10-1974

Antoine v. Washington

Lewis F. Powell Jr.

June 12, 1974 Owens

DISCUSS

See my notes attached.

No. 73-717 Views of the SG

Antoine v. Washington

The SG says that the 1891 agreement was ratified by Congress and thus became binding on the state by virtue of the Supremacy Clause. Therefore, under Puyallup the state may restrict Indian rights to hunt and fish only on the basis of reasonable conservation measures, and there must be a showing that the regulation under which the Indians were convicted is a reasonable and necessary conservation measure. "The special rights of the Indians must be accomodated, so long as consistent with preservation of the game in question." The state has not shown that conservation requires the restriction it has imposed here. Therefore, the convictions are invalid. Probable jurisdiction should be noted, or the convictions should be reversed. Await discussion--see what Justice Douglas has to say. A note may be necessary.

Owens

Response (by the state) received -- adds nothing. The views of the SG would be very helpful here, particularly in analyzing Puyallup Owens

Call for Response
Views of S.G.
done 12-17-73

Another Indian case involving meaning of hunting rights "in common" — or in ~~Tulee~~ Puyallup Tribe case.

Preliminary Memo

January 4, 1974 Conference
List 1, Sheet 1

Call for response
Owens

No. 73-717

ANTOINE	Appeal from Washington ~~Supreme~~ Court	Timely
v.	(Rossellini for the Court; Utter, concurring)	
WASHINGTON	State - Criminal	

Very severe offenses

1. The Washington Supreme Court affirmed appellants' conviction for hunting during closed season and possession of deer during closed season. The basic questions presented are whether, by virtue of an agreement with certain Indians, the federal government reserved hunting rights to the ~~Indians~~ on their former reservation and, if so, whether the State of Washington may subject these rights to regulation under its game laws?

2. FACTS: Large areas of Eastern Washington were once inhabited by the Colville Confederated Tribes. In 1872, they were placed on the Colville Indian Reservation, and half of the 5,340 enrolled members of the tribe still live there. Appellant Alexander Antoine is an enrolled member of the tribe, and although his wife, appellant Irene Antoine, is not an enrolled member, she is nonetheless an Indian. In September 1971, appellants shot and killed a deer during closed season in what is now Ferry County, Washington, and was once within the boundaries of the original Colville Indian Reservation.

The land on which appellants were arrested had been ceded back to the United States Government by the Colville Confederation by an 1891 agreement with the United States. See J.S. App. F. Article 6 of the agreement provided:

> "It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged." J.S., at 5-6. (Emphasis added.)

At no time did anyone question that appellants were beneficiaries of this agreement.

3. DECISION OF THE WASHINGTON SUPREME COURT:

a. The SC agreed with appellants that at the time of the agreement, the provisions of Article 6 were intended to

guarantee the right to hunt on the ceded half of the reservation to all Indians on the reservation and not simply the allotment Indians.

b. Because an Act of Congress at the time of the agreement barred making treaties with the Indians, this agreement was a contract and not a treaty and must be interpreted accordingly. But the State of Washington was not a party to the contract and the federal government was not authorized to act on its behalf. Furthermore, the parties could not have intended that Washington be considered a party to the agreement.

c. The SC rejected appellants' contention that it must read into the language promising the continuation of hunting and fishing rights a promise that the State would not exercise its rights, under the police power, to regulate hunting upon those ceded lands which were to become a part of the public domain. United States v. Pelican, 232 U.S. 442 (1914) (lands within the public domain not subject to exclusive federal jurisdiction are subject to state jurisdiction). When Congress passed a law the year following the agreement and vacated and restored to the public domain a certain portion of the reservation (upon which these game law violations occurred), it was well aware that these lands would be opened for settlement and would come under state control. In fact, appellants do not challenge the state's power to regulate the taking of game on these lands; they only claim to be exempt by virtue of Article 6 of the agreement.

The SC was unwilling to embrace appellants' further argument that the rights promised under the agreement must include immunity from state regulation or else they were promised nothing which they would not have had without the agreement. The agreement does not expressly or impliedly exempt them from regulation. The parties contemplated that the Indians would remain subject to regulation; regulation is not ipso facto an abridgment; and the agreement meant only that the United States, as proprietor of the land, would not abridge the Indians' hunting and fishing rights.

d. The language of Article 6 -- "in common with all other persons" -- must be read in the context of the evident intent of the government at the time to open the lands to settlement. So long as the owners of the land allowed others to hunt thereon, the Indians should be able to do likewise. Appellants' argument cannot be reconciled with the fact of cession of all the Indians' "rights, titles, claim and interest" in the lands. Furthermore, nowhere in the laws authorizing the allotment of lands, appropriating money for the purchase of the Indians' rights, or opening the unallotted land for settlement is there any reference to the reservation of hunting and fishing rights.

e. Finally, even though a state may be bound by a treaty, a state is not denied the right to enforce against the Indians its reasonable regulations for the preservation of fish. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

Sounding an "Our Federalism" note, the SC concluded by noting that its decision is in harmony with preservation of an even balance between federal and state powers. Unlike Dick v. United States, 208 U.S. 340 (1908) (recognizing Congress' power to enter into an agreement with the Indians for a reasonable period of time prohibiting the introduction of liquor into the Indian country), the hunting of game is not commerce, and here there was no clearly articulated intention on the part of Congress to exclude the states from exercising their reserved powers.

4. CONTENTIONS: Appellants renew their arguments rejected by the Washington SC. In a nutshell, they maintain that their Colville hunting rights were preserved by the 1891 agreement; that federal laws as to Indians are superior to state law; and that Indian agreements are to be liberally construed to protect the rights of the Indians with all ambiguities resolved in the Indians' favor. Appellants further argue that the state SC's holding that the federal government could make no agreement concerning Indian rights over wildlife because the state was not a party to the agreement violates settled law. Choate v. Trapp, 224 U.S. 665 (1912); this contravenes Congress' constitutional power over Indian affairs under Article I, § 8, clause 3.

5. DISCUSSION: The Washington SC decision strikes me as vulnerable on several scores as to the correctness of its analysis and the sharpness of its focus, but in the long run the

bottom line may be correct. In Puyallup Tribe I, the Court unanimously held that:

> "the manner of fishing, the size of the take and 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. . . . The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved." 391 U.S., at 398-399.

Puyallup Tribe I involved a similar pact with the boilerplate "in common with" language, but the pivotal question is the reasonableness of the conservation measure, an inquiry which the Washington SC never undertook. Under the rationale of this decision, the Washington SC appears to have departed from this mode of analysis and adopted an approach that basically says that the State of Washington qua sovereign is not bound by anything that the United States Government may have once promised all these Indians when it "bought" their land. At least under prior authority, this seems to be a potentially dangerous line of reasoning and might jeopardize countless agreements and treaties with various Indian tribes. It may very well turn out that these are reasonable game laws, but no such finding has been made.

Since there is no response, the Court will probably want to request one. Moreover, keeping with what seems to be an established practice, the Court may also want to call for the views of the SG.

There is no response.

12/12/73	O'Donnell	Opinion in Jurisdictional Statement

ME

Cert 1/15/74

Court Wash. Supreme Ct.
Argued ....., 19...
Submitted ....., 19...
Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 73-717

ALEXANDER J. ANTOINE, ET UX., Appellants

vs.

WASHINGTON

10/31/73 - Appeal filed.

Call for views of S.G.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Conference 6-14-74

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 73-717

Submitted ....., *19*... *Announced* ....., *19*...

ANTOINE

vs.

WASHINGTON

Noted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....						✓								
Rehnquist, J.						✓								
Powell, J.						✓								
Blackmun, J.						✓								
Marshall, J.							join 3							
White, J.				✓										
Stewart, J.				✓										
Brennan, J.							join 3							
Douglas, J.				✓										
Burger, Ch. J.						✓								

No. 73-717 ANTIONIE v. WASHINGTON

This is another opaque Indian case here on appeal from the Supreme Court of Washington. As I dictate this at home, I do not have for reference the Court's decision in the Puyallup Tribe cases (391 U.S. 392 and 414 U.S. 44), which are relied upon by appellants and the SG but virtually ignored by appellee.

The facts were stipulated (see appellee's brief, p. 7): Appellants were convicted for killing a deer out of season in Ferry County within the boundaries of the original Colville Indian reservation, as established by Executive Order of 1872. By agreement between the United Statea and the Colville tribes of 1891, the northern half of the Colville reservation was ceded to the United States. The killing of the deer out of season occurred in this "northern half" and "outside the exterior boundaries of the Colville Indian reservation" as it presently exists. It occurred also on "unallotted non-Indian land".*

As it is difficult (especially in view of my absence of learning in Indian law!) to understand the exact sequence of various official acts and the consequence thereof, I rely primarily on the memorandum of the SG for this aspect of the case. The briefs of the parties are in disagreement and confusing.

A presidential commission entered into an agreement with the Tribes in 1891 pursuant to which the Tribes

*Assume the deer was killed on land (e.g. public park or reservation) of State of Washington and not on land "allotted" to any private owner.

"surrendered to the United States" the northern half of the reservation. Article VI provided that:

> "The right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in any wise abridged."

Although it is contemplated that this agreement would be approved by Congress it was not approved in 1892 when Congress adopted some of its provisions and "vacated and restored to the public domain" the northern half of the reservation, opening it up to settlement in accordance with "the general laws applicable to the disposition of public lands in the State of Washington". Article VI with respect to hunting and fishing was not included in the Act of 1892. But in 1906, Congress in effect purported to ratify the 1891 agreement.

The SG, agreeing with appellants, states that by virtue of the ratification the agreement "became a law binding on the states" (SG's brief, p. 4; Perrin v. United States, 232 U.S. 478). State of Washington, while not directly meeting the SG's position that ratification made the agreement binding on the State of Washington, argues that ratification could not be a "treaty" because all treaties were barred after 1871. 25 U.S.C. 71. The State argues that Congress had no power, absent a treaty, to deprive it of its "police power" to enact game conservation laws. Appellant - apparently with the SG's approval—contends that the 1891 agreement is "supreme

law" binding on the state and that no game conservation laws are applicable to the ceded portion of the Colville reservation.

The SG, following Puyallup, retreats from the extreme position taken by appellant. Rather, the SG acknowledges that the language "in common with all other persons" means something. He quotes from Puyallup I to the effect that the state, in the interest of conservation, may regulate the taking of game provided it meets "appropriate standards and does not discriminate against the Indians". The SG then says the appellants' conviction should be reversed, as the state made no showing here that it had enacted standards of any kind.

I have no view, not having read the cases, as to whether the 1891 agreement has the force of a treaty and supercedes the state's police power. Unless the provision with respect to hunting and fishing was a condition subject to which Washington knowingly took the ceded land in 1891, I would think the state's police power could not be extinguished by the unilateral act of congressional ratification of this agreement in 1906.

In any event, if this provision is binding upon the State of Washington, unless our decisions in the two Puyallup cases* require a contrary holding, I would think state game conservation laws of general applicability are presumptively valid and binding upon Indians "in common with all other persons". they certainly should be!

*My recollection is that a Treaty was involved in Puyallup I and II. If so, we are back to the question (ignored largely by briefs) whether a state's police power can be limited by an Act of Congress not of Treaty dignity?

lfp/ss 12/2/74

No. 73-717 ANTIONIE v. WASHINGTON

This is another opaque Indian case here on appeal from the Supreme Court of Washington. As I dictate this at home, I do not have for reference the Court's decision in the Puyallup Tribe cases (391 U.S. 392 and 414 U.S. 44), which are relied upon by appellants and the SG but virtually ignored by appellee.

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rc/ss 12/14/74

BENCH MEMO

TO: Mr. Justice Powell DATE: December 14, 1974

FROM: Ron Carr

No. 73-717 Antoine and Antoine v. State of Washington

I recommend that you vote to reverse, essentially on the basis of the SG's argument. But I doubt that, in doing so, you will be giving Mr. and Mrs. Antoine very much reward for their effort.

Despite its very broad language, the Washington Supreme Court's opinion had to do essentially with construction of the 1891 agreement between the Colville Confederation and the United States, ceding back to the United States the northern portion of the Colville reservation. The problem is the effect of the agreement on Washington's police power over the ceded back portion. If the agreement has the force of treaty or federal law, then its provision that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" might limit in some measure the State's power to apply its conservation laws to Indian hunting in the northern half. The Washington court decided, however, that the agreement neither constituted a treaty nor did it have the force of law through ratification by Congress. Hence, Washington's police power over the ceded back portion

is plenary, and the above-quoted provision means only that (1) Indians remaining in the ceded northern portion will continue to have hunting rights in the southern portion; or, at most (2) the Indians will have the hunting rights in the northern portion common to all persons. Under either interpretation the Antoines were properly convicted.

The case thus turned on whether the 1891 agreement had the force of law. There is no question that prior to that time the Indians had, under the Executive Order granting them the reservation, exclusive hunting rights in the northern portion. Nor is there any doubt that, had Congress ratified the agreement, it would have had the force of law and the State's police power would have been, pro tonto, diminished. E.g., Choate v. Trapp, 224 U.S. 665. The problem here is that Congress did not immediately or expressly ratify the agreement; instead, by act of 1892, it restored the lands to the public domain, without providing the consideration or recognizing the rights provided for in the agreement. The State's central argument here is that, in doing this, Congress returned the land to the State's plenary police power, and that Congress cannot subsequently abrogate this police power except by express provision.

The SG's response to this is, I think, well taken. By act of 1906, Congress authorized payments to Indians "[t]o carry into effect the [1891] agreement. . . ." In the same

year, in an act appropriating money for such payments, Congress referred to the Authorization Act as "ratifying the agreement ceding said land to the United States. . . ." The SG argues that this ratification gives the 1891 agreement the force of law, binding on the State under the Supremacy Clause. Two canons of construction are here in conflict: (1) that limitations on state police power are to be narrowly construed; (2) that treaties and agreements with Indians are to be construed in favor of the subject people, and congressional enactments for the benefit of Indians are to be liberally construed in light of Congress's plenary power to protect Indians wherever located. E.g., Morton v. Ruiz, 415 U.S. 199, 236.

I think both canons can be satisfied by adopting the approach taken in Tulee v. Washington, 315 U.S. 681, and Puyallup Tribe v. Dept. of Game, 391 U.S. 392. Both cases dealt with treaties guaranteeing Indians "the right of taking f ish, at all usual and accustomed . . . stations, . . . in common with all citizens." The Court held that while the treaties prevented the State from conditioning the Indians' right to fish on their obtaining a license, it did not affect "[t]he overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources . . . ." The language here - that the Indians' hunting rights "shall not be . . . in anywise abridged" - is, perhaps, a bit harder to get around than the language in Tulee and

Puyallup, but not much. The language can be read as meaning that the Indians may not be excluded from hunting, forced to pay for the right, or in any way subjected to discriminatory regulation. But at the same time, the language was not meant to impinge on the State's police power to regulate the time and manner of exercising those rights, if the regulations are reasonably necessary and appropriate for the conservation of game and therefore of benefit to Indians and non-Indians alike.

I would hold that the 1891 agreement has the force of law, and this would require reversal since the State did not establish that its regulation was reasonably necessary and appropriate to conservation.

R.C.

ss

Indian -hunting rights Colville Reservation

73-717 ANTOINE v. WASHINGTON Argued 12/16/74

Do not confuse with S.D. cases argued same day

SGs position seems about right to me; 1906,

The Agt. of 1891, ratified by Congress, is binding on State of Washington

The reservation of hunting & fishing rts was explicit & must be recognized.

The State, therefore, is not free to impose same restrictions (e.g. proscribe all hunting) as it could w/r to non-Indian. Indians are entitled to more than E/P.

But some power of regulation remains in state: Thus, ~~quantitative~~ quantitative restrictions in interest of conservation for Indians primarily are permitted if reasonably related to purpose.

On other hand, this offense occurred on private land. Counsel says, contrary to op. of S/ct of Wash, that even if land were fenced Indians could still hunt. (This disturbs me & may modify my tentative view above)

If I go with Petr (& SG), I might limit to public lands. Otherwise there would be chaos.

Moresset (for Petr)

This case differs from Puyallup cases - rights of Indians here are stronger.

This is impairment of Tribal rights - all off-reservation hunting & fishing is a Tribal right.

Concedes offense occurred on private land.

Concedes no Treaty is involved. Relies on Act of Congress

Conniff (cont AG)

There was hunting out of season.
Even owner of land could not have hunted.

There shooting of deer out of season occurred "outside" the Colville Reservation as it now exists

No. _____, Reversed 7 to 2

73-717 ANTOINE[illegible]. WASHINGTON Conf. 12/18/74 Reverse 7-2

The Chief Justice Passed / Then voted to Reverse

No valid judg. vs wife

Indian rts can't be lost by implication.

No Treaty after 1871

Douglas, J. Reverse

No distinction bet. Treaty & statute.

Agree with SG

Congress could change present status ...

Brennan, J. Reverse

Agree with WOD

There was an agreement - not a Treaty

Stewart, J. Affirm (tentative)

Congress had power to make Agt.

But difficult Q is what Congress intended. The critical language is not in any act of Congress. Appropriation Acts did not constitute ratification.

If he can be persuaded there was ratification, would draw distinction bet. right of state & right of private prop owners.

Hunting may be different from fishing.

Reverse as to wife

White, J. Reverse

Agt. expressed intention clearly enough as to non-allotted land, & Congress ratified agt.

Still leaves Q whether subsequent events may be relevant — but here issue is between State & Indians. We don't have case before us of private prop. rts.

Reverse

Marshall, J. Reverse

Agree with SG Reverse

Blackmun, J. Reverse

1981 Act was not a treaty.

↑ The 1982 Act vested some rights in state (not clear what).

Agt. was ratified 1906

Powell, J. Reverse

There was an Agt. that was ratified. I'm generally in agt. with SG.

But would not go so far as to say Indians have unlimited rts to hunt on private land.

Indians would have rights on public lands.

Only case before us is bet. state & Indians.

Thus — hunting was on private land — but no indication that land was posted or that owner objected

Rehnquist, J. Affirm

In view of problems as to private prop., can't believe Congress intended to ratify.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st Draft

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 1/15/75

No. 73-717

Recirculated: _____

Alexander J. Antoine et ux., Appellants, *v.* State of Washington. | On Appeal from the Supreme Court of Washington.

[January —, 1975]

Renewed 1/20 LFP

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The appellants, husband and wife, are Indians.[1] They were convicted in the Superior Court of the State of Washington of the offenses of hunting and possession of deer during closed season in violation of RCW 77.16.020 and RCW 77.16.030.[2] The offenses occurred on unal-

See suggested addition p 14.

Joined 1/20

[1] The appellant husband is an enrolled member of the Confederated Tribes of the Colville Indian Reservation. Appellant wife is a Canadian Indian and is not enrolled in the United States. The State of Washington did not however contest before the state courts that both appellants are entitled to the rights of members of the Colville Tribes on the property in question. The State Supreme Court stated, ". . . it is not questioned that [the husband] and his wife are beneficiaries of the agreement . . . ." 82 Wn. 2d 440, 511 P. 2d 1351 (1973). Appellee state conceded at oral argument in this Court that reversal of the husband's conviction requires reversal of the wife's conviction. Tr. p. 22.

Tribes that formed the Confederated Tribes include the Colville, Columbia, San Poil, Okanogan, Nez Perce, Lake, Spokane and Coeur d' Alene.

[2] The alleged offenses occurred on September 11, 1971, in Ferry County on unallotted non-Indian land within the ceded northern half of the original reservation.

RCW 77.16.020 provides in pertinent part:

lotted non-Indian land in what was once the north half of the Colville Indian Reservation.[3] The Colville Confederated Tribes ceded to the United States that northern half under a congressionally ratified and adopted Agreement dated May 19, 1891. Article 6 of that ratified Agreement provided expressly that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.[4] Appellants' defense was that con-

---

"It shall be unlawful for any person to hunt . . . game animals . . . during the respective closed seasons therefor.

. . . . . .

"Any person who hunts . . . deer in violation of this section is guilty of a gross misdemeanor . . . ."

RCW 77.16.030 provides in pertinent part:

"It shall be unlawful for any person to have in his possession . . . any . . . game animal . . . during the closed season . . .

. . . . . .

"Any person who has on his possession . . . any . . . deer . . . in violation of the foregoing portion of this section is guilty of a gross misdemeanor . . . ."

[3] The original reservation was over 3 million acres "bound on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions." Executive Order of July 2, 1872, 1 Kappler, Indian Affairs, Laws and Treaties 916 (2d ed. 1904); see also *Seymour* v. *Superintendent,* 368 U. S. 351, 354 (1962).

[4] Article 6 provides in full:

"It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."

The status of the southern half of the Colville Reservation was considered in *Seymour* v. *Superintendent, supra,* n. 3. At issue in

gressional approval of Art. 6 preserved by federal statute the exclusive, absolute and unrestricted rights to hunt and fish that had been part of the Indians larger rights in the ceded portion of the reservation, thus limiting governmental regulation of the rights to federal regulation and precluding application by the State of Washington of RCW 77.16.020 and RCW 77.16.030 to them. The Supreme Court of Washington held that the Superior Court had properly rejected this defense and affirmed the convictions, 82 Wn. 2d 440, 511 P. 2d 1351 (1973). We noted probable jurisdiction, 417 U. S. 966 (1974). We reverse.

I

President Grant established the original Colville Indian Reservation by Executive Order of July 2, 1872. Washington became a State in 1889, 26 Stat. 10, and the next year, by the Act of August 19, 1890, 26 Stat. 355, Congress created the Commission that negotiated the 1891 Agreement.[5] By its terms, the Tribes ceded the northern half of the reservation in return for benefits

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this case are the residual rights to hunt and fish on the northern half preserved by the above Art. 6.

[5] The Colville Indian Commission was composed of Chairman Fullerton, and Commissioners Durfur and Payne. The Commission first met on May 7, 1891, with representatives of the Confederated Tribes at Nespelem, Washington, on the reservation, and according to the minutes of that meeting the immediate topic of discussion was "a sale of a part of Reservation. . . ." During succeeding days, Ko-Mo-Del-Kiah, Chief of the San Poil, strongly opposed the sale of any part of the reservation, but Antoine, Chief of the Okanogan and great grandfather of appellant Alexander Antoine, Moses, Chief of the Columbia, and Joseph, Chief of the Nez Perce, favored the proposed 1891 Agreement as fair. At a later meeting on May 23 at Marcus on the reservation, Barnaby, Chief of the Colville, and the Chief of the Lake agreed to the proposed sale. Minutes of Colville Indian Commission Concerning Negotiation for the 1891 Agreement of Sale, National Archives Document 21167.

which included the stipulations of Art. 6 and the promise of the United States to pay $1,500,000 in five installments. The Agreement was to become effective, however, only "from and after its approval by Congress." Congressional approval was given in a series of statutes. The first statute was the Act of July 1, 1892, 27 Stat. 62, which "vacated and restored [the tract] to the public domain . . . ," and "open[ed] . . . [it] . . . to settlement. . . ." The second statute came 14 years later, the Act of June 21, 1906, 34 Stat. 325, 337–338. That statute in terms "carr[ied] into effect the Agreement," and authorized the appropriation of the $1,500,000. Payment of the $1,500,000 was effected by five subsequent enactments from 1907 to 1911, each of which appropriated $300,000 and recited that it was part payment "to the Indians on the Colville Reservation, Washington, for the cession of land opened to settlement by the Act of July first, eighteen hundred and ninety-two . . . being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act of June first, nineteen hundred and six, *ratifying the agreement* ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one . . . ." (Emphasis supplied.) 34 Stat. 1015, 1050–1051 (1907); 35 Stat. 70, 96 (1908); 35 Stat. 781, 813 (1909); 36 Stat. 269, 286 (1910); 36 Stat. 1058, 1075 (1911).[6]

[6] The delay in approval was occasioned by the initial reluctance of the House to ratify the Agreement without certain changes, 23 Cong. Rec. 3840, and by doubts raised in the Senate whether the Indians had title to the reservation, since it was created by Executive Order. See S. Rep. No. 664, 52d Cong., 1st Sess., p. 2. The Interior Department reported some years later that the doubts were unfounded. S. Rep. No. 2651, 59th Cong., 1st Sess., 137, 139. A House bill passed in 1891 replaced the $1,500,000 lump sum with a payment of $1.25 per acre, to be paid to the credit of the Indians as the land would be opened for homesteading. The Senate dis-

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Although admitted to statehood two years earlier, the State of Washington was not a party to the 1891 Agreement. The opinion of the State Supreme Court relies upon that fact to attempt a distinction for purposes of the Supremacy Clause [7] between the binding result upon

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agreed, however, and passed the Senate Bill that became the Act of July 1, 1892. That Act makes no mention either of the consideration to be paid, or of the hunting and fishing rights preserved. Many protests were registered that Congress had failed to live up to the terms of the Agreement. These included protests from the Department of the Interior, S. Rep. No. 2561, 59th Cong., 1st Sess., 137, 139, and from Chairman Fullerton, who had become Chief Justice of the Supreme Court of Washington. In a letter, S. Rep. No. 2561, *supra*, p. 40, the Chief Justice said:

"It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie on earth, I cannot help a feeling of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation."

These protests and many others finally bore fruit and resulted in Congress' enactment of the Act of June 21, 1906, and the five subsequent installment acts. The Colville retained some 16 lawyers practicing in the States of Washington, Pennsyvlania, and Georgia, and the District of Columbia, who recovered judgments for their services in the Court of Claims. *Butler and Vale* v. *United States,* 43 Ct. Cl. 497 (1908).

[7] Article VI, cl. 2, of the Constitution, the Supremacy Clause, provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

the State of ratification of a contract by *treaty* effected by concurrence of two-thirds of the Senate, Art. II, § 2, cl. 2, and the binding result of ratification of a contract effected by legislation passed by the House and the Senate. The opinion states that "once ratified, a *treaty* becomes the supreme law of the land," but the ratified 1891 Agreement was a mere contract enforceable "only against those party to it," and "not a treaty . . . [and] . . . not the supreme law of the land." 82 Wn. 2d 444, 511 P. 2d 1354. The grounds for this attempted distinction do not clearly emerge from the opinion. The opinion states, however, "[t]he statutes enacted by Congress in implementation of this [1891] agreement . . . are the supreme law if they are within the power of Congress to enact . . . ." 82 Wn. 2d 451, 511 P. 2d 1358. In the context of the discussion in the opinion we take this to mean that the Congress is not constitutionally empowered to inhibit a State's exercise of its police power by legislation ratifying a contract between the Executive Branch and an Indian tribe to which the State is not a party. The fallacy in that proposition is that a legislated ratification of an agreement between the Executive Branch and an Indian tribe is a "Law of the United States made in Pursuance" of the Constitution and, therefore, like "all Treaties made," is made binding upon affected States by the Supremacy Clause.

The opinion seems to find support for the attempted distinction in the fact that the Executive Branch was not authorized to contract by treaty with Indian tribes in 1891. 82 Wn. 2d 444, 511 P. 2d 1354. Twenty years earlier, in 1871, 16 Stat. 544, 566, Congress had abrogated the contract by treaty method of dealing with Indian tribes.[8] The Act of 1871 resulted from the opposition

[8] The Act of March 3, 1871, 16 Stat. 544, 566, 25 U. S. C. § 71 provided:

"No Indian nation or tribe within the territory of the United

of the House of Representatives to its practical exclusion from any policy role in Indian affairs. For nearly a century the Executive Branch made treaty arrangements with the Indians "by and with the Advice and Consent of the Senate," Art. II, § 2, cl. 2. Although the House appropriated money to carry out these treaties, it had no voice in the development of substantive Indian policy reflected in them. House resentment first resulted in legislation in 1867 repealing "all laws allowing the President, the Secretary of the Interior, or the Commissioner of Indian Affairs to enter into treaties with any Indian tribes," Act of March 28, 1867, 15 Stat. 7, 9, but this was repealed a few months later, Act of July 20, 1867, 15 Stat. 18. There were further unsuccessful House attempts to enter the field of federal Indian policy, and ultimately the House refused to grant funds to carry out new treaties. United States Department of the Interior, *Federal Indian Law,* 1958, at 211. Finally, the Senate capitulated and joined the House in passage of the 1871 Act as a rider to the Indian Appropriation Act of 1871. *Federal Indian Law, supra,* at 138.[9]

States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

[9] Former Commissioner of Indian Affairs Walker summarized the struggle as follows:

"In 1871, however, the insolence of conscious strength, and the growing jealousy of the House of Representatives towards the prerogative—arrogated by the Senate—of determining, in connection with the executive, all questions of Indian right and title, and of committing the United States incidentally to pecuniary obligations limited only by its own discretion, for which the House should be bound to make provision without inquiry, led to the adoption, after several severe parliamentary struggles of the declaration . . . that hereafter 'no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent

This abrogation of the contract by treaty method meant no more than that after 1871 relations with Indians would be governed by Acts of Congress rather than by treaty. *Elk* v. *Wilkins*, 112 U. S. 94 (1884); *In re Heff*, 197 U. S. 488 (1905). But abrogation of the contract by treaty method in no way affected Congress' power to *legislate* on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties. Several decisions of this Court settled that proposition. In *Choate* v. *Trapp*, 224 U. S. 665 (1912), the Court held that tax exemptions contained in an 1897 agreement ratified by Congress between the United States and Indian tribes as part of a cession of Indian lands were enforceable against the State of Oklahoma, which was not a party to the agreement. In *Perrin* v. *United States*, 232 U. S. 78 (1914), the Court enforced a clause of an agreement ratified by Act of Congress that no intoxicating liquor should be sold on land in South Dakota ceded and relinquished to the United States, although South Dakota was not a party to the agreement. The Court expressly rejected the contention that the power to regulate the sale of intoxicating liquors upon all ceded lands rested exclusively in the State. Rather, because Congress was empowered, when securing the cession of part of an Indian reservation within a State, to prohibit the sale of intoxicants upon the ceded lands, "it follows that the State possesses no exclusive control over the subject and that the congressional prohibition is supreme." 232 U. S., at 483. See also *Dick* v. *United States*, 208 U. S. 340 (1908). These decisions sustained the ratified agreements as the exercise by Congress of its "plenary power . . . to deal with the special problems

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nation, tribe, or power, with whom the United States may contract by treaty.'" Federal Indian Law, *supra*, at 211–212, citing Walker, The Indian Question, 1874.

of Indians [that] is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to regulate commerce . . . with the Indian Tribes and thus, to this extent, singles Indians out as a proper subject for separate legislation." *Morton* v. *Mancari,* 417 U. S. 535, 551–552 (1974); see also *Morton* v. *Ruiz,* 415 U. S. 199, 236 (1974).

Once ratified by Act of Congress, the provisions of the agreements become law, and like treaties, are the supreme law of the land. In the absence of any contract between the Executive Branch and the Colville Confederated Tribes, Congress could constitutionally have terminated the northern half of the Colville Indian Reservation on the same terms and conditions that ultimately appeared in the 1891 agreement. *Maatz* v. *Arnett,* 412 U. S. 481 (1973). The decisions in *Choate, Perrin,* and *Dick, supra,* settle that Congress was also constitutionally empowered to do so by legislation ratifying the 1891 agreement. The legislative ratification constituted the provisions of the 1891 Agreement, including Art. 6, "Laws of the United States . . . in Pursuance" of the Constitution, and the supreme law of the land, just as a contract by treaty to the same effect, concurred in by the Senate, would have been a treaty binding upon the State. "Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes." *Dick* v. *United States, supra,* 208 U. S., at 353.[10]

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[10] WRC 37.12.060, which assumes limited jurisdiction over Indians, expressly provides that the law shall not deprive any Indian of rights secured by agreement.

"Nothing in this chapter . . . shall deprive any Indian or any Indian tribe, band, community of any right, privilege, or immunity afforded under federal treaty, *agreement,* statute, or Executive Order with respect to Indian land grants, hunting trapping, or fishing or the control, licensing, or regulation thereof." (Emphasis added.)

III

The opinion of the State Supreme Court also holds that in any event the implementing statutes cannot be construed to render RCW 77.16.020 and RCW 77.16.030 inapplicable to Indian beneficiaries of the Agreement since the implementing statutes "make no reference to the provision [Article 6] relied upon by the appellants." 82 Wn. 2d 451, 511 P. 2d 1358. The opinion reasons, "if it was thought that state regulation but not federal regulation would constitute an abridgement, an express provision to that effect should have been inserted, but only after the consent of the state had been sought and obtained." 82 Wn. 2d 448, 511 P. 2d 1357. This reasoning is fatally flawed. The proper inquiry is not whether the State was or should have been a consenting party to the 1891 Agreement, but whether appellants acquired federally guaranteed rights by congressional ratification of the Agreement. Plainly appellants acquire such rights. Congress exercised its pleanry constitutional powers to legislate those federally protected rights into law in enacting the implementing statutes that ratified the Agreement. State qualification of the rights is therefore precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State was required. On the contrary, if Congress had meant to subject to state regulation the preserved rights to hunt and fish, this Court would require that such intent explicitly appear on the face of the statutes or in their legislative history. "A congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Maatz* v. *Arnett, supra,* 412 U. S., at 505. Since the Colville Indians rights to hunt and fish on the ceded northern half of the Colville Reservation

are part of their larger rights in that ceded half, see *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968),[11] we hold that a congressional determination to subject those rights to qualification by state regulation must similarly "be expressed on the face of the statutes or be clear from the surrounding circumstances and legislative history."

But no congressional purpose to subject the preserved rights to such state regulation is to be found in either the implementing acts or their legislative history. Rather, the implementing statutes unqualifiedly, "carr[ied] into effect" and "ratif[ied]" the explicit and unqualified provision of Art. 6 that "the right to hunt and fish . . . shall not be taken away or in anywise abridged."

IV

Finally, the opinion of the State Supreme Court construes Art. 6 as merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians would be allowed also to hunt there. 82 Wn., at 449–450, 511 P. 2d, at 1357–1358. But the provision of Art. 6 that the preserved rights are not exclusive and are to be enjoyed "in common with all other persons," does not support that interpretation or affect the Supremacy Clause's preclusion of qualifying

[11] Even without an express provision preserving hunting and fishing rights, *Menominee* stated that those rights are "part of the larger rights possessed by the Indians in the lands used and occupied by them," Federal Indian Law, *supra*, at 497, citing Op. Act. Sol. M. 28107, and survive the termination of the reservation. There is no merit in the State's argument that the termination of the northern half of the Reservation by the 1892 Act without mention of Art. 6 or any other specific preservation of hunting and fishing rights left the State free to regulate the Indians' exercise of those rights. But in any event the 1892 Act was only one of the series of statutes Congress passed to ratify the 1891 Agreement, including Art. 6.

state regulation. Non-Indians are, of course, not beneficiaries of the preserved rights and the State remains wholly free to prohibit or regulate non-Indian hunting and fishing. The ratifying legislation must be construed to exempt the Indians' preserved rights from like state regulation, however, else Congress preserved nothing which the Indians would not have had without that legislation. For it is impermissible in the absence of explicit congressional expression, to construe the implementing acts as "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more." *United States* v. *Winans,* 198 U. S. 371, 380 (1905); *Puyallup Tribe* v. *Department of Game* (*Puyallup I*), 391 U. S. 392, 397–398 (1968). *Winans* involved a treaty that reserved to the Indians in the area ceded to the United States "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." 198 U. S., *supra,* at 378. *Puyallup* considered a provision that "[t]he 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 . . . ." 391 U. S., *supra,* at 395. The Court held that rights so preserved "may, of course, not be qualified by the State. . . ." 391 U. S., *supra,* at 398; 198 U. S., *supra,* at 384. Article 6 presents an even stronger case since Congress' ratification of it included the flat prohibition that the right "shall not be taken away or in anywise abridged."

The canon of construction that this Court has applied over a century is that the wording of treaties and agreements with the Indians are not to be construed to their prejudice. *Worcester* v. *Georgia,* 31 U. S. (6 Pet.) 515 (1832). See also *The Kansas Indians,* 72 U. S. (5 Wall.) 737, 760 (1866); *United States* v. *Kagama,* 118 U. S. 375 (1886); *Choctaw Nations* v. *United States,* 119 U. S. 1,

28 (1886); *United States* v. *Winans,* 198 U. S. 371, 380–381 (1905); *Choate* v. *Trapp,* 224 U. S. 665, 675 (1912); *Menominee Tribe* v. *United States,* 391 U. S. 404, 406 n. 2 (1968). That canon furthers discharge of "the distinctive obligation of trust incumbent upon the Government in its dealing with these dependent and sometimes exploited people," *Seminole Nation* v. *United States,* 316 U. S. 286, 296 (1942); *Morton* v. *Ruiz,* 415 U. S., *supra,* at 236. We have no reason in this case, however, to invoke that canon of construction. The clarity and complete absence of ambiguity in the wording of Art. 6 makes resort to the canon wholly unnecessary.

V

In *Puyallup Tribe* v. *United States, supra,* 391 U. S., at 398, we held that although, these rights "may . . . not be qualified by the State, . . . the manner of fishing [and hunting], the size of the take, the restriction of commercial fishing [and hunting] 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." 391 U. S., *supra,* at 398. The "appropriate standards" requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, *Department of Game* v. *Puyallup Tribe,* 414 U. S. 44 (1973); *Tulee* v. *Washington,* 315 U. S. 681, 684 (1942), *and* that its application to the Indians is necessary in the interest of conservation.

The United States as *amicus curiae,* invites the Court to announce that state restrictions "cannot abridge the Indians' federally protected rights without [the State] demonstrating a compelling need" in the interest of conservation. Brief of the United States as *amicus curiae,* pp. 14–16. We have no occasion in this case to address

this question. The State of Washington has not argued, let alone established, that applying the ban on out-of-season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer. See *Hunt* v. *United States*, 278 U. S. 96 (1928).[12]

The judgment of the Supreme Court of the State of Washington sustaining appellants' convictions is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[12] Appellants apparently claim no right to hunt on fenced private property. The State Supreme Court stated:

"Counsel . . . conceded in oral argument that the present owners of land in the northern half of the reservation have the right to fence their land and exclude hunters. Nevertheless they maintain that state regulation of the right to hunt is an abridgement of that right . . . ." 82 Wn. 2d 448, 511 P. 2d 1356.

A claim of entitlement to hunt on fenced or posted private land without prior permission of the owner or lessee would raise serious questions ~~of possible trespass~~ not presented in her case.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 16, 1975

Re: No. 73-717 -- Alexander J. Antoine et ux. v.
State of Washington

Dear Bill:

Please join me in your opinion.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

January 20, 1975

No. 73-717 Antoine v. Washington

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

January 20, 1975

No. 73-717 Antoine v. Washington

Dear Bill:

I read your fine opinion over the weekend, and will be happy to join you. The one concern which I have relates to hunting on private land. Your note 12 (p. 14) comes fairly close to the point. I would prefer, however, to put up a "smoke signal" that will make our message to the "Injuns" somewhat sharper. For example, perhaps an additional paragraph in the footnote along the following lines would be helpful:

> "A claim of entitlement to hunt on fenced or posted private land without prior permission of the owner would raise serious questions not presented in this case."

Indeed, I would prefer to say categorically that the reserved right to hunt cannot be construed as conferring the hunting privilege except on publicly owned land or private land with prior permission of the owner.

Without having checked the transcript of oral argument, my recollection is that the offense in this case occurred on private land, although no issue was made of this.

Sincerely,

Mr. Justice Brennan

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 20, 1975

Re: No. 73-717 -- Antoine v. State of Washington

Dear Bill:

In due course I will circulate a dissent in the above case.

Sincerely,

WHR

Mr. Justice Brennan

cc: The Conference

page 14
My suggested change made — p 14

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
— Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: _____

Recirculated: 1/21/75

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington. | On Appeal from the Supreme Court of Washington.

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The appellants, husband and wife, are Indians.[1] They were convicted in the Superior Court of the State of Washington of the offenses of hunting and possession of deer during closed season in violation of RCW 77.16.020 and RCW 77.16.030.[2] The offenses occurred on unal-

[1] The appellant husband is an enrolled member of the Confederated Tribes of the Colville Indian Reservation. Appellant wife is a Canadian Indian and is not enrolled in the United States. The State of Washington did not however contest before the state courts that both appellants are entitled to the rights of members of the Colville Tribes on the property in question. The State Supreme Court stated, ". . . it is not questioned that [the husband] and his wife are beneficiaries of the agreement . . . ." 82 Wn. 2d 440, 511 P. 2d 1351 (1973). Appellee state conceded at oral argument in this Court that reversal of the husband's conviction requires reversal of the wife's conviction. Tr. p. 22.

Tribes that formed the Confederated Tribes include the Colville, Columbia, San Poil, Okanogan, Nez Perce, Lake, Spokane and Coeur d' Alene.

[2] The alleged offenses occurred on September 11, 1971, in Ferry County on unallotted non-Indian land within the ceded northern half of the original reservation.

RCW 77.16.020 provides in pertinent part:

lotted non-Indian land in what was once the north half of the Colville Indian Reservation.[3] The Colville Confederated Tribes ceded to the United States that northern half under a congressionally ratified and adopted Agreement dated May 19, 1891. Article 6 of that ratified Agreement provided expressly that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."[4] Appellants' defense was that con-

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"It shall be unlawful for any person to hunt . . . game animals . . . during the respective closed seasons therefor.

. . . . .

"Any person who hunts . . . deer in violation of this section is guilty of a gross misdemeanor . . . ."

RCW 77.16.030 provides in pertinent part:

"It shall be unlawful for any person to have in his possession . . . any . . . game animal . . . during the closed season . . .

. . . . .

"Any person who has on his possession . . . any . . . deer . . . in violation of the foregoing portion of this section is guilty of a gross misdemeanor . . . ."

[3] The original reservation was over 3 million acres "bound on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions." Executive Order of July 2, 1872, 1 Kappler, Indian Affairs, Laws and Treaties 916 (2d ed. 1904); see also *Seymour* v. *Superintendent,* 368 U. S. 351, 354 (1962).

[4] Article 6 provides in full:

"It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."

The status of the southern half of the Colville Reservation was considered in *Seymour* v. *Superintendent, supra,* n. 3. At issue in

gressional approval of Art. 6 preserved by federal statute the exclusive, absolute and unrestricted rights to hunt and fish that had been part of the Indians larger rights in the ceded portion of the reservation, thus limiting governmental regulation of the rights to federal regulation and precluding application by the State of Washington of RCW 77.16.020 and RCW 77.16.030 to them. The Supreme Court of Washington held that the Superior Court had properly rejected this defense and affirmed the convictions, 82 Wn. 2d 440, 511 P. 2d 1351 (1973). We noted probable jurisdiction, 417 U. S. 966 (1974). We reverse.

I

President Grant established the original Colville Indian Reservation by Executive Order of July 2, 1872. Washington became a State in 1889, 26 Stat. 10, and the next year, by the Act of August 19, 1890, 26 Stat. 355, Congress created the Commission that negotiated the 1891 Agreement.[5] By its terms, the Tribes ceded the northern half of the reservation in return for benefits

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this case are the residual rights to hunt and fish on the northern half preserved by the above Art. 6.

[5] The Colville Indian Commission was composed of Chairman Fullerton, and Commissioners Durfur and Payne. The Commission first met on May 7, 1891, with representatives of the Confederated Tribes at Nespelem, Washington, on the reservation, and according to the minutes of that meeting the immediate topic of discussion was "a sale of a part of Reservation. . . ." During succeeding days, Ko-Mo-Del-Kiah, Chief of the San Poil, strongly opposed the sale of any part of the reservation, but Antoine, Chief of the Okanogan and great grandfather of appellant Alexander Antoine, Moses, Chief of the Columbia, and Joseph, Chief of the Nez Perce, favored the proposed 1891 Agreement as fair. At a later meeting on May 23 at Marcus on the reservation, Barnaby, Chief of the Colville, and the Chief of the Lake agreed to the proposed sale. Minutes of Colville Indian Commission Concerning Negotiation for the 1891 Agreement of Sale, National Archives Document 21167.

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[6] The delay in approval was occasioned by the initial reluctance of the House to ratify the Agreement without certain changes, 23 Cong. Rec. 3840, and by doubts raised in the Senate whether the Indians had title to the reservation, since it was created by Executive Order. See S. Rep. No. 664, 52d Cong., 1st Sess., p. 2. The Interior Department reported some years later that the doubts were unfounded. S. Rep. No. 2651, 59th Cong., 1st Sess., 137, 139. A House bill passed in 1891 replaced the $1,500,000 lump sum with a payment of $1.25 per acre, to be paid to the credit of the Indians as the land would be opened for homesteading. The Senate dis-

II

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"It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie on earth, I cannot help a feeling of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation."

These protests and many others finally bore fruit and resulted in Congress' enactment of the Act of June 21, 1906, and the five subsequent installment acts. The Colville retained some 16 lawyers practicing in the States of Washington, Pennsyvlania, and Georgia, and the District of Columbia, who recovered judgments for their services in the Court of Claims. *Butler and Vale* v. *United States,* 43 Ct. Cl. 497 (1908).

[7] Article VI, cl. 2, of the Constitution, the Supremacy Clause, provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

the State of ratification of a contract by *treaty* effected by concurrence of two-thirds of the Senate, Art. II, § 2, cl. 2, and the binding result of ratification of a contract effected by legislation passed by the House and the Senate. The opinion states that "once ratified, a *treaty* becomes the supreme law of the land," but the ratified 1891 Agreement was a mere contract enforceable "only against those party to it," and "not a treaty . . . [and] . . . not the supreme law of the land." 82 Wn. 2d 444, 511 P. 2d 1354. The grounds for this attempted distinction do not clearly emerge from the opinion. The opinion states, however, "[t]he statutes enacted by Congress in implementation of this [1891] agreement . . . are the supreme law if they are within the power of Congress to enact . . . ." 82 Wn. 2d 451, 511 P. 2d 1358. In the context of the discussion in the opinion we take this to mean that the Congress is not constitutionally empowered to inhibit a State's exercise of its police power by legislation ratifying a contract between the Executive Branch and an Indian tribe to which the State is not a party. The fallacy in that proposition is that a legislated ratification of an agreement between the Executive Branch and an Indian tribe is a "Law of the United States made in Pursuance" of the Constitution and, therefore, like "all Treaties made," is made binding upon affected States by the Supremacy Clause.

The opinion seems to find support for the attempted distinction in the fact that the Executive Branch was not authorized to contract by treaty with Indian tribes in 1891. 82 Wn. 2d 444, 511 P. 2d 1354. Twenty years earlier, in 1871, 16 Stat. 544, 566, Congress had abrogated the contract by treaty method of dealing with Indian tribes.[8] The Act of 1871 resulted from the opposition

[8] The Act of March 3, 1871, 16 Stat. 544, 566, 25 U. S. C. § 71 provided:

"No Indian nation or tribe within the territory of the United

of the House of Representatives to its practical exclusion from any policy role in Indian affairs. For nearly a century the Executive Branch made treaty arrangements with the Indians "by and with the Advice and Consent of the Senate," Art. II, § 2, cl. 2. Although the House appropriated money to carry out these treaties, it had no voice in the development of substantive Indian policy reflected in them. House resentment first resulted in legislation in 1867 repealing "all laws allowing the President, the Secretary of the Interior, or the Commissioner of Indian Affairs to enter into treaties with any Indian tribes," Act of March 28, 1867, 15 Stat. 7, 9, but this was repealed a few months later, Act of July 20, 1867, 15 Stat. 18. There were further unsuccessful House attempts to enter the field of federal Indian policy, and ultimately the House refused to grant funds to carry out new treaties. United States Department of the Interior, *Federal Indian Law,* 1958, at 211. Finally, the Senate capitulated and joined the House in passage of the 1871 Act as a rider to the Indian Appropriation Act of 1871. *Federal Indian Law, supra,* at 138.[9]

States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

[9] Former Commissioner of Indian Affairs Walker summarized the struggle as follows:

"In 1871, however, the insolence of conscious strength, and the growing jealousy of the House of Representatives towards the prerogative—arrogated by the Senate—of determining, in connection with the executive, all questions of Indian right and title, and of committing the United States incidentally to pecuniary obligations limited only by its own discretion, for which the House should be bound to make provision without inquiry, led to the adoption, after several severe parliamentary struggles of the declaration . . . that hereafter 'no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent

This abrogation of the contract by treaty method meant no more than that after 1871 relations with Indians would be governed by Acts of Congress rather than by treaty. *Elk* v. *Wilkins*, 112 U. S. 94 (1884); *In re Heff*, 197 U. S. 488 (1905). But abrogation of the contract by treaty method in no way affected Congress' power to *legislate* on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties. Several decisions of this Court settled that proposition. In *Choate* v. *Trapp*, 224 U. S. 665 (1912), the Court held that tax exemptions contained in an 1897 agreement ratified by Congress between the United States and Indian tribes as part of a cession of Indian lands were enforceable against the State of Oklahoma, which was not a party to the agreement. In *Perrin* v. *United States*, 232 U. S. 78 (1914), the Court enforced a clause of an agreement ratified by Act of Congress that no intoxicating liquor should be sold on land in South Dakota ceded and relinquished to the United States, although South Dakota was not a party to the agreement. The Court expressly rejected the contention that the power to regulate the sale of intoxicating liquors upon all ceded lands rested exclusively in the State. Rather, because Congress was empowered, when securing the cession of part of an Indian reservation within a State, to prohibit the sale of intoxicants upon the ceded lands, "it follows that the State possesses no exclusive control over the subject and that the congressional prohibition is supreme." 232 U. S., at 483. See also *Dick* v. *United States*, 208 U. S. 340 (1908). These decisions sustained the ratified agreements as the exercise by Congress of its "plenary power . . . to deal with the special problems

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nation, tribe, or power, with whom the United States may contract by treaty.'" Federal Indian Law, *supra*, at 211–212, citing Walker, The Indian Question, 1874.

of Indians [that] is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to regulate commerce . . . with the Indian Tribes and thus, to this extent, singles Indians out as a proper subject for separate legislation." *Morton* v. *Mancari*, 417 U. S. 535, 551–552 (1974); see also *Morton* v. *Ruiz*, 415 U. S. 199, 236 (1974).

Once ratified by Act of Congress, the provisions of the agreements become law, and like treaties, are the supreme law of the land. In the absence of any contract between the Executive Branch and the Colville Confederated Tribes, Congress could constitutionally have terminated the northern half of the Colville Indian Reservation on the same terms and conditions that ultimately appeared in the 1891 Agreement. *Maatz* v. *Arnett*, 412 U. S. 481 (1973). The decisions in *Choate*, *Perrin*, and *Dick*, *supra*, settle that Congress was also constitutionally empowered to do so by legislation ratifying the 1891 Agreement. The legislative ratification constituted the provisions of the 1891 Agreement, including Art. 6, "Laws of the United States . . . in Pursuance" of the Constitution, and the supreme law of the land, just as a contract by treaty to the same effect, concurred in by the Senate, would have been a treaty binding upon the State. "Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes." *Dick* v. *United States*, *supra*, 208 U. S., at 353.[10]

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[10] WRC 37.12.060, which assumes limited jurisdiction over Indians, expressly provides that the law shall not deprive any Indian of rights secured by agreement.

"Nothing in this chapter . . . shall deprive any Indian or any Indian tribe, band, community of any right, privilege, or immunity afforded under federal treaty, *agreement*, statute, or Executive Order with respect to Indian land grants, hunting trapping, or fishing or the control, licensing, or regulation thereof." (Emphasis added.)

III

The opinion of the State Supreme Court also holds that in any event the implementing statutes cannot be construed to render RCW 77.16.020 and RCW 77.16.030 inapplicable to Indian beneficiaries of the Agreement since the implementing statutes "make no reference to the provision [Article 6] relied upon by the appellants." 82 Wn. 2d 451, 511 P. 2d 1358. The opinion reasons, "if it was thought that state regulation but not federal regulation would constitute an abridgement, an express provision to that effect should have been inserted, but only after the consent of the state had been sought and obtained." 82 Wn. 2d 448, 511 P. 2d 1357. This reasoning is fatally flawed. The proper inquiry is not whether the State was or should have been a consenting party to the 1891 Agreement, but whether appellants acquired federally guaranteed rights by congressional ratification of the Agreement. Plainly appellants acquired such rights. Congress exercised its plenary constitutional powers to legislate those federally protected rights into law in enacting the implementing statutes that ratified the Agreement. State qualification of the rights is therefore precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State was required. On the contrary, if Congress had meant to subject to state regulation the preserved rights to hunt and fish, this Court would require that such intent explicitly appear on the face of the statutes or in their legislative history. "A congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Maatz* v. *Arnett, supra,* 412 U. S., at 505. Since the Colville Indians rights to hunt and fish on the ceded northern half of the Colville Reservation

are part of their larger rights in that ceded half, see *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968),[11] we hold that a congressional determination to subject those rights to qualification by state regulation must similarly "be expressed on the face of the statutes or be clear from the surrounding circumstances and legislative history."

But no congressional purpose to subject the preserved rights to such state regulation is to be found in either the implementing acts or their legislative history. Rather, the implementing statutes unqualifiedly, "carr[ied] into effect" and "ratif[ied]" the explicit and unqualified provision of Art. 6 that "the right to hunt and fish . . . shall not be taken away or in anywise abridged."

IV

Finally, the opinion of the State Supreme Court construes Art. 6 as merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians would be allowed also to hunt there. 82 Wn. 2d, at 449–450, 511 P. 2d, at 1357–1358. But the provision of Art. 6 that the preserved rights are not exclusive and are to be enjoyed "in common with all other persons," does not support that interpretation or affect the Supremacy Clause's preclusion of qualifying

[11] Even without an express provision preserving hunting and fishing rights, *Monominee* agreed that those rights are "part of the larger rights possessed by the Indians in the lands used and occupied by them," Federal Indian Law, *supra*, at 497, citing Op. Act. Sol. M. 28107, and survive the termination of the reservation. Thus, there is no merit in the State's argument that the termination of the northern half of the Reservation by the 1892 Act without mention of Art. 6 or any other specific preservation of hunting and fishing rights left the State free to regulate the Indians' exercise of those rights. But in any event the 1892 Act was only one of the series of statutes Congress passed to ratify the 1891 Agreement, including Art. 6.

state regulation. Non-Indians are, of course, not beneficiaries of the preserved rights and the State remains wholly free to prohibit or regulate non-Indian hunting and fishing. The ratifying legislation must be construed to exempt the Indians' preserved rights from like state regulation, however, else Congress preserved nothing which the Indians would not have had without that legislation. For it is impermissible in the absence of explicit congressional expression, to construe the implementing acts as "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more." *United States* v. *Winans,* 198 U. S. 371, 380 (1905); *Puyallup Tribe* v. *Department of Game* (*Puyallup I*), 391 U. S. 392, 397–398 (1968). *Winans* involved a treaty that reserved to the Indians in the area ceded to the United States "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." 198 U. S., *supra,* at 378. *Puyallup* considered a provision that "[t]he 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 . . . ." 391 U. S., *supra,* at 395. The Court held that rights so preserved "may, of course, not be qualified by the State. . . ." 391 U. S., *supra,* at 398; 198 U. S., *supra,* at 384. Article 6 presents an even stronger case since Congress' ratification of it included the flat prohibition that the right "shall not be taken away or in anywise abridged."

The canon of construction that this Court has applied over a century is that the wording of treaties and agreements with the Indians are not to be construed to their prejudice. *Worcester* v. *Georgia,* 31 U. S. (6 Pet.) 515 (1832). See also *The Kansas Indians,* 72 U. S. (5 Wall.) 737, 760 (1866); *United States* v. *Kagama,* 118 U. S. 375 (1886); *Choctaw Nations* v. *United States,* 119 U. S. 1,

28 (1886); *United States* v. *Winans,* 198 U. S. 371, 380–381 (1905); *Choate* v. *Trapp,* 224 U. S. 665, 675 (1912); *Menominee Tribe* v. *United States,* 391 U. S. 404, 406 n. 2 (1968). That canon furthers discharge of "the distinctive obligation of trust incumbent upon the Government in its dealing with these dependent and sometimes exploited people," *Seminole Nation* v. *United States,* 316 U. S. 286, 296 (1942); *Morton* v. *Ruiz,* 415 U. S., *supra,* at 236. We have no reason in this case, however, to invoke that canon of construction. The clarity and complete absence of ambiguity in the wording of Art. 6 makes resort to the canon wholly unnecessary.

V

In *Puyallup Tribe* v. *United States, supra,* 391 U. S., at 398, we held that although, these rights "may . . . not be qualified by the State, . . . the manner of fishing [and hunting], the size of the take, the restriction of commercial fishing [and hunting] 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." 391 U. S., *supra,* at 398. The "appropriate standards" requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, *Department of Game* v. *Puyallup Tribe,* 414 U. S. 44 (1973); *Tulee* v. *Washington,* 315 U. S. 681, 684 (1942), *and* that its application to the Indians is necessary in the interest of conservation.

The United States as *amicus curiae,* invites the Court to announce that state restrictions "cannot abridge the Indians' federally protected rights without [the State] demonstrating a compelling need" in the interest of conservation. Brief of the United States as *amicus curiae,* pp. 14–16. We have no occasion in this case to address

this question. The State of Washington has not argued, let alone established, that applying the ban on out-of-season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer. See *Hunt* v. *United States*, 278 U. S. 96 (1928).[12]

The judgment of the Supreme Court of the State of Washington sustaining appellants' convictions is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[12] Appellants apparently claim no right to hunt on fenced private property. The State Supreme Court stated:

"Counsel . . . conceded in oral argument that the present owners of land in the northern half of the reservation have the right to fence their land and exclude hunters. Nevertheless they maintain that state regulation of the right to hunt is an abridgement of that right . . . ." 82 Wn. 2d 448, 511 P. 2d 1356.

A claim of entitlement to hunt on fenced or posted private land without prior permission of the owner would raise serious questions not presented in this case.

Supreme Court of the United States
Washington, D. C. 20543

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JUSTICE BYRON R. WHITE

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Join WJB 2-14-75	Concur 2-13-75	1st draft 1-15-75 2nd draft 1-21-75	Join WHR 2-10-75	Join WJB 1-23-75	Join WJB 1-16-75	Join WJB 2-10-75	Join WJB 1/20/75	Will Dissent 1-20-75 Dissent 1st draft 2-6-75 2nd draft 2-11-75
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