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Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest

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WHERE DO THE BUFFALO ROAM? DETERMINING THE SCOPE OF AMERICAN INDIAN OFF-RESERVATION HUNTING RIGHTS IN THE PACIFIC NORTHWEST

Abstract: Courts have failed to develop a uniform test to determine the extent of Indian off-reservation hunting rights in the Pacific Northwest. Though the language guaranteeing these rights is consistent from treaty to treaty, analysis of this language varies widely from court to court. The United States Supreme Court employs three well-founded canons of construction in its interpretations of Indian treaties. These same principles should be applied by lower courts to determine the extent of off-reservation hunting rights. Consistent use of accepted canons of treaty construction would add much certainty to an area of law plagued by uncertainty and controversy.

Indian[1] off-reservation hunting rights complicate state game regulation efforts and are a source of great antagonism between non-natives and Indians.[2] Though hunting is not as economically significant as fishing for Indian tribes of the salmon-rich Pacific Northwest, off-reservation hunting rights are critical to tribal religious practices and important as a means of sustenance for individual tribal members.[3] The recognition and regulation of these rights poses jurisdictional problems that underscore the delicate relationships between tribes, states, and the federal government.

This Comment examines the various tests that courts have used to determine the extent of treaty-based off-reservation hunting rights in the Pacific Northwest, and the methods by which these rights are presently regulated. Specifically, the discussion focuses on the phrases "open and unclaimed" and "unoccupied lands of the United States," the two phrases by which many Northwest tribes reserved hunting rights on off-reservation lands in their treaties with the federal government.[4] An analysis of the judicial decisions that have addressed the scope of these off-reservation hunting rights reveals inconsistencies

1. This Comment uses the term "Indian" to refer to Native Americans.

2. *See, e.g.*, The Morning News Tribune, Dec. 30, 1990, at F4, col. 1 (Tacoma). Controversy involving Indian off-reservation hunting rights recently led Washington State Representative Steve Fuhrman to introduce legislation designed to limit the exercise of these rights. H.R. 1168, 52nd Leg., Regular Sess. (1991).

3. Inter-tribal/State Hunting Committee, Tribal Hunting 4 (1990) (on file with Washington Law Review); *see also* State v. Coffee, 556 P.2d 1185, 1187 (Idaho 1976).

4. INDIAN TREATIES 1778-1883 (C. Kappler ed. 1972) [*hereinafter* Treaties]. For example, the treaty between the United States and the Nez Perce reserved to that tribe "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." *Id.* at 703. The treaty with the Nisqually and Puyallup reserved to those tribes "the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands." *Id.* at 662. Treaties with the Crow, *id.* at 1009, and Eastern Shoshone and

that exacerbate the jurisdictional uncertainties inherent in the reservation system and create fodder for further litigation. Judicial construction of the hunting rights guaranteed by these treaty phrases would become more consistent, predictable, and useful through the adoption of a uniform test for "open and unclaimed" or "unoccupied" lands. This uniform test, based on indicia of occupation, would reduce litigation of off-reservation hunting rights and alleviate much tension between Indian and non-Indian hunters.[5]

I. THE IMPORTANCE OF OFF-RESERVATION HUNTING RIGHTS

Hunting was an integral part of Northwest Indian culture before the arrival of non-native settlers, even with respect to the salmon-dependent tribes of the Northwest Coast.[6] Indians used game as a source of food, clothing and shelter.[7] The importance of hunting was reflected in Indian religious practices and mythology.[8]

The creation of the reservation system and the redistribution or annihilation of game populations resulting from the influx of non-native settlers inevitably led to decreased dependence on wild game as a means of sustenance.[9] Many Indian representatives, however,

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Bannock Tribes, *id.* at 1021, reserved to those tribes "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon."

5. Though this Comment focuses on litigation of Indian off-reservation hunting rights, litigation is by no means the most preferable or efficient means of determining the scope of treaty rights. In recent years, many tribes and states have entered into cooperative wildlife management agreements, thereby avoiding the expense and controversy of litigation. D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 729–30 (West 2d ed. 1986).

6. *E.g.*, Kennedy & Bouchard, *Northern Coast Salish*, in 7 HANDBOOK OF NORTH AMERICAN INDIANS 441, 445 (Suttles ed. 1990).

7. *See, e.g.*, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 441 (1982); R. SPENCER, J. JENNINGS, C. DIBBLE, E. JOHNSON, A. KING, T. STERN, K. STEWART, O. STEWART & W. WALLACE, THE NATIVE AMERICANS: PREHISTORY AND ETHNOLOGY OF THE NORTH AMERICAN INDIANS 220–21 (1965) [*hereinafter* R. SPENCER & J. JENNINGS].

8. R. SPENCER & J. JENNINGS, *supra* note 7, at 199–200.

9. Indian treaty representatives realized their dependence upon game would diminish with the passage of time. For example, during talks preceding the Fort Bridger Treaty of 1868, Chief Taghee of the Bannock Tribe made the following statement: " 'I am willing to go upon a reservation, but I want the privilege of hunting the Buffalo for a few years. When they are all gone then we hunt no more, perhaps one year, perhaps two or three years, then we stay on the reservation all the time.' " State v. Cutler, 708 P.2d 853 (Idaho 1985) (Bistline & Huntley, JJ., dissenting) (quoting B. MADSEN, THE NORTHERN SHOSHONE 52 (1980)). Despite the fact that some game species are more numerous now than in 1850, the general effect of non-native settlement was the decimation and dispersal of game on which Indians had depended for food. For an account of the early effects of settlement on Indian life in the Great Basin, see Malouf & Findlay, *Euro-American Impact Before 1870*, in 11 HANDBOOK OF NORTH AMERICAN INDIANS 499 (d'Azevedo ed. 1986).

argued for continuing rights of access to their former hunting grounds before signing treaties which confined them to reservations.[10]

With the resurgence of Indian culture amidst policy reforms that enhance Indian self-determination,[11] off-reservation hunting rights have taken on a political significance. For individual Indians and tribes, however, these rights are important primarily because many Indians live at or below poverty level[12] and continue to rely on game as a means of sustenance.[13] As conflicts between Indians and non-natives over hunting and fishing have increased, more and more courts have been faced with the task of quantifying Indian treaty rights.[14]

II. THE ORIGIN AND CONSTRUCTION OF OFF-RESERVATION HUNTING RIGHTS

Though hunting rights can arise from various sources,[15] most existing off-reservation hunting rights in the Pacific Northwest were reserved by tribes in treaties signed with the federal government between 1853 and 1871.[16] Treaties were the primary means by which the federal government sought to provide for the orderly westward

10. *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974) (*Boldt I*), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); State v. Cutler, 708 P.2d 853 (Idaho 1985); State v. McClure, 268 P.2d 629, 631 (Mont. 1954).

11. *See, e.g.*, the Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. §§ 450a–450n (West 1983).

12. *See* R. NIXON, RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 363, 91st Cong., 2d Sess. 7 (1970).

13. Inter-tribal/State Hunting Committee, *supra* note 3, at 4.

14. The most dramatic example of this trend is the continuing *United States v. Washington* litigation, which has set the treaty fishing right for some tribes at one-half of the available salmon harvest on Washington streams. *See Boldt I*, 384 F. Supp. at 344–45.

15. F. COHEN, *supra* note 7, at 442–46. Off-reservation hunting rights can arise from aboriginal use, treaty, agreement, executive order, or statute. Aboriginal rights derive from traditional practices and customs, and remain with the Indians unless abandoned, granted to the United States by treaty, or extinguished by statute. Rights conferred by agreement are afforded the same weight as those created by treaty. *See infra* note 16. Executive orders and statutes have also been held to confer various hunting rights upon Indians, however, treaties are probably the greatest single source of off-reservation hunting rights. A complete discussion of the sources of Indian hunting rights is beyond the scope of this Comment.

16. The first treaties with Pacific Northwest tribes were signed in 1853. F. COHEN, *supra* note 7, at 98. Treaty-making continued in the area until 1871, when Congress revoked the federal government's treaty-making powers. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C.A. § 71 (West 1983)).

After 1871, the federal government continued its efforts to place tribes on reservations. The results of these subsequent negotiations, when ratified by Congress, became known as agreements. For all practical purposes, rights conferred by agreement and by treaty are afforded the same weight. F. COHEN, *supra* note 7, at 127; *see also* Antoine v. Washington, 420 U.S. 194, 201–04 (1975).

expansion of non-native society.[17] In the typical treaty, the signatory Indians relinquished their rights to aboriginal lands in exchange for money and confinement to a reservation with distinct boundaries.[18]

The reservation system, in addition to minimizing confrontations between encroaching settlers and the resident Indians, was also intended to transform Indians into "a pastoral and civilized people."[19] As a result, game populations were not one of the primary factors considered in the federal government's choice of reservation lands, and many tribes were removed to reservations located far from their traditional hunting grounds.[20] In response to a strong desire on the part of tribes to retain access to these areas, treaties with Northwest Indians provided for either the "the privilege of hunting . . . on open and unclaimed lands" or the "right to hunt on the unoccupied lands of the United States so long as game may be found thereon."[21] In essence, these treaty provisions preserved a portion of the aboriginal rights exercised by the signatory tribes.[22]

Though Indian tribes are not in a legal sense independent nations,[23] Indian treaties are equal in force to treaties with foreign nations.[24] Under the supremacy clause[25] of the United States Constitution, Indian treaty provisions supersede conflicting state laws or state constitutional provisions,[26]and can be abrogated only by an act of Congress.[27] In an effort to compensate for the unequal bargaining position of Indians at the time treaties were entered into,[28] and to help factor in the trust responsibilities[29] of the federal government to Indians

17. *See, e.g., Boldt I,* 384 F. Supp at 355.

18. Kvasnicka, *United States Indian Treaties and Agreements,* in 4 HANDBOOK OF NORTH AMERICAN INDIANS 195 (Washburn ed. 1988).

19. Winters v. United States, 207 U.S. 564, 576 (1908).

20. *See* Beckham, *History of Western Oregon Since 1846,* in 7 HANDBOOK OF NORTH AMERICAN INDIANS 182–83 (Suttles ed. 1990).

21. *See, e.g.,* TREATIES, *supra* note 4, at 662, 1009.

22. State v. Coffee, 556 P.2d 1185, 1188 (Idaho 1976).

23. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

24. *Id.* at 63.

25. U.S. CONST. art. VI, cl. 2.

26. *See* State v. Arthur, 261 P.2d 135, 141 (Idaho 1953), *cert. denied,* 347 U.S. 937 (1954).

27. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 564–68 (1903); *see also* F. COHEN, *supra* note 7, at 468.

28. F. COHEN, *supra* note 7, at 444. In most cases, the signatory Indians had no feasible alternative to treating with the federal government. Kvasnicka, *supra* note 18, at 199. Furthermore, Indian treaties were negotiated and drafted in English, a language with nuances wholly unfamiliar to many tribal representatives. *Id.* at 198; *see also* United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974) (*Boldt I*), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

29. F. COHEN, *supra* note 7, at 63. For a discussion of the federal trust responsibility, see *infra* notes 39–41 and accompanying text.

because of their unique and compromised position, courts employ three special canons of construction when determining treaty rights. First, treaties must be liberally construed in favor of Indians.[30] Second, ambiguous expressions must be resolved in favor of the signatory Indians.[31] Third, and perhaps most important with respect to hunting rights, treaty language must be interpreted as the signatory Indians themselves would have understood it.[32]

III. REGULATION OF OFF-RESERVATION RIGHTS

A. Federal Regulatory Power

The federal government has plenary legislative power over Indian tribes.[33] This power is based in the commerce,[34] treaty[35] and supremacy[36] clauses of the Constitution.[37] Though described as "plenary,"[38] in practice this power is limited by other provisions of the Constitution such as the takings clause of the fifth amendment.[39]

A substantial counterweight to the plenary power of Congress over Indian affairs is the federal trust responsibility, which evolved as a correlative to the discovery doctrine.[40] The trust responsibility of the federal government is analogous to the relationship between a guard-

30. For example, in United States v. Winans, 198 U.S. 371, 384 (1905), the Supreme Court held that language reserving to Indians the right to fish at "usual and accustomed places" included an easement to cross over private lands in order to reach these places.

31. *Winans*, 198 U.S. at 380. In Menominee Tribe of Indians v. United States, 391 U.S. 404, 405–06 (1968), the Supreme Court held that a treaty phrase providing for reservation land "to be held as Indian lands are held" included by implication rights to fish and hunt on that land.

32. In State v. Tinno, 497 P.2d 1386, 1390 (Idaho 1972), the Idaho Supreme Court held that the right to hunt on "unoccupied lands of the United States" included a corollary right to fish on those same lands in part because "the particular Indian languages did not employ separate verbs to distinguish between hunting and fishing but rather used a general term for hunting and coupled this with the noun corresponding to the object (either animal or vegetable) sought." *Id.* at 1389.

33. F. COHEN, *supra* note 7, at 207; *see also* United States v. Kagama, 118 U.S. 375 (1886).

34. U.S. CONST. art. I, § 8, cl. 3.

35. *Id.* at art. II, § 2, cl. 2.

36. *Id.* at art. VI, cl. 2.

37. F. COHEN, *supra* note 7, at 211. Though these clauses are often cited individually as sources of congressional power over Indians, the power probably stems from a combination of the three clauses.

38. *Id.* at 217.

39. *Id.* at 217.

40. In Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 587 (1823), Justice Marshall found that discovery of the North American continent by the Europeans gave them authority to extinguish tribal rights of occupancy and possession by "purchase or conquest." This power became vested in the United States at the conclusion of the American Revolution. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), Marshall found that tribes were "domestic dependent nations" who looked to the federal government for protection. Thus, discovery made the tribes dependent, and the federal trust responsibility arose out of that dependence.

ian and ward,[41] and executive agencies must adhere to fiduciary standards when exercising control over Indian property and affairs.[42]

In the treaty rights context, the plenary power of Congress is exclusive; only Congress can abrogate or modify Indian treaty rights.[43] In light of the federal trust responsibility, courts have developed special tests[44] for determining if and when Congress has acted to abrogate or otherwise modify Indian treaty rights or provisions. In most instances, courts will refuse to find that treaty rights have been abrogated unless there is specific evidence that Congress intended to do so.[45] If Congress does act to extinguish or diminish property rights guaranteed by treaty, the tribes holding those rights are entitled to just compensation.[46]

Because regulation of off-reservation fishing or hunting rights is essentially a modification of those rights, federal regulation of such rights must be authorized by federal statute.[47] Courts apply the special tests of Indian treaty abrogation to determine whether federal statutes of general application apply equally to Indians and non-natives when application of the statute conflicts with treaty rights.[48]

41. Perhaps the most tangible expression of this responsibility is found in 25 U.S.C.A. § 175 (West 1983), which requires the United States Attorney to represent tribes in "all suits at law and equity." This duty has been held by courts to be discretionary in some situations. *See, e.g.*, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

42. *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1941); United States v. Creek Nation, 295 U.S. 103, 110–11 (1934).

43. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 564–68 (1903); *see also* F. COHEN, *supra* note 7, at 468.

44. In Pigeon River Improvement, Slide & Boom Co. v. Cox, Ltd., 291 U.S. 138, 160 (1934), the Supreme Court stated that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." In Seneca Nation of Indians v. Brucker, 262 F.2d 27, 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959), the Circuit Court for the District of Columbia held that treaty rights were abrogated only if Congress had "in a sufficiently clear and specific way, shown an intention to do so."

45. For example, in Menominee Tribe of Indians v. United States, 391 U.S. 404, 412 (1968), the Supreme Court refused to find that the tribe's fishing and hunting rights had been extinguished, despite the fact that legislative enactments had both terminated the tribe's reservation and delegated to the State of Wisconsin criminal authority over the tribe's members.

46. *Id.* at 413.

47. F. COHEN, *supra* note 7, at 467–68.

48. Statutes of general applicability that conflict with Indian treaty rights will be found to abrogate treaty hunting rights if Congress has shown a clear intent to do so, and may abrogate those rights by implication. In United States v. White, 508 F.2d 453, 458-59 (8th Cir. 1974), the Eighth Circuit held that the Bald Eagle Protection Act, 16 U.S.C.A. §§ 668a–668d (West 1983), did not abrogate treaty-based hunting rights because it did not expressly address Indian hunting rights. In United States v. Fryberg, 622 F.2d 1010, 1016 (9th Cir.), *cert. denied*, 449 U.S. 1004 (1980), the Ninth Circuit held that the same Act abrogated Indian treaty rights by implication. The Supreme Court apparently resolved this particular issue in United States v. Dion, 476 U.S.

B. State Regulation of Treaty Fishing and Hunting Rights

State attempts to regulate off-reservation fishing and hunting rights are the source of much litigation and controversy. The underlying tension pervading the arena of off-reservation hunting rights stems from the fact that while state interests in regulating the fish and wildlife within their borders are extremely high, a number of substantial legal obstacles impede the full exercise of state regulatory powers over off-reservation hunting.

States have inherent police powers over land and persons within their boundaries.[49] Under the equal footing doctrine, western states at statehood received on an "equal footing" with the thirteen original states the powers and rights inherent in state sovereignty, including the right to manage fish and wildlife.[50] The fundamental limitation on state authority in the fishing and hunting rights context is the supremacy clause, which pre-empts state authority with respect to areas addressed by federal statute or treaty.[51]

The supremacy clause, when coupled with the fact that only Congress can abrogate or modify treaties, seems to indicate that states have essentially no power to regulate treaty-based hunting or fishing. In *Puyallup Tribe v. Department of Game,*[52] however, the Supreme Court held that states do in fact have regulatory powers over off-reservation fishing rights if such regulation is "in the interests of conservation . . . [and] meets appropriate standards," and does not "discriminate against the Indians."[53]

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734 (1986), holding that the Bald Eagle Protection Act abrogated Indian treaty hunting rights by implication.

49. State v. Arthur, 261 P.2d 135, 141–42 (Idaho 1953), *cert. denied,* 347 U.S. 937 (1954).

50. *See, e.g.,* Tulee v. Washington, 325 U.S. 681, 683–84 (1942). *See also* F. COHEN, *supra* note 7, at 501 n.241.

51. F. COHEN, *supra* note 7, at 272–79. The pre-emption doctrine, together with a weighing of state, tribal and federal interests, is the primary tool used by courts to decide jurisdictional issues on Indian reservations. *See, e.g.,* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980). State attempts to regulate on-reservation activities are usually unsuccessful because federal authority over Indian affairs is comprehensive and because such incursions would be inconsistent with the inherent sovereignty of Indian tribes. With regard to the off-reservation activities of Indians, however, state law applies unless there is "express federal law to the contrary." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973). Treaties with Indians fall into this category because only the United States government has the power to enter into treaties with tribes. *See, e.g.,* U.S. Const. art. II, § 2, cl. 2; *see also* Worcester v. Georgia, 31 U.S. 515, 580–82 (1832).

52. 391 U.S. 392 (1968) (*Puyallup I*).

53. *Id.* at 398. This holding has been the subject of much controversy. For a legal critique of the *Puyallup I* decision, see Johnson, *The State Versus Indian Off-Reservation Fishing: A United States Supreme Court Error,* 47 WASH. L. REV. 207 (1972).

C. *Tribal Regulation of Off-Reservation Rights*

Tribes have authority to regulate the off-reservation hunting and fishing of tribal members.[54] The tribal right to regulate off-reservation hunting and fishing stems naturally from tribal sovereignty, which was diminished but not destroyed by treating with the federal government.[55]

Because rights reserved by treaty are federally protected rights, tribal and federal regulatory schemes preempt state regulation unless the state can show that such regulation is necessary for conservation, is the least restrictive alternative available, and does not discriminate against Indians.[56] If a tribe has adopted a regulation intended to conserve wildlife, similar state laws are valid and enforceable against tribal members.[57]

IV. FROM THEORY TO PRACTICE: JUDICIAL INTERPRETATIONS OF OFF-RESERVATION HUNTING RIGHTS

A. *Upholding Treaty Rights:* State v. Arthur

In *State v. Arthur,*[58] the Idaho Supreme Court handed down the seminal judicial statement of the scope of treaty-based off-reservation hunting rights in the Pacific Northwest.[59] The defendant in *Arthur* was a Nez Perce tribal member charged with killing a deer out of season on National Forest lands lying outside the reservation but within the boundaries of the land ceded to the United States by the Nez Perce tribe in an 1855 treaty.[60] This treaty reserved to the signatory tribes, among other rights, "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."[61] The trial court granted the defendant's demurrer on the grounds that the facts charged did not constitute a crime, and that

54. *See* United States v. Williams, 898 F.2d 727, 729–30 (9th Cir. 1990); Settler v. Lameer, 507 F.2d 231, 237 (9th Cir. 1974).

55. *Settler,* 507 F.2d at 236–37.

56. *See, e.g.,* United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981); *see also* F. COHEN, *supra* note 7, at 459.

57. *Williams,* 898 F.2d at 729–30.

58. 261 P.2d 135 (Idaho 1953), *cert. denied,* 347 U.S. 937 (1954).

59. *Arthur* was the first case to determine the scope of the term "open and unclaimed land." *See* State v. Miller, 102 Wash. 2d 678, 680 n.2, 689 P.2d 81, 82 n.2 (1984).

60. *Arthur,* 261 P.2d at 136.

61. TREATIES, *supra* note 4, at 703; *see also Arthur,* 261 P.2d at 136.

those facts, read in light of the relevant treaty language, effectively barred the state's complaint.[62]

On appeal, the state put forth two arguments in support of its attempt to prosecute the defendant. First, the state claimed that no federal rights were reserved in the Admission Act admitting Idaho to statehood, and that no such powers of reservation were delegated by the Idaho Constitution to the federal government.[63] The *Arthur* court rejected this "equal footing" argument both on the facts at issue and on its underlying legal foundation.[64] Second, the state argued that lands set apart as a National Forest Reserve are neither "open" nor "unclaimed."[65] The *Arthur* court rejected this argument after analyzing what the phrase would have meant to the parties at the time of treaty signing, and what rights the phrase was intended to reserve.[66]

In order to ascertain the intent of the parties at treaty signing, the court looked to documentation of the negotiations preceding the execution of the treaty.[67] The court identified a number of concerns expressed by the parties, chief among which were the Indians' intent that the treaty would result in permanently fixed rights, and that the "open and unclaimed" language was intended by the federal representatives offering the treaty to preclude Indians from hunting on lands occupied by non-Indian settlers.[68] Based on these findings, the court held that the "open and unclaimed" language, because it was intended to include only lands occupied or owned by non-Indian settlers, did not preclude Indian hunting on federal lands in general or on the particular National Forest land at issue in the case.[69]

62. *Arthur,* 261 P.2d at 136.

63. *Id.* This argument was based on the United States Supreme Court's decision in Ward v. Race Horse, 163 U.S. 504 (1896). In *Race Horse,* the Court held that the act admitting Wyoming into statehood, because it did not expressly reserve Indian treaty rights, effectively abrogated those rights in favor of the state's regulatory rights stemming from the equal footing doctrine. *Id.* at 514–16.

64. *Arthur,* 261 P.2d at 139. In addition to distinguishing *Race Horse* on the facts before it, the court noted that *Race Horse* had not been followed with respect to the argument advanced by the State.

65. *Id.* at 136.

66. *Id.* at 141–43.

67. *Id.* at 140–41.

68. *Id.*

69. *Id.* at 143.

B. *Judicial Restriction of the Off-Reservation Hunting Right:* United States v. Hicks

In *United States v. Hicks,*[70] the United States District Court for the Western District of Washington was faced with the question of whether members of the Quinault Tribe could hunt in Olympic National Park.[71] The defendants, charged with killing one cow and two bull elk within the boundaries of the park, asserted their treaty right to hunt on "open and unclaimed lands"[72] as a complete defense to the charges.[73] On rehearing of the defendants' initially successful motion to dismiss, the district court held that the Quinaults' treaty-based hunting right was terminated with respect to lands within the park, and that the termination of that right was not an abrogation of the 1855 treaty.[74]

The court's decision was based on three distinct considerations: the purposes for which the park was created, the nature of the Indian hunting right, and the fact that the park's lands did not fall within the court's definition of "open and unclaimed."[75] The court first examined the various statutes by which Congress had created the park and implemented rules concerning the use of the park.[76] The legislation creating the park withdrew the lands from settlement and occupancy and set them apart "for the benefit and enjoyment of the people."[77] A related statute, however, specifically provided for the preservation of all existing claims made under federal law, including "rights reserved by treaty to the Indians of any tribes."[78] Four years after the park was created, Congress enacted a rule which prohibited all hunting of wild animals within the park's boundaries and gave the Secretary of the Interior exclusive regulatory authority over fishing within the park.[79] After analyzing this statutory framework, the court examined the pertinent treaty language, which reserved to the Quinault not the right, but the "privilege" of hunting on "open and unclaimed lands."[80] The court compared this privilege to the "right" to fish at "usual and accustomed places" guaranteed in the same sen-

70. 587 F. Supp. 1162 (W.D. Wash. 1984).
71. *Id.* at 1163.
72. *Id.* at 1163–64.
73. *Id.* at 1163.
74. *Id.*
75. *Id.* at 1163–67.
76. *Id.* at 1164.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1167.

tence of the treaty, finding that the fishing right focused on "traditional habits as to specific places," while the hunting "privilege" had no relation to traditional hunting grounds.[81]

On the basis of this language and the court's finding that the diminishment of "open and unclaimed" land was contemplated by the Indians at the time the treaty was signed, the court found that the treaty's hunting provision created a defeasible privilege which could "terminate" naturally as particular lands lost their "open and unclaimed" character.[82] This termination was non-compensable because it involved the loss of a privilege and not a treaty right.[83]

The court based its determination of "open and unclaimed" on whether the use of the land in question was compatible with hunting.[84] By this definition, "lands cease to be open and unclaimed when they are put to uses incompatible with hunting."[85] Because one of the purposes in creating the park was to protect Roosevelt elk, the court found that Indian treaty hunting was inconsistent with the uses to which the park had been put, and that the Indian hunting privilege was therefore terminated with respect to lands within the park.[86]

V. ANALYSIS OF JUDICIAL CONSTRUCTIONS OF OFF-RESERVATION HUNTING RIGHTS

The *Arthur* and *Hicks* cases are opposite endpoints on the spectrum of judicial construction of off-reservation hunting rights. The *Arthur* decision illustrates what might be called a "pure" approach to Indian treaty interpretation. The treaty language is parsed with reference to the intent of the parties upon signing the treaty, paying particular attention to what the Indians' understanding of the terms would have been. If the right that emerges from this analysis has not been abrogated by a specific act of Congress, the right survives undiminished and cannot be modified by state action.

The *Hicks* case, on the other hand, illustrates what might be called the "necessity" approach: an amalgamation of practical concerns about Indian hunting which by virtue of its sheer weight obviates the need for analysis of the intent behind the inclusion of the off-reservation hunting right in the treaty. The *Hicks* interpretation of "unclaimed" is driven by the fact that "strict, neutral application of

81. *Id.* at 1164.
82. *Id.* at 1164–65.
83. *See id.*
84. *Id.* at 1165.
85. *Id.*
86. *Id.* at 1166.

the term would have an alarming result."[87] The decision makes no mention or use of accepted canons of treaty construction, and bases its definition of "open and unclaimed" not on the intent of the treating parties, but on the construction which "best accommodates Indian hunting as settlement occurs and matures."[88]

The *Hicks*[89] decision is representative of the efforts made by courts to provide practical solutions to the problems created by the exercise of off-reservation hunting rights. Such solutions, however, sometimes disregard widely accepted principles of Indian treaty construction. An examination of the various factors used by courts in determining the scope of off-reservation rights shows that several of these factors are irrelevant to the analysis of these treaty rights.

A. The Right-Privilege Distinction

Perhaps the most glaring error in the *Hicks* decision was the adoption of a rights-privilege distinction with respect to fishing and hunting rights. Even assuming that the drafters of the treaty wished to confer a fishing "right" and a lesser and defeasible hunting "privilege," it is unlikely that the Indian representatives signing the treaty would have made any distinction between the two words, much less understood the subtle legal distinctions involved.[90] Some Indian cultures, particularly those of the Northwest Coast, may have used analogous concepts in a "legal" sense,[91] but one cannot assume that even these Indians were able to grasp these subtleties when expressed in a language wholly unfamiliar to them.[92]

Any actual intention on the part of the treaty drafters or signatories to distinguish between a fishing "right" and a hunting "privilege" seems even less probable when one compares the stock phrases used to reserve off-reservation hunting rights to Northwest Indians. Most treaties negotiated and proffered by Isaac Stevens, the first governor

87. *Id.* at 1165.

88. *Id.*

89. For a detailed discussion of *Hicks* and the methods of analysis employed in that decision, see Holt, *Can Indians Hunt in National Parks? Determinable Indian Treaty Rights and* United States v. Hicks, 16 ENVTL. L. 207 (1986).

90. *See* United States v. Washington, 384 F. Supp. 312, 353–57 (W.D. Wash. 1974) (*Boldt I*), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *see also* Holt, *supra* note 89, at 237.

91. One might infer from the fact that many tribes had forms of legal relationships such as marriage and private personal property, that analogues to the legal notions of "privilege" and "right" may have been present in some native cultures. *See* R. SPENCER & J. JENNINGS, *supra* note 7, at 216.

92. *Boldt I*, 384 F. Supp. at 355–56.

and superintendent of Indian affairs in the Washington Territory,[93] reserved to Indians the " '*privilege* of hunting on . . . open and unclaimed lands' ".[94] This was the language used in the 1855 treaty with the Nez Perce that was analyzed by the *Arthur* court.[95] In 1858, the Shoshone and Bannock tribes signed the Fort Bridger treaty, which reserved to them "the *right* to hunt on the unoccupied lands of the United States so long as game may be found thereon."[96] Prior to 1855, the Nez Perce and Shoshone Tribes occupied overlapping territories in what is now Idaho.[97] It is difficult to imagine why one group of Indians was allowed to reserve a "right" to hunt off-reservation while another group that occupied essentially the same territory was allowed to reserve only a lesser "privilege." In the negotiations preceding the 1855 treaty with the Nez Perce, even Isaac Stevens characterized the "privilege" as a "right."[98]

Finally, it is a well-accepted fact that Indian treaties are "not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted."[99] Thus, the treaty language can be seen as simply a linguistic approximation of a certain measure of aboriginal hunting rights reserved by the Indians.[100] The Indians were reserving a limited right to access and hunt on their traditional hunting grounds. This intent, not the particular language in which the intent is framed, should control. The *Hicks* court found that the off-reservation hunting right, unlike the right to fish at "usual and accustomed places," "was not preserved in relation to the Indians' customary hunting grounds."[101] This finding, like the court's legalistic distinction between the fishing "right" and the hunting "privilege," is

93. Marino, *History of Western Washington Since 1846,* in 7 HANDBOOK OF NORTH AMERICAN INDIANS 169 (Suttles ed. 1990).

94. State v. Miller, 102 Wash. 2d 678, 681, 689 P.2d 81, 83 (1984) (quoting Point No Point Treaty of 1855, 12 Stat. 933, 934) (emphasis added).

95. State v. Arthur, 261 P.2d 135, 136 (Idaho 1953), *cert. denied,* 347 U.S. 937 (1954).

96. TREATIES, *supra* note 4, at 1021 (emphasis added).

97. Murphy & Murphy, *Northern Shoshone and Bannock,* in 11 HANDBOOK OF NORTH AMERICAN INDIANS 284, 286 (d'Azevedo ed. 1986).

98. Describing the off-reservation hunting, fishing, grazing and gathering rights being reserved by the Nez Perce, Stevens said " 'Looking Glass knows . . . that . . . he can kill game and go to Buffalo *when he pleases* . . .' " *Arthur,* 261 P.2d at 140–41 (emphasis added).

For a detailed discussion of the origins of the terminology used to guarantee off-reservation hunting rights, see Holt, *supra* note 89, at 216–19.

99. United States v. Winans, 198 U.S. 371, 381 (1905).

100. State v. Coffee, 556 P.2d 1185, 1188 (Idaho 1976).

101. United States v. Hicks, 587 F. Supp. 1162, 1164 (W.D. Wash. 1984).

unsupported when the treaty language is analyzed according to accepted canons of Indian treaty construction.[102]

B. Questions of Land Ownership

Questions of land ownership are inappropriate to the construction of off-reservation hunting rights. Most courts faced with determining the extent of these rights have based their decisions at least in part on whether the land at issue is in private, state, or federal ownership.[103] At the time the treaties were signed, however, Indians would have made no distinction between these types of ownership, and such inquiries are improper if the phrases "open and unclaimed lands" and "unoccupied lands of the United States" are interpreted as they would have been understood by the signatory Indians.

Two courts have held that private lands are by definition not "open and unclaimed,"[104] and several other courts—including the *Hicks* court—have stated the same proposition in dicta.[105] Most courts have found that both the Indian signatories and the non-Indian federal representatives proffering the treaties were aware that a central purpose of the "open and unclaimed" or "unoccupied lands of the United States" provisions was to segregate the activities of Indian hunters and non-Indian settlers.[106] In the words of the *Arthur* court, the phrase "open and unclaimed lands" was "intended to include and embrace such lands as were not settled and occupied by whites under possessory rights or patent or otherwise appropriated to private ownership."[107]

There is little doubt that the *Arthur* court's analysis of the intent behind the "open and unclaimed" language is accurate, or that this intent is identical to that expressed by the phrase "unoccupied lands of the United States." Indian off-reservation hunting rights were not intended to extend to lands settled by non-Indians, and the Indian signatories were likely aware of this fact. Problems arise, however, when

102. *See supra* notes 29–31 and accompanying text. As the Washington Supreme Court noted in interpreting an identical treaty provision in State v. Miller, 102 Wash. 2d 678, 683, 689 P.2d 81, 84 (1984), the "implication that a treaty 'privilege' somehow reserves less to the Indians than a treaty 'right' is in direct conflict with the canons of construction applicable to Indian treaties."

103. *See, e.g.*, State v. Cutler, 708 P.2d 853, 854 (Idaho 1985); *Coffee*, 556 P.2d at 1194–95; State v. Chambers, 81 Wash. 2d 929, 934–36, 506 P.2d 311, 314–15, *cert. denied*, 414 U.S. 1023 (1973).

104. *Coffee*, 556 P.2d at 1194; State v. Stasso, 563 P.2d 562, 565 (Mont. 1977).

105. *See Hicks*, 587 F. Supp. at 1165; *Cutler*, 708 P.2d at 856; State v. Arthur, 261 P.2d 135, 141 (Idaho 1953), *cert. denied*, 347 U.S. 937 (1954).

106. *See, e.g.*, *Arthur*, 261 P.2d at 141; *Chambers*, 81 Wash. 2d at 935, 506 P.2d at 314–15.

107. *Arthur*, 261 P.2d at 141.

private land has no outward indications of ownership, and it becomes necessary to determine whether the signatory Indians would have known that land could be "occupied" simply by purchasing paper title to it. Pacific Northwest Indians probably had no direct cultural analogue to the real property notion of title.[108] The opinions of anthropologists vary as to whether particular tribes claimed distinct areas of land as against other tribes, but there is evidence that at least some tribes had strong notions of territory.[109] Nevertheless, it may generally be said that these territories were defined primarily through physical occupation rather than ownership.[110]

When the Indians' probable lack of understanding of the notion of paper title is coupled with their unfamiliarity with the English language, it raises doubts as to whether Indians understood that land could be "occupied" in the absence of actual physical presence.[111] As Isaac Stevens stated during the negotiation of the 1855 treaty with the Nez Perce, the Indian off-reservation hunting right was limited only " 'where the land is actually occupied by a white settler.' "[112] Thus, it is improper to assume that private property by definition cannot be "open and unclaimed" or "unoccupied." Carried to its logical extreme, the conclusion that private lands are not subject to treaty hunting rights would require treaty hunters to conduct title searches in order to determine whether a physically unoccupied piece of land is "open and unclaimed" or "unoccupied" for purposes of the treaty right.[113] A similar question arises when one considers whether state land is by definition exempt from off-reservation hunting rights

108. *See, e.g.*, Murphy & Murphy, *supra* note 100, at 293.

109. *See* R. SPENCER & J. JENNINGS, *supra* note 7, at 217.

110. *See id.*

111. An example of a court straining to avoid this conclusion is found in State v. Cutler, 708 P.2d 853, 857 (Idaho 1985), where the Idaho Supreme Court found that because 1,500 Shoshone Indians were to "occupy" millions of acres by the terms of a treaty, and because the tribal representatives had visited federal military outposts, the Indians would have understood that "occupation" does not necessarily require physical presence.

112. State v. Coffee, 556 P.2d 1185, 1194 n.6 (Idaho 1976) (quoting Official Proceedings of the Council held with the Flathead, Kootenay and Upper Pend O'reille Indians, July 7–16, 1855, National Archives Transcribed Copy, at 5).

113. The history of railroad land grants provides a good example of some of the problems associated with the conclusion that private lands are by definition not "open and unclaimed." From 1862 to 1871 the federal government granted well over one-hundred million acres of land to private railroad corporations in an effort to promote the expansion of railway lines. 2 L. HANEY, A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES 19–20 (1968). These right of ways were in some cases up to ten miles wide. *See* L. MERCER, RAILROADS AND LAND GRANT POLICY: A STUDY IN GOVERNMENT INTERVENTION 11 (1982). In many areas, these lands remain unfenced and unsettled; their outward appearance gives no indication that the lands are "claimed."

because it is technically neither "unclaimed" nor "lands of the United States." No court has held that state lands are by definition exempt, but in *State v. Cutler,* the Idaho Supreme Court decided that state lands were not by definition exempt from the "unoccupied lands of the United States" treaty hunting right.[114] This finding was correct in light of the circumstances surrounding the signing of the treaty at issue; the federal negotiators spoke only of "the Great Father in Washington"[115] and the states of Oregon, Washington and Idaho had not yet come into being.[116] In this context the Indian representatives would have had no reason to understand the distinction between state and federal governments.[117]

C. *Is the Treaty Right Limited to Lands Ceded by the Indians?*

If the principles of treaty construction are followed, the off-reservation hunting right should be limited to lands ceded by the Indians to the United States in the treaties giving rise to the right.[118] Treaty clauses reserving Indian rights to hunt on "open and unclaimed lands" or "unoccupied lands of the United States" do not expressly limit these rights to ceded lands. However, treaties were reservations of aboriginal rights, and both the signatory tribes and the federal treaty negotiators understood that rights of access would be limited to traditional hunting grounds which remained "open and unclaimed" or "unoccupied."[119]

Though solidly grounded in the canons of treaty construction, the ceded-unceded distinction poses four substantial problems in practice. First, it is difficult to place "a neat and technical geographical construction on these treaties."[120] This difficulty arises because many tribes did not occupy specific areas of land, but moved about according to the season and the location of game populations.[121] Even the salmon-based tribes of the Pacific Coast, despite the relative permanence of their settlements, wandered over large areas of land in search

114. *Cutler,* 708 P.2d at 857.

115. *Id.* at 863 (Bistline and Huntley, JJ., dissenting) (quoting minutes of General L.C. Auger, a member of the Indian Peace Commission, from the negotiations preceding Fort Bridger Treaty of 1855).

116. Oregon became a state in 1859, Washington in 1889, and Idaho in 1890.

117. *Cutler,* 708 P.2d at 857.

118. *See, e.g.,* State v. Coffee, 556 P.2d 1185, 1188–89 (Idaho 1976); State v. Stasso, 563 P.2d 562, 564 (Mont. 1977).

119. *See Coffee,* 556 P.2d at 1188.

120. State v. Tinno, 497 P.2d 1386, 1391 (Idaho 1972).

121. United States v. Washington, 384 F. Supp. 312, 350–51 (W.D. Wash 1974) (*Boldt I*), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

of game.[122] Second, the treaties themselves refer only to geographic landmarks[123] in their descriptions of the lands being ceded, and are of little help in defining the geographical range of particular tribes. Third, some treaties removed Indians from the areas where they had traditionally hunted.[124] Finally, treaties often resulted in the confinement of several tribes or bands of Indians to a single reservation,[125] and the ceded-unceded distinction would require an inquiry into the lineage of Indians wishing to exercise off-reservation hunting rights. If the principles of treaty construction are strictly followed, however, the right should be limited to the aboriginal hunting grounds of the signatory Indians. This line of demarcation should be based not on the treaty descriptions, but on other evidence which better captures the understanding of the Indians upon entering the treaty. Any line drawn must necessarily be approximate, and the principles of treaty interpretation require that any ambiguous questions be resolved in favor of the Indians.[126]

D. Incompatibility of Uses

Whether Indian hunting is compatible with the uses to which certain lands are put is irrelevant to the analysis of the off-reservation treaty right. The *Hicks* court cited the incompatibility of Indian hunting with the purposes for which Olympic National Park was created as one of the primary bases of its holding. This "incompatibility test" has no basis in the principles of treaty interpretation, but is simply a result-oriented means of limiting Indian off-reservation hunting rights when no other means for doing so exists.[127]

On one hand, the understanding of both the Indians and the federal representatives was that the purpose of the Treaty of Olympia was to segregate Indian and non-Indian activities,[128] but it is doubtful that the Quinault signatories to the treaty would have envisioned that legis-

122. *Id.*

123. For example, the treaty with the Yakima described one boundary of the lands being ceded as "the main ridge of the Cascade Mountains." TREATIES, *supra* note 4, at 698–699.

124. *See* Kvasnicka, *supra* note 18, at 196.

125. *See, e.g.*, treaty with the Yakima, in TREATIES, *supra* note 4, at 698; *see also* Beckham, *supra* note 19, at 182–83.

126. *See, e.g.*, Winters v. United States, 207 U.S. 564, 576 (1907). For another view of the ceded-unceded distinction, see Holt, *supra* note 89, at 246–51.

127. The *Hicks* court did have another means of restricting the right. The court could have found that the federal statute prohibiting hunting in the park was an implied abrogation of treaty rights. *See, e.g.*, United States v. Dion, 476 U.S. 734 (1986). The court would have had to reconcile its interpretation of this statute with the earlier statute, which expressly stated that the creation of the park would not serve to extinguish treaty rights.

128. *See* United States v. Hicks, 587 F. Supp. 1162, 1164 (W.D. Wash. 1984).

lation could transform unsettled land into land "incompatible" with hunting. On the other hand, Congress clearly has the power to abrogate treaty rights, but the *Hicks* court saw no need to find a "clear and specific" intent on the part of Congress to abrogate the treaty rights of the Quinault Tribe.[129] Instead, the court found that the off-reservation hunting right was a privilege that was terminated when the use of the land became inconsistent with treaty hunting.[130]

The parties to the Treaty of Olympia understood that Indian hunting and non-Indian settlements were incompatible, but the treaty was signed seventeen years prior to the creation of the nation's first National Park.[131] Olympic National Park was created in part to help preserve the Olympic Peninsula's dwindling population of Roosevelt elk,[132] and treaty hunting may well be incompatible with that goal, but this consideration is wholly irrelevant when determining what rights were reserved by the Quinaults in their treaty with the federal government.[133]

E. The Proper Test: Indicia of Occupation

The proper test of the scope of treaty-based off-reservation hunting rights must be based on what the Indian understanding of the terms "open and unclaimed" and "unoccupied lands of the United States" was at the time the treaty in question was signed. Given the Indians' limited exposure to the English language and their probable lack of knowledge of the distinction between state and federal governments, the "privilege . . . of hunting on open and unclaimed lands" and the "right to hunt on the unoccupied lands of the United States" probably reserved similar rights to the Indians, and evidence shows that the purpose behind both phrases was to allow Indians to hunt on all lands except those occupied by non-Indian settlers. Because Indians were

129. *Id.* at 1166–67.

130. *Id.* at 1165.

131. Yellowstone National Park, the country's first National Park, was established in 1872. *See also* Holt, *supra* note 89, at 250 n.283.

132. *Hicks*, 587 F. Supp. at 1166.

133. The uncertainty inherent in the "incompatibility test" is illustrated in State v. Cutler, 708 P.2d 853 (Idaho 1985). The defendants in *Cutler* were charged with killing elk and deer out of season within the boundaries of a state-owned wildlife preserve. *Id.* at 854. The issue of incompatibility was raised by the defendants, who maintained that their killing of elk and deer in November and December was not incompatible with the state's use of the land to preserve elk because the land had been opened to the public for special hunts in September and October. *Id.* at 859. The court found that because the elk herds did not migrate to the area until "late fall," the special hunts were compatible with the use of the park, but that Indian hunting during November and December was "the ultimate inconsistent act with the state's use of the Sand Creek Ranch in preserving and protecting the wintering elk herds." *Id.* at 860.

probably unfamiliar with the property concept of title, their perceptions of "open and unclaimed" or "unoccupied" were likely based on actual physical occupation.

It follows that outward signs of settlement or physical occupation such as houses, fences and outbuildings would indicate to Indians whether land had been settled or not. The actual ownership of the land, as well as its compatibility with treaty hunting, is irrelevant to the determination of whether land is open or unclaimed. This "indicia of occupation" test is necessarily fact-dependent, and lands cannot be exempted or subjected to Indian hunting solely on the basis of past decisions concerning that particular type of land.

The adoption of an "indicia of occupation" test would have two distinct advantages. First, courts would no longer find it necessary to engage in legal analysis when faced with off-reservation hunting rights questions. Decisions would be based solely on a factual determination of whether the external appearance of a particular piece of land would lead a person to believe that the land was "unoccupied" or "unclaimed." This factual analysis would involve difficult questions, but such questions are not unanswerable. Though the results reached in decisions employing this test might well be inconsistent, it is preferable to have inconsistencies derive from factual variance or the imperfections of judges and juries than from conflicting methods of legal analysis.

A second advantage of the "indicia of occupation" test is that Indian treaty hunters would have a consistent standard by which they could determine whether a particular piece of land was "open and unclaimed" or "unoccupied." This determination would be based entirely on the physical appearance of the land in question, and would require no inquiry into the legal status, use or ownership of the land. The determinations of treaty hunters in this respect would not be a complete defense to violations of game regulations, but a conscious appraisal of lands before the hunt would minimize the chances of committing such violations.

VI. CONCLUSION

Courts have failed to develop a uniform test for determining the scope of off-reservation hunting rights reserved by Northwest Indians in many of the treaties signed between 1853 and 1871. Judicial construction of the phrases "open and unclaimed" and "unoccupied lands of the United States" is often based on the legal status of the land in question rather than whether the land is actually "unclaimed" or

"unoccupied" as those terms were used in treaties with Northwest Indians.

Tests based on "inconsistency of use" and ownership increase rather than resolve the controversy surrounding off-reservation hunting by Northwest Indians. Furthermore, the use of these tests results in de facto judicial abrogation of Indian treaty rights. Only Congress can abrogate treaty rights, and tribes must be compensated for the loss of these rights.

The proper test of "open and unclaimed" and "unoccupied lands of the United States" is based on indicia of occupation. This test is fact-specific, comports with accepted canons of treaty construction, and allows for a greater degree of certainty than tests based on the legal status of land. Courts should use the indicia of occupation analysis not as an occasional factor in determining the meaning of "open and unclaimed" or "unoccupied," but as the sole criterion for determining off-reservation hunting rights.

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