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Off-Reservation Hunting and Fishing Rights: Scales Tip in Favor of States and Sportsmen

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OFF-RESERVATION HUNTING AND FISHING RIGHTS: SCALES TIP IN FAVOR OF STATES AND SPORTSMEN?

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> Numerous other court battles are now being fought by Indians in an attempt to uphold their traditional hunting and fishing rights. At stake is not only a property right and sometimes a treaty right, but a cultural and psychological support as well. Hunting, fishing, and trapping have always loomed large in Indian culture, even among those tribes whose primary subsistence has derived from agriculture.[1]

Interests of states in conservation, recreation, and revenue invariably clash with the hunting and fishing rights of Native Americans. Efforts to restrict the Native American game harvest will likely intensify as population pressures increase the competition for wildlife resources. This will confound the scope of rights which have been the object of controversy since the nineteenth century.[2] Even the United States Supreme Court has failed to alleviate the confusion which shrouds Native American game rights.[3] Indeed, recently the Court again neglected to offer any helpful guidance to lower courts in balancing the treaty rights of Indians against the sports privileges of non-Indians.[4]

This article explores off-reservation hunting and fishing rights with emphasis on the need for judicial analysis and guidance.[5] The first part of the discussion reviews applicable decisional law.

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1. W. WASHBURN, RED MAN'S LAND—WHITE MAN'S LAW, 196 (1971).
2. Ward v. Race Horse, 163 U.S. 504 (1896).
3. *See* Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972).
4. Department of Game v. Puyallup Tribe, Inc., 414 U.S. 44 (1973).
5. The case law has met with critical discussion, *see* Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972); Burnett, *Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy*, 7 IDAHO L. REV. 49 (1970); Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251 (1968); Hobbs, *Indian Hunting and Fishing Rights*, 32 GEO. WASH. L. REV. 504 (1964); Note, *State Power and the Indian Treaty Rights to Fish*, 59 CALIF. L. REV. 485 (1971); Note, 48 N.D. L. REV. 729 (1972); Comment, 43 WASH. L. REV. 670 (1968); Comment, 10 ARIZ. L. REV. 725 (1968).

I. NEARLY A CENTURY OF CONFUSION

> No treaty or law of general application governs the hunting and fishing rights of all Indians. Some tribes, in their treaties with the United States, reserved the right to hunt and fish on their own reservations or at "usual and accustomed" places or on "open and unclaimed" lands of the United States away from the reservations. In the absence of these provisions, the general rule is that Indians who hunt or fish away from their reservations are like non-Indians, subject to the laws of the State.[6]

A. SUPREME COURT VACILLATIONS — A DEARTH OF ANALYSIS AND GUIDANCE

> [N]o one knows the law about any case or with respect to any given situation, transaction, or event, until there has been a specific decision with regard thereto.[7]

In *Ward v. Race Horse*,[8] the United States Supreme Court first considered a conflict involving a Native American hunting pursuant to treaty, but in violation of state law. Race Horse, a Bannock residing upon the Fort Hall reservation in Idaho, was arrested[9] in the adjacent state of Wyoming for killing seven elk 100 miles from his reservation on unoccupied public land.[10] Race Horse argued that he was immune from all state hunting laws because of a provision in a treaty[11] made by the United States with the Eastern Band of Shoshonees and the Bannock Tribe of Indians. In part, the treaty provided as follows:

> The Indians herein named . . . shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.[12]

The State of Wyoming countered that its hunting laws applied to Race Horse because the Enabling Act[13] which authorized its admission to the Union stated that entry was to be "on equal footing with the original states in all respects whatsoever,"[14] and this Act

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6. Dep't of Interior, 10 (1970), ANSWERS TO YOUR QUESTIONS ABOUT AMERICAN INDIANS.
7. Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 41 (1931).
8. 163 U.S. 504 (1896).
9. He was charged with killing the animals out of season, exceeding the bag limit, and failing to possess a Wyoming hunting license.
10. In re Race Horse, 70 Fed. 598, 600 (C.C.D. Wyo. 1895), *rev'd* 163 U.S. 504 (1895).
11. 15 Stat. 673 (1868).
12. *Id.* at 674-75.
13. 26 Stat. 222 (1890).
14. *Id.* This language is commonly referred to as the "equal footing doctrine."

did not expressly except or reserve hunting rights for Indians.[15] Therefore, the State contended, the Act gave it "the police power of the original states to regulate the taking and killing of game and fish."[16] Accordingly, the State claimed that:

> possession of this police power in the new state upon its admission was inconsistent with . . . any restrictive right in the Indians, or any other persons, to hunt or fish within the state, and therefore necessarily repealed or abrogated any treaty or congressional enactment upon this subject.[17]

The federal district court rejected the State's argument of implicit repeal of hunting rights.[18] The court stated:

> [I]t is not difficult to understand how they would consider this right or privilege to hunt of supreme importance to them, and why, in negotiating a treaty, they would insist that this right be recognized and guaranteed to them.[19]

The lower court reasoned that since the Enabling Act did not expressly abrogate the treaty,[20] and since the Constitution gave exclusive power to the federal government to regulate intercourse with Indians,[21] it cannot be argued that the Act implicitly repeals treaty rights.[22]

The United States Supreme Court reversed in what the lone dissent characterized as an opinion that sanctioned a repudiation of the treaty.[23] The majority, through Justice White, focused upon the words "unoccupied lands" and decreed that only upon those lands which would remain unoccupied were hunting rights granted.[24] The Court thereby divined that the hunting rights were only "temporary and precarious"[25] because the burden (of hunting and fishing rights for aborigines) imposed upon the territory was "essentially perishable and intended to be of limited duration."[26]

Although the Court emphasized what it described as the "situation existing at the time,"[27] no appreciation for the Indian understanding of the terms of the treaty was evident. Nor was weight

15. In re Race Horse, 70 Fed. 598, 600 (C.C.D. Wyo. 1895). Interestingly, an act which established the territory of Wyoming did make such an exception. Ward v. Race Horse, 163 U.S. 504, 506.
16. 70 Fed. at 609.
17. *Id.*
18. *Id.* at 613.
19. *Id.* at 608.
20. *Id.*
21. U.S. CONST. art. I, § 8, cl. 3.
22. 70 Fed. at 613.
23. Ward v. Race Horse, 163 U.S. 504, 516 (1896) (Brown, J., dissenting).
24. *Id.* at 508 (Opinion of the Court).
25. *Id.* at 510.
26. *Id.* at 515.
27. *Id.* at 508.

given to the trial court's findings of fact as to Indian understanding, minutes of treaty negotiations which preceeded the treaty signing, or the legislative history that accompanied the ratification of the treaty. In addition, no effort was made to distinguish *Geer v. Connecticut*[28] decided a few months earlier when Justice White defined the scope of state power over game as qualified by rights conveyed to the federal government by the Constitution. Justice Brown, dissenting, accurately observed that the majority's holding meant that the admission of Wyoming as a state abrogated the Indian rights pro tanto, and put the power of Indians to hunt completely at the mercy of the state.[29]

Indian intention at the time of the treaty became important nine years later in *United States v. Winans*.[30] At issue was whether a treaty section reserved to the Indians a right-of-way across privately-owned land in the enjoyment of their reserved right to fish at "usual and accustomed places." In a marked departure from *Race Horse*, albeit sub silentio, the Supreme Court concluded as follows:

> At the time the [Yakima] treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave.
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> * * *
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> The remarks of the [trial] court stated the issue and the ground of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. . . . This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by superior justice which looks only to the substance of the right without regard to the technical rules." . . . How the treaty in question was understood may be gathered from the circumstances.
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> The right to resort to the fishing places in controversy was part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which was not much less necessary to the existence of the Indians than the atmosphere they breathed. New condi-

28. 161 U.S. 519 (1896).
29. 163 U.S. at 518.
30. United States v. Winans, 198 U.S. 371 (1905). Private land owners in the state of Washington had attempted to restrict the off-reservation commercial fishing activities of the Yakimas.

> tions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.[31]

The Court held that that treaty *reserved* a perpetual right-of-way to cross and use privately owned land in the enjoyment of the Yakimas' *reserved* right to fish.[32] The Court apparently abandoned the "equal footing" analysis used in *Race Horse*, and instead shifted to a "reserved rights" doctrine.

Eleven years later in *State of New York ex rel. Kennedy v. Becker*,[33] the Court again had occasion to pass upon state game laws that were in apparent conflict with treaty provisions. There, too, state game laws were held to apply to the Native Americans in spite of an express treaty provision to the contrary.[34] Three Seneca Indians were charged with violation of a New York conservation law when they were caught spearing fish off the Cattaraugus reservation.[35] They raised the treaty issue in a habeas corpus proceeding. The state court released them. The state appellate court reversed. It entertained the federal question and decided that state law controlled and remanded the Senecas to custody.[36] The United States Supreme Court affirmed. It postulated that the right to fish was not an exclusive right,[37] and that there could not exist a duality of sovereignty within the state so the tribal rights should not be construed to derogate the state's authority.[38] The Court arrogantly concluded that because conditions of today could not have been anticipated or understood at the time the treaty was made,[39] the treaty conveyed only a privilege to be shared in common with the grantees of the land and others subject to appropriate state regulation.[40]

In 1942 the Supreme Court reviewed another attempt by the State of Washington to wrest fishing rights from the Yakimas. In *Tulee v. Washington*,[41] a Yakima tribal member was charged in state court with having "caught food fish . . . and with selling commercially the fish which he had caught, all without first having

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31. *Id.* at 379, 380 (footnotes omitted).
32. The decision's emphasis on reserved rights in the above quoted passage is referred to as the Winans' reserved doctrine.
33. 241 U.S. 556 (1916).
34. The Treaty of the Big Tree stated, in part, as follows: "[a]lso, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." 7 Stat. 601 (1797).
35. 241 U.S. at 559.
36. *Id.* at 560.
37. *Id.* at 562.
38. *Id.* at 563.
39. *Id.*
40. *Id.* at 563-64.
41. 315 U.S. 681 (1942).

obtained a (state) license to fish. . . ."[42] The alleged violations took place at a traditional fishing site of the Yakimas within the boundaries of the original reservation. The Yakimas later ceded the land to the federal government. The question was whether the members of the Confederated Yakima Nation could fish at traditional sites within the territory ceded outside of their reservation, and sell their catch commercially as a principal means of livelihood, without having first secured a license from the State of Washington.[43]

Sampson Tulee relied on an 1855 treaty as his defense.[44] In part it provided as follows:

> 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 the citizens of the Territory.[45]

The State of Washington responded that the treaty language should not be construed to impair its "broad powers to conserve game and fish within its borders."[46] Besides, the State asserted, "since its license laws do not discriminate against the Indians, they do not conflict with the treaty."[47]

In a strongly-worded unanimous opinion by Mr. Justice Black, the Supreme Court rejected the state's arguments as follows:

> In determining the scope of the reserved rights of . . . fishing, we must not give the treaty the narrowest construction it will bear. In *U. S. v. Winans* . . ., this Court held that, despite the phrase "in common with the citizens of the Territory," Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their "usual and accustomed places" in the ceded areas; . . . . From the . . . proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.[48]

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42. State v. Tulee, 7 Wash. 2d 124, 109 P.2d 280 (1941).
43. 315 U.S. at 683.
44. 12 Stat. 951 (1859).
45. *Id.* at 953.
46. 315 U.S. at 683.
47. *Id.* at 684.
48. *Id.* at 684-85.

The application of the "reserved rights" doctrine of the *Winans Case*, in *Tulee* marks the beginning of a consistent judicial posture. However, *Tulee* continued the dictum from *Winans*[49] that

> the treaty leaves the state with the 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.[50]

In so stating, Justice Black posited a "reasonable and necessary" qualifications on the "reserved right" doctrine the extent of which remains less than lucid today.[51] In deciding *Tulee*, the "equal footing" repeal by implication doctrine of *Race Horse*[52] was ignored. Otherwise, *Tulee* should have held that the admission of Washington to Statehood without express reservation of Indian off-reservation hunting and fishing rights impliedly subjected Sampson Tulee to the state game laws. Instead of discussing Congressional intent as did *Race Horse* the Court focused on the strong Indian intent. The latter is more consistent with the reasoning of the federal trial court in *Race Horse*.[53]

After *Tulee's* dictum, allowing regulation for conservation, the Supreme Court next proclaimed that it "saw no reason" why the states could not regulate the off-reservation fishing of Indians.[54] In *Puyallup Tribe v. Department of Game*,[55] the United States Supreme Court was asked to decide whether the State of Washington could prohibit set net and drift net fishing on the Puyallup and Nisqually Rivers outside the reservations. The Puyallup and Nisqually Indians claimed immunity from state regulations by virtue of the following treaty language:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.[56]

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49. 198 U.S. at 384.
50. 315 U.S. at 684.
51. *See, e.g.*, Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251, 1255 n.26 (1968).
52. See text accompanying note 14, *supra*.
53. In re Race Horse, 70 Fed. 598, 613 (C.C.D. Wyo. 1895) *rev'd* 163 U.S. 504 (1895).
54. Puyallup Tribe v. Dept. of Game, 391 U.S. 392, 398 (1968).
55. *Id.*
56. 10 Stat. 1133 (1855).

Relying on the *Tulee* dictum, the State of Washington urged that the regulations were "necessary for conservation of the fish"

In a terse opinion Justice Douglas stated, in part, for a unanimous court:

> The treaty right is in terms of the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places" *in the "usual and accustomed"* manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians might not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. . . . 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. [57]

The *Puyallup* decision opens the door for states to regulate Indian off-reservation hunting or fishing.[58] *Puyallup* is subject to criticism in that the Court failed to give any reason for its assumption that Indian treaty rights are subject to state regulation.[59] At a minimum, the Court should have acknowledged that it was overruling *Missouri v. Holland*[60] which established the supremacy of treaties over

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57. 391 U.S. at 399.

58. The Court, quoting *Tulee v. Washington*, 315 U.S. 681, 685 (1942), held that a license fee "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Id.* at 402.

59. *See* Johnson, *The States Versus Indian Off-Reservation Fishing*, 47 WASH. L. REV. 207 (1972); Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251, 1259-61 (1968).

60. Missouri v. Holland, 252 U.S. 416 (1920). The United States and Great Britain entered into a treaty in 1916 for the protection and management of migratory waterfowl. The federal statute implementing the treaty was attacked by the State of Missouri. The Supreme Court held that the treaty overrode state law.

61. "Lacking the constitutional power to make treaties of any kind, the courts are equally without power to rewrite them from time to time or at all—even to achieve what the courts believe to be a good result. The judicial function is limited, I think, to enforcing and upholding the treaties according to their content and spirit."

Department of Games v. Puyallup Tribe, Inc., 80 Wash. 2d 256, 497 P.2d 171, 181 (1972), *rev'd* 414 U.S. 44 (1973) (Hale, J., dissenting).

states.[61] A corresponding exception to Article VI of the United States Constitution which places treaties on a par with the Constitution as "the supreme Law of the Land,"[62] needs adequate explanation. Fairness demands that treaty rights be above state regulation unless and until Congress abrogates[63] the treaty and pays due compensation for the rights.[64]

After *Puyallup,* lower courts were left to define "reasonable and necessary" conservation measures without guidance from the Supreme Court. When *Puyallup* was remanded, the Washington Supreme Court faced just this task.[65] The principal issue was whether a Department of Game regulation which forbade all commercial fishing of steelhead was reasonable and necessary for the preservation of the fishery. The Washington Supreme Court concluded as follows:

> The state has clearly met that test, at least to the extent that it has established that the continued use by defendants of their drift nets and set nets would result in the nearly complete destruction of the anadromous fish (steelheads) runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery.[66]

After being reversed by the United States Supreme Court it is understandable that the state court would carefully reason its decision. Predictably there was extensive reliance upon expert testimony to ascertain the "reasonableness and necessity" of the conservation regulations. From an initial definition of conservation,[67] the court scrutinized the regulations to see if a total ban of commercial steelhead fishing was necessary. The court held that:

> as a guideline in an allowable Indian gill net fishery for the lawful catching of one species of fish is not permissible in the event there is a substantial number of protected species caught that are within the number required for spawning

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62. "Constitution . . . of the United States . . . and all treaties made, under the authority of the United States, shall be the supreme Law of the Land; . . ." *U.S.* CONST. art. VI, part 2.

63. *Compare* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) *with* Menominee v. United States, 391 U.S. 404 (1968).

64. A student writer concludes that *Menominee v. United States,* 391 U.S. 404 (1968) may subject Congress to a claim for damages when states restrict Indian treaty hunting and fishing rights pursuant to Puyallup. Note, *Indian Hunting and Fishing Rights,* 10 ARIZ. L. REV. 725 (1968). *See* Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied,* 369 U.S. 818 (1962).

65. Department of Game v. Puyallup Tribe, Inc., 80 Wash. 2d 561, 497 P.2d 171 (1972), *rev'd* 414 U.S. 44 (1973).

66. *Id.* at ——, 497.

67. "[I]t is wise use. When we put it in terms of salmon harvest, I would put it in three categories or three parts, by harvest, in management of salmon as a crop, one, there must be a surplus and over and above the needed spawning escapement to have an available crop and not be taking the food stock. Two, the manner of fishing, itself, must be such that you can control it so

> escapement and hatchery needs, necessary for conservation of that species.[68]

From this premise, the court found that Indian net fishery for steelhead "would have been destructive to the conservation of the steelhead fishery."[69] It also held that new fishing regulations for the Tribe must be made each year, supported by facts and data to show that the regulation is necessary for state conservation.[70]

The two dissenting judges would have found that since the Puyallup Tribe allegedly had ceased to exist as a tribal entity, that descendants of the tribal members would have no fishing rights except those held in common with non-Indians.[71] Such a position is untenable after *Menominee Tribe v. United States*.[72] There a federally-terminated tribe with no express treaty right to game was found to have the rights to hunt and fish by implication from other treaty language.[73] The United States Supreme Court did not consider this argument, however, upon granting certiori to the Puyallups.

The United States Supreme Court in an opinion written by Justice Douglas consumed little space in reversing the lengthy Washington state decision.[74] The issue was whether the ban on all net fishing in the Puyallup River for steelhead amounts to discrimination under the treaty.[75] The Court initially observed that the "ban on all net fishing in the Puyallup River for steelhead grants in effect the entire run to the sports fishermen."[76] It held that the ban is discriminatory "because all Indian net fishing is barred and only hook and line fishing, entirely pre-empted by non-Indians, is allowed."[77]

Although the Court aptly noted that "the aim" must be to "accommodate the rights of Indians under the Treaty and the rights of other people,"[78] it refused to offer any guidelines to lower courts in this apportionment process. Instead, the Court reserved judgment on a percentage basis for allocating the catch based on native versus hatchery planted fish.[79] The Court had before it facts that indicated that the catch of hatchery-raised steelhead had been 60 per cent one year and 80 per cent another.[80] Since 80 per cent

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> that you do not dip into the seed stock. . . . The other thing is that the manner of fishing, itself, must not be destructive."

Id. at ——, 497 P.2d at 177.

68. *Id.* at 497 P.2d at 177-78.
69. *Id.* at ——, 497 P.2d at 178.
70. *Id.*
71. *Id.* at ——, 497 P.2d at 187.
72. 391 U.S. 404 (1968).
73. *Id.* at 409 n.10; *see also* Elser v. Gill Net No. One, 246 Cal. App. 2d 30, 54 Cal. Rptr. 568 (Dist. Ct. App. 1966).
74. Department of Game v. Puyallup Tribe, Inc., 414 U.S. 44 (1973).
75. *Id.* at 47.
76. *Id.*
77. *Id.* at 48.
78. *Id.*
79. *Id.*
80. *Id.*

of the cost of the hatchery program was borne by sports fishermen license fees,[81] it could be argued that the sports fishermen should be permitted to harvest that percentage of stocked fish.[82]

Nevertheless, *Puyallup II* did focus upon some of the variables that would have to be considered in arriving at a formula for allocation. These included the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used, the number of hook and line licenses issued, catch limits, and the duration of the sports season.[83] Additionally, *Puyallup II* assured state fish and game departments that treaty rights would not be allowed to destroy a species of fish as follows:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.[84]

Mr. Justice White wrote a concurring opinion in which he was joined by Chief Justice Berger and Justice Stewart in which he maintained that the treaty did not "obligate the State of Washington to subsidize Indian fishery with planted fish paid for by sports fishermen."[85] This means that a non-depleting portion of the native run of 5,000 to 6,000 steelhead annually is all to which "the Indian treaty rights extend,"[86] according to the concurrors. Such reasoning ignores the fact that there was evidence before the state court that the federal government subsidizes the hatchery.[87] So at a minimum the Indians as citizens[88] are additionally entitled to a portion of those fish raised at federal expense. Subsequent state regulations should accommodate the Indian commercial netting of steelhead in a formula which takes into account both the annual native run and the federally-subsidized hatchery smolt.

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81. *Id.*
82. *But see* text accompanying notes 87 and 88, *infra.*
83. 414 U.S. at 49.
84. *Id.*
85. *Id.*
86. *Id.*
87. Department of Games v. Puyallup Tribe, Inc., at 80 Wash. 2d 561, 497 P.2d at 171, 178, *rev'd* 414 U.S. 44 (1973).
88. Congress conferred citizenship upon Indians in 1924, 8 U.S.C. § 1401(a)(2) (1970). Still, several states denied Indians the franchise until 1948. *See* Olguin & Utton, *The In-*

B. STATE COURT HIGHLIGHTS—REFRESHING ANALYSIS

> [T]he broad spectrum of issues addressed . . . (in Indian off-reservation hunting and fishing rights litigation) necessarily has drawn the analysis rather thin.[89]

There are a number of state court decisions in the last three decades which merit study because of the razor-blade sharpness of the analysis displayed. In 1943 the Idaho Supreme Court unanimously applied *Tulee* to prevent the imposition of state license fees upon a Nez Perce tribal member fishing in waters off the reservation. The site of the alleged violation in *State v. McConville*[90] was once part of his reservation but the tribe later ceded it to the federal government. The treaty which conveyed this land reserved fishing rights as follows:

> The exclusive right of taking fish in all the streams whether running through or bordering said reservation. . . ; upon open and unclaimed lands; . . . as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory. . . .[91]

In addition to being originally within the 1885 treaty reservation, the stream in which McConville fished was also "one of the places where the Indians had customarily fished."[92]

The Idaho Supreme Court held that an Indian who fished without a license pursuant to his treaty rights was immune from state prosecution. The court boldly and correctly rejected state contentions that the silence of the state's enabling act abrogated the treaty rights;[93] that the failure of a subsequent allotment act to preserve the fishing rights relinquished the rights;[94] and that the cession of lands and subsequent purchase by white settlers was inconsistent with continued right to fish.[95]

The *McConville* reasoning was reaffirmed and lucidly expanded by the Idaho Supreme Court in *State v. Arthur*.[96] The court held that a Nez Perce tribal member who hunted under an off-reservation treaty right was not subject to Idaho state game laws. The court determined that the hunting right, as expressed in the treaty, exists

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dian Rural Poor: Providing Legal Servies In a Cross-Cultural Setting, 15 KAN. L. REV. 487, 503 (1966) and cases cited therein; Comment, *Native Americans and Discrimination in*

89. State v. Tinno, 94 Idaho 759, 497 P.2d 1386, 1394 (1972) (McQuade, C. J., concurring opinion).

90. 65 Idaho 46, 139 P.2d 485 (1943).

91. 12 Stat. 957 (1859).

92. 65 Idaho ——, 139 P.2d at 487.

93. *Id.* at ——, 139 P.2d at 486.

94. *Id.* at ——, 139, P.2d at 487.

95. *Id.*

96. 74 Idaho 251, 261 P.2d 135 (1953), *cert. denied*, 347 U.S. 937 (1954).

"unimpaired by subsequent agreement, treaty, Act of Congress or the admission of Idaho to statehood. . . ."[97] The *Arthur* court stressed that *all signatories intended* the treaty hunting right to extend to

> such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership, and [the treaty] was not intended to nor did it exclude lands title to which rested in the federal government, hence the National Forest reserve upon which the game in question was killed was 'open and unclaimed' land.[98]

Besides studying the intent[99] of the parties, the *Arthur* court carefully analyzed all subsequent legislation pertaining to the Indians and their hunting rights. This analysis unequivocally shatters the rationale of *Race Horse*.[100] The *Arthur* court incisively discerned that the Idaho enabling act, although silent as to Indians, did not state "any *expressed* intention to *abrogate or extinguish* any of the provisions of the treaty of 1855 not to relieve the State of the obligations thereof. The repeal of such provisions by implication is not favored. . . ."[101] The *Arthur* court next frontally attacked the *Race Horse* decision. It was incorrect, the court said, because "no resort was had to the minutes made preceding the execution of the treaty;"[102] the majority considered "the changes and developments which followed (the treaty) rather than the conditions as they existed at the time;"[103] and repeal by implication of the 1855 treaty by the 1890 Enabling Act was inapplicable because the 1893 Nez Perce Agreement expressly recognized the continuation of treaty rights.[104]

Arthur was relied upon by the Michigan Supreme Court in another state court decision that stands out because of the analysis exhibited. In *People v. Jondreau*,[105] the court held that the State of Michigan was prohibited from licensing or regulating a Chippewa Indian of the L'Anse reservation who was charged with fishing outside of the reservation in adjoining Keweenaw Bay. The bay

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97. *Id.* ——, 261 P.2d at 140.
98. *Id.* ——, 261 P.2d at 142.
99. From the minutes of the treaty council the court pointed to the following as an "interesting statement" of intent:

> I shall do you no wrong and you do me none, both our rights shall be protected forever; it is not for ourselves here that we are talking, it is for those that come that we are speaking.

Id. ——, 261 P.2d at 141.
100. Ward v. Race Horse, 163 U.S. 244 (1896). Nonetheless, since the Supreme Court's departure from *Race Horse* has been sub silentio, the decision is technically not overruled.
101. 74 Idaho ——, 261 P.2d at 137-38.
102. *Id.* ——, 261 P.2d at 139.
103. *Id.*
104. *Id.*
105. 384 Mich. 539, 185 N.W.2d 375 (1971).

was situated within land originally ceded to the United States by the Chippewas, by an 1854 treaty. Article II of the treaty provides:

> . . . and such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.[106]

The court turned to the famous decision of *Worcester v. Georgia*[107] to obtain the rule of treaty construction as follows: "how the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."[108] With this caveat, the court declared:

> The substance of the right to fish must have included the right to fish on the Keweenaw Bay. For the L'Anse Band . . . the fishing right on the Keweenaw Bay was clearly a valuable right. Any other construction of the treaty would make the right granted by the treaty without substance. The Indians did not have the knowledge of the laws concerning municipal boundaries or sovereignty disputes between the Federal and State governments. Since they were living on land bordering the Keweenaw Bay, as "an unlettered people" they would assume that the right to fish meant the right to fish on the Keweenaw Bay.[109]

Relying on *Arthur* and solid constitutional law, the Michigan Supreme Court concluded that the Supremacy Clause of the United States Constitution prevents the state from licensing or regulating the treaty right in the absence of Congressional or Presidential delegation of power.[110]

In *State v. Tinno*,[111] the Idaho Supreme Court retreated and cowed to the Supreme Court's adoption of the *Tulee-Winans* dictum[112] that permitted state regulation for conservation. The decision, while in the main well-analyzed, says that Idaho may regulate this fishing right if the State meets certain strict standards.[113] The principal holding, however, is grounded on the "reserved rights" doctrine developed in *Tulee*[114] and *Winans*[115] together with the minutes from the Shoshone-Bannock treaty negotiations.[116] The brazen court declared that in the original contemplation of the Indians, the treaty

106. 10 Stat. 1109 (1854).
107. 31 U.S. (6 Peters) 515, 582 (1832).
108. 384 Mich. at 544, 185 N.W.2d at 377.
109. *Id.* at ——, 185 N.W.2d at 378.
110. *Id.*
111. State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1972).
112. See text accompanying note 49, *supra*.
113. State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1972).
114. 315 U.S. 681 (1942).
115. 198 U.S. 371 (1905).
116. 15 Stat. 673 (1869). This is the same treaty misconstrued by Justice White in *Ward v. Race Horse*, 163 U.S. 244 (1896).

right to hunt included the right to fish upon unoccupied federal lands.[117] This was so, the court asserted, even though this area was never part of their reservation.[118]

It seems critically clear after reviewing these few state decisions that the United States Supreme Court is not giving the hunting and fishing rights questions the analysis required. After *Tinno* one cannot assume that salvation lies in state courts when the Idaho Supreme Court concedes the most important unanalyzed issue,[119] that is, whether the states have any power to regulate fishing rights. Perhaps, in the future the *Arthur-McConville* reasoning, analysis which rejects unreasoned assumption that states may regulate treaty rights for conservation, will be resurrected. Until then, what began as a dictum in *Winans*[120] will continue to plague those who expect reason and analysis in the law.

II. EQUAL PROTECTION FOR NON-INDIANS: DOES TREATY ENFORCEMENT DISCRIMINATE?

> In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.[121]

A. SPECIAL STATUS FOR NATIVE AMERICANS

> For the Indians hunting and fishing are not merely a form of recreation. Since most reservations are impoverished, these activities are necessary for their very livelihood. Time and time again sportsmen and conservationists restricted the Indians in the pursuit of their very means of subsistence.[122]

Indians possess special status[123] by virtue of their treaty rights along with their traditional relationship vis-a-vis the federal government.[124] In *United States v. Winans*,[125] the Supreme Court declared that notwithstanding the phrase "in common with citizens of the territory," treaty language conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their usual and accustomed places outside their reservation.[126] The

117. State v. Tinno, 94 Idaho 759, ——, 497 P.2d 1386, 1390-91 (1972).
118. *Id.*
119. *See* Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 222 (1972).
120. *See* text accompanying *supra* note 49.
121. United States v. Winans, 198 U.S. 371, 380 (1905).
122. W. MEYER, NATIVE AMERICANS 67 (1972).
123. For an exposition of why Indians are special citizens *see* E. SCHUSKY, THE RIGHT TO BE INDIAN 17-25 (1971).
124. For a summation of this relationship see Bean, *The Limits of Indian Tribal Sovereignty: The Cornucopia of Inherent Powers*, 49 N.D. L. REV. 303, 304-311 (1973).
125. 198 U.S. 371, 380 (1905).
126. This reasoning was cited with approval in *Tulee v. Washington*, 315 U.S. 684, 685 (1942); also citing Seufert Brothers Co. v. United States, 249 U.S. 194 (1918).

principal reason for affording Indians special status based upon treaty rights was cogently explained by Justice Marshall as follows:

> The Indians Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent.[127]

Special rights to a limited class are not ipso facto violative of the law. Both the federal government and the states have traditionally extended special benefits to farmers, indigents, veterans, handicapped and older persons.[128] The special treatment according-to-law argument is buttressed by the moral argument which asserts that since our white society has taken the land and culture from the Indian, it is only fair that each victim of his wrong be compensated. This repayment-of-debt theory appeals to our morality since Indians hunted and fished prior to the coming of the white man.

B. EQUAL PROTECTION FOR NON-INDIANS

> The issue has been clouded by the claims of conservationists that hunting has to be regulated to protect the species. This argument applies only to the annual slaughter by white men seeking "trophy" animals who often leave killed animals to rot while seeking other, larger specimens to hang on their walls as proof of their "masculinity." Indians do not slaughter deer, nor do they waste meat. Though in general Indians are no longer as conservation-minded as they were once, they hardly pose a threat to the species with their minimal hunting practices.[129]

The question of equal protection for non-Indians drums softly beneath decisions which have recognized Indian treaty game rights.[130] In newspaper articles[131] and judicial dicta[132] from state court decisions the equal protection issue has been belabored. Recently, the question surfaced again in a dissenting state court opinion. The associate judge stated as follows:

> The Treaty of Medicine Creek . . . cannot be sensibly interpreted, I think, so as to award the descendants of these prim-

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127. Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970).
128. *See* Michelman, *Property, Utility and Fairness*, 80 HARV. L. REV. 1165, 1181-82 (1967); Reich, *The New Property*, 73 YALE L. J. 733 (1964).
129. W. MEYER, NATIVE AMERICANS: THE NEW INDIAN RESISTANCE 68 (1972).
130. *See* Comment, *State Power and the Indian Treaty Right to Fish*, 59 CALIF. L. REV. 485, 498-500 (1971).
131. *See, e.g.*, The Brainerd (Minn.) Daily Dispatch, Jan. 21, 1972, at 1, col. 1-7.
132. *See, e.g.*, Department of Game v. Puyallup Tribe, 80 Wash. 2d 561, ——, 497 P.2d 171, 182, 184 (1972), *rev'd* 414 U.S. 44 (1973); Department of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 252, 422 P.2d 754, 759 (1967), *aff'd* 391 U.S. 392 (1968); Montoya v. Bolack, 70 N.M. 196, 207, 372 P.2d 387, 395 (1962).

> itive people rights and privileges today in the state's waters not enjoyed in common by all of their fellow citizens of the state and the United States. The court's ruling, I fear, not only deprives citizens of the equal protection of the laws, but grants to some Indians as a class immunities and privileges not enjoyed by all citizens, including most Indians — all in violation of the Fourteenth Amendment.[133]

Since treaties and agreements[134] are negotiated, entered into, and ratified, by the federal government, often prior to the statehood of the states which now encompass the reservations, Justice Hale obviously errs when he contends that any treaty enforcement violates the Fourteenth Amendment. The amendment only proscribes "state action."[135] Reliance might properly have been placed on the Fifth Amendment, however. The Fifth Amendment Due Process Clause has been judicially expanded to secure for individuals equality against discriminatory federal classifications.[136]

The argument must submit that the legislative, executive, and judicial guarantees of benefits or rights for certain Native Americans create a discriminatory classification. The Supreme Court has looked to the purpose of such classifications to determine constitutionality. In Shapiro v. Thompson, a state welfare regulation that required one year of residence for eligibility was found to be violative of the Fifth Amendment. There the purpose was deterring the immigration of indigents to the state. Unlike *Shapiro,* however, the purpose of honoring treaties and agreements is not constitutionally impermissible. Moreover, it is perverse to argue that equal protection of the laws under the Fifth Amendment sanctions violations of other laws such as treaties.

III. SUGGESTIONS FOR JUDICIAL BALANCING

> [N]either the United States Supreme Court nor any federal court has ever faced squarely, or analyzed carefully, the most critical issue in the conflict; that is, whether the states

133. Department of Game v. Puyallup Tribe, Inc., 80 Wash. 2d 561, ——, 497 P.2d 171, 182 (1972) (Hale, J., dissenting).

134. Since the Indian Appropriation Act of March 3, 1871, 16 Stat. 544, 566, R.S. § 2079, presently codified as 25 U.S.C. § 71 (1970), the United States no longer makes treaties with Indian nations or tribes. The act transformed the form of negotiations from treaties to "agreements." *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 67 (1941).

135. The Fourteenth Amendment provides, *inter alia*: "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States. . . ." U.S. CONST. amend. XIV.

136. *See, e.g.,* Shapiro v Thompson, 394 U.S. 618 (1969); Aptheker v. Secretary of State, 378 U.S. 500 (1961); Steward Machine Co. v. Davis, 301 U.S. 585 (1937); Truax v. Corrigan, 257 U.S. 312 (1921). *But see* Detroit Bank v. United States, 317 U.S. 329 (1943); Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941); Sunshine Authracite Coal Co. v. Adkins, 310 U.S. 381, 401 (1940); La Belle Iron Works v. United States, 256 U.S. 377, 392 (1921).

137. 394 U.S. 618 (1960).

138. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error,* 47 WASH. L. REV. 207, 232 (1972).

> have any power whatsoever to regulate Indian fishing rights. Second, the standards pronounced to date by the federal and state courts to guide state regulation of Indian fishing rights are woefully confused, uncertain, and inadequate.[138]

A. OVERDUE EXAMINATION OF STATE CONSTITUTIONAL POWER TO REGULATE TREATY RIGHTS

> The meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written — that is, that they do not apply to a situation now to which they would have applied then — is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.[139]

The above analysis of the cases underscores the need for uniform measuring rods in Native American game disputes. The first step must be to carefully consider whether the states have power to regulate Indian off-reservation hunting and fishing. This power cannot be assumed any longer.[140]

It is submitted that it would take a substantial gloss on the Supremacy Clause to find that the Tenth Amendment reserves such power to states. The language of the Supremacy Clause is unequivocal; the "[c]onstitution . . . and all treaties made . . . shall be the supreme Law of the Land."[141] The Tenth Amendment merely reserves "Powers not delegated . . . nor prohibited . . . to the States." Equally unavailing is Article One's reference to Congressional power "[t]o regulate Commerce . . . with the Indian Tribes."[142] Considerable effort is needed to find constitutional underpinnings to support state regulation of Native American treaty game rights in the name of conservation. Courts must exhibit the intellectual integrity of facing this basic constitutional question if they are to command respect. Next, courts should focus upon the treaty language and history available to establish intent of the parties.

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139. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 402-03 (1937).
140. *See* text accompanying notes 59-64, *supra*.
141. U.S. CONST. art. VI, part 2.
142. U.S. CONST. art. I, § 8, part 3.

B. INTENT OF TREATY SIGNATORIES

> The time has come at long last for the courts to brush away the fog, fantasy, folklore and mythology upon which I perceive these Indian treaty decisions appear to rest and to read the treaties *as they were intended by both the Indian and the government to be read.*[143]

In *Tulee v. Washington,*[144] the Supreme Court emphasized Indian intent reflected in records made during negotiations as follows:

> [f]rom the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.[145]

Tulee stands with *United States v. Winans,*[146] *State v. Arthur,*[147] *People v. Jondreau,*[148] and *State v. Tinno*[149] as pinnacles of judicial respect for the intent of the signers of treaties. Indian intent can be gathered from the testimony and records of tribal elders. This intent also may be gleaned from treaty minutes as in *State v. Arthur.* Another source is the legislative history including committee hearings and floor speeches preceding ratification of respective treaties. This indicium of intent is preserved in the Congressional Record. This historical research should reveal any subsequent legislation or agreements which purport to divest hunting or fishing rights. If such action is found, it must be weighed against *Menominee Tribe v. United States.*[150] The Court must test the validity of the legislative attempt to sever the rights with Indian intent, adequacy of consideration, and the effect on the tribal economy.[151] In no event should an effort be made to equate the importance of the game rights to Indians with the method or frequency of exercise because the ceremonial hunting and religious use of game, feathers, and fur differ from that of Anglo sportsmen.[152]

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143. Department of Game v. Puyallup Tribe, 80 Wash. 2d 561, 497 P.2d 171, 187 (1972) (emphasis added).
144. 315 U.S. 681 (1942).
145. *Id.* at 684-85.
146. 198 U.S. 371 (1905).
147. 74 Idaho 251, 261 P.2d 135 (1953), *cert. denied,* 347 U.S. 937 (1954).
148. 384 Mich. 539, 185 N.W.2d 375 (1971).
149. State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1972).
150. 391 U.S. 404 (1968). See text accompanying *supra* note 72.
151. *See* Note, *State Power and the Indian Treaty Right to Fish,* 59 CALIF. L. REV. 485, 523 (1971).
152. *See* C. KLUHCKHOHN, & D. LEIGHTON, THE NAVAJO 222 (1962); E. SCHUSKY, THE RIGHT TO BE INDIAN 31-32 (1971).

C. A FAIR SHARE FOR TREATY HOLDERS

> Recently, Indians have argued strongly for their exclusion from state game rules. On the reservation Indians feel they are not bound by state hunting or fishing regulations. Only rarely is game of any importance in reservation economies. Recent protests have clearly been demonstrations to show the possession of special rights; the hunting or fishing in themselves were unimportant.[153]

The Supreme Court left lower courts with the "reasonable and necessary" test to utilize in reviewing state conservation programs. Lower courts are without guidance as to the meaning of "necessity." It is submitted that "necessity" must incorporate a factor that ensures fair share of harvestable game to the holders of treaty rights.[154] One federal district court enunciated such a test. In *Sohappy v. Smith*,[155] the court declared that a state regulation which does not insure that a "fair share" of the harvestable fish actually escapes the lower river, non-Indian fishermen would violate the Indian treaty right to fish.[156] The court omitted consideration of how to implement the test. Nonetheless, a fair share to treaty holders is an excellent yardstick by which to measure state wildlife programs.

IV. CONCLUSION

Indian hunting and fishing questions today reduce to contests among sportsmen, states, and Native Americans. It is a competition for a limited resource. It results in states eroding federal guarantees to the Native Americans in the name of conservation. Conservation seems to be defined as that program which satisfies the greatest number of sportsmen.

The foregoing exploration analyzed the case law and offered modest suggestions for development of a reasoned judicial posture for future off-reservation game controversies. Judicial abnegation is revealed in the failure to carefully reason where states get the power to regulate treaty rights. This cannot continue if there is to be an end to the continual litigation of the off-reservation questions.

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153. E. SCHUSKY, THE RIGHT TO BE INDIAN, 31-32 (1971).
154. *See* Hobbs, *Indian Hunting & Fishing Rights II*, 37 GEO. WASH. L. REV. 1251, 1259-60 (1969).
155. 302 F. Supp. 899 (D. Ore. 1969).
156. *Id.* at 911.