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The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, the Effect of European Contact and the Continuing Fight to Observe a Way of Life

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THE NATIVE AMERICAN'S RIGHT TO HUNT AND FISH: AN OVERVIEW OF THE ABORIGINAL SPIRITUAL AND MYSTICAL BELIEF SYSTEM, THE EFFECT OF EUROPEAN CONTACT AND THE CONTINUING FIGHT TO OBSERVE A WAY OF LIFE

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I. INTRODUCTION

Hunting and fishing rights are, and have been, one of the most hotly contested areas of Indian legal battles. In many cases it is probable that the costs associated with litigating the rights far exceed any gain actually realized as a result of commercialized hunting or fishing based on the rights. This leaves one to question the logic behind the Indian's continuing struggle to preserve their right to hunt and fish the lands and waters of their forefathers free of state regulation. This Article attempts to lay out before the reader a possible answer to just such a question.

Part two of the Article will introduce the reader to a generalized, non-tribal specific, overview of the relationship the native North American Indian has enjoyed with Nature. It will explore some of the spiritual and mystical interrelationships between Nature and the aboriginal Indian as he walked in harmony with Nature. It will also focus upon some of the time honored rituals, taboos, and traditions that played an important role in the unique relationship between man and beast and will analyze their interdependence. The Article will then describe the major changes that occurred within the Indian cosmos as a result of the eventual discovery of the New World by showing how the advent of Old World disease, missionization, and the historic fur trade played a vital role in forever changing the Indians' walk with Nature.

Part three of the Article will address how the eventual occupation of North America by the explorers, and those who followed, resulted in a drastic change in the way of life that the Indian had known. It will focus on the effects of treaties, relocation and assimilation and will explain their impact on the Indians' right to hunt and fish. Most of the major cases dealing with the right will be analyzed in an effort to bring about an understanding, with some predictability and consistency, as to whether the federal government has the right to regulate hunting and fishing, or

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whether regulation of the right is left to a particular tribe or to the state. The Article will also explore and explain when and why the treaty right to hunt and fish will be in part preempted for conservation purposes.

The purpose of the Article is not just to provide the reader with consistent principles to apply towards an understanding of why the courts have decided the cases the way they did. Indeed, the purpose of the Article is to provide the reader with a more compassionate and realistic understanding of why the Indians considered such rights important enough to not only include them in treaties and cession documents, but continue to consider them important enough to fight for in a legal battlefield.

II. THE NATIVE AMERICANS

The primitive big game hunters from Siberia gained access to the North American Continent by way of the Bering Strait 25,000 to 40,000 years ago. This period of time is more commonly referred to as the Ice Age. Such crossings were possible because so much of the earth's water was impounded in polar ice caps or glaciers that the level of the oceans was lowered, resulting in an isthmus connecting Siberia and Alaska. Many animals, some now extinct, also made this crossing. Indeed, it was the wanderings of such animals that lured the early nomadic hunters into the New World. The Stone Age hunters who pursued the giant land mammals of their day are referred to as "Paleo Men" and their period in time is referred to as the "Paleolithic Period."

Very little is known about the Paleo man, for very little evidence of his existence has been left behind. The animals that primitive man hunted included the hairy and imperial mammoths, ancient camels and horses, sabre-toothed tigers, long-horned bison, and the flat-skulled mastodon. The Paleo hunters lived, hunted, and traveled in small bands of family groups and generally camped in the open where the game animals fell. Once the meat was gone, or was no longer useful, the group would move on. The direction the early hunters followed was that of the game trials that lured them on at random. Over time, man adapted to his ever changing environment, some progressing southward and others following the lakes and streams from coast to coast. Beyond the present trail was the horizon which contained the possibility of better hunting and a milder climate.[1]

These intrepid wanderers settled the vast North American continent, forming self-sufficient tribes whose cultures were influenced by the climate, topography, flora, and fauna of the particular locale.[2] There was a great diversity among the language and physical characteristics of the

1. *See* S. IRWIN, M.D., THE PROVIDERS 17-31 (1984).
2. A. DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 13 (1970).

many tribes. It is impossible to determine whether the diversity of language and physical characteristics developed as they crossed from Siberia to the North American continent, or whether it developed during the uncounted millenniums when they settled the continent and intermarried in small bands.[3] Whatever the reason for their cultural diversity, there existed a universality of intellectual and spiritual traits,[4] the most outstanding of which was a genuine respect for other life-forms.[5]

A. The Pre-Columbian North American Indian

In the creation myth of the indigenous Indians, all of Nature's bounty was once related to mankind. According to Chipewyan legend

> woman was the first human being. In her nocturnal dreams she imagined herself sleeping with a handsome youth, who was in reality her pet dog transformed. One day a giant appeared in the land. With mighty strokes he shaped the rough-hewn landscape into lakes and rivers and mountains—all the landforms we know today. Then he stooped down and caught up the dog, 'and tore it to pieces; the guts he threw into the lakes and rivers, commanding them to become the different kinds of fish; the flesh he dispersed over the land, commanding it to become different kinds of beasts and land-animals; the skin he also tore into small pieces, and threw it into the air, commanding it to become all kinds of birds; after which he gave the woman and her offspring full power to kill, eat, and never spare, for that he had commanded them to multiply for her use in abundance.'[6]

The creator and sustainer of all things was Kitchi Manitou, the Great Spirit.[7] The Great Spirit enjoined the culture hero, Wisekedjak, to teach man and beast how to live properly together. Wisekedjak ignored his solemn assignment. Instead, he taught pleasure and incited quarrels and soon the ground became stained with the blood of man and animals. The Great Spirit repeatedly warned Wisekedjak to end this mutual slaughter, but the admonition was ignored. The Great Spirit, exasperated beyond limit, destroyed all creation in a flood. Only a beaver, an otter, and a muskrat survived, for they took refuge with the distraught Wisekedjak.

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3. *Id.* at 8-9.
4. *Id.* at 8.
5. C. MARTIN, KEEPERS OF THE GAME 186 (1978).
6. *Id.* at 69-70 (quoting excerpts from the journal of SAMUEL HEARNE, A JOURNEY FROM PRINCE OF WALES'S FORT IN HUDSON'S BAY TO THE NORTHERN OCEAN 1769, 1770, 1771, 1772, 219-20 (1795) (R. Glover ed. 1958)).
7. "Manitou" means "Power" in Algonkian. The Algonkians were the Indian people of the Ottawa river valley and their language was spoken from Labrador to Carolina and westward to the Great Plains. Manitou, or Power, is the potency perceived to be the force which made everything in Nature alive and responsive to man. *See* C. MARTIN, *supra* note 5, at 34, 70.

Once the waters subsided, man and all other life-forms were remade. The Great Spirit stripped the flatterer, Wisekedjak, of his great authority and from then on Wisekedjak was to be a deceiver, a trickster-transformer.[8]

Legend has it that during the olden days, at the dawn of creation, men were mightier than they are now. The beaver, the bear, the lynx, and the fox were people, for they lived among man and spoke with him.[9] Nature was a congeries of societies. Every animal, fish, and plant species functioned in a society that paralleled in all respects that of mankind.[10] Each species had its leaders, referred to as "masters" or "keepers of the game." So too each local band of a particular species had its leaders, referred to as "bosses."[11]

Kitchi Manitou was a benevolent being who was equated with the sun by the early Jesuit fathers. The Great Spirit was too physically distant and omnipotent to influence affairs directly, so his will was executed by a descending hierarchy of subordinate manitous, each of whom had a unique function and abode.[12] Everything within the Indian cosmos had not only a purpose, but also a manitou, or spirit, whose power and influence depended on its significance to the Indian.[13] For example, spectacles of Nature such as waterfalls, rivers, lakes, and aged trees had particularly strong manitous. The Indian personified the elements, such as lightning, thunder, wind, and so forth. These, too, had spirit. All of creation, the animate and inanimate, had spirit and hence, they, too, had being.[14]

The Indian perceived man and nature as tripartite beings consisting of body, soul, and shadow. The soul was the life principal, for it was the seat of being. It was believed that should the soul become lost—as in sleep or unconsciousness, or should it become stolen—as by a malevolent conjurer, the individual would be dead, even though his life signs showed him to be alive and healthy. It was the shadow which was the eye of the soul, for through it the soul was informed.[15] This system was very complex and the Indian strove to manipulate the system to his advantage. He

8. C. MARTIN, *supra* note 5, at 70 (citing D. THOMPSON, NARRATIVE 1784-1812, 77-78 (R. Glover ed. 1962)).

9. *Id.*

10. C. MARTIN, *supra* note 5, at 70-71.

11. *Id.* at 71. Animal, bird, and fish bosses were typically white and larger than the rest of their species. It was considered a rare privilege to see one of them. *Id.* (citing D. JENNESS, THE OJIBWA INDIANS OF PARRY ISLAND, THEIR SOCIAL AND RELIGIOUS LIFE 22-23 (National Museum of Canada, Bull. No. 78, 1935)).

12. C. MARTIN, *supra* note 5, at 72.

13. *Id.*

14. *Id.*

15. *Id.*; *see supra* note 11.

sought a long, healthy life free from misfortune.[16] Each Indian expected to reap the good life and if it was not forthcoming, someone was to blame. Events were personalized because they were either beings in their own right, or else they were perpetrated by human or other-than-human persons.[17] To realize the good life the Indian had to pay unyielding attention to innumerous details of comportment and had to address himself to the composite society of life in a way least likely to offend.[18] Success meant strict conformity to numerous and often complex rules.

The Indian generally was able to communicate directly with the spirit world. Control over the supernatural forces and communication with them were the primary functions of the shaman. The shaman was both a soothsayer[19] and a healer.[20] He served as an intermediary between the spiritual and the physical, and the lives and destiny of the pre-Columbian Indians were profoundly affected by the ability of the shaman to supplicate, cajole, and otherwise manipulate the supernatural beings and powers.[21] When called to task as a healer, the shaman would generally diagnose the illness as a failure on the patient's part to perform a prescribed ritual or to adhere to a particular taboo, and as a result, the offended spirit had visited the offending party with illness.[22] Once the disease or illness had been diagnosed the patient was made to confess his transgressions in public,[23] and the shaman would then symbolically remove the immediate cause of the disease or illness from the patient's body.[24] Public confession reinforced the canons of normative behavior and accentuated the disease sanction concept.[25] Essentially, "the key to understanding the Indian's role within Nature lies within the notion of mutual obligation: man and Nature both had to adhere to a prescribed behavior toward one another. . . . Catastrophe resulted when either one or both parties broke the contract by some extraordinary act which caused injury to the other."[26]

16. C. MARTIN, *supra* note 5, at 72 (citing Hallowell, *Ojibwa Ontology, Behavior, and World View*, CULTURE IN HISTORY: ESSAYS IN HONOR OF PAUL RADIN 19-52 (S. Diamond ed. 1960); and A. HALLOWELL, CULTURE AND EXPERIENCE 291-305 (1955)).

17. C. MARTIN, *supra* note 5, at 73. *See also supra* note 16.

18. C. MARTIN, *supra* note 5, at 73.

19. As a soothsayer, the shaman would work himself into a dreamlike state and consult the spirit of his animal-helper in discerning the future. *Id.* at 38.

20. The shaman was a healer by means of conjuring. He generally kept a large pharmacopeia of roots and herbs and other plant parts which were utilized with at least moderate success towards the cure of physical ailments. *Id.*

21. *Id.*

22. *Id.* at 39.

23. *Id.* at 73.

24. *Id.* at 39.

25. *Id.* at 73 (citing Hallowell, *Sin, Sex and Sickness in Saulteaux Belief*, 18 BRIT. J. OF MED. PSYCHOLOGY 191-97 (1939)).

26. C. MARTIN, *supra* note 5, at 73.

The Indian, as a hunter-gatherer, was dependent upon wildlife and plant-life for his subsistence. Even his tools, weapons, clothing, shelter, and food were collected from other life forms. The mutual obligation, man to Nature, and Nature to man, was that other life forms, such as animals, fish, birds, and plants, were to yield themselves up to the Indian for his needs. For his part in the scheme, the Indian knew that he must never abuse Nature's bounty by taking more than he needed for the present, nor should he torture them, nor insult them through ridicule or blasphemy, for if he did, he ran the risk of outrage from their spirits. The hunter was acutely aware of the boundaries of propriety from which he was not to transgress. Conversely, wildlife was not to subject the Indian to duress, for if this were done, man may retaliate with his arsenal of sanctions.[27]

The Indian sought to control his environment and he accomplished this through strict adherence to hunting and fishing taboos and rituals. Adherence to ritual and taboo was thus perceived as a way of bestowing cautious respect to a conscious fellow-member of the same eco-system who literally allowed itself to be killed for food and clothing.[28] For example, an Indian hunter setting out for the winter hunt would commonly sacrifice a dog. The dog was offered up to the spirits in search of goodwill. By the offering of the sacrifice the game spirits and their bosses were put in good humor and they became well disposed to capture.[29] Seeking additional advantage, the Indian and his family would invoke the lingering shadows of departed friends and relatives.[30] The dog sacrifice and ancestral invocation gave the hunter the confidence he needed to successfully effectuate the hunt, but a truly successful hunt depended on more than just confidence: the hunter must be skilled at deception, charms were used to make hunting gear infallible, and inclement weather could be made cooperative by use of magical means.[31] If game was not forthcoming the hunter would appeal to Nanabozo, the Great Hare. The Great Hare was the hunter's special manitou.[32]

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27. *Id.* at 74.

28. *Id.* at 35.

29. *Id.* at 78 (citing A. HENRY, TRAVELS AND ADVENTURES IN CANADA AND THE INDIAN TERRITORIES BETWEEN THE YEARS 1760 AND 1776, 125-26 (M. Quaife ed. 1921)).

30. It was believed that ancestral spirits could be found only in lineal territories. This belief fostered a compelling reason for permanent family hunting and fishing territories, for to hunt and fish elsewhere would be to cut oneself off from the care of the spirits of departed friends and relatives. C. MARTIN, *supra* note 5, at 78.

31. To entice a north wind the hunter would swing a buzzer around his head. A buzzer was a hollowed piece of wood with a string attached. If the hunter was slowed by soft slushy snow, a snowman would be built to entice cold weather and give the snow a firm crust. C. MARTIN, *supra* note 5, at 78-79 (citing Bernard, *Religion and Magic Among Cass Lake Ojibwa*, 2 PRIMITIVE MAN 53 (1929)).

32. C. MARTIN, *supra* note 5, at 78-79.

Once the hunt was successful and game had been captured, a new set of rituals and taboos came into play, for nothing was more offensive to game bosses and the shadow of slain animals than to have the carcass desecrated. This resulted in rituals concerning consumption and disposal of the slain beast.[33] Strict adherence to ritual and taboo was necessary in order to propitiate the soul-spirit, or shadow, of the slain animal. If these ceremonials were not adhered to, the offended shadow would report the outrage to other members of its species who would then retaliate against man by either withdrawing from the locale, or by inflicting disease. Above all else, the bones of the animal or fish carcass were to be protected from harm. The carcass was usually deposited, intact, in the element from whence it came—aquatic, marine, or terrestrial. It was believed that if the carcass were so disposed, the souls and spirits of slain animals and fish would return, in due course, to re-inhabit and re-clothe the bones so preserved.[34]

Pre-Columbian contact despoliation of Nature and her resources was never a problem. Numerous journals and observations of the first wanderers to make contact with the North American Indian can attest to that fact, as all observations report that game was abundant. It appears that the hunter's strict attentiveness to the taboos and rituals associated with the continued welfare of his prey regulated pre-Columbian exploitation of game for subsistence.[35] Violation of the taboo desecrated the remains of the slain animal and offended its soul-spirit. Depending on the nature of the broken taboo, the offended soul-spirit would retaliate in several ways: it could render the guilty hunter's means of hunting ineffective and could also inflict the same curse upon the entire band; it could encourage its living kind to abandon the hunter's territory; or it could inflict sickness.[36] Regardless which form of retaliation was utilized, the end result was the same and was mediated by the same power—the offended spirit of the slain animal or its keeper rendered the hunt unsuccessful.[37] In most instances the shaman was able to reverse the ill-fated effect of retaliation by the offended spirit by use of his magical arts. Thus, it was the threat of retaliation that kept the pre-Columbian Indian from overkilling and abusing Nature.

B. The Effect of Early European Contact on the Indian-Land Relationship.

In the pre-Columbian contact era the Indian revered and propitiated

33. *Id.* at 79.
34. *Id.* at 81-82.
35. *Id.* at 39.
36. *Id.*
37. *Id.*

wildlife, not only out of fear that their favors might be withheld, but also because they were felt to be deserving of such regard. The Indians not only needed their goodwill to survive, they also appealed to them for spiritual and aesthetic sustenance which they evidently furnished. Man and Nature fulfilled each other's needs and respected each other's boundaries. As long as this courteous relationship lasted the two lived in harmony, a compact predicated on mutual esteem. Sanctions were invoked only when either party violated this delicate system of mutual respect, adherence to taboos, and compliance with rituals. The system proved adequate and man lived in harmony with his environment for many years, neither killing more than was needed for sustenance, nor bestowing disrespect and dishonor on a fellow-member of the cosmos by slaughtering Nature's bounty unmercifully.

With the early travelers to the New World came Old World diseases. The Native Americans did not know that the fatal illnesses were brought to them by their Old World visitors. The diseases spread so swiftly to an unsuspecting and readily susceptible population that even the shaman, with all his power, wisdom, and knowledge of healing, could not cause the onslaught of disease and death to cease. Believing the disease to be the product of unhappy spirits of Nature's bounty, the Indians began to ravage Nature's wildlife in a vengeful attack and began to overkill, mutilate, and destroy American wildlife with fervor.

The spread of disease, which was blamed on unhappy animal spirits, was accompanied by European missionaries who subverted and undermined the traditional belief systems of the pre-Columbian Indians. With the advent of Christianity and the desecration of the traditional spiritual-mystical system of the Indians came the fur trade, which provided additional motivation for the native American Indian to overexploit the very beings which, according to Indian belief, were responsible for causing so much disease and the destruction of a way of life. Each element, in and of itself, impacted the pre-Columbian Indian's relationship with his cosmos. The combined effect of all three factors, however, created a significantly destructive effect so as to change forever the Indian's walk with his spirit world.

Although no one can be certain what the aboriginal Indian population of North American was prior to 1492,[38] several scholars and demographers have attempted an educated guess and have generally been content to accept as an estimate that there were 1 million Indians populating North America and an estimated 8 to 12 million Indians populating the entire

38. The methods employed by historic demographers to calculate early contact or prehistoric populations are described by William M. Denevan in his introduction to THE NATIVE POPULATION OF THE AMERICAS IN 1492, 1-12 (W. Denevan ed. 1976).

hemisphere.[39] During the pre-Columbian contact period the aboriginal Indians lived in a land relatively free of Old World diseases. Although Paleopathological studies of the aboriginal New World Indian have turned up evidence of diseases and functional disorders, none appear to have had a devastating impact on the overall aboriginal population prior to early European contact.[40] In fact, the studies tend to indicate that most premature deaths in prehistoric times could be attributed to hunting accidents, drowning, burns, suffocation, exposure, animal predation, cannibalism, infanticide, sacrifice, geronticide, suicide, homicide, and warfare.[41]

Although most people tend to believe that the first European contact with the New World was that of Columbus in 1492, there is some evidence that Bristol merchants sailed to Newfoundland in the 1480's.[42] Indeed, records in Bristol, England, reveal that on July 6, 1481, two cargo ships were cleared from Bristol for the purpose of examining and finding an island called the Isle of Brasil.[43] The ships belonged to a partnership of Bristol merchants and they sailed and subsequently returned, but there is no record of what they found. It has been surmised that the men of Bristol discovered a great fishery off Newfoundland and kept their discovery to themselves in hope of keeping out competitors for as long as possible.[44]

Regardless of who first discovered the New World, it is a well-accepted fact that by the first of the sixteenth century fishing fleets from England, France, and the Basque provinces were visiting the numerous banks off the Atlantic coast of Canada every spring for cod, and returned to Europe in the fall to market their catch.[45] It was these codfishermen who first traded with coastal North American Indians while drying their catch on land, and it was these same fishermen who unwittingly infected the unsuspecting aboriginal natives with a variety of Old World diseases against which the natives had no immunity.[46] Subsequent merchants and New

39. C. MARTIN, *supra* note 5, at 44.

40. The studies performed relied mainly on bones, coprolites, and native materia medica and turned up evidence of cases of pinta, yaws, syphilis, hepatitis, encephalitis, polio, limited forms of non-pulmonary tuberculosis, rheumatism, arthritis, some intestinal parasitism, other gastrointestinal illnesses, respiratory infections, and possibly other ailments. *Id.* at 48. *See also* Jarcho, *Some Observations on Disease in Prehistoric North America*, 38 BULL. OF THE HIST. OF MED. 1-19 (1964); Dunn, *Epidemiological Factors: Health and Disease in Hunter-Gatherers*, MAN THE HUNTER 221-28 (R. Lee & I. DeVore eds. 1968).

41. C. MARTIN, *supra* note 5, at 48.

42. *Id.* at 40 (citing excerpts from Quinn, *England and the Discovery of America*, 1481-1620 THE BRISTOL VOYAGES OF THE FIFTEENTH CENTURY TO THE PILGRIM SETTLEMENT AT PLYMOUTH: THE EXPLORATION, EXPLOITATION, AND TRIAL-AND-ERROR COLONIZATION OF NORTH AMERICA BY THE ENGLISH (A. Knopf ed. 1974)).

43. *Id.*

44. *Id.* at 40-41.

45. *Id.*

46. *Id.* at 43.

World explorers were soon to follow and with them came even more Old World diseases and infections with which the Indians had never before come into contact.

These alien diseases had a devastating impact on the aborigines. Once these disease-bearing Europeans arrived in the New World the native population began succumbing in droves. Studies of South and Central America, Mexico, the West Indies, and the American Southwest indicate that there was, especially in the coastal and island areas, a depopulation rate as high as 90 to 95 percent within the first one to two hundred years of European contact.[47] In one such study, Sherburne Cook demonstrated that for the post-contact period of 1620 to 1720, warfare eliminated one-quarter of an initial New England Indian population figure, and exotic diseases eliminated four-fifths of the Indian population. Thus, in seventeenth century New England, for every one Indian who was succumbing to overt hostilities, three Indians were dying of some foreign disease.[48] This staggering death rate is not attributable to a lack of genetic equipment necessary for the production of infection fighting antibodies. Rather, it is attributable to the manner in which the infections and diseases were experienced and treated.[49]

Alfred Crosby, Jr., a biological historian, has found evidence indicating that the major Indian diseases, such as smallpox and influenza, were most lethal to persons in the age range of fifteen to forty years—the age group of the Indians who were the most productive members of their society.[50] Depopulation due to disease was not the result of only one epidemic. The diseases arrived in clusters which came in a series, punctuated by brief interludes of respite. In other words, there generally was a period by which a community was ravaged by three or four diseases, followed by a few years of remission, followed by another bout of diseases with a new or different set of microbes. This insidious periodicity of diseases, along with the plurality of the diseases, explains why the aboriginal natives were unable to develop an adequate immune response.[51]

47. *Id.* at 46 (citing studies by Sherburne Cook and Woodrow Borah which revealed that the central Mexican population was "decimated by alien diseases according to the following schedule: from an initial, pre-contact population of 25 to 29 million in 1519, the natives dropped to a mere 16.8 million in 1532, 7.3 million in 1548, 2.65 million in 1568, 1.9 million in 1585, 1.27 million in 1595, and bottomed out at slightly over 1 million in 1605." S. COOK & W. BORAH, ESSAYS IN POPULATION HISTORY: MEXICO AND THE CARIBBEAN (1971)).

48. C. MARTIN, *supra* note 5, at 46. *See* Cook, *Interracial Warfare and Population Decline Among the New England Indians*, 20 ETHNOHISTORY 1-24 (1973); Cook, *The Significance of Disease in the Extinction of the New England Indians*, 45 HUMAN BIOLOGY 485-508 (1973).

49. C. MARTIN, *supra* note 5, at 49-50.

50. *Id.* at 50 (citing Crosby, *Virgin Soil Epidemics as a Factor in the Aboriginal Depopulation in America*, 33 WILLIAM & MARY Q. 289-99 (1976); and A. CROSBY, THE COLUMBIAN EXCHANGE: BIOLOGICAL AND CULTURAL CONSEQUENCES OF 35-63 (1972)).

51. *Id.*

The aboriginal reaction to disease is an important consideration in the study of aboriginal hunting and fishing and its interrelationship with the spiritual and religious structure of the native North American Indians. When diseases did strike, the aborigines were unable to take care of themselves. Many were abandoned by frightened family members and still others fled the infected and contagious communities only to carry the diseases with them to new communities where the illnesses spread just as rapidly as they had in the home community.[52] Because the alien European diseases were carried inland by infected natives before most inland Indians had actually encountered the white man, a causative connection between the infectious and deadly diseases and the emergence of white man in the New World was not initially considered.[53]

Native American Indians were dying at an alarming rate. The shaman was called upon to provide relief and a cure for the diseases, but the epidemics were beyond his capacity to cure or to explain. The shaman's magic and other traditional cures were ineffective and the epidemics had the effect of demoralizing the afflicted communities.[54] The rituals no longer worked and the native Indians, who had always blamed offended wildlife for their sicknesses, now suspected that the contagion was the result of a conspiracy of the beasts.[55] For a reason unknown to the Indians, the long-standing compact between the animal kingdom and man was disrupted and the Indian's ability to control and otherwise influence the supernatural realm was rendered dysfunctional.[56] The Indians apostatized from their longstanding ritualistic practices, which in turn subverted the retaliation principal of taboo and opened the way to a corruption of the Indian-land relationship.[57] In an attempt to extricate themselves from the morbid grip of the conspiracy of the beasts, the Indians sought to destroy their wildlife tormentors by engaging in a war of revenge.[58] The war of revenge soon gained momentum under the influence of the missionaries who sought to change the spiritual edifice of the native Indians, as well as by the incentives and luxuries afforded by participation in the historic fur trade.[59]

As white men began to settle the North American continent, so too came the missionaries, eagerly imposing upon the "heathen" Indians a Western religion called Christianity. To the Europeans, the sweet message

52. *Id.*
53. *Id.* at 152.
54. *Id.*
55. *Id.* at 146.
56. *Id.* at 53.
57. *Id.*
58. *Id.* at 146.
59. *Id.* at 152.

of Christianity would bring civilization and salvation to the "savage" Indians. Unbeknownst to the missionaries, their arrival in the New World was at a time when the Indian was at war with his symbolic world. Even the shaman was unable to manipulate the spirit world, for he had lost his ability to cure the diseases which the offended spirits of wildlife were inflicting upon the tribes. The Indians were no longer sensitive fellow-members of a symbolic world.[60]

With them, the missionaries brought to the New World an array of what must have been impressive technology, implements, and trade goods, to which the curious Indians had never before been introduced. In the Indian intellect, an object was efficacious according to the degree of power it housed.[61] In other words, the more functional a tool, the more power it obviously possessed. The missionaries were able to provide the Indians with implements and trade goods that not only eased the toil of their labor, but also provided them with goods which the Indians considered as having great powers. By accepting European material culture, such as trade goods and implements, the Indians were impelled to accept European religion as well, for the trade goods which the Indians so eagerly accepted were accompanied by Christian religious teachings.[62] Therefore, as the Indians traded with the missionaries, they received exposure to a Western culture vastly different from their own.

For the Indians, who attached a spirit-like essence to all things, Christianity was viewed as a ritual which harnessed the power of all to which they had been introduced by the missionaries.[63] By virtue of his superior power, the priest became a replacement for the shaman and he used his power to attack the Indian culture with fervor.[64] As the Indian abandoned more and more of his implements for those of the white man, he was

60. *Id.* at 59-61.

61. *Id.* at 59. The author gives as an example:

> [T]he Micmac believed that there was a spirit of his canoe, of his snowshoes, of his bow, and so forth. For this reason a man's material goods were either buried with him or burned, in order that their spirits might accompany [him] to the spirit world, where he would need them. Just as he had hunted game in this physical-spiritual world, so his spirit would again hunt the game spirits with the spirits of his weapons in the land of the dead.

Id.

62. *Id.* The approach of the European missionaries was successful only to the degree that their power exceeded that of the shaman. For example, the nonliterate Indian was awed by the magic of the written word as a means of communication. The white man's impressive technology and greater success at manipulating life to his advantage made Christianity as a religion even more significant. *Id.* at 58-59.

63. *Id.* at 60.

64. *Id.* For example, polygamy was condemned by the missionaries as immoral, the consultation of shamans was discouraged, the custom of interring material goods was criticized, eat-all feasts were denounced as gluttonous and improvident, and the Indians were freed from the falsity of many of their taboos. *Id.*

also subjected to more and more attacks on the spiritual and mystical belief systems which, until the encroachment of white man upon the native land, had always served the Indian well. The result was that the spiritual beliefs of the Indians were subverted, for not only were the native spiritual beliefs no longer effective, they were no longer necessary.[65]

Prior to European influence, the native North American Indians were on amicable terms with the spirits of the game. The Indians never killed wantonly or wastefully, and Nature's resources were plentiful. There were several considerations which restrained the native hunter in the quantity of game harvested. Once a kill was made there were the logistical problems of storing and transporting the superfluous flesh and the accompanying task of smoking or drying the provision and finding a suitable place to store the preserved meat.[66] The great diversity and aggregate abundance of wildlife available meant the Indians did not have to concentrate hunting pressures on any particular species, thus, there was no reason to overkill to near extinction. The means the native American Indians utilized in locating game, such as conjuring, divination, and scouting, also ensured an abundance of game and little chance of overkill. Perhaps the most effective restraint on the over-exploitation of game was the fear of spiritual reprisal for indiscreet slaughter.[67] Because there were traditionally powerful and genuinely compelling sanctions against overkilling wildlife, it was necessary for the mutually courteous relationship between man and nature to disintegrate before the Indian could declare war on his animal brethren.[68] The war between man and beast was already underway when the fur trade was introduced to the New World.

Fur fashions in Western Europe had been fluctuating for centuries. During the thirteenth and fourteenth centuries squirrel was a favorite, and during the fifteenth century the craze was for marten. In the sixteenth century the European demands for fur soared, which resulted in a scarcity of furbearers and soaring wholesale prices. The demand could not be met, for political instability cast a pall over international fur trade. Beaver, which was in great demand, was ominously scarce by the time Columbus made his voyage.

Moscow had been the fur capital of Western Europe, but the political problems associated with the international fur trade led Moscow to turn from the depressed European market to a more lucrative one in the Orient.[69]

65. *Id.* at 59.
66. *Id.* at 17-18.
67. *Id.*
68. *Id.* at 18.
69. P. PHILLIPS, THE FUR TRADE 1:3-14 (1961); *see also* C. MARTIN, *supra* note 5, at 172-73.

The inevitable discovery of North America and her plentiful array of furbearers provided Western Europe with a source which easily satisfied the demands that were made.[70]

Initially, the Indians perceived the fur trade as "embodying certain principles of gift giving, as a source of major prestige items, and as a forum for social and ceremonial gratification."[71] Indeed, until the early nineteenth century, the Indians insisted on viewing the fur trade as a form of gift exchange.[72] Because the Indians placed nowhere near the same value on skins and pelts as the Europeans did, they were astonished at the fierce competition and greed among the traders for a few worn-out skins. The Indians did not understand the concept of material accumulation and hoarding in order to gain prestige. They believed the Europeans must have been impoverished for such items for them to seek so desperately to provide themselves with such prodigious quantities of it for transshipment.[73]

Soon the Indians realized the pelts and skins they supplied to the Europeans provided them with a means of getting something desirable, such as European trade goods, in exchange for something they considered to be of less value.[74] Once presented with the opportunity to exchange their pelts and skins for European trade goods, the Indians quickly seized the opportunity to effect the transaction, for European hardware and other trade items were immediately perceived as being far superior in their utility to the primitive technology and general material culture of the native American Indians.[75] Chief among trade items sought by the Indians was iron, for iron not only saved them from days of drudgery, but enabled them to vanquish their enemies who were armed only with stone, wood, and bone implements.[76] The white man offered other material goods as well—woolens, gewgaws, and alcohol—which the Indians could not resist. Such trade items were considered by the natives to be riches, for

70. It was the advent of the beaver hat and its popularity late in the sixteenth century that triggered a take-off in the trade. C. MARTIN, *supra* note 5, at 173.

71. C. MARTIN, *supra* note 5, at 11 n.b. (citing Washburn, *Symbol, Utility, and Aesthetics in the Indian Fur Trade*, ASPECTS OF THE FUR TRADE: SELECTED PAPERS OF THE 1965 NORTH AMERICAN FUR TRADE CONFERENCE 50-54 (R. Fridley ed. 1967)).

72. C. MARTIN, *supra* note 5, at 10 n.b. (citing Rich, *Trade Habits and Economic Motivation Among the Indians of North America*, 26 CAN. J. ECON. & POL SCI. 35-53 (1960)).

73. C. MARTIN, *supra* note 5, at 151.

74. An early day Jesuit missionary was recorded as saying "my host said to me one day, showing me a very beautiful knife, 'The English have no sense; they give us twenty knives like this for one Beaver skin.'" *Id.* at 153 (quoting 6 THE JESUIT RELATIONS AND ALLIED DOCUMENTS: TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NEW FRANCE, 1610-1791, 297-99 (R. Thwaites ed. 1896-1901)).

75. C. MARTIN, *supra* note 5, at 8.

76. *Id.* (citing A. BAILEY, THE CONFLICT OF EUROPEAN AND EASTERN ALGONKIAN CULTURES, 1504-1700: A STUDY IN CANADIAN CIVILIZATION 6 (Publication of the New Brunswick Museum, Monographic Series No. 2, 1937)).

they gave his life an expanded dimension it had never known before.[77] In effect, the traders economically seduced the Indians by displaying the European wares and in many other ways fostered capitalistic drives.

Obviously, the desire for European trade items provided a significant incentive for the Indian to deplete wildlife. There was still the gnawing spiritual and mystical belief system of the Indian that had to be dealt with, however. An early observer of the Micmac culture at the beginning of the eighteenth century witnessed and recorded what appeared to be a native superstition which compelled them to tear out the eyes of fish, birds, and beats. "Such an act evidently served to blind the lingering spirit of the animal to the irreverent treatment accorded its carcass. To have left the eyes intact would have risked having the spirit witness the outrage, whereupon it would surely inform the surviving members of its kind of the act and these, in their turn, would resist capture."[78] This practice has been interpreted as a means for the Indian to hide his guilt while ensuring his continued success in the hunt.[79]

The diaries and reminiscences of explorers, traders, captives, settlers, missionaries, and other first-hand observers of post-contact Indian society offer incontrovertible evidence that the Indian was quick to respond to the removal of the obstacles of overkilling wildlife. John Dunn, an employee of the Hudson Bay Company and an eight year resident of the Oregon Territory was an appalled spectator to the wholesale slaughter of a migrating herd of caribou as it strove to cross the Hayes River in the summer of 1831. Only a fraction of the meat was rescued for present use; the remainder was abandoned to rot on the banks or to float downstream.[80] Samuel Hearne wrote in his journal that time and again his Chipewyan guides would seemingly kill far more caribou and musk ox than they could use. They would cut out the tongue, fat, and other choice portions and leave the remainder of the carcass to rot. Samuel Hearne's

77. C. MARTIN, *supra* note 5, at 9-10.

78. *Id.* at 62 (citing S. DE DI'EREVILLE, RELATION OF THE VOYAGE TO PORT ROYAL IN ARCADIA OF NEW FRANCE 161 (1708) (C. Webster trans., J. Webster ed. 1933)).

79. C. MARTIN, *supra* note 5, at 63. A priest, Father Robert J. Sullivan, was informed by his Koyukon hosts during the 1930's that hunters would destroy a slain bear's eyes for fear of reprisal from the offended animal's spirit

> The Ten'a [Koyukon] believe that the *yega* [spirit] of the bear is very powerful, so precautions are taken even after the animal has been killed. The first thing a man does after he catches a bear is cut off the fore-paws; he is afraid that the bear *yega* would somehow enable the bear to follow him and inflict harm on him, if he neglected to do this. Then he must burst the eyes or punch them out, so the bear cannot see him to injure him in any way.

Id. at 63 n.p. (quoting R. SULLIVAN, THE TEN'A FOOD QUEST 86 (Catholic Univ. of Am., Anthropological Series No. 11, 1942)).

80. C. MARTIN, *supra* note 5, at 164-65 (citing J. DUNN, THE OREGON TERRITORY, AND THE BRITISH NORTH AMERICAN FUR TRADE; WITH AN ACCOUNT OF THE HABITS AND CUSTOMS OF THE PRINCIPAL NATIVE TRIBES ON THE NORTHERN CONTINENT 65 (1845)).

attempts to induce the Indians from engaging in such wanton and wasteful practices proved ineffective, for the Indians "were so accustomed to kill everything that came within their reach, that few of them could pass by a small bird's nest, without slaying the young ones, or destroying the eggs."[81] The combination of disease, illness, and missionization served to despiritualize the native American Indian, but once the Indian became exposed to European material goods, through the advent of the fur trade, the Indian became a raider of the American earth.

III. TREATIES, RELOCATION, ASSIMILATION, AND THE RIGHT TO HUNT AND FISH

On the discovery of the North American continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Because all of the European nations were in pursuit of the same object, it became necessary to establish a principle which all should acknowledge as the law by which the right of acquisition should be regulated as between themselves. This principle was that discovery gave title to the government by whose authority discovery was made. Title was consummated by possession and was good as against all other European governments. The exclusion of all other European governments gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. Thus, all of the nations of Europe who acquired territory on the North American continent asserted in themselves, and recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.

The relations which were to exist between the discoverer and the natives were to be regulated by the discovering nation. In the establishment of these relations the rights of the natives were impaired. They were admitted to be the rightful occupants of the soil with a legal and equitable claim to retain possession of it and to use it according to their own discretion; however, their rights to complete sovereignty as independent nations were diminished, for their power to dispose of the soil they occupied was denied by the fundamental principle that discovery gave exclusive title to the nation that made the discovery. The discovering nations claimed and exercised their power to grant the soil of their domination. The grants that were made conveyed title to the grantees subject to the Indian right of occupancy.

The Treaty of Paris, entered into by France and Great Britain in 1763,

81. C. MARTIN, *supra* note 5, at 165 (citing excerpts from SAMUEL HEARNE, *supra* note 6, at 25-26, 48-49, 75-76, 87, 259).

resulted in the surrender of lands held by Great Britain which were located west of the Mississippi to France. In return, France ceded to Great Britain her interest in lands east of the Mississippi. Thus, the British government asserted title to all the lands occupied by the Indians which were within the chartered limits of the British colonies. It also asserted a limited sovereignty over the Indians and the exclusive right of extinguishing the title which occupancy gave to them. Although the colonies, by declaring independence from the British government, took possession of these lands, it was by the treaty which concluded the Revolutionary War that Great Britain relinquished all claim, not only to the government, but to the property and territorial rights of the United States.[82]

In the early years, as white man pressed against Indians in the eastern part of the continent, the United States' policy was to enter into treaties with the differing tribes and to displace them from their traditional homelands to territories of their own beyond the Mississippi, where they were free to govern themselves.[83] "As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country."[84] The power to make treaties with the Indian tribes was abolished in 1871,[85] and in 1887 Congress passed the General Allotment Act[86] for the purpose of dividing reservation land among individual Indians with a view toward their eventual assimilation into the American society.[87] In 1934 the policy of assimilation was abruptly reversed. Because a great many of the allottees of reservation lands had sold them and disposed of the proceeds, further allotments were prohibited in order to safeguard the remaining Indian lands. The Secretary of the Interior was authorized to create new reservations and to enlarge the existing ones.[88] In addition, the tribes were permitted to become chartered federal corporations with the attendant power to manage their own affairs and to organize and adopt constitutions for their own self-government.[89]

82. Historical essay on the acquisition of aboriginal lands taken from Chief Justice Marshall in Johnson v. McIntosh 21 U.S. (8 Wheat.) 543 (1823).

83. Organized Village of Kake v. Egan, 369 U.S. 60, 71 (1962). "The 1828 treaty with the Cherokee Nation, 7 Stat. 311, guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory. Even the Federal Government itself asserted its power over these reservations only to punish crimes committed by or against non-Indians. 1 Stat. 469, 470; 2 Stat. 139." *Id.*

84. *Kake*, 369 U.S. at 72.

85. 16 Stat. 544, 566 (1871), 25 U.S.C. § 71 (1982).

86. 24 Stat. 388 (1887), *amended by* 25 U.S.C. §§ 331-358 (1982).

87. *Kake*, 369 U.S. at 72.

88. *Id.* at 73.

89. 48 Stat. 984, 986-88 (1934).

The rights of the Native American Indians are in a constant state of flux and no topic is of greater significance, nor the source of more lengthy and bitter litigation, than are the hunting and fishing rights of the Indians. The Indians have sought to control the right to capture game and fish both within and without the boundaries of their reservations. They have also sought to control these rights as they relate to Indians as well as non-Indians. Likewise, the several states have attempted to impose state regulations on Indians and non-Indians, whether on or off the reservations. Towering above them all is the Federal Government, whose supremacy no one can contest.

A. Federal Regulation of Indian Treaty Hunting and Fishing Rights

"Originally the Indian tribes were separate nations within what is now the United States. Through conquests and treaties they were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land."[90] That Congress has the power to regulate tribal affairs has rarely been the source of litigation, for its broad powers are firmly established by the Constitution.[91] Although brought within the realm of federal dominion, the Indian tribes retained attributes of sovereignty over both their members and their territory.[92]

> The relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.[93]

When the Indian tribes were displaced from their native lands and relocated on reservations, the Federal Government entered into treaties with the different tribes. In almost all cases the treaties defined the territorial limits of the reservations, established a Federal Government fiduciary-like relationship wherein the lands would be held in trust for the Indians, and otherwise defined the boundaries of state and federal jurisdictions. Quite often the Federal Government would allow the tribes to choose the lands that were to become reservations. Because hunting,

90. Williams v. Lee, 358 U.S. 217, 218 (1959).

91. The source of federal authority over Indian affairs derives from federal responsibility for regulating commerce with Indian tribes and treaty making. *See* U.S. CONST. art. I, § 8, cl. 3; U.S. Const. art. II, § 2, cl. 2.

92. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

93. United States v. Kagama, 118 U.S. 375, 381-82 (1886).

fishing, and trapping of game were not only necessary for the Indian's subsistence, but were also deeply entwined in the spiritual, mystical, and cultural system of the Indians, they often premised the location of reservations on the availability and abundance of wildlife.

Many of the treaties specified that reservation land was "to be held as Indian lands are held," with such treaties construed as recognizing hunting and fishing as normal incidents of Indian life.[94] Other treaties were more specific in that they expressly reserved certain rights incident to the use of the land, such as fishing.[95] Some, however, made no mention of hunting and fishing rights at all.[96] Regardless of the specificity of hunting, fishing, and trapping rights, as mentioned or not mentioned in the treaties, the courts have generally construed such rights as aboriginal rights which are incident to Indian title.[97]

The tradition of Indian sovereignty over the reservations and tribal members and the right of tribal self-government is ultimately dependent on, and subject to, the broad power of Congress.[98] Indeed, Congress has enacted several statutes specifically relating to Indians, Indian country, and more specifically, to the hunting, fishing, and trapping rights of Indians.[99] Inherent in these statutes is a firm federal policy of promoting tribal self-sufficiency and economic development.[100] Generally speaking, federal criminal law is extended to Indian country, with the exception of offenses committed as between Indians or where an Indian committing an offense in Indian country has been punished by the local law of the

94. *See* Treaty of Jan. 3, 1786, with the Choctaws, 7 Stat. 22; Treaty of Jan. 31, 1786, with the Shawnees, 7 Stat. 27; Treaty of Jan. 9, 1789, with the Wyandots, 7 Stat. 29; Treaty of Aug. 3, 1795, with the Wyandots, 7 Stat. 52; Treaty of Nov. 10, 1808, with the Osages, 7 Stat. 109; Treaty of Aug. 24, 1835, with the Comanches, 7 Stat. 475.

95. *See* Treaty with the Flathead, July 16, 1855, United States—Flathead, Kootenay, and Upper Pend d'Oreilles Tribes, 12 Stat. 975; Treaty of Olympia, July 1, 1855, United States—Qu-nai-elt and Qui-hel-ute Tribes, 12 Stat. 971; Treaty with the Tribes of Middle Oregon, June 25, 1855, United States—Walla Walla and Wascoe Tribes, 12 Stat. 963; Treaty with the Nez Perce, June 11, 1855, United States—Nez Perce Tribe, 12 Stat. 957; Treaty with the Yakimas, June 9, 1855, United States—Yakima Nation, 12 Stat. 951; Treaty with the Walla Wallas, June 9, 1855, United States—Walla Walla, Cayuse, and Umtilla Tribes, 12 Stat. 945; Treaty of Neah Bay, Jan. 31, 1855, United States—Makah Tribe, 12 Stat. 939; Treaty of Point No Point, Jan. 26, 1855, United States—S'Klallams Tribe, 12 Stat. 933; Treaty of Point Elliott, Jan. 22, 1855, United States—Dwamish and Suquamish Tribes, 12 Stat. 927; and Treaty of Medicine Creek, Dec. 26, 1854, United States—Nisqually Tribe, 10 Stat. 1132.

96. *See* United States v. Minnesota, 466 F. Supp. 1382, 1383 (D. Minn. 1979), *aff'd sub nom.* Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980) (referring to the 1863 Treaty at the Old Crossing of the Red Lake River, which contained no mention of hunting and fishing rights. This treaty was between the United States Government and the Red Lake Band of Minnesota Chippewa Indians).

97. *Id.* at 1385.

98. *White Mountain Apache Tribe*, 448 U.S. at 143.

99. *See generally* 18 U.S.C. §§1152, 1153, 1165 (1982).

100. *White Mountain Apache Tribe*, 448 U.S. at 143.

tribe.[101] Federal law is also pre-empted where treaty stipulations grant exclusive jurisdiction over a matter to the tribe.[102] The Federal Government has seen fit, however, to provide a special remedy when a tribe's sovereignty as to its hunting, fishing, and trapping rights are involved.[103] This special provision, created by statute, allows for federal enforcement of violators of tribal regulations pertaining to hunting, fishing, and trapping on lands held by Indians or lands held in trust for Indians, but does not extend to fee-patented lands. Congress intended to grant the Indian owner permission to hunt, fish, and trap, as well as to provide for federal assistance in the enforcement of tribal regulations relating to these activities. In the absence of such a statute, non-Indians would be immune from prosecution for violation of a tribe's hunting, fishing, and trapping regulations, while Indian trespassers could be prosecuted in tribal courts.[104]

A careful reading of the statutes shows that they apply to Indian country, not Indian reservations. This is because Indian country is a more inclusive reference to the lands to which the federal statutes apply. Indian country is defined as:

> (a) all land within the limits of any Indian reservation under the

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101. 18 U.S.C. § 1152 (1982) reads in part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . .

102. 18 U.S.C. § 1152 (1982) continues, "or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

103. 18 U.S.C. § 1165 (1982) provides:

> Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or any Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

104. S. Rep. No. 1686, 86th Cong., 2d Sess., pertaining to 18 U.S.C. § 1165, reads in part:

> The problem confronting Indian tribes with sizeable reservations is that the United States provides no protection against trespassers comparable to the protection it gives to Federal property as exemplified by title 18, United States Code, section 1863 [trespass on national forest lands]. Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. This is by reason of the fact that the Indian tribal law is enforcible against Indians only; not against non-Indians.

> jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have been extinguished, including rights-of-way running through the same.[105]

By its very definition, Indian country encompasses more than the present boundaries of a reservation. This brings into issue the question of whether a state has the power to regulate and enforce its gaming laws on land that is located within the reservation's boundaries that is fee-patented land owned by non-Indians. Such an issue becomes critical when Indian tribal members seek to enforce their on-reservation treaty rights of hunting and fishing free of state regulation. The existence of on-reservation rights to hunt and fish under a treaty creates a dual system of state-federal jurisdiction over non-Indians who hunt and fish the lands and waters to which the treaty rights attach. Such a situation brings the doctrine of preemption into play, for

> [w]henever dual jurisdiction exists between a state and the federal government, the state may regulate only to an extent and in a manner that is consistent with federal regulation. Therefore, where the federal regulatory scheme is not intended to be pervasive and all-inclusive, the state is free to regulate the same area in a manner that does not conflict or interfere with federal regulation. But where federal regulation provides a comprehensive scheme in a given area, the state's power to regulate is preempted and the state is precluded from exercising its regulatory powers in any manner.[106] [Citations omitted.]

It would be nice to be able to make blanket statements that a tribe, by its inherent sovereignty, has the exclusive right to regulate on-reservation hunting, fishing, and trapping rights of Indians and non-Indians alike. Likewise, it would be an easy chore to surmise that a state has regulatory authority over the hunting, fishing, and trapping rights of Indians who engage in such treaty rights off the reservation. Unfortunately, such blanket statements are impossible to make, for a determination of which entity has the authority to regulate such treaty rights necessarily rests upon a clear and thorough reading of the treaty under which the aboriginal rights were reserved, an analysis of the subsequent agreements and enactments affecting the treaty, the prior history, surrounding circumstances, and the

105. 18 U.S.C. § 1151 (1982).

106. Confederated Tribes v. Washington, 412 F. Supp. 651 (E.D. Wash. 1976), *rev'd on other grounds*, 591 F.2d 89 (9th Cir. 1979).

subsequent construction given these documents by the parties.[107] Ultimately, the determination of who may regulate such treaty rights rests on an analysis of the facts of each particular case. In the following pages we will analyze cases that involve the question of regulation of hunting and fishing rights both on and off the reservation. Sometimes the holdings appear to conflict, sometimes they appear to be aligned, but whatever the result reached there is one consistent element—the courts consistently look to the factors detailed above, and from such an application of the principles of interpretation several consistent theories emerge.

B. State Regulatory Power Over Indian Treaty Hunting and Fishing Rights

It is necessary to understand the principles of treaty construction that are applied to treaties which have been the subject of judicial interpretation in order to understand why the courts have upheld state regulation of treaty rights in some cases and have disallowed state regulation in others. The remainder of this section will focus on the courts' application of these principles to many of the most notable cases and will attempt to summarize the pertinent issues and rationale behind the court's allowance or disallowance of state regulation of the treaty right to hunt and fish.

1. Principles of Treaty Construction

"Once Congress has established a reservation, all tracts included within the boundaries remain a part of the reservation until separated from it by Congress."[108] Congressional enactments which purportedly alter the property rights of Indians, such as Congressional action removing certain reservation land from Indian ownership, do not necessarily disestablish Indian rights and reservation boundaries.[109] Disestablishment of the reservation only occurs when Congress intends to create a smaller reservation within adjusted boundaries; it does not occur when Congress only intends to remove from Indian control certain land within the reservation boundaries while retaining its original exterior boundaries.[110] Indeed, the Supreme Court has ruled that Congressional intent to abrogate Indian property rights must be clear from the face of the Act or from surrounding cir-

107. *See* Sac & Fox Tribe v. Licklider, 576 F.2d 145, 150 (8th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978); United States v. Minnesota, 466 F. Supp. 1382, 1385 (D. Minn. 1979), *aff'd sub nom.* Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); Sohappy v. Smith, 302 F. Supp. 899, 905 (D. Or. 1969).

108. Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 815 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).

109. *Id.*; *see also* United States v. Minnesota, 466 F. Supp. at 1384.

110. *Lower Brule Sioux*, 711 F.2d at 815.

cumstances.[111] Because of the dependent status of the Indians and the nonconsensual nature of the land cessions, treaties and agreements with the Indians cannot be considered as exercises in ordinary conveyancing. "Rather, cession treaties and agreements must be interpreted as the Indians understood them, and doubtful expressions must be resolved in their favor."[112]

2. Treaty Right to Hunt and Fish Free of State Regulation

The following case summaries involve disputes over whether a state has the power to regulate the Indian treaty right to hunt and fish. In some cases the states will assert their authority to regulate the Indian's treaty rights both on and off the reservation. In other cases the states will attempt to show that such treaty rights do not exist at all. Still others assert a different position and rationale underlying their asserted right to regulate or abrogate the right of Indians to hunt and fish. Whatever the theory or rationale espoused by the states, the courts in the following cases have placed restraints upon state regulation of the Indian right to hunt and fish.

Seufert Brothers Co. v. United States[113] entailed a 1855 treaty between the Yakima Indians and the United States[114] whereby a reservation was established and the right to take fish at all usual and accustomed places was reserved unto the Yakima Tribe in common with citizens of the Territory.[115] Certain of these "usual and accustomed places" were located on lands and waters of non-ceded property. Seufert Brothers owned certain lands bordering such waters and sought to exclude the Yakima Indians by reason of ownership of the land. In upholding the treaty rights of the Yakima Indians the United States Supreme Court held that the treaty right to fish at "usual and accustomed places" was a continuing one that could not be destroyed by a change in ownership of the land bordering the river.[116]

In *Menominee Tribe v. United States,*[117] the State of Wisconsin prosecuted three Menominee Indians for violations of the State's hunting and

111. United States v. Minnesota, 466 F. Supp. at 1384-85 (citing DeCoteau v. District County Court, 420 U.S. 425, 444 (1975)).

112. *Id.* at 1384.

113. 249 U.S. 194 (1919).

114. Treaty with the Yakimas, June 9, 1855 (ratified by the Senate March 8, 1859, 12 Stat. 951 (1859)).

115. *Seufert Bros.*, 249 U.S. at 195-96. Article III of the Treaty reads in part:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory. [Emphasis omitted.]

Id. at 196.

116. *Id.*

117. 391 U.S. 404 (1968).

fishing regulations. The defense claimed that the Indians were exempt from state regulation because the alleged violations occurred on Menominee Reservation lands. The Wisconsin Supreme Court, in holding the state regulations valid, found that the hunting and fishing rights of the Menominees had been abrogated by Congress by the Termination Act of 1954.[118] The Menominee Tribe then brought suit in federal court to recover just compensation for the loss of these rights.[119] The United States Supreme Court held that the Menominee treaty right to hunt and fish, as reserved by the Wolf River Treaty of 1854,[120] survived the Termination Act of 1954.[121] In so deciding, the Court also looked to Public Law 280, which was enacted prior to the effective date of the Termination Act of 1954.[122] Public Law 280 expressly excluded the states from having jurisdiction over tribal hunting and fishing rights afforded Indians under Federal treaties.[123] Therefore, the State did not have regulatory power over Indian hunting and fishing on the reservation.

The 1971 case, *Leech Lake Band v. Herbst*[124] involved an interpretation of the Nelson Act,[125] by which the United States passed title to certain reservation lands to non-Indians. The Nelson Act was silent as to the Indian's treaty right to hunt and fish. The State of Minnesota sought to enforce state game regulations on Indians who were hunting and fishing on the publicly held lands and waters of the Leech Lake Indian Reservation.[126] The State claimed the Nelson Act disestablished the Leech Lake Indian Reservation, thus terminating the Indian's hunting and fishing rights.[127] The United States District Court held that it was the termination of federal responsibility and not the passing of legal title within an area that determined whether a reservation existed in law.[128] The court found that the purpose of the Nelson Act was to terminate federal supervision, not federal responsibility, over the Leech Lake Band of Chippewa Indians.[129] Thus, the Indians were free to hunt and fish on the publicly owned lands within the Leech Lake Indian Reservation.

The United States District Court in *United States v. Pollman*,[130] was afforded the opportunity to interpret a federal statute prohibiting hunting

118. 68 Stat. 250 (1954), *repealed by* Pub. L. No. 93-197, § 3b, 87 Stat. 770 (1973).
119. *See* Shoshone Tribe v. United States, 299 U.S. 476 (1937).
120. 10 Stat. 1064 (1854).
121. The purpose of the 1954 Termination Act was to provide for the orderly termination of federal supervision over the property and members of the tribe.
122. 25 U.S.C. §§ 1321-23.
123. *Id.*
124. 334 F. Supp. 1001 (D. Minn. 1971).
125. Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 (1889).
126. *See* Leech Lake Band, 334 F. Supp. at 1002-3.
127. *Id.*
128. *Id.* at 1005.
129. *Id.* at 1006.
130. 364 F. Supp. 995 (D. Mont. 1973).

or fishing in Indian country without tribal permission. Under the Treaty of Hellgate[131] the Confederated Salish and Kootenai Tribes retained the exclusive right to hunt and fish the lands and waters within the boundaries of the Flathead Indian Reservation, located in Montana. A non-Indian was fishing in the part of Flathead Lake that was within the boundaries of the Flathead Reservation and was subsequently charged with violation of 18 U.S.C. section 1165.[132] The non-Indian questioned the applicability of the federal statute.[133] In interpreting the statute the court held that federal authority, by treaty and statute, allowed the tribe to adopt rules governing the control, licensing, and regulation of hunting and fishing on the reservation.[134] This authority provided sustenance to 18 U.S.C. section 1165, so that lawful authority or permission for non-Indians to hunt and fish on the reservation must come from the tribe itself.

The United States Court of Appeals in *Kimball v. Callahan*[135] interpreted certain provisions of the Klamath Termination Act of 1954[136] which gave the Klamath Indians the option of withdrawing from tribal membership and taking their interest in tribal property in cash, or retaining membership and an interest in the land while agreeing to participate in a land management program. Five Klamath Indians who elected to withdraw sought declaratory judgment as to their right to hunt and fish on their ancestral lands free of State regulation.[137] The State of Oregon asserted that non-member Indians were subject to State game regulations on lands no longer held in trust for the Reservation.[138] The Court of Appeals held that reservation lands sold to the United States were Indian country and the Indians retained the right to hunt and fish free of State regulation on both lands still held in trust as a reservation, as well as the reservation lands ceded to the United States to be held as forest lands.[139] The court did not intimate an opinion as to the treaty right to hunt and fish free of State regulation on lands that were ceded into private ownership.[140]

In *Quechan Tribe v. Rowe*[141] the United States Court of Appeals addressed the issue of tribal regulatory powers over on-reservation hunting

131. 12 Stat. 975 (1855).

132. 18 U.S.C. §1165 (1982) makes it a federal offense to hunt, fish, or trap on Indian country without tribal permission.

133. 364 F. Supp. at 997.

134. *Id.* at 1003.

135. 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974).

136. 25 U.S.C. §§564-564x (1982). Under this Act, land proportionate to the number of Indians who wished to remain in the tribe was transferred to be held in trust. The remaining reservation lands were sold to provide funds to pay the withdrawing Indians. The majority of the land sold was sold to the Federal Government to be held as forest land.

137. *Kimball*, 493 F.2d at 565.

138. *Id.* at 568.

139. *Id.*

140. *Id.* at 569 n.10.

141. 531 F.2d 408 (9th Cir. 1976).

and fishing by non-Indians. As an incident to its organization under the Indian Reorganization Act of 1934,[142] the Quechan Tribe of Indians adopted by-laws and ordinances relating to tribal control and regulation of on-reservation hunting and fishing. Three non-Indians were charged with violation of tribal hunting and fishing ordinances, as well as violation of 18 U.S.C. section 1165.[143] The State of California contested tribal authority over on-reservation hunting and fishing by non-Indians.[144] The United States Court of Appeals held that "[i]n the absence of treaty provisions or congressional pronouncements to the contrary, the tribe has the inherent power to exclude non-members from the reservation."[145] The court found that the tribe's express powers to govern its internal affairs[146] and to control hunting and fishing on the reservation supplemented the tribe's inherent power.[147] Although the tribe may regulate on-reservation hunting and fishing by non-Indians, however, the court found it doubtful that a tribal court would have criminal jurisdiction over a non-Indian, so as to try him for violations of tribal laws while on tribal lands.[148]

In the 1980 case, *Cheyenne-Arapaho Tribes v. Oklahoma*,[149] the Cheyenne-Arapaho Tribes sought an injunction against the State of Oklahoma to enjoin her from asserting jurisdiction over Indian treaty hunting and fishing rights as to lands within the reservation which were allotted to the Indians under the General Allotment Act of 1887.[150] Under the General Allotment Act parcels of reservation lands were allotted to the Indians, with the remaining land either ceded to non-Indian settlers or to the United States to be held in trust.[151] In interpreting the Act the United States Court of Appeals held that although the treaties[152] and Executive Order by which the reservation was established did not expressly reserve to the Indians the right to hunt and fish, such rights were inherent and were exclusively possessed by the Indians as to lands within the reservation.[153] The court also construed the term "Indian country" to include both the lands allotted to the Indians and those held in trust by the United States.[154] The court held that states have no authority over Indians in Indian country unless such authority is expressly conferred by Congress and that the abrogation

142. 48 Stat. 984, 25 U.S.C. §§461-479 (1982).
143. *See supra* note 132.
144. *Quechan*, 531 F.2d at 410.
145. *Id.* (citing Williams v. Lee, 358 U.S. at 219).
146. QUECHAN CONST. art. IV, § 17.
147. *Id.* at art. XI.
148. *Quechan*, 531 F.2d at 411 n.4.
149. 618 F.2d 665 (10th Cir. 1980), *appeal after remand*, 681 F.2d 705 (10th Cir. 1982).
150. 24 Stat. 388, *amended by* ch. 2348, 34 Stat. 182 (1906).
151. *Id.*
152. 14 Stat. 703 (1865); 15 Stat. 593 (1867).
153. *Cheyenne-Arapaho*, 618 F.2d at 668.
154. *Id.* at 669.

of treaty rights will not be lightly implied and can be accomplished only by clear and plain congressional action.[155] The court did not find that reservation lands ceded to non-Indians were a part of Indian country, and also failed to intimate whether the State could regulate non-Indians who hunt and fish on Indian country.

In *New Mexico v. Mescalero Apache Tribe*[156] the State of New Mexico sought to impose State hunting and fishing regulations on non-Indians who hunted and fished on the Mescalero Apache Reservation. The State conceded it had no jurisdiction over the hunting and fishing activities of Indians on the Reservation, but asserted that once the tribe chose to permit hunting and fishing by non-Indians, the non-Indians were subject to State regulation.[157] The State regulations were inconsistent with those imposed by the tribe. The United States Supreme Court held that tribal sovereignty under treaty included the right to regulate the use of tribal resources by members and non-members.[158] To allow concurrent State-Tribal jurisdiction would be to nullify the tribe's authority to regulate on-reservation hunting and fishing and to allow the State to wholly supplant tribal regulations.[159] An assertion of State authority must be viewed against the interference with the successful accomplishment of federal purposes.[160]

In *Lower Brule Sioux Tribe v. South Dakota*[161]the United States Court of Appeals utilized the principles of treaty construction in sifting through a series of land acquisitions through various Acts to determine the resulting rights of the Lower Brule Sioux as they pertain to hunting and fishing. The reservation boundaries of the Great Sioux Indian Reservation were established by the Fort Laramie Treaties of 1851 and 1868.[162] The Treaty of 1868 expressly reserved the right of the Sioux to hunt and fish within certain areas of the Great Sioux Reservation, including the area subject of this action.[163] By the Sioux Agreement of March 2, 1889,[164] Congress divided the Great Sioux Reservation into smaller ones, including the Lower Brule Reservation. Under the General Allotment Act of 1887,[165] tribal members received allotments of land from the reservation in trust and the government held surplus lands for eventual sale to white settlers. The Flood Control Act of 1944[166] eventually resulted in the acquisition

155. *Id.*
156. 462 U.S. 324 (1983).
157. *Id.*
158. *Id.* at 337.
159. *Id.* at 338.
160. *Id.* at 441.
161. 711 F.2d 809 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).
162. 11 Stat. 749 (1851); 15 Stat. 635 (1868).
163. *Lower Brule Sioux*, 711 F.2d at 809.
164. 25 Stat. 888 (1889).
165. 24 Stat. 388 (1887).
166. 58 Stat. 887 (1944) (codified as amended at 16 U.S.C. § 460(d) (1976)).

of tribal and trust lands from the Lower Brule Tribe for use as a site for the Fort Randall and Big Bend flood control projects. The Lower Brule Sioux Tribe asserted the exclusive right to control hunting and fishing in the areas appropriated for the flood control projects.[167] South Dakota claimed the statutes authorizing appropriation of the lands for the flood control projects diminished the Lower Brule Reservation to the extent of the land taken by the United States, thus abrogating the hunting and fishing rights guaranteed by treaty to the Lower Brule Sioux on the land taken.[168] Consequently, South Dakota had the vested right to exercise exclusive jurisdiction over hunting and fishing on the lands.[169]

In deciding the controversy the United States Court of Appeals held that "[a] federal treaty, statute, or agreement setting aside a reservation for the use and occupation of a tribe is necessarily preemptive of state jurisdiction over Indian hunting and fishing activity on the reservation."[170] Disestablishment can only occur if Congress unmistakenly intended such a result and such intent by Congress must be clear and must be expressed on the face of the Act, or be clear from the surrounding circumstances and legislative history.[171] Neither the Big Bend Act nor the Fort Randall Act disestablished the boundaries of the Lower Brule Sioux Reservation, and inquiry into the surrounding circumstances and legislative history of the Acts did not show a Congressional intent to abrogate the Indian's treaty reserved hunting and fishing rights.[172] Therefore, the Lower Brule Sioux retained jurisdiction over tribal hunting and fishing within the land in controversy. The case was remanded, however, for a determination of who possessed jurisdiction to regulate hunting and fishing by non-members of the tribe within the Fort Randall and Big Bend taking areas.[173]

Although the above cases all differ as to the treaties, subsequent Acts, facts, theories expounded and relief sought and granted, they do not differ radically in one thing: efforts at state regulation failed and Indian treaty rights, express or implied, prevailed. To summarize, the starting point for any inquiry into the hunting and fishing rights of Indians must be the treaty which established the reservation system and, in most cases, preserved the hunting and fishing rights. Absent mention of such rights in the treaty, an inquiry into the circumstances surrounding the making of the treaty, the customary practices of the Indians prior and subsequent to the treaty, the intent and understanding of the parties, and reliance on

167. *Lower Brule Sioux*, 711 F.2d at 812-13.
168. *Id.* at 815.
169. *Id.*
170. *Id.* at 814.
171. *Id.* at 815-16.
172. *Id.* at 821-22.
173. *Id.* at 827.

field notes and other documents during the course of negotiations, generally results in an inherent Indian right to hunt and fish. After one examines the treaty to determine if the right existed at all, one then looks to subsequent Acts, statutes, and agreements to determine if, from their very terms or by surrounding circumstances, they have diminished or abrogated the original rights as guaranteed by the treaty. Any intent on the part of Congress to alter treaty rights will not be lightly inferred. Indeed, such an intent must appear clear from the documents or circumstances themselves, and ambiguities will not be interpreted to the detriment of the Indians.

With treaties, statutes, Acts, and agreements interpreted to grant the Indians a right to hunt and fish, several consistencies emerge. When a treaty mentions that the right extends to "usual and accustomed places," it does not matter whether these places are on reservation lands, for the right also gives the Indians the right of access to these lands and waters. Although the right to hunt and fish on the lands and waters which are privately owned by non-Indians may be subject to state regulation, the right of access may not be quantified by the state. Furthermore, the right of access survives land title transfers and is a continuing right.

Indian country, by its very definition, encompasses lands contained within the original reservation that are either owned by the Indians or have been ceded to the government. Indian country does not include fee-patented lands, such as lands within the original reservation boundaries that were ceded to the United States and later sold to non-Indians. The Indians retain the right to hunt and fish the lands and waters within the original reservation boundaries that are Indian lands, or are ceded lands held by the United States, and they retain the right to do so free of state regulation. The Indians do not have the right to hunt and fish fee-patented lands within the original borders of the reservation which are owned by non-Indians free of state regulation, unless the right to do so is premised on the basis that such lands and waters are "usual and accustomed places." The Indians who hunt and fish on these fee-patented lands do so under the constraints of state regulation.

Once a tribe has, under the auspice of federal authority, adopted a system of tribal government and rules and regulations governing the taking of game on the reservation, lawful authority for non-members to hunt and fish on the reservation must come from the tribe. Although the tribe has inherent power to exclude non-Indians from the reservation, the tribal court does not have criminal jurisdiction over non-Indians violating tribal laws while on tribal lands. As will be more fully detailed in the following section, a state may have regulatory authority, in common with a tribe's regulatory authority, over non-Indians who hunt and fish on the reservation. Such a dual-jurisdictional situation will be allowed, however,

only if the state's regulatory authority is not inconsistent with tribal regulation and does not interfere with tribal sovereignty and the successful accomplishment of federal purposes.

3. State Regulatory Authority Over Treaty Hunting and Fishing Rights

The above section outlined cases in which state regulation of the Indian treaty right to hunt and fish was disallowed. This section of the Article will focus on those cases whereby the courts have allowed state regulation to prevail. Each of the leading cases is summarized and a careful reading of the court's application of the principles of treaty construction will reveal that although the holdings allow state regulation, the rationale is not inconsistent with the cases in the previous section whereby state regulation was disallowed.

In *Ward v. Race Horse,*[174] Race Horse, a member of the Bannock Tribe of Indians who resided on the Fort Hall Indian Reservation in Idaho, was convicted of killing seven elk in Uinta County, Wyoming, in violation of Wyoming's game regulations.[175] Race Horse contended he was immune from the Wyoming regulations because the treaty between the United States and the Bannock Tribe reserved the Bannock Tribe's "right to hunt on the unoccupied lands of the United States so long as the game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."[176]

In deciding the case the United States Supreme Court held that the treaty gave no implication of continuance, because by its very terms the treaty showed that the burden imposed on the Territory was perishable and intended to be of a limited duration.[177] The treaty was entered into prior to Wyoming's being admitted into statehood. To construe the treaty as affording hunting and fishing rights as to all unoccupied lands held in fee by the United States would be to render Wyoming and every other state bereft of regulatory power over unoccupied lands within their borders until such time as fee passed into the hands of private ownership.[178] Furthermore, the treaty right of Race Horse was repealed by implication due to the unreconcilable conflict between upholding the treaty rights and admitting Wyoming into the Union with all of the attendant powers of statehood as every other state so admitted.[179]

174. 163 U.S. 504 (1896).
175. 1895 Wyo. Sess. Laws ch. 98, p. 225.
176. 15 Stat. 673, art. IV (1868).
177. *Ward*, 163 U.S. at 514-15.
178. *Id.*
179. *Id.*

Kennedy v. Becker[180] involved three Seneca Indians who were spear fishing in a creek located off the Cattaraugus Indian Reservation when they were arrested for violation of a New York conservation law. Although the creek and adjacent lands were once a part of reservation land, title to the lands and creek had been ceded to a non-Indian.[181] The Indians reserved the right to hunt and fish upon the lands ceded and by the terms of the grant, these rights were to be exercised in common with the grantee, his heirs, and assigns.[182] The Indians claimed they were immune from state regulation because they had reserved their treaty rights to hunt and fish upon these lands.[183] The United States Supreme Court held that all who jointly enjoy the right to hunt and fish on the lands so ceded were subject to state regulations.[184] The Indians merely retained an easement giving them the exclusive right of access to the waters and lands ceded.[185]

In *Antoine v. Washington*[186] two Indians were convicted of the offenses of hunting and possession of deer during closed season in violation of Washington law.[187] The offenses occurred on unallotted non-Indian land in what was once the northern-half of the Colville Indian Reservation.[188] "The Colville Confederated Tribes ceded to the United States that northern half under a congressionally ratified and adopted agreement, dated May 9, 1891. Article 6 of that ratified agreement provided expressly that the 'right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise [be] abridged.'"[189] Defendants asserted that Congressional approval of the agreement retained and preserved for the tribe the exclusive, absolute, and unrestricted right to hunt and fish in the ceded portion of the reservation, thus limiting State governmental regulation of their federal rights, and precluding application of Washington's game laws.[190]

The United States Supreme Court held that the Supremacy Clause precluded application of State game laws as to the Indians, beneficiaries of the 1891 agreement, because Congress manifested no purpose of subjecting the rights conferred upon the Indians to state regulation, and because the unqualified ratification of the agreement made it binding upon affected States.[191] The ratifying legislation exempted the Indians from

180. 241 U.S. 556 (1916).
181. *Id.* at 560.
182. *Id.* at 559.
183. *Id.*
184. *Id.* at 562.
185. *Id.* at 562-64.
186. 420 U.S. 194 (1975).
187. WASH. REV. CODE §§ 77.16.020, 77.16.030 (1974).
188. *Antoine*, 420 U.S. at 196.
189. *Id.*
190. *Id.* at 196-97.
191. *Id.* at 201.

state control.[192] The State remained free to regulate non-Indian hunting and fishing rights in the ceded area, however, thus allowing a dual-sovereignty situation over the ceded lands so that Indians regulated Indians, and the State regulated non-Indians.[193]

The 1978 case, *Sac & Fox Tribe v. Licklider,*[194] involved members of the Sac and Fox Tribe of the Mississippi in Iowa who were arrested for alleged violations of Iowa's fish and game laws. The alleged violations occurred on the Tama Reservation, a tract of land occupied by the tribe.[195] The occupied land did not pass to the United States to be held in trust for the Indians by either treaty, statute, or Executive Order.[196] Instead, the Tama Reservation was tendered by the State of Iowa to the United States as trustee.[197] When conveying the land the State of Iowa expressly reserved jurisdiction over crimes against the laws of Iowa committed thereon.[198] In accepting the conveyance the United States accepted the lands subject to the limitations contained therein.[199] The issue to be decided was whether the Federal Government, through treaties and statutes, preempted Iowa's regulation of the tribe's hunting, fishing and trapping rights on the Tama reservation.[200]

In deciding this issue the United States Court of Appeals held that "[i]n order to create a reservation, it is not necessary that there should be a formal cession or a formal [A]ct setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes."[201] The Federal Government's actions pertaining to the manner and approach by which it cared for the tribe clearly showed that although not established by treaty, agreement, or statute, a de facto reservation existed, and the land located in Tama

192. *Id.* at 206.
193. *Id.*
194. 576 F.2d 145 (8th Cir. 1978), *cert. denied,* 439 U.S. 955 (1978).
195. *Id.*
196. *Id.*
197. *Id.*
198. Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act the service of any judicial process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon by said Indians or others, or of such crimes committed by said Indians in any part of this state.
1894-1897 Iowa Acts ch. 110.
199. That the United States hereby accepts and assumes jurisdiction over the Sac and Fox Indians of Tama County, in the State of Iowa, and of their lands in said State, as tendered to the United States by the act of the legislature of said State passed on the sixteenth day of January, eighteen hundred and ninety-six, subject to the limitations therein contained.
Act of June 10, 1896, ch. 398, 29 Stat. 321, 331 (1896).
200. *Sac & Fox*, 576 F.2d at 146-47.
201. *Id.* at 150 (citing Minnesota v. Hitchcock, 185 U.S. 373, 390 (1902)).

County and occupied by the tribe constituted an Indian reservation.[202] In 1896, however, Congress consented to Iowa's jurisdiction over crimes committed on the Tama tract by members of the tribe, and by the Act of June 30, 1948,[203] Congress granted jurisdiction generally to the State of Iowa over crimes committed by or against Indians on the Tama reservation, except for those crimes listed in the Federal Major Crimes Act.[204] Because a violation of Iowa's fish and game laws did not fall within the Federal Major Crimes Act, Congress recognized Iowa's jurisdiction to enforce its fish and game laws on the Tama reservation.[205]

In *United States v. Minnesota*[206] the United States District Court analyzed the effect that subsequent land cessions had on Indian hunting and fishing rights. Under the 1863 Treaty at the Old Crossing of the Red Lake River,[207] the Red Lake Band of Chippewa Indians ceded to the United States approximately 10 million of their originally inhabited 13 million acres. Although the treaty contained no mention of hunting and fishing rights, the transcript of negotiations with the band made it clear that the Indians could hunt and fish on the ceded land until it was settled.[208] Under the Nelson Act, the Red Lake Band in 1889 ceded to the United States about 2.4 million acres of the band's previously remaining 3 million acres.[209] A final land cession occurred in 1904, which reduced the size of the reservation to approximately 543,000 acres.[210] In 1934, approximately 160,000 acres were restored to tribal ownership.[211] Except as to the land restored to tribal ownership, the State of Minnesota had consis-

202. *Id.* at 149-50.

203. In 1948, Congress conferred concurrent criminal jurisdiction on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation located in Iowa. Act of June 30, 1948, ch. 759, 62 Stat. 1161 (1948).

204. 18 U.S.C. § 1153 (1982).

205. *Sac & Fox*, 576 F.2d at 152.

206. 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom.* Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980).

207. Treaty with the Chippewa Indians, Oct. 2, 1863, 13 Stat. 667 (1863).

208. *See* ALEXANDER RAMSEY, JOURNAL OF PROCEEDINGS CONNECTED WITH THE 1863 TREATY AT THE OLD CROSSING OF THE RED LAKE RIVER, at 8, 15, 27, 37-38, 47, 54 (1863), *cited in* United States v. Minnesota, 466 F. Supp. at 1383.

209. Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 (1889).

210. The Nelson Act authorized negotiations for the purchase of land from the Red Lake Band. Congress appointed a commission to conduct the negotiations and instructed it to obtain an agreement with the band for the cession and relinquishment in writing of all their title and interest in and to the lands the band agreed to sell. Upon approval by the President, any such agreement was to operate as a complete extinguishment of the Indian title to the ceded lands. Both the 1889 and 1904 cession agreements contained language that the band agreed to "grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all" of the lands so ceded. Neither the acts, the agreements, nor the transcripts of negotiations surrounding the 1889 and 1904 land cessions contained any reference to reserved hunting, fishing, trapping, or wild ricing rights in the ceded areas. *See* United States v. Minnesota, 466 F. Supp. at 1384.

211. 1934 Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

tently enforced its gaming laws against band members who hunted and fished in the areas ceded in 1889 and 1904.[212] The band members sought declaratory judgment that its members retained hunting, fishing, trapping, and wild ricing rights in the areas ceded to the Federal Government in 1889 and 1904 that had not been restored to tribal ownership.[213]

The United States District Court held that the cession documents contained language showing that the band relinquished all its rights, title, and interest in and to the ceded areas.[214] The court stated that such language is "'precisely suited' for the purpose of eliminating Indian title and conveying to the government all the band's interest in the ceded lands."[215] The right to hunt, fish, trap, and gather wild rice are considered mere incidents of Indian title, not rights separate and apart from such title; therefore, if the cessions extinguished Indian title to the ceded areas, they would also have the effect of abrogating any aboriginal hunting, fishing, trapping, and wild ricing rights.[216] Although the rights could have been granted back to the band in exchange for the land cessions, the court found nothing to indicate such a grant of rights were made.[217] The court reasoned that when a treaty contains express provisions that reserve Indian hunting and fishing rights in areas ceded by the treaty, such rights are normally only reserved until the land is required for settlement or until the Indians are required to remove themselves by the President.[218] Therefore, Indians exercising such hunting, fishing, trapping, and wild ricing rights on the ceded lands must do so in accordance with State regulations.

In *Confederated Tribes v. Washington*[219] the Court of Appeals considered the effect of joint tribal-state regulation as to hunting and fishing rights of non-Indians while on the Reservation. The Colville Indian Reservation was established by Presidential Executive Order in 1872.[220] The tribe established a governmental system and maintained a program to develop sport fishing and tourism on the reservation in an area known as Twin Lakes.[221] As part of the program the tribe stocked Twin Lakes with game fish and required persons using the lakes to purchase a tribal fishing license.[222] The tribe did not require state fishing licenses for fishing on the reservation.[223] A dispute over the right to regulate the Twin Lakes

212. United States v. Minnesota, 466 F. Supp. at 1384.
213. *Id.* at 1383.
214. *Id.* at 1385.
215. *Id.*
216. *Id.*
217. *Id.* at 1386.
218. *Id.*
219. 591 F.2d 89 (9th Cir. 1979).
220. *Id.* at 92.
221. *Id.* at 90.
222. *Id.*
223. *Id.*

fishing area arose when a State of Washington game warden entered the Colville Reservation, began checking the non-Indians fishing on Twin Lakes for State fishing licenses, and issued citations to non-Indians fishing on reservation waters for fishing without a state license.[224] The issue was whether the State of Washington could legally enforce its game regulations against non-Indians fishing on the reservation.[225]

The United States Court of Appeals reasoned that in creating its program of sports fishing the Colville Tribe explicitly acknowledged that state jurisdiction would not create an obstacle to effectuating the tribal program.[226] Such reasoning was evidenced by several factors. For example, the Tribal Hunting and Fishing Code specifies that where tribal law is more restrictive than state law that tribal law shall prevail. By negative inference the court reasoned that the Tribal Code did not specify that state law should never apply.[227] Moreover, several tribal enactments appeared to place their imprimatur on certain state restrictions. For example, resolutions of the tribal governing council provided that the state definition of fishable waters should limit tribal permits and that the tribal fishing season should be identical to that of the state.[228] Furthermore, the 1974 tribal fishing permit read in part that a state fishing permit was required in addition to the tribal permit.[229] The court concluded that the tribal council's own scheme permitted a situation of dual state-federal jurisdiction.[230] Therefore, the state rules and regulations were applicable to non-Indians hunting and fishing on the reservation. It is important to note that the State never asserted that it could lawfully authorize hunting or fishing practices by non-Indians that are prohibited by tribal regulation.[231]

In *Montana v. United States*[232] the United States Supreme Court addressed the issue of Indian tribal authority to regulate non-Indian hunting and fishing activities on non-Indian owned lands within reservation boundaries. The Crow Tribe of Montana sought to prohibit hunting and fishing within its reservation by anyone not a member of the tribe so as to prohibit hunting and fishing by non-members on lands within the reservation which

224. *Id.*
225. *Id.*
226. *Id.* at 92.
227. *See id.* at 91.
228. *Id.*
229. *Id.* at 92. The pertinent part of the tribal permit reads as follows:
IN ADDITION TO OUR PERMIT, THE STATE OF WASHINGTON REQUIRES STATE FISHING PERMITS TO FISH ON ALL LAKES, RIVERS AND STREAMS WITHIN THE EXTERIOR BOUNDARIES OF THE STATE OF WASHINGTON.
Id.
230. *Id.*
231. *Id.*
232. 450 U.S. 544 (1981), *reh'g denied*, 452 U.S. 911 (1981).

were owned in fee-simple by non-Indians. Montana sought to assert its authority to regulate hunting and fishing by non-Indians within the reservation.[233] The United States, as trustee for the tribe, intervened and sought a declaration requiring Montana to secure the tribe's permission before issuing hunting and fishing licenses for use within the reservation.[234] As sources of tribal regulatory power the tribe relied on two Crow treaties,[235] 18 U.S.C. section 1165, and inherent Indian sovereignty.[236]

The United States Supreme Court held that neither the 1851 nor the 1868 Fort Laramie Treaties suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by non-members on non-Indian lands.[237] The federal trespass statute, 18 U.S.C. section 1165, cannot be said to augment tribal regulatory powers over non-Indian land, for the legislative history of the statute shows that fee-patented lands were intended to be excluded from the scope of the statute.[238] It is apparent that inherent Indian sovereignty did not confer upon the tribe the regulatory powers it sought. Inherent powers extend to the power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, to prescribe rules of inheritance for members, and to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when such conduct threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[239] Because non-Indian hunters and fishermen on non-Indian fee lands do not enter into any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction, the Crow Tribe has no power to regulate such activities and the non-members exercising their right to hunt and fish on non-Indian fee patented lands within the boundaries of the reservation are subject to the regulatory powers of the State of Montana.[240]

The United States Court of Appeals, in *White Earth Band v. Alexander,*[241] was faced with determining the effect of land cessions and restoration of lands to reservation status on previously existing hunting and fishing rights when the land cession documents were executed absent a treaty and rights were not expressly retained. The White Earth Reservation was established by treaty in 1867[242] and consisted of thirty-six

233. *Id.* at 550.
234. *Id.*
235. First Treaty of Fort Laramie of 1851, 11 Stat. 749. *See* C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 594 (1904). Second Treaty of Fort Laramie of 1868, 15 Stat. 649.
236. *Montana*, 450 U.S. at 564.
237. *Id.* at 560.
238. *Id.* at 561-62.
239. *Id.* at 565-66.
240. *Id.*
241. 683 F.2d 1129 (8th Cir. 1982), *cert. denied*, 459 U.S. 1070 (1982).
242. Treaty with the Chippewa Indians, March 19, 1867, 16 Stat. 719 (1869).

townships. Four northeastern townships of the original reservation were ceded to the United States by an agreement[243] executed between the band and the United States pursuant to the Nelson Act.[244] About 2,900 of the ceded 92,000 acres in the four townships were returned to trust status after the enactment of the Indian Reorganization Act.[245] State of Minnesota officials had made several arrests of band members for fishing and hunting violations within the White Earth Reservation.[246] The band filed suit seeking a declaration that its members and members of the Minnesota Chippewa Tribe were entitled to hunt, fish, trap, and gather wild rice without any interference, regulation, control, or licensing by the State, and further sought a declaration that the band and tribe had jurisdiction to regulate these activities by non-members within the reservation.[247]

The United States Court of Appeals held that the terms by which the ceded land was conveyed, pursuant to the Nelson Act, did not act to disestablish the reservation but did act to relinquish all tribal interests in the four northeastern townships.[248] Only a small portion of these four townships was restored to reservation status as a result of the Indian Reorganization Act, with no allotments of land to the Indians made in any of the four townships.[249] Because the four townships were ceded, with no tribal treaty or Indian interest in the ceded land specifically retained, exclusive Indian hunting and fishing rights no longer existed in the area.[250] Furthermore, state regulation over non-members on trust lands located within the reservation was not preempted by federal law, nor did it impinge upon the band's right of self government.[251] In this situation, non-members who hunted and fished on trust lands within the Reservation were subject to licensing regulations by both the band and the State.[252]

To summarize the foregoing cases and to better understand why state regulation at times preempts federal or tribal regulation and at other times acts in concert with it, one must look not only to the wording of a treaty to discern Indian rights to hunt and fish, but also to the cession documents

243. The agreement was executed July 20, 1889.

244. Ch. 24, 25 Stat. 642 (1889); I Kappler 301. The Act was to effect a gradual transition of assimilating Indians into non-Indian society by breaking up the reservation system. *See* H. R. REP. No. 789, 50th Cong., 1st Sess. 6 (1888). The agreement provided that the band did "grant, cede, relinquish and convey to the United States all [their] right, title, interest in and to all and so much of said . . . [r]eservation as is not embraced in the following described boundaries." H.R. EXEC. DOC. No. 247; *White Earth Band*, 683 F.2d at 1135, n.n.5-6.

245. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. § 476 (1982)).

246. *White Earth Band*, 683 F.2d at 1132.

247. *Id.*

248. *Id.* at 1135.

249. *Id.*

250. *Id.* at 1138.

251. *Id.* at 1137.

252. *See id.*

relating to Indian conveyancing of aboriginal land to the United States. These documents affect certain rights of Indians, not only as they pertain to hunting and fishing, but as they pertain to tribal-federal regulation, or the preemption of such regulation by state law. Generally, when reservation land is later ceded to the United States, the Indians retain the right to hunt and fish the lands and waters so ceded free of state regulation. However, a state is free to regulate non-Indian hunting and fishing on the same land.

It is possible for the Federal Government to relinquish certain regulatory rights over ceded lands to the state within whose borders the land lies, but such an intent must be clear from the face of the cession document or from the surrounding circumstances. When cession documents convey all right, title, and interest to the United States in the lands so ceded, such a conveyance includes the Indians' right to hunt, fish, and trap the ceded lands free of state regulation. This is because the Indians' right to hunt, fish, and trap is an incident of title to the land, and is not a right separate and apart from such title. Therefore, a cession agreement which serves to completely sever and extinguish Indian title to the land also abrogates Indian treaty rights to hunt and fish the land.

When a treaty contains an express reservation of the right to hunt and fish in areas ceded by the treaty but not retained within the borders of a reservation, such rights to hunt and fish free of state regulation are reserved only until the ceded areas are required for settlement, or until Congressional or Presidential Act or Order requires that Indians relinquish use of such areas. Such a reservation of rights is distinguished from the reserved right of access to hunt and fish at usual and accustomed places, for such a reservation of the right of access is continuous and grants to the Indians only an easement giving an exclusive right of access to such areas. Once upon the areas, the Indians exercising such rights are subject to state regulation.

When a tribe does not choose to preserve its treaty right of tribal self government and the right to regulate hunting and fishing among Indians and non-Indians when on treaty lands, the tribe, by its inherent sovereignty, retains an inherent right to regulate such activities by Indians but relinquishes the right to exclusive regulation of such rights by non-Indians, thus rendering non-Indians subject to a dual system of state and tribal regulation. When an Indian tribe preserves its right to regulate both Indian and non-Indian hunting and fishing on the reservation but acknowledges that state regulation will not present a barrier to effectuating tribal progress or tribal sovereignty and the two can regulate without conflict, it imposes a dual state-tribal regulatory system upon the non-Indians. Indians, however, will be subject only to the tribal regulatory scheme. An Indian tribe does not have the power to regulate hunting and

fishing activities of non-Indians while on non-Indian fee-patented lands within the reservation.

C. *The Conservation Cases*

Disputes over the hunting and fishing rights of the North American Indian have been on-going for many years. Particularly, challenges to such rights frequently arise in the north-western states where Indian treaty fishing interferes and competes with commercialized fishing for such economically valuable fish as the steelhead trout, and more particularly, the salmon. In fairly recent years the controversy has taken on new significance because the availability of such fish has been diminishing, and with such a dwindling resource, tensions have mounted, as well as the demand and price on such a limited supply of a natural resource.

Fish, of course, are not the only well-springs for criticism of the Indian and his so called "super citizen" rights to hunt and fish free of state regulation. Ted Williams, in his critical essay entitled *Don't Blame the Indians*,[253] attempted to point out several species that have fallen prey to the non-conservationist Indian who purportedly feels his treaty rights to hunt and fish have given him the right to overkill. Despite the criticisms that the American Indian is above regulation and reproach, both state and federal conservation statutes have been held to apply to Indian and non-Indian alike.

One of the earliest conservation cases was *Tulee v. Washington*.[254] Tulee, a member of the Yakima Tribe, was convicted in a Washington court on a charge of catching salmon with a net, without first having obtained a license as required by state law.[255] Tulee challenged the validity of the Washington statute, as applied to him, on the ground that it was repugnant to a 1859 treaty[256] between the Yakima Indians and the United States.[257] Article III of the treaty gave Indians the right to take fish at all usual and accustomed places and further secured the privilege of hunting on open and unclaimed land.[258] The State did not claim regulatory power

253. T. WILLIAMS, DON'T BLAME THE INDIANS: NATIVE AMERICANS & THE MECHANIZED DESTRUCTION OF FISH & WILDLIFE (1986).

254. 315 U.S. 681 (1942).

255. *Id.*

256. 12 Stat. 951 (1855).

257. *Tulee*, 315 U.S. at 682.

258. The exclusive right of the taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

12 Stat. 951, art. III (1955).

over fishing by the Indians on the reservation, but asserted that its regulatory powers may be exercised at places like the scene of the arrest, which was within the territory originally ceded by the Yakimas, but beyond the boundaries of the reservation.[259]

The United States Supreme Court held that Article III of the treaty "conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area."[260] This right also extended to places outside the ceded area. However, "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."[261] The imposition of license fees is not an indispensable element to the effectiveness of a state conservation program.[262]

State conservation related regulatory powers were likewise held to apply in the 1969 case, *Sohappy v. Smith*.[263] Plaintiffs in the case were fourteen individual members of the Confederated Tribes and Bands of the Yakima Indian Nation.[264] In 1855 the United States negotiated separate treaties with the tribes.[265] Each treaty secured to the tribes "'the right of taking fish at all usual and accustomed places in common with citizens of the Territory.'"[266] Plaintiffs sought a decree defining their treaty right to take fish at all usual and accustomed places on the Columbia River and the manner and extent by which the State of Oregon may regulate Indian fishing.[267]

The United States District Court determined that the rights at issue were the non-exclusive off-reservation fishing rights secured by the various treaties.[268] "[The] state's police power gives it adequate authority to regulate the exercise of the treaty-secured Indian off-reservation fishing rights, provided its regulations meet [certain standards]."[269] When a state "is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the

259. *Tulee*, 315 U.S. at 683.
260. *Id.* at 684.
261. *Id.*
262. *See id.*
263. 302 F. Supp. 899 (D. Or. 1969).
264. The tribes involved were the Walla Walla, Cayuse, Umatilla, Nez Perce, Warm Springs, and the Yakimas.
265. Treaty with the Yakima Tribe, June 9, 1855, 12 Stat. 951; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945; Treaty with the Nez Perce Tribe, June 11, 1855, 12 Stat. 957.
266. *Sohappy*, 302 F. Supp. at 904.
267. *Id.* at 903-904.
268. *Id.* at 906.
269. *Id.* at 912.

management objectives and the regulatory means of achieving them [as it would have if it were regulating the behavior of non-Indians]. The state may not qualify the federal right by subordinating it to some other state objective or policy."[270] The state may assert its police power only to the extent necessary to prevent the exercise of the federal right in a manner that will imperil the continued existence of the fish resource.[271] "To prove necessity, the state must show there is a need to limit the taking of fish and that the particular regulation sought to be imposed upon the exercise of the treaty right is necessary to the accomplishment of the needed limitation."[272]

The State may use its police power to regulate and restrict, not the right of taking fish, but the time and manner of exercising the federal right; however, the "state's restriction on the time and manner of fishing by treaty Indians must not discriminate against the Indians,"[273] and 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."[274] Finally, "[t]he restrictions on the exercise of the treaty right must be expressed with such particularity that the Indian can know in advance of his actions precisely the extent of the restriction which the state has found to be necessary for conservation."[275]

Puyallup v. Washington Game Dep't[276] is one of the most famous of all the conservation cases. The *Puyallup* case was heard by the United States Supreme Court three times.[277] The facts pertaining to the first case, *Puyallup I*, have persisted throughout the trilogy. The facts involved a judicial construction of the Treaty of Medicine Creek,[278] made with the Puyallup and Nisqually Indians in 1854, and the constitutionality of certain conservation measures adopted by the State of Washington which allegedly impinged upon the treaty rights. The objects of the controversy were two types of anadromous fish[279] that hatch in the fresh water of the

270. *Id.* at 908.
271. *Id.*
272. *Id.*
273. *Id.* at 910.
274. *Id.* at 911.
275. *Id.*
276. 433 U.S. 165 (1977).
277. Puyallup Tribe v. Washington Game Dep't, 391 U.S. 392 (1967), *reh'g denied*, 393 U.S. 898 (1967) (Puyallup I); Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II); Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977) (Puyallup III).
278. Treaty with Nisquallys, Dec. 26, 1854, 10 Stat. 1132.
279. Anadromous fish hatch in fresh water, migrate to the ocean where they are reared and reach mature size, and eventually complete their life cycle by returning to the fresh water place of their origin to spawn. The regular habits of anadromous fish make their runs predictable. This predictability makes it possible for both fishermen and regulators to forecast and to control the number of fish that will be caught or harvested. *See generally Puyallup I*, 391 U.S. 392 (1967).

Puyallup and Nisqually Rivers—steelhead trout and salmon.[280] Both the Puyallup and Nisqually Indians used set nets in fishing for the steelhead and salmon.[281] The Indians fished for both personal needs and commercially. The nets used were illegal under Washington law.[282] This prohibition was directly related to the state's conservation efforts and the desire to ensure a perpetual supply of the fish.

In holding that state law applied, the United States Supreme Court looked to the wording of the treaty, the circumstances surrounding the treaty, and the accustomed mode and manner of the Indians in exercising their treaty right subsequent to the treaty. The Court found that although the treaty gave the Indians the right to fish at all usual and accustomed places, and that commercial fishing was customary at the time of the treaty, the treaty was silent as to the manner in which fishing may be accomplished.[283] Therefore, since the treaty was silent as to the mode of fishing, the right of the Indians may be regulated by the State.[284] The right to fish at all the usual and accustomed places could not be qualified by the State, but "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."[285] Whether the prohibition of the use of set nets in the fresh waters of the Puyallup and Nisqually Rivers was a reasonable and necessary conservation measure was left for determination by the trial court when the Supreme Court remanded the case for further findings.

Puyallup II and *Puyallup III* further refined and developed the Supreme Court's holding in *Puyallup I*. *Puyallup II* arose because the State's Department of Game insisted on and enforced a total prohibition of net fishing for steelhead trout.[286] It was held that such a ban, when applied

280. These fish "come in from the ocean, pass through the salt water of Puget Sound, enter the fresh waters at the mouths of rivers, and go up these rivers to spawn. The adult salmon die after spawning, but not necessarily the steelhead. In time the fry return to the ocean and start the cycle anew." *Id.* at 395.

281. The Puyallup Indians used set nets to fish in both the Bay and the mouth of the Puyallup River, as well as areas upstream. The Nisqually Indians used set nets to fish in the fresh waters of the Nisqually River. *Id.* at 396.

282. The State of Washington required that a fishing license be purchased. WASH. REV. CODE §§ 75.28.010—.28.380; §§ 77.32.005—.32.280. Steelhead trout were to be taken only by hook, and not commercially. Wash. Dept. of Game, Perm. Reg. No. 34 (1964). Salmon were to be taken commercially with nets of a certain type, and only in certain areas. WASH. REV. CODE §§ 75.12.140, 75.12.010. Set nets or fixed appliances were barred in any waters of the State for the taking of steelhead or salmon. WASH. REV. CODE § 75.12.060. Monofilament gill net webbing was likewise barred. WASH. REV. CODE § 75.12.280. *Puyallup I*, 391 U.S. at 396 n.n.4-8.

283. *Puyallup I*, 391 U.S. at 398.

284. *Id.*

285. *Id.*

286. *Puyallup II*, 414 U.S. at 48-49

to the Indians, resulted in discrimination under the treaty.[287] The case was remanded with the directive that the Washington State Court devise a formula pursuant to which the steelhead catch could be fairly apportioned between Indian net fishing and non-Indian sport fishing.[288] *Puyallup III* found the Indians, under the doctrine of sovereign immunity, asserting the right to exclusive control of the steelhead run while the steelhead passed through the reservation on its way upstream to complete its spawning cycle.[289] The Court rejected such an assertion and stated that the State's chief concern was the total number of steelhead netted during each season.[290] The Court also noted that the State had attempted to encourage and incorporate tribal participation in supplying and obtaining information on the availability and abundance of steelhead so as to recommend a proper allocation of Indian-non-Indian catch, as well as enlisting the tribe's aid in enforcement against individuals who net fished after allowable limits had been reached.[291] The Court found the Indians were not voluntarily cooperating with the State in its efforts to implement a workable conservation program and also reminded the State to accord full respect to the tribe's right to participate in the proceedings without treating such participation as qualifying the tribe's right to a claim of sovereign immunity.[292]

In *Washington v. Fishing Vessel Ass'n*[293] the United States Supreme Court was forced to interpret the character of a treaty "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory,"[294] and the impact that a need for state regulation for conservation purposes had on the right. In 1854 and 1855 the United States entered into a series of treaties with Indian tribes in what is now the State of Washington.[295] At that time, the salmon and steelhead were plentiful and there was no indication that such a resource would ever become scarce. The commercial exploitation of salmon and steelhead in the Washington State area eventually resulted in a dwindling supply of fish, however, and this scarce natural resource made the interpretation of the Indian's treaty right to take fish a critical one.[296] The

287. *Id.*
288. *Id.*
289. *Puyallup III*, 433 U.S. at 176-77.
290. *Id.* at 177-78.
291. *Id.* at 178.
292. *Id.* at 177-78.
293. 443 U.S. 658 (1979), *modified*, Washington v. United States, 444 U.S. 816 (1979).
294. 10 Stat. 1133 (1854).
295. Treaty with Nisquallys, Dec. 26, 1854, 10 Stat. 1132; Treaty with the Dwámish Indians, Jan. 22, 1855, 12 Stat. 927; Treaty with the S'Klallams, Jan. 26, 1855, 12 Stat. 933; Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951; and Treaty with the Qui-nai-elts, July 1, 1855, Jan. 25, 1856, 12 Stat. 971.
296. *Fishing Vessel Ass'n*, 443 U.S. at 669.

tribes contended that the treaties had reserved a pre-existing right to as many fish as their commercial and sustenance needs dictated. Although the state agencies involved differed over the percentage of harvestable fish to which the Indians should be entitled, they all recognized the Indians' right of access over private lands to their usual and accustomed fishing grounds, as well as exemption from the payment of state fishing license fees.[297]

The litigation also properly focused on judicial construction of the effects of an agreement entered into between Canada and the United States in 1930.[298] By this agreement, the yearly catch of Fraser River salmon should be equally divided between Canadian and American fishermen.[299] The Fraser River salmon run passed through certain "usual and accustomed" places of fishing under the tribe's treaties. The Indians claimed a share of these runs and the State argued that the agreement between Canada and the United States pre-empted the tribe's treaty rights with respect to the sockeye and pink salmon runs on the Frasier River.[300]

The United States Supreme Court held in favor of state regulation.[301] In so doing, the Court looked not only to the language of the treaties, but also to surrounding circumstances pertaining to the making of the treaties. It discerned that the language of the treaties which secured the "right of taking fish in common with all citizens of the Territory" secured to the Indians the right to harvest a share of each run of anadromous fish that pass through tribal fishing areas.[302] Although the Court allowed state regulation for conservation purposes, the Court devised a system whereby an equitable measure of the right to take fish would be apportioned between Indian and non-Indian fishermen.[303] Finally, the Court found that the Canada-United States agreement did not pre-empt the Indians fishing rights under the treaties with respect to the Fraser River salmon runs passing through certain "usual and accustomed" fishing places of the tribes.[304]

297. *Id.* at 670-71.

298. Convention of May 26, 1930, 50 Stat. 1355, *amended by* 8 U.S.T. 1058 (1957).

299. To implement this agreement, the two Governments established the International Pacific Salmon Fisheries Commission. Each year it is the Commission's responsibility to propose regulations to govern the time, manner, and number of the catch by the fisherman of the two countries. *Fishing Vessel Ass'n*, 443 U.S. at 689.

300. *Id.* at 689-90.

301. *Id.*

302. *Id.*

303. The Court found this equitable measure by dividing the harvestable portion of each run that passed through a tribal treaty fishing place into approximately equal treaty and non-treaty shares. The treaty share was to include fish taken by the Indians on the reservation as well as fish caught for ceremonial and sustenance needs, and should be reduced if tribal needs may be satisfied by a lesser amount. *Id.* at 685-89.

304. *Id.* at 689-92.

Although of a different nature and species, the United States Supreme Court in *United States v. Dion*[305] decided yet another hotly contested conservationist-Indian treaty right issue. Dion, a member of the Yankton Sioux Tribe, was convicted of shooting four bald eagles on the Yankton Sioux Reservation in South Dakota in violation of the Endangered Species Act,[306] and was also convicted of selling carcasses and parts of eagles and other birds in violation of the Eagle Protection Act and the Migratory Bird Treaty Act.[307] Dion contended that members of the Yankton Sioux Tribe had a treaty right to hunt bald and golden eagles within the Yankton Reservation and that the Eagle Protection Act and Endangered Species Act did not abrogate this treaty right.[308]

After looking at the treaty under which the Yankton Reservation was established[309] the United States Supreme Court held that the treaty did not place any restriction on the Yankton's hunting rights on reservation land.[310] The Court then turned to the subsequent and applicable Acts to determine if there was a Congressional intent to abrogate certain of the Yankton Treaty rights. The Court found that the Eagle Protection Act strongly suggested a Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles, for not only did the Act fail to exempt Indians from the coverage of the statute, it expressly authorized the Secretary to issue permits to Indians where appropriate.[311] Furthermore, the legislative history of the statute expressly noticed a concern to provide an exception to the Act so as to allow Indians to continue ancient customs and ceremonies that were of deep religious or emotional significance.[312] Finally, after passage of the statutes, the Interior Department adopted regulations authorizing permits to be issued only to Indians who were authentic, bona fide practitioners of such religious and ceremonial practices.[313] The Court upheld the convictions.

The need to protect endangered species of wildlife from over exploitation and certain extinction has resulted in the modification of certain treaty rights of Indians. When a tribe has the treaty right to hunt and fish in "usual and customary places," such a right of access, although not generally subject to state regulation, may become subject to state regulation because of the overwhelming state interest in conserving a species

305. 476 U.S. 734 (1986).
306. 87 Stat. 884 (1973), *amended by* 16 U.S.C. § 1531 (1982) et seq.
307. Ch. 128, 40 Stat. 755 (1918), *amended by* 16 U.S.C. § 703 (1982) et seq.
308. *Dion*, 476 U.S. at 745.
309. Treaty with the Yancton [sic] Sioux, Apr. 19, 1858, 11 Stat. 743.
310. *Dion*, 476 U.S. at 737.
311. *Id.* at 740.
312. *Id.* at 740-41.
313. 28 Fed. Reg. 976 (1963).

unique to that locale. State regulations imposed must meet certain standards, however. The state must first prove necessity, and once it shows the need to limit the taking of a particular species, the state must show that the regulation sought to be imposed is necessary to accomplish the needed limitation. The state may regulate the time and manner of the exercise of Indian treaty hunting and fishing rights, but only to the extent necessary for conservation. The regulations may not discriminate against the Indians, and in legislating, so as to prevent discrimination, the states may allow Indians to hunt and fish by means not available to non-Indians. Any restriction on an Indian's treaty right to hunt and fish must be clear so as to provide the Indians with adequate notice of the restrictions.

IV. CONCLUSION

In recent years conservationists, sportsmen, wildlife lovers, and Indian haters have all come to, in one way or another, criticize the American Indian by referring to him as a "super citizen" with "superior rights" as compared to the rest of the American citizenry. For countless millenniums, Indians have enjoyed hunting and fishing rights not only for subsistence, but for cultural, social, and spiritual reasons as well. The strongest accusation leveled at the Indians is that they, by the exercise of their "superior rights," have proceeded to butcher and overkill American wildlife with vigor. Indeed, stories of Eskimos who hunt endangered species of whales with bombs, killing them just to leave their bodies to rot, stories of headless walruses and skinless polar bears, stories of eagles killed by the hundreds, are not uncommon. These stories shock the consciousness and leave the reader angry at the super-citizens who exercise their superior rights by killing endangered species needlessly and wantonly. But are these stories portraying the true picture of the native American Indian exercising his right to hunt and fish the lands and waters that his forefathers hunted and fished? Or are we only seeing a small and distorted view that really encompasses a minority of those afforded "superior" rights?

Such stories are common. What is not common, however, is for one to understand that the right to hunt and fish is a right that pre-dates ideas of conservation. When man first walked the Bering Strait, the lure of game brought him to eventually settle this land. The native American Indians depended on game for more than just subsistence. Man encountered wildlife and communed with it. Wildlife was revered and afforded many time-honored and time-proven rituals, customs, and taboos. Man was at one with Nature, and the beasts of Nature were people, too. For thousands of years their systems served them well, and as long as the Indians complied with custom, ritual, and tradition, Nature's bounty surrendered itself up to mankind. Then came the Europeans, bringing

with them disease and desecration for all that the Indian held sacred. Suddenly, a way of life that had worked for thousands of years was no longer working. Not only did the white man desecrate the Indian's way of life, but white society did not make an honest attempt to understand the ways of the Indians.

How far have we come in attempting to understand why American Indians continue to fight for some form of preservation of their prior way of life? The Indians are people who were stripped of their native lands in exchange for a much smaller parcel upon which to live. They were promised that they could hunt, fish, trap, and gather wild rice as they had done for years. How can we as a society understand why they continue to fight for the rights they were promised? Indeed, maybe some Indians are still at war with their animal brethren's enangered spirits, but perhaps others seek to retain and exercise their aboriginal hunting and fishing rights for reasons of the spirit, reasons we shall never fully understand.