appeared to breathe new life into *Kennedy.* On the other hand,

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[89]See discussion of the "reasonable" guideline in Note, *Regulation of Treaty Indian Fishing,* 43 WASHINGTON L. REV. 670 (1968).

[90]70 Wash. 2d 245, 422 P.2d 754 (1967).

[91]391 U.S. 392, 88 S. Ct. 1725, 20 L. Ed. 2d 689 (1968).

[92]391 U.S. at 395.

[93]The phrase "in common with" was apparently included in many Northwest treaties to ensure that whites could also fish in ceded territory. The Court chose not to explain how equal protection might necessarily be implied.

[94]Memorandum to the governors of Washington, Oregon and Idaho, *Re: Puyallup* (1968) at 2. (Original copy of this memorandum in office of Governor Tom McCall, Salem, Oregon.)

the Court actually disposed of the case by remanding it with instructions to limit the injunction sought. One could read into Puyallup what one wanted to find. Comment ranged from approval of the Court's firm stand against Indian hindrance of conservation endeavors[95] to a cautious observation that at least the state had not been given a *carte blanche* to apply to the Indian all regulations covering whites.[96]

The courts were similarly split. In *People v. Jondreau,*[97] a Michigan appeals court relied upon the "reasonable and necessary" rule to uphold conviction of a Chippewa for illegal trout fishing in a lake off the reservation. The court explained that, in its view, *Puyallup* affirmed the old *Chosa*[98] decision, which had applied the *Kennedy* rule of "appropriate regulation" to a similar fact situation. The state sovereignty arguments of *Kennedy* and *Chosa* were invoked:

> The treaties evidently established a servitude of the right to hunt and fish on the ceded land in favor of the Indians and against the exclusive dominion of private ownership, but they provided no immunity from operation of game laws, as against the State.[99]

But a federal district court in Oregon disagreed. In *Sohappy v. Smith,*[100] several tribes and bands that fish along the Columbia River and its tributaries sought a decree defining their rights and the premissible extent of state regulation. The court carefully traced the history of the issue, emphasizing the rules of liberal construction of treaties established in *Choctaw Nation*[101] and the Indians' great concern during treaty negotiations about their rights to continue to resort unhindered to their traditional hunting and fishing grounds. Critical attention was focused on the state's conservation policies:

> (Oregon) has divided the regulatory and promotional control between two agencies—one concerned with the protection and promotion of fisheries for sportsmen (ORS 496.160) and the other concerned with protection and promotion of commercial fisheries (ORS 506.036). The regulations of these agencies, as well as their extensive propagation efforts, are designed not just to preserve the fish but to perpetuate

[95]Note, *Indian Hunting and Fishing Rights,* 10 ARIZ. L. REV. 725, 732 (1968).
[96]Hobbs, *Indian Hunting and Fishing Rights II,* 37 GEO. WASH. L. REV. 1251, 1258 (1969).
[97]15 Mich. App. 169, 166 N.W.2d 293, (1968).
[98]People v. Chosa, *supra,* note 60a.
[99]252 Mich. at 160, 233 N.W. at 207.
[100]302 F. Supp. 899 (D. Ore. 1969).
[101]Choctaw Nation v. United States, *supra,* note 6.

> and enhance the supply for their respective user interests . . . . There is no evidence in this case that the defendants have given any consideration to the treaty rights of Indians as an interest to be recognized or a fishery to be promoted in the state's regulatory and developmental program.[102]

Against this background, the court interpreted *Puyallup* as imposing three limitations on state power to regulate Indians: (1) regulations must be "necessary for the conservation of fish;" (2) they "must not discriminate against the Indians;" and (3) they must meet "appropriate standards."[103] The latter two were supported by the *Puyallup* Court's own words, while the first was taken from the *Tulee dictum* which the Court appeared to affirm. The crucial term "appropriate," around which *Puyallup* and *Kennedy* were centered, was defused and place in new context:

> In determining what is an "appropriate" regulation one must consider the interests to be protected or objectives to be served. In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users.[104]

Having cleared the way, the district court drew from *Puyallup* a meaning as favorable to the Indians as could be tenably maintained:

> The Supreme Court had said that the right to fish at all usual and accustomed places may not be qualified by the state. . . . I interpret this to mean that the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located. . . . In prescribing restrictions upon the exercise of Indian treaty rights the state may adopt regulations permitting the treaty Indians to fish at their usual and accustomed places by means which it prohibits to non-Indians.[105]

Moreover, while the court was careful not to express reliance on the *Umatilla* "indispensable" rule discredited by *Puyallup*, it announced that "some of the fish now taken by the sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago."[106] Stricter regulation of whites before treaty Indians was implied. The disputing parties were encouraged to negotiate allocation agreements

[102] 302 F. Supp. at 909, 910.
[103] *Id.* at 907.
[104] *Id.* at 911.
[105] *Id.* at 911.
[106] *Id.* at 911.

assuring the Indians a "fair share" of the fish in the Columbia River system.[107]

Briefly, the highlights of the later compromise decisions were these: *Tulee* and *Makah,* propounding the "necessary" rule, established a limited measure of Indian immunity from state regulation. The Idaho court in *Arthur* adopted a "no regulation" rule, taking this immunity to its logical extreme. *Umatilla* set forth the only slightly less liberal "indispensable" doctrine. The Washington court, after flirting with the "no regulation" rule in *Satiacum,* adopted the "reasonable and necessary" rule in *McCoy* and *Puyallup.* The United States Supreme Court upheld the latter in a vague decision, its language appearing to indicate that the Indian is subject to "appropriate" state regulation. A Michigan tribunal, upholding convictions in *Jondreau,* attributed the *Kennedy* sense of "appropriateness" to *Puyallup;* but the *Sohappy* court redefined "appropriateness" for its own purposes and came very near to reading the "indispensable" doctrine back into law, as it protected the Indian's right to a "fair share" of fish. The Supreme Court had spoken ambiguously; and the tension between Indian immunity under the "supremacy clause" and state regulatory power remained unresolved.

Perspective on Puyallup: A Taking of Sides. If construction of *Puyallup* along the lines of *Kennedy* and *Jondreau,* as opposed to its more liberal treatment in *Sohappy,* should eventually prove to be the end product of the later compromise cases, the compromise would be a harsh one for the Indian. A familiar political truth is involved: state legislatures and agencies are disinclined to enact restrictive regulations on the exploitation of a natural resource such as wildlife unless future exploitability is threatened.[108] Such regulations are unlikely to fail the "reasonable and necessary"

[107]The court did not elaborate on how such agreements might be enforced. A hint of the problems which could arise appeared in State v. Gowdy ___ Ore. ___, 462 P.2d 461 (Ct. App. Ore. 1969). That court sustained conviction of two Yakimas for illegal net fishing, ruling that Indians violating regulations established by their tribes lost their treaty rights and were subject to the same regulations as whites. Authority was cited as Whitefoot v. United States, 293 F.2d 658, 155 Ct. Cl. 127 (1961), *cert. denied,* 369 U.S. 818, 82 S. Ct. 629, 7 L. Ed. 2d 784 (1962). However, this decision does not appear to be in point. It merely held that fishing rights were communal property of the tribe; and that where a federally financed dam destroyed the fishery, compensation was to be paid to the tribe, not directly to individuals. At most, this might be extended to mean that tribal agencies can regulate the use of tribal property such as treaty fishing rights, but not that a state court may treat Indian defendants as whites, stripped of treaty rights, whenever tribal regulations have been violated.

[108]See discussions of the politics of conservation by Patterson and Wildavsky in DAEDALUS, *"America's Changing Environment,"* Vol. 96, No. 4 (Fall 1967).

or "appropriate" test. The practical result is that the Indian is generally subject to those regulations applying to whites.[109]

The Indian's prior claim to fish and game, based on his treaty or formal agreement rights and his occupancy rights, would not be recognized. From the Indian's viewpoint, this would be an outrage. Reservation of rights to hunt, fish and trap on the ceded lands is an integral part of most treaties. It is usually one of the first items listed among concessions to the Indian.[110] Without it, dozens of treaties, especially those with Western tribes who hunted, fished and trapped for subsistence, might never have been concluded.

The Indian was not a skilled jurist. He could not read or write English; treaties were interpreted to him—often imperfectly, since the native dialects had no words to express concepts of property. His grasp of treaty provisions was limited. He lacked the political sophistication to foresee that exercise of his reserved rights might be regulated later by sovereign entities, states, which did not exist when the treaties were signed; and that this regulation could threaten to reduce his rights essentially to those of the white man.[111] What the Indian was led to believe was a valuable concession, inducing him to sign treaties ceding millions of acres of land, might be converted to no concession at all. Such disposition of treaty rights would hardly reflect the spirit of Justice McLean's *dictum*, "the language used in treaties with the Indians should never be construed to their prejudice."[112]

The harshness of the compromise is even more apparent when it is considered that, in addition to purely legal claims to priority, the Indian has a weighty claim based on economic necessity. Those tribes which hunt, fish and trap most intensely are most likely to run afoul of state regulations; yet these are commonly the tribes most dependent on wildlife for subsistence or economic livelihood.

[109]*Puyallup* reaffirmed that Indian hunting, fishing and trapping rights could never be destroyed altogether (while, in theory, the states could completely prohibit all white taking of fish and game). In reality, however, this constitutes no special treatment of the Indian, for the states have not completely prohibited white activities. The states have needed only to regulate the taking of fish and game, so the Indian is in danger of being subject to state regulation to the same extent as whites.

[110]See KAPPLER, *supra*, note 53. A quick glance at treaties with hunting and fishing tribes will reveal that reservation of rights to fish and game on ceded lands was a key element in most agreements.

[111]A sensitive treatment of the Indian's difficulty understanding treaties, and the problems this creates in the law, may be found in the opinion of Justices Jackson and Black in Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335, 65 S. Ct. 690, 89 L. Ed. 985 (1944).

[112]See note 8, *supra*.

The availability of fish or game as a food item is often of great importance to Indian families, estimates of whose current annual income range from $1500 to $2000.[113] The significance of salmon fishing, for example, as an economic enterprise is especially great in view of the need for viable indigenous industries, serving both as sources of development capital and as social anchors for the tribes.[114,115] Such industries are also needed to reduce the extremely high levels of Indian unemployment. Among employable Yakima males, for instance, unemployment was last measured at 41%. In the Lummi tribe the comparable rate was 81%. Both are fishing tribes in Washington. Unemployment among Indians generally ranges from 40% to 75%.[116] In light of these conditions, construction of the "reasonable and necessary" rule in favor of the states, allowing the Indian no substantial rights beyond those of whites, would be a very stern measure.

Finally, it must be recalled that hunting, fishing and trapping are of great cultural significance to the Indian. The point is made by the National Congress of American Indians:

> One not familiar with Indians and how they think (at least the typical reservation Indians) cannot appreciate how important hunting and fishing rights are to them, not only because of their poverty, but also because of their Indian traditions. Hunting and fishing (by individuals for subsistence) has a symbolic, perhaps quasi-religious meaning to many Indians. It is a practicing of their ancient culture, something many of them cling to fiercely in the face of the efforts of the state governments, and sometimes even the federal government, to eliminate Indian rights in the name of progress and equality. Many non-Indians feel that treaty promises made 100 years ago have outlived their purpose. The Indian think not; to him the treaty promises are as alive as if made yesterday.[117]

[113]$1500 has been suggested by P. Collier, "The Red Man's Burden," RAMPARTS, Feb., 1970, at 30. An equivalent figure is provided by P. Farb, *"The American Indian: A Portrait in Limbo,"* SATURDAY REVIEW, Oct. 12, 1968, at 36. The $2000 estimate comes from the Christian Science Monitor, April 16, 1969, at 1, Col. 3.

[114]1967 and 1968 "Progress Reports" of the Commissioner of Indian Affairs indicate that fostering such indigenous industry has become an integral part of federal policy.

[115]The Washington court, in *McCoy* (*supra*, note 88), recognized the potential profitability of salmon fishing for the Indian; but regarded it as another reason for allowing the Indians no substantial immunity from state regulation.

[116]House Committee on Interior and Insular Affairs, MEMORANDUM: INDIAN UNEMPLOYMENT SURVEY, Committee Print No. 3, 88th Cong., 1st Sess. (1963). This survey provides careful estimates of unemployment among all major tribes on reservations. (Puyallup tribe figures were unavailable because that tribe no longer has a reservation.)

[117]Brief for Petitioner as Amicus Curiae, Puyallup Tribe v. Dept. of Game, etc., 391 U.S. 392 (1968) at 9.

To the Indian and his already splintering culture, unfavorable interpretation of *Puyallup* would inflict severe damage.

This great danger results from a misdirected attempt at conservation. The "reasonable and necessary" rule makes Indian hunting, fishing and trapping subject to the adequacy of the resource for *all* exploiters. That is, when a wildlife resource is in danger of becoming inadequate to satisfy white sporting and commercial demands, the regulations imposed will usually restrict the Indian as well as whites, despite the fact that the Indian is generally responsible for a very small share of the harvest of valuable fish and game. In *Puyallup*, for example, the trial court found that only 3% to 5% of the total yearly salmon harvest in Washington was attributable to the Indians, and that Indian fishing had never destroyed a salmon run.[118] The trial court in *Umatilla* found, similarly, that salmon fishing by Oregon's tribes had never resulted in the destruction of a run.[119]

The relatively small Indian harvest constitutes a conservation problem only because it comes on the heels of the larger exploitation by white commercial and sporting interests. To illustrate, petitioner in *Puyallup* showed that over 90% of the salmon catches in the Puyallup River are attributable to the activities of white interests near the mouth of the river. By the time the surviving fish get upstream to the Indians' "usual and accustomed" fishing stations, the Indians must assume the burden of restraint in order to preserve the run.[120]

To emasculate the Indian's treaty rights is clearly not the solution to the conservation problem. It is necessary to direct conservation measures at the greater exploiters—the white commercial and sporting interests. But this is difficult; for the courts have often openly aligned themselves with these interests.

Exemplary is *Hynes v. Grimes Packing Co.* (*supra*, note 23), in which the Supreme Court ruled that a directive authorizing a reservation for the Karluk Indians of Alaska, including waters known for their excellent salmon fishing potential, be judicially revoked because it discriminated in favor of the Indians and against the white canneries, in that it gave the former first claim to the salmon of those waters. This, argued the Court, had not been authorized by Congress. Moreover, the Court was careful to note

[118]422 P.2d at 767.
[119]314 F.2d at 173.
[120]Brief for Petitioner, Puyallup Tribe v. Dept. of Game, etc., 391 U.S. 392 (1968) at 8.

that over one million salmon had been caught at the fishery two years previous, and that the number had gone as high as four million. What is more, the Court said, no small amount of white capital was at stake:

> The canners' investment is substantial, running from two to five hundred thousand dollars, respectively. . . . These packers employ over four hundred fishermen, chiefly residents of Alaska, and over six hundred cannery employees, chiefly nonresidents.[121]

The Court's decision effectively negated the power of the Secretary of the Interior to establish a reservation for a fishing tribe in a good fishing location.

The facts in *Tlingit and Haida Indians of Alaska v. United States*[122] provide further evidence of the strength of white interests. The Indians sued the United States for refusing to block the intrusion into Indian territory of white-owned canneries employing Chinese labor, depriving the Indians of many of their land holdings along the shore, and using Navy gunboats to destroy Indian villages and put down unrest. The tribes were economically decimated:

> The amount of salmon and other fish taken from the streams by the new white fishing industries and canneries left hardly enough fish to afford bare subsistence for the Tlingits and Haidas and nothing for trade or accumulation of wealth.[123]

The tribes were allowed some compensation for fish in island streams, but in a second Tlingit and Haida suit in 1968,[124] the Court of Claims refused to compensate the islanders for their loss of fishing opportunities in the sea around them; fishing rights lost in navigable waters were not recoverable.

The pressure of white interests has also been visibly at work in the state of Washington. The second (less liberal) opinion in Satiacum (*supra,* note 84) took special care to make clear the economic importance of salmon to the state and to private white interests:

> The Washington Department of Fisheries, in its 1953 report, placed the capitalized value of fish and shell fish resources in this state at $679,150,000. To this value must be added the contribution of salmon as a recreational asset. In recent years from 150,000 to 200,000 fishermen have participated in saltwater sport angling. . . . They spend

[121] 337 U.S. at 95-96.
[122] 177 F. Supp. 452 (Ct. Cl. 1959).
[123] *Id.* at 467.
[124] 389 F.2d 778 (1968).

> $8,500,000 annually on fishing trips. There are 160 boathouses and resorts with an investment value of $12,000,000.[125]

These were the interests that voiced anger when the Indian defendants in *Satiacum* were released. They organized a campaign, climaxed by resolutions of the state legislature, for stricter control of Indian fishing. The effect was still being felt when *McCoy* came to trial.[126]

McCoy was complicated further by the fact that the defendant was a Swinomish, and that tribe had recently dismayed whites by failing to give swift approval to a plant to convert the entire Swinomish reservation into a "country club" style residential development.[127] Moreover, the defendant had been using a gill net. Such an apparatus may catch up to 2000 fish in a season; but the court failed to mention that modern fish traps operated by commercial establishments are capable of harvesting some 600,000 fish per season.[128] The publicity which surrounded *McCoy*, and the celebrated "fish-ins" that followed, served to increase still further the intensity of white-Indian friction, at a peak when the *Puyallup* injunction was sought.

Deep concern for the protection of white interests is not limited to states which traditionally have taken hard lines on Indian rights. It was noted earlier that *State v. Sanapaw* (*supra*, notes 39 and 41) sanctioned the imposition of Wisconsin regulations on Indian hunting, fishing and trapping, creating hunger among the Menominees while the fish and game were saved for white sportsmen. It will be recalled that the *Sohappy* court revealed the Oregon Fish and Game Commission's failure to include Indians with whites as planned beneficiaries of its conservation programs. Testimony in *Umatilla* (*supra*, note 85) had revealed the same problem. The Chief of the Wildlife Division of the Oregon State Game Commission stated at the trial that his employer, the State Game Commission, used the term "conservation" only to mean protection of commercial and sporting hunters and fishermen, with no regard for the welfare of the Indian.[129] Apparently the Indian could not exert the political leverage in the state bureaucracy that whites could. This is not suprising in view of the underdeveloped state of Indian political organizations.[130]

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[125]314 P.2d at 411. The stakes are even greater today.
[126]Hobbs, *supra*, note 25, at 526.
[127]See discussion of this project in H. Hough, DEVELOPMENT OF INDIAN RESOURCES (1967), 174-176.
[128]See *Metlakatla Indian Community* at the state level. 362 P.2d at 915.
[129]314 F.2d at 172-173.
[130]See Comment, *The Indian: The Forgotten American*, 81 HARVARD L. REV. (1968) 1818, 1830.

All of these cases, in which the influence of white economic and sporting interests has been admitted by courts, point up the fact that disputes over Indian hunting, fishing and trapping rights are political matters. The politically powerless Indian can only rely on the courts' sense of fairness and sensitivity to the special problems of a maltreated people.

SUMMARY AND CONCLUSION

Indian hunting, fishing and trapping disputes are of four types: (1) attempted *federal* regulation on *reservation or alloted land,* and (2) attempted *state* regulation on these lands; (3) attempted *federal* regulation on *lands ceded* by treaty or formal agreement, and (4) attempted *state* regulation on these lands. The law regarding the first three types of disputes is generally well settled. In the fourth case, the tension between Indian treaty rights protected by the "supremacy clause" and state regulatory power has had an unsettling effect. The law in this area historically has been unfixed; and the Supreme Court's ruling in *Puyallup* does not seem to have set the terms for a stable resolution.

(1) The federal government has seldom attempted to regulate Indian hunting, fishing and trapping on reservation or allotted lands. When such attempts have been made, the courts have disallowed them. Only where the treaty or formal agreement protecting the Indian conflicts with an overriding act of Congress is federal regulation possible.

(2) The states are also barred from exercising a regulatory power on reservation or allotted lands, without the tribes' consent, when the Indian is protected by treaty or formal agreement. However, state regulation is possible if the protection claimed is not authorized by Congress. Moreover, those tribes which have accepted termination may be vulnerable to state regulation if the protection claimed is in a form other than treaty. With this exception, the Supreme Court's decision in *Menominee* has blocked any broadening of the scope of state regulation through the Termination Act of 1954.

(3) The federal government has made no significant effort to regulate the taking of fish and game under treaty or formal agreement on ceded lands. Nevertheless, as noted above, a potential power to regulate exists if the treaty or formal agreement conflicts with an overriding act of Congress.

(4) State regulation on ceded lands has conflicted with Indian immunity from regulation under the "supremacy clause." This conflict was resolved in the early cases denying immunity by the argument that acts of admission to the Union vested in the states full sovereign power to regulate; and that these acts of Congress superseded earlier treaties and agreements. However, a countercurrent in the law produced pressure for change. The constitutional principle that rights established by treaty can not be extinguished by implication appeared in fishing rights cases; and decisions more liberally construing Indian property rights through occupancy also appeared. Both undercut the admission-act-as-superseding-act argument of *Race Horse*, although the more general argument for state sovereignty made in *Kennedy* survived. Nevertheless, the countercurrent forced a re-evaluation of the tension between state regulatory power and Indian rights. The result was a series of compromise decisions, leading to *Puyallup*, which established the ambiguous "reasonable and necessary" or "appropriate" guideline for state regulation. Because that guideline can be construed along the restrictive lines of *Kennedy*, from which it was—at least in part—taken, the Indian is threatened by the possibility that some courts will not recognize his prior legal claim and his great economic and cultural stake in hunting, fishing and trapping. This potential harshness may be traced to attempts at conservation which shy away from attacking the greater exploiters of wildlife resources: white commercial and sporting interests.

The tension between treaty rights and state power to regulate has not been resolved in more than one hundred years; it is presumptuous to think it will be soon. Both sides have ample legal foundation. All the courts really can do is attempt to obtain the most equitable result on the facts of each case. Such judgments are singularly political and subject to sway by dominant political forces. Only in the very long run, when the Indian has developed more potent political organizations of his own, can he adequately protect his livelihood and culture. The unsettled history of hunting, fishing and trapping litigation, and the dangers ahead, demonstrate that a subject people can not rely merely on liberal canons of construction or even constitutional guarantees to protect their rights.