# INDIAN HUNTING AND FISHING RIGHTS

Few controversies have raised the emotions of American Indians to the fever pitch recently attained in the continuing fight over Indian hunting and fishing rights. In the State of Washington a group of Indian tribes banded together, in what was popularly coined a "fish-in," to fish several off-reservation rivers in defiance of the state's conservation laws.[1] These protesters contended that Washington had unjustifiably restricted their natural right to pursue their livelihood as outdoorsmen:

> [B]efore it [the "fish-in"] had ended the hundreds of Indians had swelled to thousands. There were Fish-Ins on half a dozen rivers. There were dozens of arrests, war dances on the steps of the capitol rotunda, 'an Indian protest meeting of several thousand at the state capitol. There were Treaty Treks on the streets of the cities and Canoe Treks, of sixty miles, through Peugot Sound. There was a gathering of more than one thousand Indians from fifty-six tribes throughout the country who came to join . . . .[2]

Participants in this same movement also came to the Nation's Capital for last summer's Poor Peoples' Campaign and demonstrated at the steps of the Supreme Court in protest of alleged discrimination, and to air their furor over the case of *Puyallup Tribe v. Department of Game*,[3] discussed *infra*.

As state populations continue to grow, conservation laws will become increasingly necessary to the preservation of wildlife and natural resources. Therefore it may be expected that the tempo of the states' attack on Indian hunting and fishing rights will be intensified. Because of the value of these rights to tribal Indians, representing in some communities the backbone of their economy,[4] the courts should tread carefully in allowing assertion of state control over Indian hunting and fishing rights.

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[1] S. STEINER, THE NEW INDIANS 50 (1968).

[2] *Id.*

[3] 391 U.S. 392 (1968).

[4] The following information was received in response to questions (italicized sentences) which were posed to the Bureau of Indian Affairs:

(1) *A list of reservations which encompass lakes which do or could sustain a commercial fishing operation.* We believe that the Red Lake Indian Reservation in Minnesota sustains the only commercial fishing operation within the boundaries of an Indian reservation. This reservation contains the 'Red Lake' which produces over 650,000 pounds of Walleyed Pike annually.

(2) *A list of tribes which engage in either on or off reservation commercial fishing operations and the extent of these operations.* Members of several Indian tribes engage in both "on and off" reservation commercial fishing operations. Operations are primarily for anadromous fish in the Northwest. The extent often is determined by quality and quantity of the fish run which depends on the

## OFF-RESERVATION RIGHTS

Last summer, in *Puyallup Tribe,* the United States Supreme Court did much to clarify the confusion which previously existed over the permissible extent of state control over off-reservation fishing rights conferred by federal treaty. The case involved the Treaty of Medicine Creek, negotiated between the United States and the Puyallup and Nisqually Indians of Washington. The treaty conferred upon the Indians the "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the territory."[5]

The source of the controversy rested in the fish and game statutes of Washington, which forbid the use of set nets or fixed appliances, in any waters of the state, for the taking of salmon or steelhead.[6] In 1960, members of the Puyallup Tribe began using set nets off their reservation to catch salmon and steelhead, not only for their own needs, but for commercial distribution as well. The Game Department of Washington instituted a declaratory judgment action to determine whether the Indians' treaty rights immunized them from state conservation laws and, if so, the extent of such immunity. The Supreme Court of Washington, though basing its decision on different grounds than had the trial court,[7] affirmed for the state, holding that the Indians possessed off-reservation rights to fish at the usual and accustomed places, but that such activities were subject to state regulation which was reasonable and necessary to

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variety and season. The principal tribes with membership engaging in these operations are the Yakima, Nez Perce, Warm Springs, Umatilla, Quinault, Makah, Lummi, Tulalip, and several groups in Alaska.

(3) *A list of reservations which contain wildlife utilized by tribal members for sustenance, support, etc., and an indication whether this use is beneficial or harmful to wildlife resources.*
Most Indian reservations have wildlife. It is difficult to generalize as to whether the Indian use is beneficial or harmful. Some tribes have excellent management and produce and properly harvest their wildlife. Some tribes do not harvest the wildlife crop properly and some others over-harvest the crop. Indian tribes through treaty or other rights control the wildlife resource and its management is within their jurisdiction.
Letter from Mr. Charles P. Corke, Deputy Assistant Commissioner of Indian Affairs to the *Arizona Law Review,* Jan. 21, 1969 on file University of Arizona Law Library.

[5] Treaty with the Nisquallys, Dec. 26, 1854, art. III, 10 Stat. 1132 (1855).

[6] WASH. REV. CODE §§ 75.12.060, 77.16.060 (1962).

[7] The trial court concluded that the Tribe no longer existed as an entity and hence its members no longer had any rights under the Treaty; and that since all lands within the reservation boundaries had been transferred into private ownership, with the exception of two small tracts being utilized as a tribal cemetery, there was no longer any reservation. Department of Game v. Puyallup Tribe, 70 Wash. 2d 245, 422 P.2d 754, 756 (1967). The United States Supreme Court specifically refused to determine whether the reservation had been extinguished. Puyallup Tribe v. Department of Game, 391 U.S. 392, 394 n.1 (1968). As to whether termination of a reservation necessarily entails a corresponding abrogation of treaty rights connected therewith, *see* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), which was decided the same day as *Puyallup Tribe* and discussed *infra.*

preserve the fishery.[8] On certiorari, the United States Supreme Court affirmed, holding that the State of Washington was precluded from regulating the places at which the Indians might fish, but that the terms of the treaty, expressly conferring a non-exclusive right and not specifying the manner in which the right might be exercised, permitted the state to limit the mode of fishing, the size of the take, the commercial purpose, and the like, provided that the regulations were in the interests of conservation, met "appropriate standards," and did not discriminate against the Indians.[9]

The type of treaty provision which was before the Court in *Puyallup Tribe* is commonly found in Indian treaties and has been the subject of prior adjudication.[10] These decisions have established that such a grant does not confer an exclusive right as to time and manner of fishing upon the Indians and, therefore, are in accord with the interpretation arrived at by the Supreme Court in *Puyallup Tribe*.[11] In the leading case of *Tulee v. Washington*,[12] relied upon by the Court in *Puyallup Tribe*, the Court stated:

> [T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish.[13]

This interpretation is supported not only by many prior decisions, but also by the import of the terms of the treaty as manifestations of the parties' intent.

The *Puyallup Tribe* case would have been decided differently if the terms of the treaty had preserved the right to fish *"at the 'usual and accustomed places' in the 'usual and accustomed' manner."*[14] The Court indicated that if such had been the phraseology, the state would be

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[8] Department of Game v. Puyallup Tribe, 70 Wash. 2d 245, 422 P.2d 754 (1967).

[9] 391 U.S. at 398.

[10] See Tulee v. Washington, 315 U.S. 681 (1942); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); Kennedy v. Becker, 241 U.S. 556 (1916); United States v. Winans, 198 U.S. 371 (1905); Maison v. Confederated Tribes of the Umatilla Reservation, 314 F.2d 169 (9th Cir. 1963); United States v. The James G. Swan, 50 F. 108 (N.D. Wash. 1892); Makah Indian Tribe v. United States, 151 Ct. Cl. 701 (1960); State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953); State v. McCoy, 63 Wash. 2d 421, 387 P.2d 942 (1963).

[11] Cases cited note 10 *supra*.

[12] 315 U.S. 681 (1942).

[13] *Id.* at 684. Here, an Indian was convicted of fishing for salmon without a license. In seeking to uphold the conviction, the state contended that since the license was required of all fishermen it did not discriminate against the Indians and, therefore, did not impair the rights conferred by the treaty. The Indians claimed that the treaty gave them an unrestricted right to fish in the usual and accustomed places, free from state regulation of any kind. The Court disagreed with both contentions, stating: "We think the state's construction of the treaty is too narrow and the appellant's too broad." *Id.* at 684.

[14] 391 U.S. at 398. (emphasis original).

bound by the rights conferred.[15] As the Court pointed out, however, the treaty did not contain an unlimited guarantee of an absolute right to fish at "usual and accustomed places," and to impliedly find such an extension would be unwarranted.[16] The conclusion that the parties to the treaty could not have expected it to confer unlimited fishing rights is further reinforced by the fact that the grant was couched in non-exclusive terms. It was expressly stated that the treaty right was to be shared "in common with all citizens of the Territory," and that "[c]ertainly the right of the latter may be regulated."[17] Thus, the Court could see "no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State."[18] Treaty rights cannot, of course, be infringed upon by the enactment of regulations under the state police power.[19] If, however, the *manner* in which this right to fish may be exercised is *not* a right guaranteed by treaty, it is subject to regulation by state law, and this raises a question which has long been unsettled — the permissible extent of such allowable regulation (*i.e.*, what the court in *Puyallup Tribe* refers to as "appropriate standards").

In *Ward v. Race Horse*,[20] the first Supreme Court case dealing with the permissible extent of state regulation of Indian activities outside the reservation, the Court apparently laid down a test allowing unfettered state control. The Court had before it the Shoshone Treaty, which conferred upon the signatory tribes "the right to hunt upon un-

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[15] *Id.*

[16] *Id.* For illustrations of the "liberal spirit" in which Indian treaties are usually construed *see* United States v. Winans, 198 U.S. 371 (1905); Choctaw Nation v. United States, 119 U.S. 1 (1886); Worcester v. Georgia, 31 U.S. (65 Pet.) 515, 581 (1832); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). In Seufert Bros. Co. v. United States, 249 U.S. 194 (1919), the rule of liberal construction, taken from the *Winans* case, *supra*, was stated to be as follows:

> We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection' . . . . 249 U.S. at 198.

[17] Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968).

[18] *Id.*

[19] See U.S. CONST. art. VI, under which treaties made under the authority of the United States, along with the Constitution and federal laws made in pursuance thereof, are declared to be the supreme law of the land. Missouri v. Holland, 252 U.S. 416 (1920); Baldwin v. Franks, 120 U.S. 678, 683 (1887); Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872). Treaties with Indian tribes are treaties within the meaning of the Constitution. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Indian treaties ratified since 1871, however, are not accorded this constitutional ranking, for in that year Congress decreed:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; . . . . 25 U.S.C. § 71 (1964).

(Note that the Treaty with the Nisquallys, *supra* note 5, was negotiated in 1854). This statute, however, did not affect the federal government's exclusive jurisdiction over Indian tribes, but was only a determination to govern its Indian wards by congressional enactment, rather than by treaty. State *ex rel.* Adams v. Superior Court, 57 Wash. 2d 181, 356 P.2d 985 (1960).

[20] 163 U.S. 504 (1896).

occupied lands of the United States so long as game may be found thereon . . . ."[21] The defendant was a Bannock Indian, who had been hunting elk on unoccupied land in Wyoming. The Court held that the admission of Wyoming into the Union abrogated the operation of the treaty rights off the reservation, since their exercise was incompatible with the state's right to regulate hunting.[22] However, this view was soon impliedly discarded.[23] *Race Horse* is now generally considered as doing no more than recognizing the general proposition that a state may impose some control over off-reservation hunting rights.[24]

Diametrically opposed to *Race Horse* is the Idaho case of *State v. Arthur*,[25] in which the court indicated that a state was powerless to control Indians exercising off-reservation treaty rights. *Arthur* involved the Nez Perce Treaty,[26] which reserved to the tribe the right to hunt upon off-reservation unclaimed land. The defendant, a member of the tribe, had been charged with killing deer out of season in a national forest. The court held that members of the tribe could hunt on such land, notwithstanding that it was prohibited by Idaho law. The reasoning of *Arthur* was subsequently adopted by four justices of the Supreme Court of Washington in *State v. Satiacum*;[27] however, six years later, in *State v. McCoy*,[28] that same court refused to follow the doctrine.

The factual setting of *McCoy* clearly illustrates the danger to wildlife preservation which could result from a strict adherence to the *Arthur* approach. In *McCoy*, a member of the Swinomish Tribe, by means of a 600-foot gill net, engaged in commercial fishing for salmon outside the reservation at the "usual and accustomed fishing grounds," as guaranteed by treaty. The use of such tackle makes it possible for a few fishermen to eradicate an entire salmon run within a very short time. At the trial, the state attempted to introduce evidence showing the effects of this type of fishing on the preservation of the fishery. In line with the *Arthur* rule, the trial judge rejected the offered evidence

[21] Treaty with the Shoshone and Bannock Indians, July 3, 1868, 15 Stat. 673, 674-75 (1869).

[22] Ward v. Race Horse, 163 U.S. 504, 514 (1896): "The two facts, the privilege conferred and the act of [Wyoming's] admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting."

[23] United States v. Winans, 198 U.S. 371 (1905). The reasoning of the Court in *Race Horse* was predicated upon the general rule that an act of Congress may supersede a prior treaty. In the *Race Horse* situation, the subsequent statute was held to be the enabling act which admitted Wyoming into the Union "on an equal footing with the original States in all respects whatever." Wyoming Admission Act, ch. 664, § 1, 26 Stat. 222 (1890). This reasoning was rejected in *Winans*, where the Court, citing Shively v. Bowlby, 152 U.S. 1 (1894), pointed out that while the United States holds lands as a territory, it has the power to create rights which would continue to bind the states upon their entry into the Union, notwithstanding use of the words "equal footing" in their enabling acts.

[24] Hobbs, *Indian Hunting and Fishing Rights*, 32 GEO. WASH. L. REV. 504, 524 (1963).

[25] 74 Idaho 251, 261 P.2d 135 (1953), *cert. denied*, 347 U.S. 937 (1954).

[26] June 11, 1855, 12 Stat. 1957 (1855).

[27] 50 Wash. 2d 513, 314 P.2d 400 (1957).

[28] 63 Wash. 2d 421, 387 P.2d 942 (1963).

since he felt the state was powerless to limit the treaty rights notwithstanding the effect on the fishery. The Supreme Court of Washington reversed, holding the evidence admissible. The majority did not discuss the *Satiacum* decision, and pointed out that the state had the power to subject Indian off-reservation fishing rights to reasonable and necessary regulations until limited by a clear and unequivocal expression to the contrary by Congress.[29]

The views set down in *Race Horse* and *Arthur* represent the periphery of judicial thought concerning the extent of permissible state regulation of the Indians' off-reservation treaty rights; most decisions are more moderate in approach. For example, in *Maison v. Confederated Tribes of the Umatilla Indian Reservation*,[30] the Ninth Circuit put forward a doctrine which permits a state to regulate off-reservation Indian fishing to the extent it is shown that such regulation is "indispensable." By "indispensable" it is meant that regulation is necessary when it is not possible to preserve the fishery by regulation of non-Indian fishing alone.[31] Thus, if it is shown that total curtailment of fishing, by those who do not possess treaty rights, will not be sufficient to check an apparent danger to the fishery, the "indispensable" test has been met.[32]

The test approved by the Supreme Court in *Puyallup Tribe* subjects Indian off-reservation fishing rights to that state regulation which is "reasonable and necessary" to preserve the fishery.[33] This test guarantees to the Indians greater protection than is afforded by a mere test of "reasonableness," which is the due process criterion that governs the fishing rights of citizens not possessing treaty privileges.[34] If Indians

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[29] *Id.* at 952-53.

[30] 314 F.2d 169 (9th Cir. 1963).

[31] *Id.* at 173.

> But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation. *Id.* at 172.

[32] In *Maison*, where the defendant had been arrested for fishing out of season, the state failed to present proof sufficient to meet this criteria.

[33] Puyallup Tribe v. Department of Game, 391 U.S. 392, 401 (1968).

[34] As pointed out by the Court in *Puyallup Tribe*, the measure of the legal propriety of off-reservation fishing rights granted by treaty is distinct from the federal constitutional standard governing the scope of the state's regulatory power. The usual police power test is one of "reasonableness" only. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 355 U.S. 525 (1949). "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

One prior case which could possibly be used in support of a "reasonableness" test is that of United States v. Winans, 198 U.S. 371 (1905), where the Court stated, by way of dicta: "Nor does it [the right to fish at usual and accustomed places] restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." *Id.* at 384. In *Winans*, the private owners of lands, on which the Indians had usual and accustomed fishing stations, were authorized as state licensees to be the sole users of fishing wheels at the stations. These fishing devices possessed the capacity to quickly eradicate an entire run of spawning fish. In other words, if such licensees were not restricted the Indians would suffer a total annihilation of their rights, as there would

exercising treaty rights were protected only against those state regulations which might be deemed "arbitrary" or "unreasonable," the treaties would not accomplish the purpose for which they were enacted since there would be no real difference between the Indians fishing rights and those of other citizens. That such would be an unintended result was succinctly brought out in *United States v. Winans*,[35] where the Court stated that to construe a treaty as giving the Indians "no rights but such as they would have without the treaty" would be "an impotent outcome to negotiations and convention which seemed to promise more and give the word of the Nation for more."[36]

Thus, by making the test "reasonable and necessary," rather than mere reasonableness, the Court in *Puyallup Tribe* has protected the dignity of the treaty without unduly hampering the state in the exercise of its inherent power to conserve the fishery. On the other hand, to have held that the treaty conferred unlimited fishing rights would not only have been an unjustified extension of its terms, but would have ignored basic practical considerations such as the availability of modern gear (unknown to fishermen at the time of the treaty) which makes it possible for a few men to exhaust a fishery, and the fact that most salmon are now the product of state supported hatcheries.[37]

Unfortunately, the *Puyallup Tribe* standard is unavoidably vague. As noted above, the Ninth Circuit equated "necessary" with "indispensable" in the *Maison* case. Yet the Court in *Puyallup Tribe* rejected this definition and characterized it as an erroneous interpretation of *Tulee v. Washington*.[38] Nor do the facts of *Puyallup Tribe* itself provide

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soon be no fish. In response to the state's contention that the transfer of the lands in question to private ownership abrogated whatever treaty rights the Indians might possess, the Court held that the treaty conferred upon the Indians "continuing rights," beyond those which other citizens might enjoy, to "fish at their usual and accustomed places." The concept that the treaty rights are "continuing," and thus cannot be destroyed by a conveyance of the servient land, has been repeatedly affirmed by the Supreme Court. *See* Tulee v. Washington, 315 U.S. 681 (1942); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); Kennedy v. Becker, 241 U.S. 556 (1916).

[35] 198 U.S. 371, 380 (1905).

[36] *Id.* at 381.

[37] An additional criticism of the "unlimited rights" construction was brought out in Kennedy v. Becker, 241 U.S. 556 (1916), where the Indians contended that the treaty called for "dual sovereignty" of fishing rights (*i.e.*, the state would monitor the rights of non-Indians and the tribe would control its members). The Court reasoned that such a policy would be inevitably self-defeating, as it would lead to the destruction of fishing rights for whites and Indians alike since neither would be able to restrain the predatory conduct of the other. *Id.* at 563.

[38] Puyallup Tribe v. Department of Game, 391 U.S. 392, 401 n.14 (1968). In Tulee v. Washington, 315 U.S. 681 (1942), the defendant was an Indian convicted of fishing for salmon without the license which was required of all fishermen. The purpose of the licensing fee was not merely to regulate fishing, but also to obtain revenue for state institutions. In holding that the license fee was an unwarranted derogation of the Indians' treaty rights, the Court stated in dictum: "The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program." *Id.* at 685. In *Puyallup Tribe*, the Court rejected the proposition that *Tulee* set up

much assistance. The Indians had been using set nets in salmon preserves which created cavities into which many fish would be "funnelled" upon making their run up the main stream. Obviously such conduct, if allowed to continue, could rapidly decimate an entire salmon run.[39] As such, it represents conduct far surpassing what would seem to be required in order to meet the "reasonable and necessary" test. The other extreme would be an attempt on the part of the state to regulate Indian fishing practiced by means of rod and reel. This type of regulation would seem to be in derogation of the treaty, since such equipment is similar to methods employed at the time of the treaty's enactment and does not present an acute danger to the fishery. A more difficult problem is presented by small scale Indian commercial fishing enterprises. The answer, of course, would necessarily depend on the facts of the particular case.[40]

The construction placed upon the Puyallup Treaty by the courts represents an attempt to determine what must have been the intent of the parties and to accord an equitable balance between Indian fishing rights and the state's inherent power to protect its fisheries. Contrary to the vociferous opinions of some dissidents,[41] it does not seem that the *Puyallup Tribe* test prevents an Indian from pursuing his life as an outdoorsman. Admittedly, the doctrine restricts the ability of Indians to develop commercial fishing enterprises, but only in the sense that it seeks to protect state wildlife resources from misuse.

### ON RESERVATION RIGHTS

As a general proposition, state conservation laws do not apply to

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"indispensable" as the controlling standard, indicating that the only context which might justify the use of "indispensable" would be that present in *Tulee*, where the state was, in effect, levying a revenue tax upon the exercise of a federal right. *Puyallup Tribe, supra*, at 401 n.14.

[39] In *Puyallup Tribe*, the Court refrained from deciding whether the Indian activity made the statutes in question "reasonable and necessary," since the Supreme Court of Washington had remanded to the trial court for determination of this issue. But, the parties had stipulated that the Indians' commercial fishery would "virtually exterminate the salmon and steelhead fish runs of the Nisqually River . . . ." and that:

> it is necessary for proper conservation of the salmon and steelhead fish runs . . . that the plaintiffs enforce state fishery conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds. 391 U.S. 392, 402 n.15 (1968).

[40] The distinction between fishing for commercial distribution and fishing for subsistence by traditional means was mentioned in the concurring opinion of Judge Hill in State v. McCoy, 63 Wash. 2d 421, 387 P.2d 942 (1963), a case where the potential harm from the defendant's conduct was of a nature similar to that stipulated to in *Puyallup Tribe*. *See also* Moore v. United States, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947). *Moore* deals with the on-reservation fishing rights of the Quillayute Indians, a very industrious tribe which had been engaged in large scale commercial fishing long before their treaty was negotiated. Surely as to them it cannot be said that commercial fishing was not within their minds at the time of the treaty deliberations.

[41] *See* notes 1 & 2 and related text *supra*.

Indians on the reservation,[42] rather, any non-tribal regulation must emanate from the federal government.[43] The Government's power over Indian reservations is derived from the commerce[44] and treaty[45] clauses of the Constitution and from the necessity of giving uniform protection to a dependent people.[46] The first case to deny states the right to control on-reservation activity was *Worcester v. Georgia*,[47] which involved the Cherokee Indians, then located in the State of Georgia. The Georgia Legislature had sought to extend its law-making power to the reservation, despite the existence of federal treaties which set aside the land for the Cherokees. A Georgia statute prohibited non-Indians from entering reservation land without gubernatorial permission. The defendant in *Worcester* was a white missionary, licensed by the federal government to practice among the Cherokees, who had been arrested for living on the reservation without the required permission. Chief Justice Marshall held Georgia's assertion of power over entry onto the reservation invalid, stating:

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[42] *E.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Moore v. United States, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947), United States v. Romaine, 255 F. 253 (9th Cir. 1919); Klamath & Modoc Tribes v. Maison, 139 F. Supp. 634 (D. Ore. 1956); United States v. Hamilton, 233 F. 685 (W.D.N.Y. 1915); *In re* Lincoln, 129 F. 247 (N.D. Calif. 1904); *In re* Blackbird, 109 F. 139 (W.D. Wis. 1901); State v. Jackson, 218 Minn. 429, 16 N.W.2d 752 (1944); State v. Cloud, 179 Minn. 180, 228 N.W. 611 (1930); Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 P. 557 (1930).

In *Pioneer Packing*, the Washington court had before it the Treaty with the Quinault, July 1, 1855, 12 Stat. 971 (1856). Under this treaty, the Indians ceded their land to the United States, reserving "for their exclusive use" a tract to be determined later by executive order. Many years after the determination was made, the Quinaults were catching salmon on their reservation, in violation of state law, and shipping them to buyers in other states. The state seized a shipment and, in an action brought by the purchaser, it was held that the state could not interfere with the Indians' right to take fish from rivers and streams located within their reservation. The court reasoned that the Quinaults owned the fish in reservation streams by the same title and under the same prerogative as they were owned prior to the making of the treaty, and rejected the state's contention that title to fish on the reservation was held by the state in trust for the benefit of all its people.

A different view than that espoused in *Pioneer Packing* is illustrated by the federal case of *In re* Blackbird, 109 F. 139 (W.D. Wis. 1901), where a Chippewa Indian was arrested by state officials for violating Wisconsin fishing laws on a reservation stream. The reasoning set forth here was that Indians are wards of the federal government, dependent upon it for their protection. As such, jurisdiction over Indians on reservation land is within the exclusive province of the federal government and the states have only that jurisdiction conferred upon them by congressional action. Thus, the *Blackbird* court recognized that the federal government possesses the power to regulate on-reservation fishing rights and, should it so desire, to delegate this power to the states. However, since no delegation had been made, the State of Wisconsin was held powerless to enforce its fishing regulations on Indian land. The reasoning of *Blackbird*, is in accord with the bulk of the decisions in this area and with the leading case of Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), discussed in the text *infra*.

[43] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[44] U.S. CONST. art. I, § 8, *See* Perrin v. United States, 232 U.S. 478 (1914).

[45] U.S. CONST. art. VI.

[46] Williams v. Lee, 358 U.S. 217 (1959); United States v. Kagama, 118 U.S. 375 (1886).

[47] 31 U.S. (6 Pet.) 515 (1832).

> The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[48]

The jurisdictional doctrine of *Worcester* — that state courts have no jurisdiction over Indians on the reservation except where Congress has expressly conferred it[49] — remained virtually undisturbed until two recent Supreme Court decisions cast a shadow on the rigid policy of state preclusion. In *Organized Village of Kake v. Egan*,[50] Justice Frankfurter, speaking for a unanimous Court, stated:

> The general notion drawn from Chief Justice Marshall's opinion in Worcester v. Georgia . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations.[51]

The Justice went on to state that the proper test to apply in determining whether state jurisdiction extends over the reservation is whether it "would interfere with reservation self-government or impair a right granted or reserved by federal law."[52] Under this standard, a state is able to assert jurisdiction over reservations notwithstanding lack of congressional assent, provided it can show that such assertion will not interfere with either tribal self-government or federally conferred rights. If such infringement is present, any state assertion of jurisdiction is invalid unless authorized by the federal government.

As applied to Indians living on a reservation, the practical effect of this decision is to add little, if anything, to the limited scope of state

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[48] *Id.* at 561.

[49] *E.g.*, 18 U.S.C. § 1162 (1964).

[50] 369 U.S. 60 (1962).

[51] 369 U.S. at 72. Despite the clear indication that the doctrine of *Worcester v. Georgia* would no longer be so stringently applied, it was unnecessary for Justice Frankfurter, in resolving the issues posed in *Village of Kake*, to delineate the practical effect of the new standard on state jurisdiction over Indian reservations. The primary question to be decided was whether Alaska might regulate the exercise of off-reservation aboriginal fishing rights, notwithstanding its statehood act, which provided that Indian fishing would be under the absolute control and jurisdiction of the federal government. The Court held that the statehood act did not bar such state regulation because "absolute" merely meant "undiminished," not "exclusive;" and Indian rights, aboriginal in nature, have always been a permissible subject of state regulation. Village of Kake v. Egan, 369 U.S. 60, 71, 75 (1962).

[52] Village of Kake v. Egan, 369 U.S. 60, 75 (1962). *See* Williams v. Lee, 358 U.S. 217 (1959). Since Village of Kake v. Egan, 369 U.S. 60 (1962), dealt primarily with off-reservation rights (see discussion in note 50 *supra*), it is at least arguable that the Court in that case meant to have this new test apply solely to the off-reservation, rather than the on-reservation, situation. This argument would have to be rejected, however, in light of the earlier statement of the test in *Williams v. Lee*, which was clearly an on-reservation case. (*See* note 56, *infra*).

control accorded by *Worcester*. It would seem most uncommon to find a situation where state regulation of a reservation would not constitute an interference with tribal self-government or a federally conferred right.[53] Most Indian hunting and fishing rights are conferred by federal treaty; however, where such rights have not been so conferred, the basis of the Indians' claim against such regulation must rest upon their aboriginal title, which always has been considered subject to state regulation.[54]

Although modified by *Kake*, the doctrine of *Worcester* remains substantially intact as was pointed out by Justice Black in *Williams v. Lee*:[55]

> [T]his Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. Thus, suits by Indians against outsiders in state courts have been sanctioned . . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation . . . . But if the crime was *by or against an Indian*, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.[56] (emphasis added).

Because of this immunity from direct state prosecution a state must receive express congressional permission as a condition precedent to the effective assertion of regulatory influence over on-reservation Indians. The most pervasive delegation of such federal authority appears in the Assimilative Crimes Act,[57] which, on its face, may provide the states with an indirect method of penetrating the federal protection accorded on-reservation hunting and fishing rights. This statute provides in part:

Whoever within or upon any of the places now existing or here-

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[53] In Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962), a companion case to *Village of Kake*, the Court found that the federal statute, though creating a reservation, made no provision for tribal self-government. Nevertheless, the State of Alaska was held powerless to enjoin the use of fish traps (each capable of taking over 600,000 fish per annum) on reservation waters since the power to govern on-reservation activities was vested in the Secretary of the Interior by the same federal statute which created the reservation. 48 U.S.C. § 358 (1964).

[54] Village of Kake v. Egan, 369 U.S. 60, 75 (1962).

[55] 358 U.S. 217 (1959).

[56] *Id.* at 219, 220. The holding of this case was that Arizona courts are precluded from exercising jurisdiction over a civil suit brought by a non-Indian against an Indian, where the cause of action arises on the reservation. The Supreme Court of Arizona had adopted the view that the states have that jurisdiction over Indian affairs which Congress has not chosen to take away, either expressly or through pre-emption. Therefore, not finding a federal statute to the contrary, the court held that it possessed jurisdiction over the Indian defendant. Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958). The Supreme Court rejected this residual theory of Indian jurisdiction, adopting the holding stated above. The basis of the Supreme Court's decision was that the asserted state jurisdiction constituted an infringement on the Indians' right of self-government. *See* note 52 *supra*.

[57] 18 U.S.C. § 13 (1964).

> after reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.[58]

The places "reserved or acquired as provided in section 7" have been held to include Indian reservations.[59] Thus, the Act bestows on the states the *legislative* jurisdiction to define some crimes within the reservation, while leaving unaffected federal jurisdiction to apprehend and punish Indians who have perpetrated the crimes thus defined by state legislation.[60] The Act does not assimilate, however, those state penal laws which either are contrary to federal policy, or which conflict with federal laws and regulations.[61]

Thus, it could be argued that indirect state regulation of on-reservation hunting and fishing is permissible under the Assimilative Crimes Act through a combination of state legislative definition and federal enforcement of the offenses so defined. It seems unlikely, however, where Congress has expressly conferred fishing rights upon the Indians, under their treaties, that no contrary federal policy will be found. It is basic that state law cannot override a conflicting federal treaty.[62] Furthermore, the regulations of the Secretary of the Interior in this area have been significantly expanded in recent years.[63] Although the Secretary does not possess a general power to regulate Indian affairs as he sees fit, where his regulations are "necessary and proper" adjuncts to furthering treaty rights conferred by Congress, it seems quite clear that they will be upheld, and will prevail over any contrary state legislation.[64] The enabling acts in numerous state constitutions[65] disclaim state

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[58] *Id.*

[59] Williams v. United States, 327 U.S. 711 (1946); Guith v. United States, 230 F.2d 481 (9th Cir. 1956).

[60] Davis, *Criminal Jurisdiction over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 81 (1959).

[61] Williams v. United States, 327 U.S. 711, 717 (1946); Hunt v. United States, 278 U.S. 96 (1928).

[62] See note 19 *supra*.

[63] *See, e.g.*, 32 Fed. Reg. 10433 (1967). *See also* Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962), where the Secretary had been given the power to regulate internal Indian affairs pursuant to the congressional act which created the reservation.

[64] *Compare* Organized Village of Kake v. Egan, 369 U.S. 60 (1962), *with* Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962).

[65] *See, e.g.*, the Arizona Enabling Act, which states that "until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." 36 Stat. 569-70 (1910). *But see* Organized Village of Kake v. Egan, 369 U.S. 60, 71 (1962). For a compilation of the other states having similar disclaimers and an analysis of subsequent state action in light of Public Law 280, 18 U.S.C. § 1162 (1964), 28 U.S.C. § 1360 (1964), discussed

jurisdiction over Indian reservations thereby providing additional evidence of a federal policy which would be inconsistent with a state's exercise of jurisdiction under the Assimilative Crimes Act.

Congress, in 1953, passed Public Law 280,[66] which permitted those states having disclaimers of jurisdiction in their enabling acts to pass constitutional amendments removing the disclaimers. However, subsection (b) of the enactment provides:

> [Nothing herein] shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian . . . of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.*[67] (emphasis added).

In *Metlakatla Indian Community v. Egan*,[68] where Alaska had amended its constitution to take advantage of the expanded jurisdiction afforded by Public Law 280, the Supreme Court held that the phraseology in subsection (b) protects against state invasion of all fishing rights and privileges given by federal treaty, agreement or statute. The Court further indicated that the Act also protected those rights given by administrative regulation, made pursuant to a treaty or statute.[69]

That subsection (b) of Public Law 280 evinces a strong congressional policy to prevent state interference with the Indians' on-reservation fishing rights was even more firmly established by the recent Supreme Court case of *Menominee Tribe of Indians v. United States*.[70] In that case, the Court held that the Menominee Indians not only continued to possess their on-reservation fishing rights after passage of the Menominee Termination Act of 1961,[71] but also retained their previously enjoyed protection from state control over such rights, at least to a greater extent than that accorded non-Indians. (The Court expressly refrained from determining the *extent* of the surviving rights.)[72] The Termination Act expressly states that, upon termination of the reservation and transfer of title by the Secretary of the Interior to a tribal corporation, "the laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens or

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*infra* at notes 67-74, see Davis, *Criminal Jurisdiction over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 81, 85-89 (1959).

[66] 18 U.S.C. § 1162 (1964), 28 U.S.C. § 1360 (1964). Public Law 280 is no longer available to those states failing to take advantage of its provisions prior to the passage of the Civil Rights Act of 1968. 25 U.S.C. § 1301 (Supp. III 1968).

[67] *Id. See also* 25 U.S.C. § 1321(b) (Supp. III 1968).

[68] 369 U.S. 45 (1962).

[69] *Id.* at 56. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968); Klamath & Modoc Tribes v. Maison, 139 F. Supp. 634 (D. Ore. 1956).

[70] 391 U.S. 404 (1968).

[71] 25 U.S.C. §§ 891-902 (1964).

[72] Menominee Tribe of Indians v. United States, 391 U.S. 404, 407 (1968).

persons within their jurisdiction."[73] Despite such language, and the fact that the Termination Act was not made applicable to the Menominees until seven years after the enactment of Public Law 280, the Court concluded that the Termination Act must be construed in *pari materia* with subsection (b) of Public Law 280:

> The two Acts read together mean to us that, although federal supervision of the tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954.[74]

The Court went on to express its belief that to construe the Termination Act otherwise would be a "backhanded way of abrogating the hunting and fishing rights of [the Menominees]."[75]

## CONCLUSION

The case of *Puyallup Tribe v. Department of Game*[76] establishes that states need not fear the decimation of their fish population in off-reservation waters, and at the same time it preserves for the Indian more extensive rights than non-Indians enjoy. This same balance should be struck in the on-reservation situation. But since the states do not possess the power to regulate on-reservation treaty rights, potentially serious problems lie in the way of effective state conservation efforts. For example, states such as Washington, where large rivers run through both state and Indian land, could have the beneficial effects of off-reservation conservation offset by wasteful activities on the non-regulable Indian part of a river. The federal government does have the power to prevent such deleterious conduct,[77] but this would not seem to be an area where it should take control. Each state has its own unique conservation problems, and they should be left to their own measures in handling those problems. If the federal government were to impose uniform regulations for all on-reservation hunting and fishing activities,

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[73] 25 U.S.C. § 899 (1964).
[74] Menominee Tribe of Indians v. United States, 391 U.S. 404, 411 (1968).
[75] *Id.* at 412.
[76] 391 U.S. 392 (1968).
[77] Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968); Organized Village of Kake v. Egan, 369 U.S. 60, 69 (1962). Nevertheless, while the federal government has the power to abrogate Indian hunting and fishing rights, the intention to modify a treaty, so as to subject the federal government to a claim for compensation, "is not to be lightly imputed to the Congress." Menominee Tribe of Indians v. United States, *supra*, at 413. The fact that compensation would have to be paid if the Menominee fishing rights were held terminated under the Termination Act was one of the reasons proposed by the Court in *Menominee* for holding that such rights were not terminated. Although the Court refrained from deciding the extent of the rights held to survive the Termination Act, its reasoning would seem to support an argument that the fishing rights of the Menominees were preserved intact, *i.e.*, to the same extent that such rights were held by those Indians prior to the termination of their reservation. To hold otherwise would subject the federal government to a claim for compensation.

it could well defeat the purpose behind different state laws. Congressional codification of the *Puyallup Tribe* "reasonable and necessary" standard would provide a workable solution. While this may subject Congress to a claim for damages by affected tribes,[78] it would insure the effectiveness of state conservation measures and would leave Indian tribes with greater hunting and fishing rights than are enjoyed by their non-Indian counterparts.

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[78] *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968).