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WHIGS AND HUNTERS:
INDIAN TRIBAL RIGHTS
IN THE NATIONAL FORESTS

Robert A. Williams, Jr.

Professor of Law and American Indian Studies

University of Arizona

THE NATIONAL FOREST MANAGEMENT ACT
IN A CHANGING SOCIETY, 1976-1996

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Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado

Whigs and Hunters: Indian Tribal Rights in the National Forests

by Robert A. Williams, Jr.

I. Summary.

E.P. Thompson's *Whigs and Hunters: The Origin of the Black Act* (1975) is a classic of the modern historical canon. In this influential book on eighteenth century British cultural history, Thompson examines the notorious Black Act of 1723, which introduced the death penalty for such trivial offenses under England's forest laws as deer stalking in disguise, cutting down young trees, and writing threatening letters.

What makes *Whigs and Hunters* such an important contribution to twentieth century historiography is its illustration of Thompson's central thesis that the "essential precondition for the effectiveness of law...is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just."

Under this test, Thompson found that the eighteenth century Whig rulers of England, in enforcing the Black Act, violated their nation's great constitutional tradition of the rule of law. In his famous concluding chapter, Thompson reprises for the reader what his study has shown in painful detail; a "political oligarchy inventing callous and oppressive laws to serve its own interests....judges who...were subject to political influence, whose sense of justice was humbug, and whose interpretation of the laws served only to enlarge their inherent class bias. Indeed... this study has shown that for

many of England's governing elite the rules of law were a nuisance, to be manipulated and bent in what ways they could."

For an Indian law scholar who is familiar with history and the interesting cycles it occasionally generates, Thompson's famous book on the English forest laws suggests a most useful paradigm for evaluating the effectiveness of our nation's laws as applied to Indian rights in the national forests. First, Thompson's book looks at the eighteenth century Black Act against the backdrop of competing interests in the forests, and the unique set of legal claims and sense of justice engendered by ancient customary practice and written statutory and common law. In terms of modern-day Indian rights in the national forests of the United States, a unique set of legal interests similarly arise from ancient aboriginal customary uses, claims, and practices, and by confirmatory written treaty documents, congressional legislation, and judicial decision.

Second, Thompson in *Whigs and Hunters* shows us how an obscure set of laws on the management of the English forests can shed light on the values and culture of an entire people and its era. For the preservation of a few head of deer to hunt and chase, England's Whig rulers were willing to execute individuals living sometimes in desperate conditions of poverty and powerlessness for exercising what they sincerely regarded as their natural rights. Similarly, the ways in which the United States federal government manages the national forests show us a great deal about the values and culture of our present age. We as a society have been willing to violate the treaty rights and the most basic human rights of cultural survival belonging to Indian tribal peoples to benefit the powerful, and usually monied special interests that have historically controlled the management of our national forests.

II. Whigs and Hunters: The Paradigm Story

Thompson's basic story in his book is that in the early eighteenth century, the Whig rulers of England enacted the Black Act and its oppressive listing of petty crimes punished as capital offenses as a reaction to the increasingly strident claims of right in the royal forests asserted by the "loose and disorderly set of people" in the forest-supported communities. (*Id.*, at 197). The foresters asserted ancient customary rights, written and unwritten, that they claimed, on the basis of natural law and justice, trumped any rights that might be claimed by the superior sovereign in the forests of England. Ultimately, Thompson concludes, the Black Act was not effective in protecting the deer in the forests because it was so strongly resisted by the foresters. A long series of petty, but annoying, agrarian guerilla wars between Whigs and Hunters characterize the period that followed the Black Act's passage. Thus, one historical lesson to draw from this story is that a society that seeks to govern itself by the rule of law is probably failing at the task if its most disempowered members believe that the law being applied to them is fundamentally unjust.

III. Whigs and Hunters in the National Forests

Applying my paradigm story to Indian rights in the national forests, it should be obvious that the Whigs are the special interests and federal managers who have historically controlled the management of the forests. The Hunters, of course, are the Indians, who claim ancient customary rights, confirmed by treaty, statute and case law, to the forests. To understand why Indians believe that these rights trump the special interests that historically have controlled national forest policy, it is important to grasp the basic fundamental principles governing Indian rights in United States law.

IV. Indian Rights and United States Law

Indian rights under United States law are governed by a special area of the law, Federal Indian Law. Under principles of Federal Indian Law, the United States, by virtue of the Doctrine of Discovery, a medieval, feudal doctrine that regulated European colonizing activities in non-European parts of the world, holds superior title to the lands aboriginally occupied by American Indian Tribes. Indians have a right of occupancy to these lands until the United States acts to extinguish Indian rights in the land, by treaty, conquest, or other means.

In most of the historically documented instances, the United States chose to extinguish the Indian right of occupancy through treaties. Territories reserved to the tribes under the treaties were to remain under tribal control. Oftentimes, the treaties reserved to tribes certain rights in ceded lands and resources outside the boundaries of the reservation. Even more often, tribes did not forget the ancient and customary uses attached to all their aboriginally held lands, whether on or off the reservation, particularly when confirmed by treaty, statute, or court decision. These uses were often the ones most essential to the tribe's cultural and even physical survival.

Under principles of modern Federal Indian law, the United States holds a trust responsibility to Indian tribes whenever its actions affect the legal rights of tribes in the national forests. Under emerging principles of modern human rights law, the United States is bound to manage the national forests to protect, rather than destroy, Indian cultural survival.

V. Applying the Paradigm

Indian tribes assert many types of important rights in the national forests. I want to focus on some of the most important ones: aboriginal rights to territory and resources in the forests; treaty-based rights to territory and resources on off-reservation national forest lands, and ancient customary use rights that sustain their cultural survival.

Through the case studies presented in this section of the talk, we should be able to learn something useful about the effectiveness of United States law in protecting Indian rights in the national forests. The case studies that I will present include:

- The Tee Hit Ton Indians and the Denial of Aboriginal Title in National Forest Lands;
- The Klamath Indians and Termination of Tribal Reserved Rights in National Forest Lands;
- The Crow Indians and Extinguishment of Off-Reservation Tribal Hunting Rights in National Forest Lands;
- The Yurok Indians and the Denial of First Amendment Protection for Indian Religious Rights in National Forest Lands.

VI. Concluding Remarks

The paradigm story of Whigs and Hunters helps us understand these case studies as opportunities to assess the effectiveness of our law in protecting and upholding the unique set of rights based on history, custom, and law belonging to Indians in the national forests. Ways to improve our present laws and policies to achieve justice are also illuminated by this paradigm.

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