

TREATY WITH THE FLATHEADS, &c. JULY 16, 1855.

975

Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians. Concluded at Hell Gate in the Bitter Root Valley, July 16, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING : July 16, 1855.

WHEREAS a treaty was made and concluded at the treaty ground, at Hell Gate, in the Bitter Root Valley, on the sixteenth day of July, eighteen hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the hereinafter named chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes and duly authorized thereto, by them, which treaty is in the words and figures following, to wit :

Articles of agreement and convention made and concluded at the treaty ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead nation, with Victor, the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, headmen, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognise Victor as said head chief. Contracting parties.

ARTICLE I. The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit : Cession of lands to the United States.

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flat-bow or Kootenay River and Clarke's Fork ; thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Cœur d'Alene Rivers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the head waters of the Koos-koos-kee River and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning. Boundaries.

ARTICLE II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes Reservation.

Congress approved February 28, 1931, June 9, 1932, and June 13, 1933, are hereby extended one and three years, respectively, from June 13, 1934.

Amendment.

SEC. 2. The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, June 18, 1934.

[CHAPTER 576.]

AN ACT

June 18, 1934.
[S. 3645.]
[Public, No. 383.]

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Indian affairs.
Future allotment in severalty prohibited.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Existing trust periods extended.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

Restoration of lands to tribal ownership.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further,* That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation:

Prorisos.
Existing valid rights not affected.

Provided further, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further,* That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further,* That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of \$1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further,*

Lands in reclamation projects.

Order temporarily withdrawing Papago Reservation lands from mineral entry, etc., revoked.

Provided further, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further,* That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further,* That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of \$1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further,*

Resulting damages to be paid tribe; limitation.

Annual rental to be paid.

Applicant for mineral patent must first make deposit of rent.

That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of \$1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Patentee to pay, to credit of Indians, damages, for loss of improvements.

Refund, if not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

Rights of way, etc. not restricted.

Vol. 46, p. 1202

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further,* That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

No transfers of restricted Indian lands, etc.; exception.

Provisos. Lands may descend only to Indian tribe or successor corporation.

Descent, etc., according to applicable laws.

Voluntary exchanges for proper consolidations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

Acquisitions, for providing lands for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

Appropriation authorized.

Proviso. Not to be used outside boundary lines of Navajo reservation.

Ante, p. 960.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Balances available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Title vested in United States in trust. Lands exempt from taxation.

Indian forestry units
Regulations govern-
ing.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

New Indian reserva-
tions on lands acquired
by proclamation.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

Proviso.
Additions, for exclu-
sive use of Indians.

Holdings for home-
steads outside of res-
ervations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

Sum for defraying ex-
penses of tribal organi-
zation herein created.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed \$250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

Establishment of rev-
olving fund, to make
loans for economic de-
velopment.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of \$10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

Repayments to be
credited to revolving
fund
Report to Congress.

Vocational and trade
school.
Annual appropria-
tion for loans, to pro-
vide payment for tui-
tion, etc.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed \$250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than \$50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

Proviso.
Indian students in
secondary, etc., schools

Reimbursable.

Standards of health,
ability, etc., to be estab-
lished.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Appointments.

Provisions dealing
with Indian corpora-
tions, education, etc.,
applicable to Alaska.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of

Designated sections
inapplicable to various
tribes.

such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomie, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Protecting treaty rights with Sioux Indians. Continuation of allowances, etc. Vol. 23, p. 894; Vol. 29, p. 334; Vol. 25, p. 451.

No person to receive more than one allowance.

No Indian claim or suit impaired by this Act.

Indians residing on same reservation may organize for common welfare.

Effective, when ratified.

Revocation, amendments, etc.

Additional powers vested in tribe.

Secretary to advise tribe of contemplated appropriation estimates.

Charters.
Issue of, to each tribe,
upon petition therefor.
Proriso.
Ratification condi-
tion precedent to opera-
tion.
Powers conferred.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Revocation.

Inapplicable to res-
ervation rejecting prop-
osition.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Term "Indian" de-
fined.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

"Tribe."

"Adult Indians."

[CHAPTER 577.]

AN ACT

June 18, 1934.
[S. 3742.]
[Public, No. 384.]

Granting the consent of Congress to the State Board of Public Works of the State of Vermont to construct, maintain, and operate a toll bridge across Lake Champlain at or near West Swanton, Vermont.

Lake Champlain.
Vermont may bridge,
at West Swanton.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby granted to the State Board of Public Works of the State of Vermont to construct, maintain, and operate a bridge and approaches thereto across Lake Champlain, at a point suitable to the interests of navigation, between a point at or near East Alburg, Vermont, and a point at or near West Swanton, Vermont, in accordance with the provisions of an Act entitled "An Act to regulate the construction of bridges over navigable waters", approved March 23, 1906, and subject to the conditions and limitations contained in this Act.

Construction.
Vol. 34, p. 84.

Toll rates to be ad-
justed to provide cost
of operation and sink-
ing fund.

SEC. 2. If tolls are charged for the use of such bridge, the rates of tolls may be so adjusted as to provide a fund sufficient to pay (a) the reasonable cost of maintenance, repair, and operation of the said bridge and its approaches, and (b) the amortization within a reasonable time, and not exceeding twenty-five years from the

Sale of lands remaining.

Deposit of funds.

Sale of agency land and buildings.

Elreno given preference rights for sixty days.

Sale of remaining land.

Use of proceeds.

Dewey, Okla. Land set aside for town-site purposes.

Subdivision and sale.

Provisos. Preference rights.

Sale of unimproved lots.

Expenses.

Hartshorne, Okla. Reappraisalment of town of.

Past payments. Reimbursement.

Flathead Indian Reservation, Mont. Allotment and sale of lands in. Vol. 33, p. 304, amended.

And in case said lands, or any part thereof, remain unsold after the expiration of said ninety days, the said Secretary shall proceed to offer said lands for sale under such regulations as he may prescribe. The funds received from said sales to be deposited in the Treasury of the United States to the credit of the Indians of the Cheyenne and Arapahoe Reservation, Oklahoma. That the Secretary of the Interior be, and he hereby is, authorized to cause to be appraised and sold six hundred and forty acres of land, together with the buildings and other appurtenances thereto belonging, heretofore set aside as reservation for the Cheyenne and Arapahoe Agency and the Arapahoe Indian school in Oklahoma, and that for sixty days from and after said appraisement the city of Elreno, in Oklahoma, be given the preference right to purchase said land and improvements thereon at the appraised value thereof, to be used for school purposes, the purchase price thereof to be paid in cash at the time of the acceptance by said purchaser. And in case said land remains unsold after the expiration of said sixty days, the Secretary shall proceed to offer said land for sale under such regulations as he may prescribe, and he is authorized to use all or any part of the proceeds of the sale thereof in the erection of new buildings and in repairs and improvements at the present Cheyenne Boarding School in the Cheyenne and Arapahoe Agency, in Oklahoma, and in the establishment of such day schools as may be required for said Cheyenne and Arapahoe Indians in Oklahoma, and that the balance of said proceeds, if any there be, may be used in support of said Cheyenne Boarding School or said day school.

SEC. 13. That the Secretary of the Interior is hereby authorized to set aside for town-site purposes at Dewey, Oklahoma, the south half of the northwest quarter of the northwest quarter, and the northeast quarter of the northwest quarter of the northwest quarter of section twenty-eight, township twenty-seven north, range thirteen east, formerly allotted to Julia Lewis, who failed to establish her citizenship in the Cherokee Nation.

That the Secretary of the Interior is directed to subdivide these lands in accordance with the present streets and alleys laid out on such lands and to dispose of such lands and place the proceeds derived therefrom to the credit of the Cherokee Nation: *Provided*, That the owners of permanent and substantial improvements on such lots shall have the preference right of purchasing their lots for cash at a price not to exceed two hundred dollars per acre: *Provided further*, That all unimproved lots shall be sold at public auction to the highest bidder for cash: *And provided further*, That the expense of surveying, platting, laying out, and selling such lands shall be deducted from the proceeds of such sale.

SEC. 14. That the Secretary of the Interior is hereby authorized to make, and shall cause to be made, within sixty days from the passage of this Act, a reappraisalment of the town of Hartshorne, Oklahoma, as of the date of the original appraisement made by the town-site commission; that payment already made on lots therein shall be credited on the basis of the reappraisalment; that there shall be reimbursed to lot owners from the town-site funds of the Choctaw and Chickasaw nations any amounts paid by them in excess of the new appraisement, and that the first installment on the purchase price or of the balance remaining unpaid shall be due thirty days after the service of notice of reappraisalment, but in all other respects the existing laws relating to the sale of town lots and issue of patents therefor in the Choctaw and Chickasaw nations shall remain in full force and effect.

SEC. 15. That section nine, chapter fourteen hundred and ninety-five, Statutes of the United States of America, entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and

disposal of all surplus lands after allotment," be, and the same is hereby, amended to read as follows:

"Sec. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and prescribed in section twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said Commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments, to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said Commission, receiving credit for payments previously made: *Provided, however*, That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this Act shall in addition to the payment required by section nine of said Act be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

"The entryman of lands to be irrigated by said system shall in addition to compliance with the homestead laws reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. No right to the use of water shall be disposed of for a tract exceeding one hundred and sixty acres to any one person, and the Secretary of the Interior may limit the areas to be entered at not less than forty nor more than one hundred and sixty acres each.

"A failure to make any two payments when due shall render the entry and water-right application subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys paid thereon. The funds arising hereunder shall be paid into the Treasury of the United States and be added to the proceeds derived from the sale of the lands. No right to the use of water for lands in private ownership shall be sold to any landowner unless he be an actual bona fide resident on such land or occupant thereof residing in the neighbor-

Post, p. 795.

Lands opened to settlement.

Provisos.
Soldiers and sailors' rights not affected.
R. S., sec. 2304, 2305, p. 422.
Vol. 31, p. 847.

Price.

Payments.

Forfeiture.

Commutation.

R. S., sec. 2301, p. 421.

Irrigable lands.

Vol. 33, p. 304, amended.

Water rights.

Payment for.

Reclamation of part of irrigable lands.

Restriction.

Cancellation and forfeiture.

Disposal of proceeds.

	hood of such land, and no such right shall permanently attach until all payments therefor are made.
Payment of annual charges.	"All applicants for water rights under the systems constructed in pursuance of this Act shall be required to pay such annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the water-right application and the entry subject to cancellation, with the forfeiture of all rights under this Act as well as of any moneys already paid thereon.
Forfeiture.	
Regulations.	"The Secretary of the Interior is hereby authorized to fix the time for the beginning of such payments and to provide such rules and regulations in regard thereto as he may deem proper. Upon the cancellation of any entry or water-right application, as herein provided, such lands or water rights may be disposed of under the terms of this Act and at such price and on such conditions as the Secretary of the Interior may determine, but not less than the cost originally fixed.
Disposal of canceled entries, etc.	
Water rights free to Indians.	"The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.
Exemptions.	
Pro rata share of cost.	
Unallotted irrigable lands.	"When the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior.
Maintenance by owners.	
Regulations.	"The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."
	That section fourteen of said Act be, and the same is hereby, amended to read as follows:
Disposal of proceeds. Vol. 33, p. 305, amended.	"SEC. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the Commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation; one half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior as he may deem advisable for the benefit of said Indians in the purchase of live stock, farming implements, or the necessary articles to aid said Indians in farming and stock raising and in the education and civilization of said Indians, and the remaining half of said money to be paid to said Indians and persons holding tribal rights on said reservation, semiannually as the same shall become available, share and share alike: <i>Provided</i> , That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of irrigation system."
Payment of expenses.	
Use of remaining funds.	
Proviso. Payment of assessed charges.	

Name of corporation. Rights, etc., of. Purposes. Provisos. Limit of property holdings, etc. Restriction. Capital stock. Provisos. Additional stock. Dividends. Board of directors. Powers of board. Amendment.	<p>junior, Augustus S. Worthington, Emily Tuckerman, Thomas W. Smith, Clare G. Addison, John B. Larner, Bernard T. Janney, Tallmadge A. Lambert, Charles F. Weller, G. Lloyd Magruder, Charles E. Foster, E. Francis Riggs, Alexander Graham Bell, Samuel R. Bond, Caleb C. Willard, and George H. Harries, their associates and successors, be, and they are hereby, created a body corporate and politic in the District of Columbia by the name, title, and style of the Washington Sanitary Housing Company, and by that name shall have perpetual succession, and it shall be lawful for the said corporation to have a common seal, sue and be sued, plead and be impleaded, and have and exercise all the rights, privileges, and immunities for the purposes of the corporation hereby created, which purposes are declared to be to acquire, hold, improve, rent, mortgage, sell, and convey real estate within the District of Columbia, for the building of sanitary houses for the poor to replace the insanitary houses now occupied by them, especially in the alleys, and to rent such houses at so low a rental that dilapidated and insanitary houses will be abandoned by their tenants when, as a result of this work, better houses can be secured at the same or a lower figure: <i>Provided</i>, That the value of any and all property so acquired shall not exceed the sum of five hundred thousand dollars: <i>And provided further</i>, That no land shall be acquired or houses built thereon except of the character hereinbefore described.</p> <p>SEC. 2. That the capital stock of said corporation shall be twenty-five thousand dollars, divided into two hundred and fifty shares of the par value of one hundred dollars each, and when said amount shall have been subscribed the said corporation shall be fully authorized and empowered to commence business: <i>Provided</i>, That said capital stock may be increased by the sale of additional stock from time to time, but the total issue thereof shall not exceed the sum of five hundred thousand dollars: <i>And provided further</i>, That it shall be unlawful for the officers or directors of said corporation to declare any greater dividend to the stockholders than four per centum per annum upon the capital stock outstanding at the time of any such dividend.</p> <p>SEC. 3. That the affairs of the corporation shall be managed by a board of directors consisting of fifteen persons, who shall for the first year be elected by the incorporators hereinbefore named, from their number, and thereafter said board shall annually be elected in such manner as may be provided by the by-laws of the corporation, and such board of directors shall have power to ordain, establish, and put in execution such rules, regulations, ordinances, and by-laws as they may deem essential for the good government of the corporation, not contrary to the laws and the Constitution of the United States, or of this Act, and generally to do and perform all acts, matters, and things which a corporation may or can lawfully do.</p> <p>SEC. 4. That Congress reserves the right to repeal, alter, or amend this Act.</p>
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Approved, April 23, 1904.

April 23, 1904.
[H. R. 12231.]
[Public. No. 159.]

Public lands,
Flathead Indian
Reservation, Mont.
Allotment and sale
of lands in.
Vol. 12, p. 975.

CHAP. 1495.—An Act For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Terri-

tory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent or Indian inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants as may be necessary, at a salary not to exceed six dollars per day while so actually employed. Mineral lands shall not be appraised as to value.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State

Allotments.

Commission to appraise unallotted lands.

Composition of.

Organization of commission.

Clerk.

Classification, etc., of lands.

Timber lands.

Mineral lands.

Compensation.

Time limit.

Disposal of lands.

Timber and school lands excepted.

<p>Selection of school lands in lieu of lands formerly allotted.</p>	<p>of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: <i>Provided</i>, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.</p>
<p><i>Proviso.</i> Price to be paid Indians.</p>	<p><i>SEC. 9.</i> That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: <i>Provided</i>, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: <i>Provided further</i>, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: <i>Provided</i>, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: <i>And provided</i>, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.</p>
<p>Opening to settlement.</p>	<p><i>SEC. 10.</i> That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: <i>Provided</i>, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.</p>
<p><i>Provisos.</i> Existing rights of soldiers and sailors unimpaired. Vol. 31, p. 847. R. S., secs. 2304, 2305, p. 422.</p>	<p><i>SEC. 11.</i> That all of said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.</p>
<p>Payments.</p>	<p><i>SEC. 12.</i> That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for Catholic mission schools,</p>
<p>Patent.</p>	
<p>Forfeiture.</p>	
<p>Right to commute entries not affected. R. S., sec. 2301, p. 421.</p>	
<p>Mineral land entries.</p>	
<p><i>Proviso.</i> Exceptions.</p>	
<p>Sale of timber lands.</p>	
<p>Reservations. For Catholic religious organizations.</p>	

church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other missionary or religious societies that may make application therefor within one year after the passage of this Act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

Post, p. 1080.

For other religious organizations.

For agency, etc., buildings.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

Sale of undisposed lands.

Maximum.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

Disposal of proceeds.

Ante, p. 304.

SEC. 15. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school, and mission purposes, as provided in sections eight and twelve of this Act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this Act.

Payment for lands reserved.
Appropriation.

Ante, pp. 303, 304.

Reimbursement.

Ante, p. 302.

SEC. 16. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in

Liability of the United States limited.

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each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

Approved, April 23, 1904.

April 23, 1904.
[H. R. 12687.]

[Public, No. 160.]

CHAP. 1496.—An Act To amend an Act entitled "An Act to provide for the opening of certain abandoned military reservations, and for other purposes," approved August twenty-third, eighteen hundred and ninety-four.

Military reservations.
Lands on abandoned, opened to entry.
Vol. 28, p. 494,
amended.

Fort Abraham Lincoln Reservation, N. Dak.
Homestead entries allowed.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act to provide for the opening of certain abandoned military reservations, and for other purposes," approved August twenty-third, eighteen hundred and ninety-four, be, and the same is hereby, amended by adding thereto section three, which said section shall read as follows:

"**SEC. 3.** That all persons now having, or who may hereafter file, homestead applications upon any of the lands situate within the abandoned Fort Abraham Lincoln Military Reservation, in Morton County, State of North Dakota, shall be entitled to a patent to the land filed upon by such person upon compliance with the provisions of the homestead law of the United States and proper proof thereof, and shall not be required to pay the appraised values of such lands in addition to such compliance with the said homestead law."

Approved, April 23, 1904.

April 25, 1904.
[H. R. 14621.]

[Public, No. 161.]

CHAP. 1600.—An Act For the disposal of the unsold lots in the Fort Crawford military tract at Prairie du Chien, Crawford County, Wisconsin.

Fort Crawford Reservation, Wis.
Sale of land to occupants, etc., in.
Vol. 12, p. 771.

Sale of undisposed lots.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lots in the Fort Crawford military tract at Prairie du Chien, Crawford County, Wisconsin, not heretofore sold under the Act entitled "An Act to provide for the disposal of certain lands therein named," approved March third, eighteen hundred and sixty-three, shall be disposed of and patented to the occupants and settlers thereon under bona fide title thereto who shall apply therefor within one year from the passage of this Act and furnish proof of such occupation and settlement under claim of title and pay therefor the appraised value heretofore placed thereon, together with interest on said appraised value at the rate of five per centum per annum from the date of said appraisement. All lots in said tract not so disposed of at the expiration of one year from the passage of this Act shall be subject to sale at private entry at not less than the said appraised price, with interest thereon at the rate of five per centum per annum from the date of said appraisement.

Approved, April 25, 1904.

April 26, 1904.
[S. 3.]

[Public, No. 162.]

District of Columbia.
Regulation of electrical wiring in.

CHAP. 1602.—An Act To regulate electrical wiring in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioners of the District of Columbia shall have power to make from time to time such rules and regulations respecting the production, use, and control of electricity for light, heat, and power purposes in the District of

Remedy by existing law not impaired.

SEC. 2. That nothing in this act contained shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any owner of letters patent for a design, aggrieved by the infringement of the same, might have had if this act had not been passed; but such owner shall not twice recover the profit made from the infringement.

Approved, February 4, 1887.

Feb. 8, 1887.

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

President authorized to allot land in severalty to Indians on reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

Distribution.

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

Provisos.

Allotment pro rata if lands insufficient.

Allotment by treaty or act not reduced.

Additional allotment of lands fit for grazing only.

Selection of allotments.

Improvements.

Proviso.

On failure to select in four years, Secretary of the Interior may direct selection.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

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SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be

Allotments to be made by special agents and Indian agents.

Certificates.

Indians not on reservations, etc., may make selection of public lands.

Fees to be paid from the Treasury.

Patent to issue.

To be held in trust.

Conveyance in fee after 25 years.

Provisos.

Period may be extended.

Laws of descent and partition.

Negotiations for purchase of lands not allotted.

Lands so bought to be held for actual settlers if arable.

Patent to issue only to person taking as homestead.

Purchase money to be held in trust for Indians.

Religious organizations.

Indians selecting lands to be preferred for police, etc.

Citizenship to be accorded to allottees and Indians adopting civilized life.

Secretary of the Interior to prescribe rules for use of waters for irrigation.

prescribed by Congress: *Provided however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

Lands excepted.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

Appropriation for surveys.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

Rights of way not affected.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Southern Utes may be removed to new reservation.

Approved, February 8, 1887.

CHAP. 120.—An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes.

Feb. 8, 1887.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, are hereby declared to be forfeited to the United States of America in all that part of said grant which is situate on the east side of the Mississippi River, and also in all that part of said grant on the west of the Mississippi River which is opposite to and coterminous with the part of the New Orleans Pacific Railroad Company which was completed on the fifth day of January, eighteen hundred and eighty-one; and said lands are restored to the public domain of the United States.

•Certain lands granted to New Orleans, Baton Rouge and Vicksburg R. R. Co. forfeited. Vol. 16, p. 579.

SEC. 2. That the title of the United States and of the original grantee to the lands granted by said act of Congress of March third, eighteen hundred and seventy-one, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed, and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October twenty-seventh, eighteen hundred and eighty-one and November seventeenth, eighteen hundred and eighty-two, which indicate the definite location of said road: *Provided,* That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

Certain lands confirmed to New Orleans Pacific R. R. Co., assignee of New Orleans, Baton Rouge and Vicksburg R. R. Co.

Provided. Lands of actual settlers at the time excepted.

SEC. 3. That the relinquishment of the lands and the confirmation of the grant provided for in the second sections of this act are made and shall take effect whenever the Secretary of the Interior is notified that

When grant to be in effect.

**THE ELUSIVE IMPLIED WATER RIGHT FOR
FISH: DO OFF-RESERVATION INSTREAM
WATER RIGHTS EXIST TO SUPPORT
INDIAN TREATY FISHING RIGHTS?**

COMMENT

FULL CITATION:

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THE ELUSIVE IMPLIED WATER RIGHT FOR FISH: DO OFF-RESERVATION INSTREAM WATER RIGHTS EXIST TO SUPPORT INDIAN TREATY FISHING RIGHTS?

COMMENT

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I. INTRODUCTION

What is included with a treaty right to fish? Courts have repeatedly considered this question over the course of the past century. The first question addressed was whether the treaty right to fish at traditional places included a right to access those places, a servitude across the land. As the Columbia Basin was impacted by a decline in salmon, the

next question was whether the treaty right to take fish meant an opportunity to fish, or a right to a harvestable amount of fish. Now, the treaty right to fish is affected by environmental and habitat considerations. Between climate change, habitat modification, and an increasing amount of water users who draw water from the rivers, there is a low volume of stream flow, which affects the riparian habitat that fish require to survive. Fish need water, so does a treaty right to fish include an instream water right to ensure that there are fish? Several courts that have addressed this question have been willing to imply an instream water right to support a treaty fishing right. However, a common feature of these cases is that the treaty right was located on reservation land. Many of the treaties signed by Pacific Northwest Indian Tribes reserved the right to fish at “usual and accustomed places,” some of which are not located on reservation land. These treaties prompt the question: Do treaty rights to fish include an instream water right when the traditional fishing ground is off-reservation?

The Confederated Tribes of the Yakama Nation is a group that has experienced a century of litigation over the meaning of their treaty right to fish. After an unpromising decision from the Supreme Court of Washington diminishing the Tribe’s fishing rights, the Yakama Nation spent ensuing years in negotiations with adversaries for instream flows to protect its fish resource.¹ This article will examine how a Washington or other Pacific Northwest court today might analyze whether there is an off-reservation instream water right to support a fishing right reserved by treaty language. Such a court should find that an off-reservation instream water right supports a treaty fishing right because a water right would support the fish population, and rules of Indian treaty interpretation require courts to adopt inferences that will support treaty.

In order to answer the question of whether an off-reservation instream right exists to support a treaty fishing right, this comment will begin with treaty fishing rights, move to reserved water rights, and then address where the gaps in analysis are and how to fill them in. First, the comment will examine what is included with the treaty right to fish. Supreme Court decisions have relied on a similar analysis to decide what this right does and does not include. Next, the comment will look at the origin of the implied reserved water right, and argue that the analysis of the court to find a reserved water right is similar to the analysis of the court to determine what is included in a treaty fishing right. Because the implied reserved water right developed into a doctrine, the doctrine will be compared with the original rule. After discussing treaty fishing rights and implied reserved water rights in Washington State litigation, this comment will discuss and evaluate the only court decision, an Idaho court decision, to rule on the question of an off-reservation instream water right to support a treaty fishing right. Fol-

1. See Michael C. Blumm, David H. Becker & Joshua D. Smith, *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENVTL. L. 1157, 1180–82 (2006).

lowing a critique of the Idaho court decision, the comment will consider the recent move of a district court to apply treaty-based analysis and find for protection from fish habitat degradation and what this means for instream water rights. Finally, this comment will look at potential approaches to resolve whether there could be an instream water right implied to support fish for a treaty fishing right, which includes identifying links and bridging the gaps between treaty right and reserved water right analysis.

II. BACKGROUND

The Confederated Tribes of the Yakama Nation² consists of indigenous groups who have, since time immemorial, lived on the Columbia Plateau east of the Cascade Mountains and west of the Yakima River,³ land which is now present-day Washington State. The Yakama subsisted on hunting, fishing, and gathering, and these subsistence activities influenced strategic seasonal migration around the plateau.⁴ As with other tribes in the Pacific Northwest region, salmon consisted of a substantial part of the diet for Yakama Tribes.⁵

In the mid-1800s, federal Indian policy touched the Indian tribes of the Pacific Northwest. In anticipation of an increased flow of settlers into the newly formed Washington Territory in 1853, Washington Territory Governor Isaac Stevens attempted to make land and resources accessible to these new settlers.⁶ During 1854-1855, Stevens formed ten treaties with different Pacific Northwest Tribes; the purpose of these series of treaties was to make land available for settlers migrating west, and to provide the Indians areas where they could remain until fully assimilated into American society.⁷ The region-wide intent on the part of the United States resulted in similarly drafted treaty language.⁸

2. This article will adhere to the spelling "Yakama" when referring to the Confederated Tribes of the Yakama Nation. Traditionally spelled "Yakima" in many historical documents, including the Treaty of 1855, in the mid-1990s the Tribe changed the spelling of its name to "Yakama" because it was closer to the native pronunciation. *Yakama Nation History*, YAKAMANATION-NSN.GOV, <http://www.yakamanation-nsn.gov/history3.php>. The Yakama were a native group of tribes to the region that had constructed a permanent village at a place where the Yakima River narrows, and the people came to be known as the Yakama, or "narrow-river people." NORTHWEST POWER AND CONSERVATION COUNCIL, TRIBAL BRIEFING BOOK 61 (2000), available at <http://www.nwcouncil.org/library/2000/2000-11.pdf>.

3. *Yakama Nation History*, YAKAMANATION-NSN.GOV, <http://www.yakamanation-nsn.gov/history.php> (last visited Nov. 14, 2011).

4. *See id.*

5. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979).

6. Kent Richards, *The Stevens Treaties of 1854-1855*, 106 OR. HIST. Q. 342, 346 (2005).

7. *Id.* at 347.

8. *See, e.g.*, Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957; Treaty with the Yakama, June 9, 1855, 12 Stat. 951; Treaty at Medicine Creek, Dec. 26, 1854, 10 Stat. 1132.

Tribal signatories from the different tribes of the Pacific Northwest shared a common thread: they sought to preserve their traditional food resources. Anthropological experts from a Washington district court decision summarized the importance of the fish resource to the Northwest Indians: “[F]ish were vital to the Indian diet, played an important role in their religious life, and constituted a major element of their trade and economy.”⁹ During the Stevens Treaty negotiations, tribes repeatedly emphasized the importance of fish to their culture, and expressed their desire to continue to collect salmon at their usual and accustomed fishing grounds.¹⁰ Governor Stevens assured the tribes the continued freedom of accessing traditional fishing places while maintaining that this right would be shared with other territory residents.¹¹

The Yakama Nation was among Pacific Northwest Indian Tribes that entered into a treaty agreement initiated by Washington Territory Governor Isaac Stevens.¹² Similar to many tribes in the Northwest, the Yakama were concerned with preserving access to places where they traditionally fished.¹³ The result was a provision in article three of the treaty that addressed this concern: “The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory”¹⁴ This treaty language, echoed in various other treaties,¹⁵ was to become perhaps the most litigated provision in Indian treaty interpretation.

III. FISHING RIGHTS, ROUND ONE: THE RIGHT TO ACCESS USUAL AND ACCUSTOMED PLACES

The first question posited to the courts involved the right to access usual and accustomed fishing grounds. Approximately one half century after the Treaty with the Yakama was signed, residents of Washington State who owned property abutting the Columbia River erected state-licensed fishing wheels in common areas where the Indians and citizens both fished.¹⁶ The structure of the fishing wheels was such that it monopolized the fishing area and blocked the Yakama’s access to tradition-

9. *United States v. Washington*, 384 F. Supp. 312, 350 (D. Wash. 1974). Fish constituted one of the major resources comprising the Northwest Indians’ diets. *Id.* Tribes held a religious ceremony at the beginning of the harvest to ensure future harvests of fish. *Id.* at 351. Fish was a fundamental element of inter-tribe trade that occurred within the region. *Id.*

10. *Id.* at 355.

11. *Id.*

12. Treaty with the Yakama, *supra* note 8.

13. *United States v. Washington*, 384 F. Supp. at 350.

14. Treaty with the Yakama, *supra* note 8.

15. Treaty at Medicine Creek, *supra* note 8, at art. 3. Treaty of Point Elliott, art. 5, Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, art. 4, Jan. 26, 1855, 12 Stat. 933; Treaty with the Nez Perces, *supra* note 8, at art. 3.

16. *United States v. Winans*, 198 U.S. 371, 379–80 (1905).

al fishing grounds.¹⁷ In response to this new development, the Yakama brought suit. To determine whether the Yakama had legal recourse for exclusion from their fishing places, the Court had to first determine the nature of the fishing right in article three of the treaty.

In construing the “right of taking fish at all usual and accustomed places,” the Supreme Court looked to its existing precedent to guide Indian treaty interpretation. In 1905 there was one established cornerstone of how to interpret an Indian treaty, and the rule involved heavy consideration of how the Indian signatories understood the treaty:

And we have said we will construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,’ and counterpoise the inequality ‘by the superior justice which looks only to the substance of the right without regard to technical rules.’¹⁸

Since justice and precedent warranted interpretation according to tribal understanding, the next step was to consider how historical circumstances surrounding the treaty informed the Court as to the Indians’ understanding of the provision.¹⁹

The Supreme Court looked to the Indians’ rights as a precursor to circumstances surrounding the signing of the treaty. The Court acknowledged these rights to be completely unfettered from time immemorial.²⁰ However, the Court noted, changing times limited these rights.²¹ Since Indians originally had unlimited rights, the starting point for analysis of a treaty should presume that the Indians have rights not expressly limited by language: “[T]he treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted.”²² These reserved rights that were not expressly granted to the government implied a servitude on the land: the right to cross land to access these fishing grounds and the right to occupy land for the purpose of fishing.²³

The Court went on to explain that the right to take fish in common with territorial citizens was not an exclusive right: It was a protected right of access to fishing grounds.²⁴ Although the Yakama Tribe had no exclusive rights, neither did the owners of land appurtenant to the Columbia River. Any arrangement, including fish wheel construction, where the Yakamas would have been denied access to usual fishing

17. *Id.* at 380.

18. *Id.* at 380–81 (quoting *Choctaw Nation v. United States*, 119 U.S. 1 (1886) and citing *Jones v. Meehan*, 175 U.S. 1 (1899)).

19. *Id.* at 381.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *See id.*

sites, was incompatible with rights reserved to the Yakama by treaty and was thus impermissible.²⁵

IV. CHANGES IN THE COLUMBIA RIVER BASIN

A century and a half later, the Columbia River Basin is vastly altered from its natural free-flowing condition and the era of the Stevens Treaties. Beginning in 1933 and for the next forty years, thirteen dams were erected on the main stem of the Columbia.²⁶ These include Bonneville, The Dalles, John Day, and McNary dams, all of which are located between the confluence of the Yakima and Columbia rivers and the mouth of the Columbia at the Pacific.²⁷ These concrete structures created upstream lakes and permanently altered river habitat for anadromous fish.²⁸ This habitat change has resulted in a sharp decline in salmon numbers in the Columbia River Basin since the 1970s.²⁹ The decline has been so sharp from what it once was that currently twelve distinct population segments of salmon and steelhead in the Columbia River Basin are listed as either endangered or threatened under the Endangered Species Act (ESA).³⁰ The definition of “endangered species” under the ESA is a species that is in danger of extinction throughout at least a significant portion of its range.³¹ “Threatened species” are species at risk of becoming endangered throughout at least a significant portion of its range.³² An anadromous fish species is listed under the ESA by the Secretary of Commerce (delegated to NOAA³³ Fisheries) on the basis of the best available science.³⁴ So, according to the best available science,

25. *Id.* at 382.

26. MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 164 (Penguin Books 1993).

27. *Hydroelectric Information for Columbia and Snake River Projects*, UNIV. OF WASH. SCH. OF AQUATIC & FISHERY SCIS., <http://www.cbr.washington.edu/crisp/hydro/> (last visited Nov. 14, 2011).

28. Bill Lang, *Columbia River*, CTR. FOR COLUMBIA RIVER HISTORY, <http://www.ccrh.org/river/history.htm#gorge> (last visited Nov. 14, 2011). Reservoirs disorient fish because the water in a reservoir moves slower and is warmer than the river water that constitutes their normal habitat; this puts physiological stress on the salmon. *See* NATIONAL RESEARCH COUNCIL, *UPSTREAM: SALMON AND SOCIETY IN THE PACIFIC NORTHWEST* 229 (National Academy Press 1996). Reservoirs also increase the time and energy fish spend attempting to migrate downstream. *Id.* at 65. Salmon migrating upstream to their spawning habitats become disoriented and sometimes pass back through the dam downstream. *See* George P. Naughton et al., *Fallback by Adult Sockeye Salmon at Columbia River Dams*, 26 N. AM. J. OF FISHERIES MGMT. 380, 381 (2006).

29. Bill Lang, *Columbia River*, CTR. FOR COLUMBIA RIVER HISTORY, <http://www.ccrh.org/river/history.htm#gorge> (last visited Jan. 5, 2012).

30. *Endangered Species Act Status of West Coast Salmon and Steelhead*, NAT'L OCEANIC & ATMOSPHERIC ASSOCIATION, <http://www.nwr.noaa.gov/ESA-Salmon-Listings/upload/1-pgr-8-11.pdf> (last visited Oct. 18, 2011).

31. 16 U.S.C. § 1532(6) (2006).

32. *Id.* § 1532(20).

33. National Oceanic and Atmospheric Administration.

34. *See* § 1533(b)(1)(A).

anadromous fish in the Columbia River Basin had (and have) become a scarce resource.

V. FISHING RIGHTS, ROUND TWO: IS THE RIGHT TO TAKE FISH A RIGHT TO THE OPPORTUNITY TO CATCH FISH, OR IS THE RIGHT SOMETHING MORE?

Similar to many other tribes in the Pacific Northwest, the decline in salmon profoundly affected the Confederated Tribes of the Yakama Nation:

The spiritual view of the Yakama people is place-based. They believe in the sacredness of all things, but particularly so when things are in their correct places. All things have ordered roles to play within their ecosystems. Changing the content of a place—forcing a species into extinction, for example—changes the order and balance, and disrupts the harmony and sacredness of the place. People are only elements of this integrated wholeness, not owners or masters of it.³⁵

In addition to affecting the spiritual existence of the Yakama Nation, the decline in salmon has affected the physical existence of the Yakama as well. In the 1970s the Yakama joined other Pacific Northwest tribes in litigation seeking (1) a declaration of the existence of off-reservation treaty fishing rights; and, (2) relief for the destruction of the treaty fishing rights due to the state's failure to prevent activities that degraded fish habitat.³⁶ In what the court termed "Final Decision #1,"³⁷ the court declared the existence of off-reservation treaty fishing rights, but did not address the issue of whether the treaty fishing right was connected to a right from degradation of fish habitat or an instream water right.³⁸ The State of Washington refused to comply with this ruling, and this refusal was challenged and ultimately reviewed by the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.³⁹

Fishing Vessel was a case about treaty fishing rights in the face of an increasingly scarce resource.⁴⁰ In 1979 the Supreme Court evaluated four potential interpretations of the boilerplate provision, the "right of taking fish, at all usual and accustomed grounds and stations . . . in common with the citizens of the territory."⁴¹ The proposed interpreta-

35. NORTHWEST POWER AND CONSERVATION COUNCIL, *supra* note 2, at 61.

36. *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974).

37. *Id.* at 409.

38. *Id.* at 328, 405. *See generally* Blumm et al., *supra* note 1, at 1177–81 (discussing the general history of litigation in which the Yakama Nation has been involved).

39. 443 U.S. 658 (1979).

40. *Id.* at 669.

41. *Id.* at 662. Treaties at issue in this litigation included Treaty of Medicine Creek, Treaty of Point Elliot, Treaty of Point No Point, Treaty of Neah Bay, Treaty with the Yakamas, and Treaty of Olympia. *Id.* at 662 n.2.

tions for the right to take fish included the following: (1) as many fish as tribal needs dictated (asserted by the Tribes); (2) a fifty percent allocation of the harvestable fish or tribal needs, whichever was less (asserted by the United States); (3) a “fair and equitable share” (asserted by the Washington Department of Fisheries); or, (4) no assurances for the taking of any fish (asserted by the Game Department).⁴² The Supreme Court ultimately adopted the government’s interpretation, entirely rejecting the Game Department’s interpretation: “In our view, the purpose and language of the treaties are unambiguous; they secure the Indians’ right to take a share of each run of fish that passes through tribal fishing areas.”⁴³

The Court explained a fundamental concept for interpreting a treaty between foreign nations and then modified the concept according to precedent on Indian treaties. A treaty between two sovereign nations is like a contract.⁴⁴ When the contract language is at issue, the intent of the parties controls the interpretation.⁴⁵ However, because the United States, as the stronger negotiating party, had a duty not to take advantage of the other side, the treaty should be interpreted in the manner in which it would have been understood by the Indians.⁴⁶ The 1979 Supreme Court then applied this concept to the case at hand.

In considering how the Indians would have understood the treaty fishing provisions, the Supreme Court looked to the circumstances surrounding the treaty. It found overwhelming evidence that the Indians understood that the right to take meant more than a mere opportunity to catch fish. First, during the treaty negotiations, the tribal signatories repeatedly emphasized the importance of fish as a subsistence and economic resource.⁴⁷ Additionally, Governor Stevens expressed his intention not to exclude tribes from their traditional fishing grounds.⁴⁸ The Court found it impossible that either side intended for the tribes to be crowded out of their traditional fishing grounds by settlers, and even less plausible was that “taking fish” meant a chance to fish:

That each individual Indian would share an “equal opportunity” with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations. Such a “right,” along with the \$207,500 paid the Indians, would hardly have been sufficient to compensate them for the millions of acres they ceded to the Territory.⁴⁹

In holding that taking fish meant a proportion of the harvestable share, the Supreme Court supported its interpretation with its own on-

42. *Id.* at 670–71.

43. *Id.* at 679.

44. *Id.* at 675.

45. *Id.*

46. *Id.* at 675–76 (citing *Jones v. Meehan*, 175 U.S. 1, 11 (1899)).

47. *Id.* at 676.

48. *Id.*

49. *Id.* at 676–77.

point precedent on fishing rights: *United States v. Winans*.⁵⁰ Rights to traditional fishing places were part of a spectrum of unlimited Indian rights before treaties, and the only way to give effect to the reserved right of taking fish was to imply a servitude for access.⁵¹ The *Fishing Vessel* Court concluded that, in *Winans*, “removal of enough of the fishing wheels to enable some fish to escape and be available to Indian fisherman upstream” was evidence that the *Winans* Court interpreted the fish harvest to be some nonzero amount.⁵² The *Fishing Vessel* Court held that the Indians were entitled to half of the harvestable share or the Tribes’ needs, whichever was less.⁵³ Whether a treaty fishing right meant an instream water right or protection against habitat degradation was not before the Court and neither discussed nor considered.

Litigation on the treaty fishing right has answered questions about the present right of taking fish, but has not addressed how this right relates to changing riparian conditions. *Winans* interpreted the fishing right to include a servitude on the land appurtenant to usual and accustomed fishing grounds. Perhaps more importantly, *Winans* instructed generally that treaties should be interpreted as rights reserved to Indians and only rights granted to the federal government those rights expressly granted. *Fishing Vessel* demonstrated that the right to take fish meant a share of harvestable fish. In fact, the *Fishing Vessel* Court referred to *Winans* for evidence that taking fish meant a share of the harvest. What is uncertain is the nature of this right in the face of changing natural conditions. The management of water in many western states follows a system where agricultural or urban users typically divert water from the stream, lessening the flow of the river.⁵⁴ Some of these rivers are fully appropriated: water users have claims for every cubic foot of water that comprises streamflow.⁵⁵ Also, climate change will cause water stored as snowpack to melt, and runoff to happen sooner, which will characteristically affect streams by decreasing streamflow later in the season.⁵⁶ Low streamflow is likely to negatively impact fish populations, so the question then becomes whether a treaty fishing right can be translated into a reserved water right that remains in the stream to support fish.

50. *Id.* at 679.

51. *Id.* at 680–81 (citing *United States v. Winans*, 198 U.S. 371, 380–81(1905)).

52. *See id.* at 681.

53. *Id.* at 685.

54. *See, e.g.*, MARK T. ANDERSON & LLOYD H. WOOSLEY, JR., WATER AVAILABILITY FOR THE WESTERN UNITED STATES—KEY SCIENTIFIC CHALLENGES 1–2 (USGS Circular 1261, 2005), available at <http://pubs.usgs.gov/circ/2005/circ1261/pdf/C1261.pdf>.

55. *See, e.g., id.* at 3.

56. *See, e.g., id.* at 1.

VI. THE IMPLIED RESERVATION OF WATER: *WINTERS V. UNITED STATES* AND THE DEVELOPMENT OF THE WINTERS DOCTRINE

Increased water usage has decreased the volume of water in various stretches of the Columbia River and its tributaries, such as the Yakima and Snake Rivers.⁵⁷ Water usage that draws water from the rivers consists of irrigation projects developed as early as the 1920s, when agriculture started to become more common in the basin.⁵⁸ In fact, water usage on some of the tributaries of the Snake and Columbia Rivers is so intense that there are adjudicative proceedings to determine which parties have a right to use the water.⁵⁹

Adjudicative proceedings are necessary in western water law because of the doctrine by which the right to use water is decided. Many states out West, including Washington and Idaho, follow some form of the doctrine of prior appropriation,⁶⁰ which came into existence as early as the 1800s as a system to resolving disputes over water rights.⁶¹ As miners and settlers migrated to the arid West, it became abundantly clear that land without access to water was valueless.⁶² Consequently, miners, some of the first water users, began diverting water out of the stream for use on their land.⁶³ The rule that developed between miners was one of temporal preference; the first in time was the first in right.⁶⁴ With a system of appropriation that gives preference to senior users (i.e., parties who were first to use the water), once every cubic foot per second of water is claimed, new arrivals do not have any legal right to water, regardless of whether their property abuts the water source. As a result, the date when water was first used, the priority date, is of paramount importance.⁶⁵

57. Bill Lang, *Columbia River*, CENTER FOR COLUMBIA RIVER HISTORY, <http://www.ccrh.org/river/history.htm#gorge> (last visited Nov. 15, 2011).

58. See *id.* *Accord Hydroelectric Information for Columbia and Snake River Projects*, COLUMBIA BASIN RESEARCH, <http://www.cbr.washington.edu/crisp/hydro/> (last visited Nov. 15, 2011).

59. See *generally Water Right Adjudications*, STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, <http://www.ecy.wa.gov/programs/wr/rights/adjhome.html> (last visited Oct. 19, 2011) (River adjudications establish parties' rights in relation to one another in a particular water system).

60. See WASH. REV. CODE § 90.03.010 (2008) ("the first in time shall be the first in right"); IDAHO CODE ANN. § 42-106 (2010) ("first in time is first in right").

61. See, e.g., *Irwin v. Phillips*, 5 Cal. 140 (1855).

62. *Colorado Water Rights*, WATER INFO. PROGRAM, <http://www.waterinfo.org/rights.html> (last visited Nov. 15, 2011).

63. *Id.*

64. See *Irwin*, 5 Cal. at 147 (holding "the miner, who selects a piece of ground to work, must take it as he finds it, subject to prior rights . . . [H]e has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.").

65. An example: In 1900 User X, the first person to divert water from Stream S, diverts 1,000 c.f.s. (cubic feet per second). In 1905, User Y, the only other user, begins to divert the remaining 1,000 c.f.s. from Stream S. In 1910, due to lack of rainfall, Stream S has only 1,200 c.f.s. of water in it. User X, with the priority date of 1900, is entitled to her full water

Although establishing a priority date under state water law generally requires express action, such as the physical diversion of water,⁶⁶ the Supreme Court has been willing to imply a water right under federal law to satisfy congressional purposes for federally reserved land. The doctrine that recognizes this implied water right is the Winters Doctrine.⁶⁷ The Winters Doctrine originated from *Winters v. United States*,⁶⁸ which examined the question of water rights for an Indian reservation. The doctrine expanded the holding in *Winters* to imply water rights for federal reservations of land and imposed other limitations,⁶⁹ but that very expansion has diverged from the nature of the Supreme Court's original ruling.⁷⁰

A. *Winters v. United States*

*Winters v. United States*⁷¹ resulted from a water conflict between Indian reservation water users and non-Indian farmers. In 1888 the Fort Belknap Reservation was created in the Milk River Basin in Montana.⁷² Federal Indian policy of this era was to convert Indians to an agrarian society.⁷³ Additionally, federal policy of this region was to encourage non-Indians to settle and establish small farms.⁷⁴ These two policies conflicted with each other when the needs of both exceeded the water available in the Milk River.⁷⁵ In 1904 and 1905 the Milk River Basin suffered a drought, and water failed to reach the point where the reservation diverted water from the river.⁷⁶ In response to the shortage of water for agricultural and domestic purposes on the reservation, the United States brought suit on behalf of the Gros Ventre and Assiniboine Tribes located on the Fort Belknap Reservation.⁷⁷

*United States v. Winans*⁷⁸ proved influential to the outcome of *Winters* in both the lower court and the Supreme Court. The upstream de-

right: 1,000 c.f.s. User Y, with a junior date of 1905 gets the remaining of what is available: 200 c.f.s. Essentially, junior users absorb losses in dry years when there is less water available.

66. See, e.g., *Water Glossary*, WESTERN RESOURCE ADVOCATES, <http://www.westernresourceadvocates.org/water/waterglossary.php> (last visited Jan. 11, 2012).

67. See, e.g., Barbara Cosens, *The Legacy of Winters v. United States and the Winters Doctrine, One Hundred Years Later* (2008), <http://www.americanbar.org/content/dam/aba/migrated/enviro/fallmeet/2008/bestpapers/Cosens.authcheckdam.pdf>.

68. *Winters v. United States*, 207 U.S. 564 (1908).

69. See *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978); *Wyoming v. United States*, 492 U.S. 406 (1989).

70. See Cosens, *supra* note 67, at 8.

71. 207 U.S. 564 (1908).

72. Act of May 1, 1888, ch. 213, 25 Stat. 113.

73. See, e.g., Cosens, *supra* note 67, at 1, 3.

74. *Id.* at 3.

75. *Id.*

76. JOHN SHURTS, *INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880s-1930s* 29 (2000).

77. *Winters v. United States*, 207 U.S. 564, 565 (1908).

78. 198 U.S. 371 (1905)

fendant farmers had perfected an earlier priority date of water use than did the Tribes, which meant that the Tribes would lose if prior appropriation were applied.⁷⁹ The attorney arguing on behalf of the United States in *Winters* had to argue another theory.⁸⁰ One potential theory was the adoption of the riparian doctrine over that of prior appropriation.⁸¹ Another theory was expanding the interpretation of treaty rights to include reserved water rights. *Winters* was initially filed approximately a month and a half after the Supreme Court decided *Winans*.⁸² Although it is uncertain as to whether the attorney who argued the case on behalf of the government had access to the *Winans* decision when he first filed *Winters*, the federal district judge in Montana did rely on *Winans* in finding a reserved water right for the Tribes on the Fort Belknap Reservation.⁸³ More importantly, the Supreme Court relied on *Winans* as well.⁸⁴

The Supreme Court in *Winters* considered the fact that the reservation's downstream irrigation diversion was not a historic practice of the Gros Ventre and Assiniboine Tribes, and did not exist prior to the creation of the reservation.⁸⁵ In light of these unfavorable factors for the Tribes, the Court began its analysis by considering the 1888 agreement that created the Fort Belknap Reservation.⁸⁶ Part of the policy driving the creation of the reservation was to convert the "nomadic and uncivilized" tribes to a "civilized" agrarian society, and the arid tract of land reserved to the Indians was valueless without water.⁸⁷ The Court considered two possible alternatives: (1) water rights were lost when the Indians ceded their lands and agreed to reservation life; or, (2) water rights for the reservation had been preserved so as to maintain the value of the land.⁸⁸ There is an arguable connection between *Winters* and *Winans* because of how the court considered the two alternative interpretations of the agreement:

The key language in *Winters* indicating the Court's reliance on [*Winans*] is: "[t]he Indians had command of the lands and the waters—command of all their beneficial use, whether kept for

79. SHURTS, *supra* note 76, at 35.

80. *Id.*

81. *Id.* at 43. The riparian doctrine recognizes water rights for all landowners appurtenant to the waterway, and generally water may not be diverted to land not abutting the water. See A. DAN TARLOCK, JAMES N. CORBRIDGE, JR. & DAVID H. GETCHES, WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 111, 113 (5th ed. 2002). In Montana in 1905, litigation had not decidedly established the prior appropriation or the riparian doctrine, thus this was a possible argument. SHURTS, *supra* note 76, at 43.

82. SHURTS, *supra* note 76, at 56.

83. *Id.* at 57.

84. *Id.* at 58.

85. Cosens, *supra* note 67, at 5.

86. *Winters v. United States*, 207 U.S. 564, 565 (1908).

87. *Id.* at 576.

88. *Id.*

hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this?"⁸⁹

In answering its own question, the Court dismissed the first alternative.⁹⁰ It was highly unlikely that Tribes would have given away the one commodity that provided sustenance and worth to the land.⁹¹

Additionally, the Supreme Court did not entertain the first unlikely alternative because, when it came to matters of treaty interpretation, "ambiguities occurring will be resolved from the standpoint of the Indians."⁹² Applying this rule, if treaty language gives rise to two possible inferences, and one inference would support the purpose behind the treaty, then it is the inference that supports the treaty that should be adopted.⁹³

The second alternative considered was the inference that supported the treaty.⁹⁴ Since implying a right to water would support farming, and the government had the power to reserve water for an Indian reservation, the Supreme Court upheld the injunction so water would reach the reservation's downstream diversion.⁹⁵ By applying the rules of treaty interpretation, the Court established that when Congress creates an Indian reservation, it impliedly reserves the water necessary to satisfy the purposes of the Indian reservation.

The take-away from the *Winters* decision included two important concepts, but one of those concepts is vastly better known in water law.⁹⁶ The *Winters* decision is more commonly known for the proposition that when Congress creates an Indian reservation, it impliedly reserves water for the purpose of that reservation with a priority date being the date that the reservation was created.⁹⁷ The less common take-away from the case is the process that the Court employed to get to its proposition, which was by applying the rules of treaty interpretation from *Winans*. *Winters* is still oft cited in Federal Indian law as a rule of Indian treaty interpretation: ambiguities will be resolved in favor of the Indians.⁹⁸

89. Cosens, *supra* note 67, at 4 (citing *Winters v. United States*, 207 U.S. 564, 576 (1908)).

90. *Winters*, 207 U.S. at 576.

91. *Id.*

92. *Id.*

93. *Id.* at 577.

94. *Id.*

95. *Id.*

96. See Cosens, *supra* note 67, at 5.

97. See *Winters*, 207 U.S. 564.

98. See, e.g., *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514, 524 (6th Cir. 2006); *Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1166 (2d Cir. 1988); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 350 (7th Cir. 1983). See also FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 37 (1958).

B. The Winters Doctrine

Since *Winters*, the Supreme Court has expanded the concept of implied water rights to all federal reservations of land, not just Indian reservations. The series of cases that collectively mold and develop this original concept and apply it to federal reservations are collectively known as the Winters Doctrine.⁹⁹ Two cases that mold the Winters Doctrine are worth noting, as these precedents have resurfaced in instream water right analysis.

The first of these cases is *Cappaert v. United States*.¹⁰⁰ In this case, at issue was whether Congress had impliedly reserved water rights when it established Devil's Hole as a national monument.¹⁰¹ Devil's Hole was made a national monument in 1952 to preserve unique scenic and scientific features, including an underground pool from Pleistocene-era lakes that comprised the Death Valley Lake System.¹⁰² This underground pool was home to a species of desert fish found nowhere else on earth.¹⁰³ In 1968 defendant Cappaert, a nearby landowner, began pumping groundwater that shared its source with the Devil's Hole pool.¹⁰⁴ The pumping decreased the water level of the pool, which affected the habitat of the fish and put it at risk of eventual extinction.¹⁰⁵ The Supreme Court held that the United States impliedly reserved a water right to preserve the pool when the United States reserved Devil's Hole to preserve its scientific value.¹⁰⁶ With this decision, the Supreme Court defined reserved water rights for federal land as only those necessary to satisfy the purpose of the federal reservation.

The second case worth noting restricted the amount of water that could be implied for federal land. In *United States v. New Mexico*,¹⁰⁷ the Court examined whether the federal government reserved water from the Rio Mimbres when it established the Gila National Forest.¹⁰⁸ That the government had the power to do this was clear: "Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes."¹⁰⁹ Instead, the real question was how to determine the amount of water reserved for future needs.¹¹⁰

99. See, e.g., Cosens, *supra* note 67, at 1. Cases include *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978); and, *Wyoming v. United States*, 492 U.S. 406 (1989).

100. 426 U.S. 128.

101. *Id.* at 131.

102. *Id.* at 132.

103. *Id.*

104. *Id.* at 133–34.

105. *Id.*

106. *Id.* at 147.

107. 438 U.S. 696 (1978).

108. *Id.* at 698.

109. *Id.* (citing *Winters v. United States*, 207 U.S. 564 (1908) and *Cappaert v. United States*, 426 U.S. 128 (1976)).

110. *Id.* Court precedent for determining the quantity of water reserved for future needs on an Indian reservation was Practicably Irrigable Acreage, the amount of land on an

The Court held that Congress intended to reserve the amount of water necessary to fulfill the primary purpose of the reservation.¹¹¹ Water needs for secondary purposes were subject to the state rules of prior appropriation, just as they would be for any other public or private appropriator.¹¹²

Decisions from cases like *Cappaert v. United States* and *United States v. New Mexico* developed into the Winters Doctrine, but the fundamental analysis governing this doctrine has diverged from its namesake case. In expanding the concept of implied water rights to include all federal land, this resulting doctrine has strayed from Indian treaty interpretation. In *Winters*, the Supreme Court used rules for Indian treaty interpretation to develop the concept of implied water rights. Through treaty interpretation, *Winters* demonstrated that it was possible to imply a water right from a treaty. In expanding the concept of reserved water rights to all federal land, analysis applying the rules of treaty interpretation was lost, separating the Winters Doctrine from *Winters*. *Winters* and the Winters Doctrine are different. *Winters* asks how the tribe would have understood its rights under a treaty. The Winters Doctrine asks what the primary purpose of the reservation was.

The difference between *Winters* and the Winters Doctrine suggests that it is perhaps inappropriate to rely on the Winters Doctrine in cases involving federal Indian reservations, specifically, reservations created by an agreement or a treaty. One of the problems with expanding the rule of reserved water for federal land is that federal land comprises so much of the West. Excluding Indian reservations, approximately 46 percent of land in the West is federally held, and 60 percent of water yield originates from these federal lands.¹¹³ *New Mexico* restricted implied water rights to the primary purpose of the reservation in order to limit the government's competition for water in arid parts of the country.¹¹⁴ When an original rule has evolved into a new doctrine as it has here, it does not logically follow that the new doctrine should necessarily be applied to a case better served by application of the original rule. Nonetheless, courts have applied the new doctrine to all reserved water right analysis,¹¹⁵ and this application could become a point of criticism if the Winters Doctrine ever determines the outcome of a case involving an Indian reservation. However, what has typically happened in cases where the Winters Doctrine has been applied is that *New Mexico* guides the court to ascertain the purpose of a reservation, which is determined by interpreting the document creating the reservation, and for Indian

Indian reservation that could reasonably be irrigated. *Arizona v. California*, 373 U.S. 546, 600–01 (1963). This standard is not applicable to instream reservations of water.

111. *New Mexico*, 438 U.S. at 702.

112. *Id.*

113. *New Mexico*, 438 U.S. at 699.

114. *See id.*

115. *See, e.g.*, *Wash. Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1315–16 (Wash. 1993); *United States v. Adair*, 723 F.2d 1394, 1408–09 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46–47 (9th Cir. 1981).

reservations this document is often a treaty or agreement.¹¹⁶ As a result, the court will inevitably be led to back to *Winans*, *Winters*, and rules of Indian treaty interpretation.

VII. INSTREAM WATER RIGHTS TO SUPPORT FISHING RIGHTS: RIGHTS APPURTENANT TO LAND

After the *Fishing Vessel* decision, which stopped at a broad interpretation of what was meant by the provision “the right to take fish,” the Yakama continued to pursue the issue of instream water rights for fish. In 1982 the Ninth Circuit reviewed a Washington district court decision ordering the release of reservoir-stored water from Cle Elum Dam.¹¹⁷ At issue were the treaty fishing rights reserved to the Yakama and the rights of farmers to preserve water for application to their crops later in the season.¹¹⁸ If the release of water from the dam, according to plan, was to cease after the irrigation season, the minimal streamflow would destroy nests of salmon eggs.¹¹⁹ As a necessary response to preserving the redds in an emergency situation, the court ordered the release of water to augment streamflow until the redds could be transplanted elsewhere.¹²⁰ Because the Yakama Nation’s interest in treaty fishing rights pre-dated the water rights of the irrigators and it was absolutely necessary for water not to be cut off before alternative measures could be taken, the Ninth Circuit affirmed the district court’s order to release water to preserve the redds.¹²¹ The Ninth Circuit did point out, however, that this conflict was not a general adjudication of water rights in the Yakima River Basin.¹²² The court had recognized the treaty right and the water right as distinct and different rights, and the treaty right could provide only temporary relief until alternative solutions could be found. In order to establish a water right, the tribe would have to pursue it through the general adjudication, which was happening in a different jurisdiction (the Washington State court system) at approximately the same time.¹²³

At roughly the same time the Yakama were pursuing water rights to preserve the redds downstream of Cle Elum Dam, the Colville Confederated Tribes were pursuing instream water rights for fish in Washington State. In 1981 the Ninth Circuit Court of Appeals determined an instream water right to sustain replacement fisheries.¹²⁴ The Colville Reservation was created in 1872, in part, to protect land the Indians

116. See, e.g., *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1317; *Adair*, 723 F.2d at 1409; *Colville Confederated Tribes*, 647 F.2d at 47.

117. *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1033 (9th Cir. 1985).

118. *Id.*

119. *Id.* at 1033–43.

120. *Id.* at 1035. The term “redds” refers to nests of salmon eggs. *Id.* at 1033.

121. *Id.* at 1034.

122. *Id.* at 1035.

123. See *id.*

124. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981).

were farming from the encroachment of settlers.¹²⁵ In 1892 Congress took 1.5 million acres of the reservation land for public domain and opened it to settlers.¹²⁶ In 1906 the remaining reservation lands were divided up and distributed to tribal members pursuant to the General Allotment Act of 1887.¹²⁷ Water had been allocated for irrigation purposes on allotments, but not all of the allotted water for irrigation was being used.¹²⁸ The court looked to the purpose of the Indian reservation to determine the existence and extent of a water right under the theory of implied reservation.¹²⁹ The Ninth Circuit found two purposes for the reservation. Not only was the reservation established for the Indians to pursue agriculture, it also was established to preserve the Colville Tribe's access to their fishing resource at Omak Lake, which had replaced traditional fishing places lost to dams on the Columbia River.¹³⁰ Ultimately, since fishing was a purpose for the reservation, the court granted the Colville Tribes the right to apply their unused water right to sustain replacement fisheries.¹³¹

VIII. THE YAKIMA RIVER ADJUDICATION

Approximately the same time that the Colville Confederated Tribes were arguing for water rights to sustain fish and the Yakama were seeking emergency measures to preserve nests of salmon eggs, the Yakima River Basin adjudication was underway.¹³² Adjudication of water rights for the Yakima River and its tributaries began in 1977 when the Washington State Department of Ecology filed an action.¹³³ The adjudication was divided into four parts, the first of which was to determine the reserved rights for Indian claims.¹³⁴ There was no dispute that the Yakama had treaty rights to water in the Yakima Basin. Rather, the issue was how to determine the amount of water and what priority date to give the water right. The Supreme Court of Washington reviewed the

125. *Id.* at 44–45.

126. *Id.*

127. *Id.* at 45. The General Allotment Act furthered a federal Indian policy between the 1880s and 1920s of dividing up reservation lands and distributing them to heads of households. ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 106 (2d ed. 2010). Although conceived by reformers who thought they were helping the Indians, allotment was a complete failure of a policy: the Indians lost about two thirds of their land base during this period. *Id.* at 109.

128. *Colville Confederated Tribes*, 647 F.2d at 46.

129. *Id.* at 47.

130. *Id.* at 48.

131. *Id.* at 46, 48.

132. *Wash. Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1309 (Wash. 1993). The Supreme Court of Washington reviewed matters of the Yakima River Basin adjudication several times. The first appeal concerned the procedural matter of serving process for the adjudication, the second appeal reviewed the quantity of water for the Yakama Nation, and the third appeal reviewed a water award to some private claimants. *Wash. Dep't of Ecology v. Acquavella*, 935 P.2d 595, 597 (Wash. 1997).

133. *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1309.

134. *Id.*

adjudication court's determinations of the quantity and dates of water rights.¹³⁵

The Yakama sought water rights amounts on the basis of the 1855 treaty, which created the Yakama Indian Reservation.¹³⁶ The Yakama sought reserved water rights for different categories of water uses. One use was for irrigation; the other water use was to support fish to satisfy their treaty fishing right.¹³⁷

One of the adjudication court's holdings granted the Yakama Tribe some water rights for fish. The court awarded the Tribe the following water rights to support treaty fishing rights: "The maximum quantity to which the Indians are entitled as reserved treaty rights is the minimum instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions."¹³⁸ This minimum instream flow had a priority date of "time immemorial."¹³⁹ However, the court also held that any water rights for fish that were beyond the minimum would have priority dates junior to the non-Indian irrigator appellants.¹⁴⁰ The reason for this, the adjudication court held, was because the treaty fishing rights had been "diminished."¹⁴¹ Both sides appealed. The Yakama contended that there was no diminishment of treaty fishing rights, and non-Indian irrigators contended that the tribe was entitled to no water rights for fish.¹⁴² On appeal, the Supreme Court of Washington decided that the fishing treaty rights of the Yakama were, indeed, "diminished."¹⁴³

In diminishing the Yakama's fishing rights, the Supreme Court of Washington began its analysis with the text of the treaty, considered the Winters Doctrine, and finally evaluated whether the treaty had been abrogated. In reviewing the text of the treaty, the court found that the treaty did not expressly reserve a water right for either fishing or irrigation.¹⁴⁴ After determining that there was no express reservation, the court considered the application of *Winters*.¹⁴⁵ However, instead of looking to the rule of treaty interpretation as the *Winters* Court did, the Supreme Court of Washington opted for the popular holding which led to the Winters Doctrine, which was that water rights for the needs of a reservation are implied.¹⁴⁶ In proceeding to determine the quantity of the water right, the court applied *Cappaert*—part of the Winters Doctrine, which limits water rights to the primary purpose of a federal res-

135. *Id.*

136. *Id.*

137. *See id.* at 1309–10.

138. *Id.* at 1310.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1310–11.

143. *Id.* at 1332.

144. *Id.* at 1315.

145. *Id.*

146. *Id.*

ervation.¹⁴⁷ Although it was questionable whether it was appropriate to apply the Winters Doctrine due to its divergent nature, looking to the purpose of the reservation led the court back to interpreting the instrument that created the reservation—the Treaty with the Yakama.

Although the Supreme Court of Washington reviewed the rules of Indian treaty interpretation, these rules weighed little into the final holding about treaty fishing rights. The Treaty with the Yakama expressly reserves a fishing right appurtenant to reservation lands: “The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes”¹⁴⁸ The court began with lip service that ambiguities should be resolved in favor of the Indians and that treaties must be construed in favor of the Indians.¹⁴⁹ However, the court then focused on treaty abrogation. As the court noted, treaty provisions may be abrogated unilaterally by Congress.¹⁵⁰ Courts should be reluctant to find abrogation of a treaty because the Supreme Court has required clear evidence of Congressional intent to abrogate a treaty.¹⁵¹ In other words, Congress must have considered the conflict which involved treaty rights and, after considering the conflict, chose to eliminate those rights.¹⁵² The Supreme Court of Washington then considered several arguments for the abrogation of the Yakama’s treaty right to fish.

The irrigation parties argued that one or a combination of several factors diminished the Yakama’s treaty fishing rights. The first argument was that fishing treaty rights were diminished in 1906 when the Secretary of the Interior quantified Yakama water rights at 147 cubic feet per second (c.f.s.) during low flow.¹⁵³ The Supreme Court of Washington disagreed with this argument. The low-flow allotment established by the Secretary was to ensure the success of the Yakima Irrigation Project.¹⁵⁴ All water users would have had to agree to limit their water usage during low flow, and 95 percent of the other water claimants had agreed to similar restrictions.¹⁵⁵ The court held that the standard in finding treaty abrogation by Congress should also apply to the Secretary’s actions; he must have considered that a water right quantification would extinguish treaty rights, and then must have intentionally chosen to eliminate the treaty rights.¹⁵⁶ Since there was nothing in the record that evidenced any sort of consideration or intent, the court held that the Secretary’s act did not abrogate treaty rights.¹⁵⁷

147. *Id.* at 1316 (citing *Cappaert v. United States*, 426 U.S. 128 (1976)).

148. Treaty with the Yakama, *supra* note 8, at 953.

149. *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1317 (citing *Choctaw Nation v. United States*, 318 U.S. 423, 431–32 (1943)).

150. *Id.*

151. *Id.* at 1318.

152. *United States v. Dion*, 476 U.S. 734, 739–40 (1986).

153. *Yakima Reservation Irrigation Dist.*, 850 P. 2d at 1318–19.

154. *Id.* at 1319.

155. *Id.*

156. *Id.* at 1320.

157. *Id.*

The irrigation districts' second argument was that the Act of August 1, 1914 abrogated the Yakama's treaty fishing rights.¹⁵⁸ When the Secretary limited the Yakama's water rights to 147 c.f.s. in low water flow, it did not take long for all to realize that this was a gross inequity for the Yakama, and 147 c.f.s. was inadequate for even domestic irrigation.¹⁵⁹ The Act of August 1, 1914 authorized and directed the Secretary to augment the low-flow water right to an amount at least enough for the irrigation of forty acres on each Indian allotment.¹⁶⁰ The Act did not, the irrigation districts argued, address fishing rights, which would make fishing rights junior in priority to the irrigation districts' water rights.¹⁶¹ Again, the court called for clear evidence that Congress weighed its action against treaty fishing rights and chose this action knowing it would eliminate those rights.¹⁶² There was some evidence that individuals who testified before a congressional committee had mentioned fishing, and the government inconsistently limited instream flow, while at the same time advocating for water rights for fish.¹⁶³ However, the court found that inconsistent actions were not enough to determine that Congress considered the conflict between water for irrigation and water for fish, and then purposefully chose water rights only for irrigation.¹⁶⁴

The Supreme Court of Washington agreed with the irrigation districts that two arguments provided a basis for diminishing, although not extinguishing, the Yakama's fishing rights. The first was the accumulation of actions by all branches of the government (Congress, the executive and its agencies, and the judiciary) between 1905 and 1968.¹⁶⁵ During these years, the government focused on irrigation projects.¹⁶⁶ During roughly these same years, however, the government continued to recognize the Indians' treaty fishing rights and was constructing fish ladders and fish screens at dams to ensure fish movement up and downstream.¹⁶⁷ The court then held that these inconsistent acts were not enough to extinguish treaty fishing rights, but the acts "encroached" upon the rights, and in damaging the rights, consequently diminished them.¹⁶⁸ Despite rejecting the previous argument that inconsistent government actions abrogated treaty rights, despite stating the treaty rule was that ambiguities that would be construed in favor of the Yakama, and despite acknowledging the continual recognition of treaty fishing rights by the federal government, the Supreme Court of Washington nonetheless found an impairment of treaty fishing rights.¹⁶⁹ The court

158. *Id.* at 1321.

159. *Id.* at 1319, 1321.

160. *Id.* at 1321.

161. *Id.*

162. *Id.*

163. *Id.* at 1322.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1323.

168. *Id.*

169. *Id.*

offered no further insight into how governmental actions might diminish but not abrogate a treaty.¹⁷⁰ The court also did not specify what kind of standard would apply for ruling that a treaty had been diminished,¹⁷¹ but it was certainly not the standard requiring clear evidence that the government, as an aggregate whole, at least considered the fact that its cumulative actions were encroaching upon treaty fishing rights and chose to diminish them in the face of conflicting interests.

The Supreme Court of Washington also found that treaty fishing rights had been diminished due to a 1968 settlement from the Indian Claims Commission.¹⁷² In 1951 the Yakama Nation brought four claims against the United States to the Indian Claims Commission.¹⁷³ One of the claims, Docket No. 147, sought compensation for lost fishing rights attributed in part to the Yakima Irrigation Project.¹⁷⁴ Specifically, the Yakama alleged that the United States destroyed all of the usual and accustomed fishing locations by constructing dams without fish passageways and by polluting the stream.¹⁷⁵ The four claims were settled together, and as part of that settlement, which included money damages for other claims, Docket No. 147 was dismissed with prejudice.¹⁷⁶ In consideration of the treaty encroachment by the government and the dismissal of Docket No. 147, the Supreme Court of Washington held that the Yakama's treaty fishing rights had been reduced to the current minimal flow with additional instream rights assuming a junior priority date to irrigation.¹⁷⁷

The Yakama Nation's fight for fishing rights has extended over a century. The Yakama have litigated for appurtenant and non-appurtenant fishing rights, both on and off the reservation. Over the past decade, there have been negotiations and water right settlements with other private parties regarding riparian management to preserve off-reservation instream flow.¹⁷⁸ Although an off-reservation instream water right for fish has not otherwise been litigated in the State of Washington, the issue has been litigated in the State of Idaho.

170. *See id.*

171. *See id.* at 1319–20.

172. *Id.* at 1323 (citing *Yakima Tribe of Indians v. United States*, 20 Indian Claims Comm'n Dec. 76 (1968)). The Indian Claims Commission was formed in 1946 and waived United States sovereign immunity so that Indians could bring suit for damages against the United States for claims of wrongdoing that arose earlier than 1946. ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 210–11 (2d ed. 2010).

173. *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1323.

174. *Id.* (citing *Yakima Tribe of Indians v. United States*, 20 Indian Claims Comm'n Dec. 76 (1968)).

175. *Id.*

176. *Id.* at 1323.

177. *Id.* at 1318, 1331–32.

178. Blumm et al., *supra* note 1, at 1181–82.

IX. FISHING RIGHTS, ROUND THREE: AN OFF-RESERVATION
INSTREAM WATER RIGHT TO SUPPORT THE NEZ PERCE TREATY
FISHING RIGHT

The Snake River Basin Adjudication (SRBA) court has been the only court thus far to address the issue of off-reservation instream water rights for an Indian tribe. And the SRBA held that such a right did not exist.¹⁷⁹ In the reasoning that led to the rejection of water rights, the SRBA court limited itself where doing so might not have been entirely necessary and ignored precedents that should have been better considered.

Similar to the Confederated Tribes of the Yakama Nation, the Nez Perce traditionally relied on fish as a significant component of their diet.¹⁸⁰ The Nez Perce Tribe's treaty with the United States Government was also a product of Washington Territory Governor Isaac Stevens and contains practically identical language to the Treaty with the Yakama: "The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory"¹⁸¹ The court examined this provision to determine whether it supported an off-reservation instream water right.

A. SRBA Analysis

The SRBA commenced its analysis of the Nez Perce off-reservation instream right by categorizing the nature of the water right. The first category of water right that the court discussed was the federal reserved water right.¹⁸² Within the discussion of this first category, the SRBA court recited the rules from *United States v. New Mexico*¹⁸³ and *Cappert v. United States*.¹⁸⁴ when the government reserves land, it implicitly reserves the amount of water necessary to satisfy the primary purpose of the reservation.¹⁸⁵

The SRBA court then discussed the category into which the Nez Percés' right fell: the aboriginal reserved right.¹⁸⁶ Aboriginal rights are rights that the Indians originally possessed and never granted to the

179. *In re Snake River Basin Adjudication*, No. 39576, Consolidated Subcase 03-10022, at 47 (Idaho 5th Jud. Dist. Ct., Twin Falls Cnty. Nov. 10, 1999) [hereinafter *In re SRBA*, Consolidated Subcase 03-10022] (order on motions to strike, motion to supplement the record, and motions for summary judgment).

180. *Frequently Asked Questions*, NEZ PERCE TRIBAL WEB SITE, <http://www.nezperce.org/Official/FrequentlyAskedQ.htm> (last visited Nov. 15, 2011).

181. Treaty with the Nez Percés, *supra* note 8, at 958. For substantially similar language in the Yakama treaty, see Treaty with the Yakama, *supra* note 8, at 953.

182. *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 24.

183. 438 U.S. 696, 699–700 (1978).

184. 426 U.S. 128, 138 (1976).

185. *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 24.

186. *Id.* The court referred to this aboriginal right as an "Indian reserved water right."

United States.¹⁸⁷ These rights (e.g., hunting or fishing) were never ceded by a treaty and date back to time immemorial.¹⁸⁸ In the SRBA proceeding, the Nez Perce and the federal government contended that a water right could be implied from the language in the treaty, specifically, the right to take fish at usual and accustomed places.¹⁸⁹

The SRBA court then examined the Treaty with the Nez Perce. The first issue that the court addressed was whether the question of treaty interpretation to support an instream water right could be resolved as a matter of law at summary judgment.¹⁹⁰ The court decided that it could.¹⁹¹ The court began with the premise that treaty interpretation was like contract interpretation; interpreting an Indian treaty was a question of law for the court and a question that could be decided without considering history relevant to the treaty.¹⁹²

In determining the issue to be a question of law and understanding history surrounding treaty negotiations with the Nez Perce to be merely an aid, the SRBA court held that the “fishing in common” language of the treaty had settled legal meaning.¹⁹³ This meaning originated out of the Supreme Court’s interpretation in *Fishing Vessel*.¹⁹⁴ The tribes in *Fishing Vessel* were all parties to treaties negotiated by Isaac Stevens, and all treaties shared identical language.¹⁹⁵ Likewise, the Treaty with the Nez Perce was also a Stevens treaty with similar language.¹⁹⁶ Fish were traditionally and culturally important to both the *Fishing Vessel* tribes and the Nez Perce.¹⁹⁷ Finally, both the *Fishing Vessel* tribes and the Nez Perce were impacted by changes to the natural and human world that were not anticipated in the treaties.¹⁹⁸ Because of these similarities, the SRBA court concluded that it was appropriate to import the holdings of *Fishing Vessel* to the instream water right issue before it.¹⁹⁹

With what the SRBA court concluded to be a completely relevant and binding precedent, the court identified several features of *Fishing Vessel* that essentially decided the Nez Perce water right issue because

187. See *United States v. Winans*, 198 U.S. 371, 381 (1905) (“In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted.”).

188. See *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 24–25 (citing *United States v. Winans*, 198 U.S. 371 (1905), and acknowledging that rights not expressly granted in a treaty to the government are reserved by the Indians).

189. *Id.* at 27 (referring to the Treaty with the Nez Percés, art. III, June 11, 1855, 12 Stat. 957).

190. *Id.* at 29.

191. *Id.*

192. *Id.*

193. *Id.* at 30.

194. *Id.* (citing *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979)).

195. *Id.* at 30–31.

196. See *id.* at 32.

197. *Id.*

198. *Id.* The court listed the examples of the development of fishing wheels, right of access issues, and conservation laws.

199. *Id.* at 30–31.

it limited the SRBA court by scope. *Fishing Vessel* held that the right to take fish was broader than a right of access; the right included a proportional share of fish.²⁰⁰ First, the SRBA court held that interpreting a share of fish to imply a water right inappropriately broadened the *Fishing Vessel* holding: “Now the Nez Perce [Tribe] asks this Court to take the additional leap and by judicial fiat declare a water right for that purpose.”²⁰¹ Second, the SRBA court interpreted *Fishing Vessel* not to guarantee any amount of fish, focusing on the language that “[b]oth sides have a right, secured by treaty to take a fair share of the available fish.”²⁰² Finally, fishing rights could be limited by conservation regulations that the state had the authority to implement.²⁰³ If the state could regulate and provide for the survival of fish, then there need not be an instream water right belonging to the Nez Perce to do the same.²⁰⁴

In addition to being limited by the scope of *Fishing Vessel*, the SRBA court determined that the 1855 treaty did not support an aboriginal right. The court reviewed history to support this legal determination and found two circumstances surrounding the treaty that undermined an aboriginal right.²⁰⁵ The first circumstance was that the Stevens Treaties were intended to resolve disputes over land opened to settlers by the Oregon Donation Act of 1850.²⁰⁶ The SRBA court thought it “inconceivable” that the Nez Perce would have been permitted to reserve instream flow for water appurtenant to lands not on the reservation and lands which were yet to be settled.²⁰⁷ The second circumstance, as both the Nez Perce and the United States in the SRBA litigation acknowledged, was the absence of expressly reserved instream water rights or intent to reserve instream water rights in the 1855 treaty.²⁰⁸ If neither party had expressly or impliedly intended to reserve an instream water right, the court reasoned, then the most liberal interpretation of what the treaty did secure was that off-reservation fishing rights would be unimpaired.²⁰⁹

Relying primarily on *Fishing Vessel* to support the rejection of an instream water right, the SRBA court dismissed any consideration of other cases involving Indian fishing rights that have implied a water right.²¹⁰ The court first acknowledged that there have been cases where

200. *Id.* at 33; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979).

201. *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 33.

202. *Id.* at 31 (citing *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684–85 (1979)).

203. *See id.* at 34 (citing *Puyallup Tribe v. Dep't of Game of Wash.*, 433 U.S. 173 (1977)).

204. *See id.*

205. *See id.* at 38.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 39.

courts were willing to imply a water right from a treaty fishing right.²¹¹ However, the court understood there to be a common feature that distinguished these cases from the case at issue; water in the cases finding for implied water rights was appurtenant to reservation land.²¹² The SRBA court cited *Colville Confederated Tribes v. Walton*²¹³ and *United States v. Adair*.²¹⁴ Both courts found a federal reserved water right and reserved an instream flow for an on-reservation fishing right.²¹⁵ But, because cases like these addressed seemingly appurtenant rights, the SRBA court held that these holdings could not guide off-reservation instream water right analysis.²¹⁶

Using only what *Fishing Vessel* provided, the SRBA court limited itself from making logical steps toward an instream water right. The SRBA court also dismissed other cases examining the existence of instream water rights as too dissimilar to be compared. Relying on these two self-imposed boundaries, the SRBA court decided that there could not be an off-reservation implied instream water right for the Nez Perce's treaty fishing right.²¹⁷

B. A Critique of the SRBA Analysis

The SRBA court might have handicapped itself in the analysis of whether there could be an off-reservation instream water right to support a fishing treaty right. The court limited itself to what it thought was the scope of the *Fishing Vessel* decision, and in doing so misinterpreted suggestions in the holding. The court dismissed all cases, such as *United States v. Adair*,²¹⁸ that considered treaties and crossed the gap from fish to water for fish. Finally, the SRBA court largely ignored rules of Indian treaty interpretation, which would have led it to find an implied water right.

In adhering to *Fishing Vessel*, the SRBA court misconstrued some aspects of the holding. The SRBA court interpreted the Supreme Court's refusal in *Fishing Vessel* to determine an amount of fish that could be taken as fairly significant and inferred that, without a minimal limit, the proportion of fish that could be taken would be nothing.²¹⁹ A water right would be inconsistent with a proportion equal to nothing.²²⁰ Alt-

211. *Id.* Some of the cases cited included *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) and *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985).

212. *Id.*

213. 647 F.2d 42 (9th Cir. 1981) (applying an unused irrigation water right for replacement fisheries); *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 39.

214. 723 F.2d 1394 (9th Cir. 1983) (determining an instream water right for fish because fishing was among the purposes of the Klamath Reservation); *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 39.

215. *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 39.

216. *Id.*

217. *Id.* at 47.

218. 723 F.2d 1394 (9th Cir. 1983).

219. *See In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 33.

220. *See id.*

though the Supreme Court in *Fishing Vessel* did not set a minimum limit because of the need to respond to “changing circumstances,”²²¹ there is little to suggest that the changing circumstances that the Court contemplated referred to riparian conditions or instream flow. The Supreme Court gave two examples to support why changing circumstances could not permit a guaranteed minimum limit of fish for the Tribes. The first example was in a situation where a population of a tribe decreased to only a handful of members.²²² The second example described a situation where a tribe would find resources that resulted in completely replacing the role of the fisheries.²²³ In both of these examples, the Supreme Court opined that perhaps a fifty-percent allocation would be excessive.²²⁴ It is noteworthy and seminal that both of these examples were socio-economic in nature. The court never contemplated habitat or biology as a compelling reason to refrain from establishing a predetermined minimum amount of fish for tribal harvest.

In fact, the Supreme Court holding in *Fishing Vessel*, contrary to the SRBA court’s interpretation of that holding, may be consistent with a water right. In *Fishing Vessel*, the Washington Game Department proffered the interpretation of the fishing in common language to mean no guarantee to any fish.²²⁵ The Game Department’s interpretation was rejected when the Supreme Court adopted the federal government’s position that fishing in common meant the lesser of either a fifty-percent allocation or tribal needs.²²⁶ If the interpretation of no guarantees to fish was rejected, then there must be some impliedly guaranteed amount, and any guarantee to a proportion of a fish run exceeding nothing would be consistent with a water right to support fish.

The SRBA court concluded that implying a water right in connection to the proportionate share of the fish run would be a “judicial fiat.”²²⁷ However, the SRBA court dismissed potentially helpful cases where courts found instream rights to support fishing rights and could have provided the step in logic that the SRBA court decided was improper to take. One such case that might have been instructive, but which the SRBA court dismissed,²²⁸ was *United States v. Adair*.²²⁹ At issue in *Adair* were water rights to the Williamson River for the Klamath Indian Tribe.²³⁰ The Treaty with the Klamath reserved the exclusive right of fishing, hunting, and gathering sustenance on the Tribe’s

221. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 686–87 (1979).

222. *Id.* at 687.

223. *Id.*

224. *Id.* at 686–87.

225. *Id.* at 670.

226. *See id.* at 679.

227. *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 33.

228. *See id.* at 39.

229. 723 F.2d 1394 (9th Cir. 1983).

230. *Id.* at 1399.

reservation.²³¹ As with the Nez Perce and the Yakama, fish were an important resource to the Klamath.²³² The court looked to the Winters Doctrine as modified by *New Mexico*²³³ and *Cappaert*,²³⁴ and considered the primary purpose of the reservation.²³⁵ Referring to the treaty language, the Ninth Circuit found support for dual purposes.²³⁶ One purpose, the court found, was to transition the Klamath to an agrarian society.²³⁷ The second purpose, the court found, was to ensure that the Tribe could continue to hunt, fish, and gather.²³⁸

After determining fishing to be one purpose of the reservation, the court was faced with how to attribute water to that right. The doctrine of prior appropriation is most typically used for diversions, not for water remaining in the stream.²³⁹ The court looked to how the *Cappaert* Court framed the right: instead of a right to divert, it was the right to stop other appropriators from diverting water from the stream.²⁴⁰ It is a right to an amount of water in the stream that is free from impediment. This is the very nature of an instream water right. Accordingly, the Ninth Circuit affirmed a district court decision finding implied instream water rights to protect the fishing right.²⁴¹

The SRBA court's use of the *Fishing Vessel* holding was appropriate because of the similarities, but the dismissal of *Adair* may not have been as necessary. Although the Treaty with the Klamath was not a product of the Stevens era, the Ninth Circuit found dual purposes of agriculture and fishing on the Klamath reservation.²⁴² These dual purposes, supported by several treaty articles,²⁴³ suggest similar policy objectives.

The SRBA court recognized the fishing right in *Adair* to be appurtenant to the land and therefore uninformative,²⁴⁴ but the 1864 Klamath Treaty provides compelling evidence for characterizing the fishing right as an aboriginal right, and not as a right appurtenant to the reservation. Specifically, it is the very treaty language that reserves the right to

231. Treaty with the Klamath, art. I, Oct. 14, 1864, 16 Stat. 707 (“[T]he exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians . . .”).

232. *Adair*, 723 F.2d at 1409 n.14.

233. *United States v. New Mexico*, 438 U.S. 696 (1978).

234. *Cappaert v. United States*, 426 U.S. 128 (1976).

235. *Adair*, 723 F.2d at 1408.

236. *Id.* at 1409.

237. *Id.* at 1410 (citing Treaty with the Klamath, art. II, Oct. 14, 1864, 16 Stat. 707).

238. *Id.* at 1409 (analyzing judicial constructions of Treaty with the Klamath, art. I, Oct. 14, 1864, 16 Stat. 707).

239. *Id.* at 1410.

240. *Id.* at 1411 (citing *Cappaert v. United States*, 436 U.S. 128, 143 (1976)).

241. *Id.*

242. *Id.*

243. See Treaty with the Klamath, *supra* note 231, at art. I (“[T]he exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians . . .”). See also *id.* art. III (reserving a part of the payment promised the Klamath Tribe for farm equipment).

244. See *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 39.

fish.²⁴⁵ And while a federal reserved water right may be appurtenant to the land, an aboriginal right need not be. Despite the characterization and regardless of appurtenance, *Adair* could have been instructive in the move from a fishing right to an implied instream water right. However, the SRBA chose to adhere to only what *Fishing Vessel* was able to resolve.

The role of state regulation for species conservation was the third and determinative way the SRBA court interpreted *Fishing Vessel* to limit the scope of off-reservation fishing rights.²⁴⁶ The SRBA court interpreted *Fishing Vessel* to be consistent with earlier Supreme Court holdings which “stated that the power of the State was adequate for protection of the fish.”²⁴⁷ The SRBA court argued that it was the responsibility of the State to regulate for conservation—this responsibility did not fall to the tribes.²⁴⁸ However, any argument emphasizing the State’s police power for conservation is peripheral to the issue. The Nez Perce Tribe’s primary interest is in a water right to support the fish that the Tribe could harvest per its treaty right. It would go against rules of treaty interpretation to consider instream flow to conserve a species and instream flow for harvestable fish to be the same instream flow.

The SRBA court’s overarching treatment of the treaty bafflingly failed to apply any rules of Indian treaty interpretation. Although the SRBA court held otherwise, the 1855 treaty did support an aboriginal right. The motive behind the Stevens treaties was more multi-layered than merely a land conflict, as the SRBA court suggested.²⁴⁹ The purpose of the Stevens-era treaties across the Pacific Northwest was to ensure the Indians’ traditional sustenance (i.e., hunting, fishing, and gathering)²⁵⁰ while attempting to convert them to agrarian societies and assimilate them into American societies.²⁵¹ Whether the Treaty with the Nez Perce impliedly reserved a water right is a question that could have been resolved by *Winters* and the rules of treaty interpretation. The treaty does not expressly reserve a water right.²⁵² However, the treaty did expressly reserve to the Nez Perce the right to take fish in traditional off-reservation fishing locations.²⁵³ *Winters* dictates ambiguities to be resolved in favor of the Indians: “[T]he rule should certainly be applied

245. *See id.*

246. *Id.* at 33.

247. *Id.* at 34 (referencing *Puyallup Tribe v. Dep’t of Game of Wash.*, 433 U.S. 173 (1977)).

248. *Id.* at 35.

249. *Id.* at 38.

250. *Washington v. Wash. State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 667 (“The Governor’s concern with protecting the Indians’ continued exploitation of their accustomed fisheries was reflected in his assurances to the Indians during the treaty negotiations that under the treaties they would be able to go outside of reservation areas for the purpose of harvesting fish.”).

251. Kent Richards, *The Stevens Treaties of 1854–1855*, 106 OR. HIST. Q. 342, 346–47 (2005).

252. *See Treaty with the Nez Percés, supra* note 8, at art. III.

253. *Id.*

to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.”²⁵⁴ The implication that off-reservation water might one day be completely diverted from a stream, creating an inhabitable environment for fish, does not support the purpose of a fishing right. Alternatively, the implication that there is an implied reservation of water to create a habitable environment for fish does support a fishing right. The ambiguity should have been resolved in favor of the Nez Perce. Despite the Supreme Court’s consideration of the rules of treaty interpretation in *Fishing Vessel*,²⁵⁵ the SRBA court, which emphasized the *Fishing Vessel* decision, failed to incorporate the rules of treaty interpretation into its own analysis.²⁵⁶

The SRBA decision was handed down in 1999.²⁵⁷ It was never appealed. Instead, the Nez Perce were able to settle with other parties, avoiding a binding judgment.²⁵⁸ Even though the issue of a reserved water right has not been taken head-on again in any other case, a court decision has stepped towards a reserved instream water right by protecting habitat to support current fish levels for treaty-based fishing rights.

X. FISHING RIGHTS, ROUND FOUR: TREATY-BASED DUTY TO REFRAIN FROM IMPAIRING FISH RUNS (A STEP TOWARDS INSTREAM WATER RIGHTS)

Within the past ten years, the right to take fish in common with citizens of the territory was the central focus of more litigation. In 1970 the United States filed suit as trustee for various tribes in western Washington for a declaratory judgment regarding off-reservation treaty fishing rights and for relief regarding the impairment of the streams where the fishing rights existed.²⁵⁹ The Washington district court separated the issues into two phases.²⁶⁰ In 2001 the United States and the Tribes initiated a subproceeding of the second phase to obtain a declaratory judgment that the State of Washington had a treaty-based duty to

254. *Winters v. United States*, 207 U.S. 564, 576–77 (1908).

255. *Fishing Vessel*, 443 U.S. at 676.

256. However, the SRBA court did mention the rules of treaty interpretation. *See In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 24–25.

257. *See id.*

258. *The Nez Perce Water Rights Settlement*, IDAHO WATER RESOURCE BOARD, <http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/default.htm> (last visited Nov. 16, 2011).

259. *United States v. Washington*, 384 F. Supp. 312, 327 (W.D. Wash. 1974).

260. *Id.* Judge Boldt, the judge who issued the decision, held the “in common with” language in the treaty to mean “sharing equally the opportunity to take fish” and held this right meant an opportunity to take up to fifty percent of the available harvest. *Id.* at 343. For an interesting discussion of the controversy up to and following this decision, see Angelique EagleWoman, *Tribal Hunting and Fishing Lifeways & Tribal-State Relations in Idaho*, 46 IDAHO L. REV. 81, 103–05 (2009). Judge Boldt’s decision preceded the Supreme Court’s *Fishing Vessel* decision by five years.

the Tribes to maintain culverts under state roads.²⁶¹ The Yakama Nation was a party to this litigation, the *Culverts* litigation.²⁶²

The Tribes sought three judgments from the *Culverts* litigation. First, they requested a declaratory judgment that the treaty right to take fish imposed on the State of Washington a duty to construct or maintain culverts so as not to diminish numbers of fish en route to or from usual and accustomed tribal fishing grounds.²⁶³ The Tribes also requested a declaratory judgment establishing that the State was in violation of the treaties.²⁶⁴ In addition to declaratory judgments, the Tribes sought injunctions as well, including an injunction to prohibit the State from constructing culverts that would impair fish runs, and an injunction to maintain culverts built or maintained by the State so that culverts would not impair fish runs.²⁶⁵

Evidence to support these requests for declaratory and injunctive relief turned on the language from the Stevens Treaties. Specifically, the prayers for relief turned on the provision in which the Tribes reserved “[t]he right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory”²⁶⁶ The Tribes asserted that the State violated this provision with habitat modification; the placement of culverts where roads cross streams blocked fish passage and prevented migration, which resulted in diminishing fish numbers.²⁶⁷

In beginning to analyze what the treaty fishing right included, the court examined what the treaty right did not include. In 1980, a federal district court in Washington State held that the treaty right to fish included protection from environmental degradation,²⁶⁸ but this holding was reversed by the Ninth Circuit Court of Appeals because “environmental degradation” was just too ambiguous: “The legal standards that will govern the State’s precise obligations . . . that may affect the environment of the treaty area will depend . . . upon concrete facts which underlie a dispute in a particular case.”²⁶⁹ Although the Ninth Circuit held that the treaty fishing right did not include a broad, undefined environmental servitude, the court supported the existence of treaty-based obligations on the part of the State.²⁷⁰ Since culverts under state roads were a narrow issue, and the Tribes presented sufficient facts of the effects of culverts on fish migration, the court returned to the treaties for evidence of State duty to maintain fish passageways under culverts.²⁷¹

261. *United States v. Washington (Culverts)*, No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007).

262. *See id.*

263. *Id.* at *2.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at *3.

268. *United States v. Washington*, 506 F. Supp. 187, 190 (W.D. Wash. 1980).

269. *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985).

270. *See Culverts*, 2007 WL 2437166, at *5.

271. *Id.* at *6.

The court began its analysis with rules of Indian treaty interpretation. First, the court acknowledged that the intention of the parties controlled treaty interpretation.²⁷² Treaties are not interpreted by the understanding of the party who drafted the treaty with a mastery of the language.²⁷³ Rather, treaties are interpreted as to how the Indian signatories understood the treaty provisions.²⁷⁴ The court then looked to the intent of both sides to the treaty and found assurances from Governor Stevens to the Indians that their fish sustenance would not be taken away at some future time.²⁷⁵ The court concluded with strong support for the Indians' understanding that they would continue to exercise their fishing rights at usual and accustomed places per the treaty's guarantee.²⁷⁶

The *Culverts* holding turned on the Tribes' understanding of the treaty language. Once that understanding was determined, the analysis that followed was rather brief. The impairment of fishing rights was limited to the construction or maintenance of culverts that blocked the fish passage.²⁷⁷ The Tribes were entitled to exercise their fishing rights and access their fish resource, and the diminishment of fish would exclude the Tribes from their treaty rights.²⁷⁸ Since the impairment of culverts prevented fish from reaching the accustomed fishing places of the Tribes, thereby excluding them from their fishing right, the State of Washington had a duty to refrain from diminishing fish numbers.²⁷⁹

The holding in *Culverts* added a new dimension to the fishing litigation. With a sufficiently defined scope, treaty fishing language includes a right to protection from environmental degradation. A right to protection from the degradation of water quality in fish passages compels the presumption of water in fish passes. This is essentially an implied instream right.

XI. FISHING RIGHTS, THE NEXT ROUND: INSTREAM FLOW

Given the lengthy legal history of treaty fishing rights in the Northwest, how would a Washington or Pacific Northwest court decide whether an off-reservation instream water right is supported by treaty fishing language? A court could adopt one of several legal analyses in arriving at the answer, each of which would most likely affirm an off-reservation instream water right. Courts could examine the recent cases and piece logic and holdings together from each case. The problem with this method, as the SRBA court demonstrated, is that if a scope is too narrowly framed, there could be gaps between holdings that a court

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at *9.

276. *See id.* at *10.

277. *Id.*

278. *Id.*

279. *Id.*

might shy away from bridging because the holdings vary by degree of analogy. Another, perhaps more convincing, analysis is utilizing the same procedure as various Supreme Court decisions have used. This analysis begins with the rules of Indian treaty interpretation and then asks whether an action excludes the Indians from the right guaranteed by the treaty.

There is enough case precedent to easily piece together an implied off-reservation instream water right. The Supreme Court's holding in *Fishing Vessel* regarding the right to the harvest of fish is very similar to an earlier Supreme Court holding over seventy years earlier. The Court itself in *Fishing Vessel* recognized this fact: "The Court has interpreted the fishing clause in these treaties on six prior occasions. In all of these cases the Court placed a relatively broad gloss on the Indians' fishing rights and—more or less explicitly—rejected the State's 'equal opportunity' approach"²⁸⁰

Winans and *Fishing Vessel* denote what off-reservation fishing rights directly include. These fishing rights include a right to access locations and to take a non-zero number of fish, not merely the chance to fish.²⁸¹ However, both cases may be understood as affirming what the treaty rights directly include and not what might be implied to support those treaty rights.

Colville Confederated Tribes v. Walton and *United States v. Adair* added implied water rights to the right of taking fish. The Ninth Circuit in *Colville* acknowledged that fish need water and implied a water right to support replacement fisheries.²⁸² The court emphasized that the Tribes were entitled to use the water reserved to them for purposes of the reservation, and one purpose was for the Indians to continue feeding themselves.²⁸³ Despite this expansion to what treaty rights impliedly included, there is a gap between *Colville* and the instream water right question. The Tribe in *Colville* already owned the water right for irrigation, but the water was going unused.²⁸⁴ The water right was also understood by the court to be appurtenant to the Colville Reservation.²⁸⁵

Adair potentially creates a similar gap between instream water rights for fish and off-reservation instream water rights, but this gap can be resolved. *Adair* held that, since the tribe was entitled to fish, there must be water to support the existence of fish in the stream; this gave rise to an instream water right.²⁸⁶ From one possible interpretation of the holding, the instream water right in *Adair* arose from a fishing

280. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979).

281. *Id.* at 679–80; *see also* *United States v. Winans*, 198 U.S. 371, 381–82 (1905).

282. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981). The Ninth Circuit noted that the Colville Tribes no longer had claims to the historical fisheries on the Columbia River because of the "replacement" that had been developed in Omak Lake. *Id.*

283. *Id.*

284. *Id.* at 45–46.

285. *See id.* at 46.

286. *See United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

right appurtenant to reservation land.²⁸⁷ However, there is a second way to categorize this fishing right. The fishing right in *Adair* happened to be on the reservation, seemingly appurtenant, and therefore not analogous to the question of off-reservation fishing rights. However, the fishing right might also be more broadly categorized as a treaty right to fish as reserved by language in the Treaty with the Klamath.²⁸⁸ Categorizing the fishing right as a treaty right makes *Adair* analogous and therefore applicable. The Klamath's on-reservation fishing right is treaty-based, and the court implied an instream water right. Because the Yakama's off-reservation fishing right is also treaty-based, a court should imply an instream water right as well.

Even if a court were to distinguish the Klamath's water rights as appurtenant to the land and decline to compare *Adair* as an analogous case, holdings from cases like *Winans*, *Fishing Vessel*, and *Adair* complement each other and are not mutually exclusive. *Fishing Vessel* held that the treaty right to fish reserved a non-zero proportion of fish.²⁸⁹ *Adair* expanded that scope by making the logical step from a right to fish to the conclusion that water must be included to sustain fish for that right.²⁹⁰ In addition to the cases forming a logical chain, the Supreme Court denied certiorari in *Adair*, a Ninth Circuit case.²⁹¹ If the Ninth Circuit's step in logic was, in fact, a leap and an error, the Supreme Court might well have corrected it, but the Court instead declined to hear the case.

An even more compelling and stronger argument for finding an off-reservation instream water right is to find an implied water right as the Supreme Court did in *Winters*, which was by treaty interpretation. Circuit and Supreme Court decisions have started analyses with the rules of Indian treaty interpretation. One of the first rules established by the Supreme Court is that treaties should be interpreted according to the understanding of the Indians who signed the treaty.²⁹² *Winans* relied on this rule and coined another fundamental concept: a right is a right reserved by the Indians, not a right granted from Congress.²⁹³ *Winans* is precedent that *Winters* relied upon to find implied water rights, and *Winans* is precedent that *Fishing Vessel* relied upon to find that fishing rights meant to take a harvestable share of fish. The holdings from *Winans*, *Winters*, and *Fishing Vessel* were all outcomes of treaty interpretation. *Winans* found that there was an implied servitude so that the Yakama could access their traditional fishing places.²⁹⁴ *Winters* resolved

287. *Id.* at 1418–19.

288. *See* Treaty with the Klamath, *supra* note 231.

289. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679, 682 (1979).

290. *See Adair*, 723 F.2d at 1415.

291. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

292. *See Jones v. Meehan*, 175 U.S. 1 (1899).

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

294. *Id.*

the ambiguity over whether the agreement creating the reservation included water to make the land viable, in favor of the Indians.²⁹⁵ *Fishing Vessel* began its analysis with the intention, or understanding, of the signing parties to control the interpretation of the treaty.²⁹⁶ Likewise, the Ninth Circuit in *Adair* examined the fishing rights reserved in the Treaty with the Klamath and found that instream water could be implied to support fish.²⁹⁷ Cases that have begun analyses with treaty rights have found implied water rights in favor of tribes.

In examining the treaty right, treaty interpretation would require the court to ask if the effect of denying the relief sought would harm the treaty right. This analysis, explicitly stated in *Winters*,²⁹⁸ directs that if there are two implications, one that would support the treaty and the other that would undermine it, the court must adopt the implication that favors the treaty. This analysis originated in *Winans*. Allowing the fishing wheels to remain would have completely excluded the Yakama from exercising their treaty fishing right, whereas implying a servitude to access the fishing location (i.e., enjoining the construction of fishing wheels) would support the right.²⁹⁹ Based on this exercise, the Supreme Court in *Winans* enjoined the obstruction from fishing wheels at usual and accustomed Yakama fishing grounds.³⁰⁰ Years later, the Supreme Court in *Fishing Vessel*, opted for an interpretation that ensured the tribe a right to the proportion of a fish harvest and denied the one interpretation offering no assurances to any fish.³⁰¹ This holding declined an interpretation that would have completely undermined a treaty fishing right. Finally, the *Culverts* court looked at the effect of blocking or impairing fish passages.³⁰² Implying that there was no duty to maintain culverts would impair fish runs, diminish fish numbers, and exclude the Tribes from full enjoyment of treaty fishing rights. This interpretation would undermine the treaty provision. However, implying a duty to maintain culverts would not impair fish runs and would enable the Tribes to fully enjoy treaty fishing rights. This would support a treaty fishing right. The court held that the State had a duty to refrain from

295. See *Winters v. United States*, 207 U.S. 564 (1908).

296. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675–76 (1979).

297. *United States v. Adair*, 723 F.2d 1394, 1408 (1984).

298. *Winters*, 207 U.S. at 576–77.

299. See *Winans*, 198 U.S. at 381–82.

300. See *id.* The Supreme Court followed a very similar framework three years later in *Winters*, even though the analysis in *Winans* had begun with a water right appurtenant to the reservation. See *Winans*, 198 U.S. at 381. The Court in *Winters* began analysis with the creation of the reservation, which included the purpose of promoting agriculture on the reservation. *Winters*, 207 U.S. at 575–76. With this purpose in mind, the Supreme Court considered what the Indians would have without a water right to irrigate their crops. *Id.* at 576. The answer, the Court held, would be nothing; with no water, the land was worthless. *Id.*

301. See *Fishing Vessel*, 443 U.S. at 670, 672, 679.

302. *United States v. Washington (Culverts)*, No. CV 9213RSM, 2007 WL 2437166, *1, *10 (W.D. Wash. Aug. 22, 2007).

activities that would “diminish the number of fish that would otherwise be available for Tribal harvest.”³⁰³

The treaty between the government and the Yakama, the history surrounding the signing of the treaty, and judicial precedent strongly suggest that there should be an off-reservation instream water right to support fish for a treaty fishing right. *Winans* and *Fishing Vessel* are precedent and have already determined that the Yakama have the treaty right to access fishing spots and to take a non-zero amount of fish. A court should consider whether the Yakama would be excluded from their treaty right to take fish if there were no instream water right. If most of the users of the Yakima River Basin are diverting the water from the stream, then fish would need an instream water right to survive. An instream right for conservation purposes does not overlap with an instream right to support a treaty fishing right because the instream right would be one right for two opposite purposes: preserving fish is the opposite of harvesting fish. Denying an instream water right in a completely appropriated river basin would constructively exclude the Yakama from exercising their treaty right. Because an implied water right would support the treaty, and the alternative would undermine it, there should be an implied water right.

A. What About Changed Conditions?

Courts are often faced with having to determine how to include changed conditions in treaty analysis. The SRBA court was unwilling to entertain changed conditions, holding that consideration of such conditions in treaty interpretation exceeded the scope of the treaties.³⁰⁴ This uncertainty might create a gap in some approaches, but if the analysis begins by looking at the intent of the treaties and then asks whether the Indians have been excluded from a treaty right, there is no gap. *Winans* and *Culverts* are examples of court decisions that have ruled on treaty rights in the face of changed conditions. In *Winans*, the condition was the new technology, the fish wheel; because this new technology denied the Yakama access and impaired the exercise of their fishing right, it had to be removed or modified so that fish could escape upstream.³⁰⁵ In *Culverts*, the changed condition was the effects that culverts had on fish habitat; because this new habitat condition impeded fish migration and resulted in diminished fish available for harvest, the construction and maintenance of the culverts had to be rectified. Addressing a changed condition is simply asking whether the new condition would exclude the exercise of a treaty fishing right. If so, then duties or rights to prevent that exclusion might justifiably be implied.

303. *Id.*

304. *In re SRBA*, Consolidated Subcase 03-10022, *supra* note 179, at 1, 38–39.

305. *United States v. Winans*, 198 U.S. 371, 381–82 (1905).

B. A Note on Jurisdiction

The type of court deciding the off-reservation instream water right issue may affect the outcome. In general, federal courts or courts with appellate jurisdiction, such as the Ninth Circuit or Supreme Court, have been more likely to apply rules of Indian treaty interpretation. *Winans* and *Fishing Vessel*, decisions defining the right to take fish, are Supreme Court decisions.³⁰⁶ *Adair* and *Colville*, where courts were willing to imply an instream water right for fish, have been Ninth Circuit decisions.³⁰⁷ And the recent *Culverts* decision came from a Washington federal district court.³⁰⁸ Heavily criticized or enigmatic decisions have more often arisen from state courts. The Snake River Basin Adjudication court, for example, was heavily criticized for its decision denying the Nez Perce off-reservation instream water rights.³⁰⁹ The Yakima Basin Adjudication, involving the Yakama Tribe, began as a filing in state court.³¹⁰ The trial court ruled that fishing rights were not extinguished, yet somehow diminished, and the Supreme Court of Washington affirmed this decision without articulating how such a result might have happened.³¹¹

XII. CONCLUSION

Treaty-based fishing rights have seen a century of litigation. In dissecting the nature of the right, courts have determined that the right includes a right to access off-reservation fishing locations and a right to take a harvestable amount of fish. How might a Washington court address the question of whether the treaty right to take fish might include an off-reservation instream water right? The strongest approach is to apply the rules of Indian treaty interpretation. If an off-reservation water right is not expressed in a treaty, a court might consider that (1) rights not expressly granted in treaty language are reserved to the Indians; and, (2) if there are two inferences, the inference which would support the treaty should be adopted. These considerations are grounded in Supreme Court precedent. A water right that could maintain fish runs would support a treaty fishing right. No water right could result in water users diverting all the water from the stream, destroying fish and consequently destroying a treaty fishing right. Courts have not gone so

306. See *id.*; *Fishing Vessel*, 443 U.S. 658.

307. See *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

308. *United States v. Washington (Culverts)*, No. CV 9213RSM, 2007 WL 2437166, at *1, *10 (W.D. Wash. Aug. 22, 2007).

309. See, e.g., Michael Blumm, Dale D. Goble, Judith V. Royster & Mary Christina Wood, *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449, 451–52 (2000).

310. See *Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306 (Wash. 1993).

311. See, e.g., Blumm et al., *supra* note 1, at 1179 (suggesting that, by diminishing fishing rights, the court avoided having to order restoration of historical streamflows).

far as to determine an instream water right to protect fish, but the most recent case has established a treaty-based right of protection from habitat degradation. The holding which declared a treaty-based duty to prevent habitat degradation resulted from applying the rules of Indian treaty interpretation. Perhaps if courts continue to follow precedential rules for Indian treaty interpretation, finding an implied instream water right reserved by treaty language is not far off.

*Katheryn A. Bilodeau**

* J.D. Candidate, University of Idaho College of Law, May 2012; M.S. Water Resources: Law, Management and Policy, 2009, University of Idaho; B.A. Japanese, 2002, University of Notre Dame. I would like to thank Professor Barbara Cosens for her outstanding help on this comment; her wisdom and commitment to her students make her among the best of advisors. I also would like to thank Jeremiah Busch and my family, whose unfailing love and support make law school possible.

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Robert T. Anderson
boba@uw.edu

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Indian Water Rights, Practical Reasoning, and Negotiated Settlements

Robert T. Anderson†

INTRODUCTION

Indian reserved water rights have a strong legal foundation buttressed by powerful moral principles. As explained more fully below, the Supreme Court has implied reserved tribal water rights when construing treaties and other similar legal instruments. The precise scope and extent of these rights in any treaty are unknown until quantified by a court ruling or an agreement ratified by Congress. When litigation is the quantification tool, tribal claims are generally caught up in massive general-stream adjudications. These adjudications are massive because to obtain jurisdiction over the Indian water rights (and over the United States as trustee to the tribes), states must adjudicate *all* claims to a given river system; they may not engage in piecemeal litigation of only the Indian and federal claims. The result can be that there are thousands of state water rights holders who must be joined as parties to exceedingly complex litigation that takes too long and costs too much. Moreover, even when such adjudications are litigated to a conclusion and tribes win a decreed water right, such a “paper right” may do little to advance tribal needs without the financial ability or the infrastructure to put the water to use. At the same time, the general failure of the United States to assert and protect tribal rights until the 1970s, along with its zealous advancement of competing non-Indian uses, created expectations among non-Indians that their state-law water rights were secure. In fact, many non-Indian rights are far from secure.

This Article first reviews the few Indian water rights cases that the U.S. Supreme Court has decided. The Article then traces a threshold issue common to Indian water rights litigation in the federal and state courts: how to determine

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† Associate Professor of Law and Director of the Native American Law Center, University of Washington School of Law, Seattle, Washington; Oneida Nation Visiting Professor of Law, Harvard Law School, 2010–15. Thanks to my friend and colleague, Professor Philip P. Frickey, for his wonderful scholarship in the field of American Indian law. May his wisdom and kindness live on in our work and personal lives.

the purposes of a reservation for which a reserved water right should be implied. A review of major Indian water rights cases demonstrates the generally confusing state of the law in significant respects, especially with regard to the “purposes” determination. This Article posits that the relative uncertainty in this area has created an environment in which creative, practical solutions to conflicts have emerged in the Indian water settlements approved by Congress. This practical approach is consistent with the approach manifested in the few Supreme Court decisions that reached the merits of Indian water disputes and fits neatly into the portions of Professor Frickey’s scholarship that call for less litigation and more sovereign-to-sovereign negotiation.¹ There have been over two dozen Indian water rights settlements since the 1970s, each usually preceded by years of litigation. Given the Supreme Court’s abandonment of long accepted substantive and interpretive rules of Indian law, many tribes now prefer government-to-government negotiations for settling natural resource disputes to “all or nothing” litigation. Non-Indian water right claimants also often endorse such an approach since their rights are frequently suspect not just because of potentially senior tribal rights, but due to infirmities under state law.

In his 1990 article, *Congressional Intent*, Professor Frickey described two modern camps of scholarly work, neither of which is currently supported by a majority on the modern Supreme Court. The foundationalist camp acknowledges federal plenary power over Indian affairs, but couples it with the principle of continued inherent tribal sovereignty informed by traditional canons of construction and a federal trust responsibility that are protective of Indian rights. Under this line of reasoning, tribal treaty rights and powers of sovereignty over members and territory continue unless Congress explicitly limits them.² If followed, this Felix Cohen-like approach would provide predictability in determining the relative bounds of tribal and state jurisdiction within Indian country;³ however, for reasons outlined in Frickey’s article, the Court has not followed this approach in a number of recent cases. Since the

1. See, e.g., Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1206–09 (1990) [hereinafter Frickey, *Congressional Intent*]; Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199 (1989) (reviewing WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (2d ed. 1988)).

2. Frickey, *Congressional Intent*, *supra* note 1, at 1206–07.

3. Felix Cohen authored the classic treatise *HANDBOOK OF FEDERAL INDIAN LAW* (G.P.O. 1945), which is generally credited with bringing some focus and coherence to the field of federal Indian law. Cohen was a legal realist who read federal law as clearly recognizing Indian tribes as domestic sovereigns with inherent powers of self-government and free of state authority, but he also acknowledged comprehensive federal authority over Indian affairs as principally assigned to Congress pursuant to the Indian Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. While Congress has such power, Cohen found in the cases the principle that congressional limitations on tribal power would be found only when Congress had clearly manifested this intent. Further, the federal trust responsibility to tribes required ambiguities in treaties and statutes to be interpreted in favor of the Indian nations.

article's publication in 1990, the Court has continued to resist adopting such an approach, as demonstrated in a series of tribal losses involving tribal jurisdiction over nonmembers.⁴ The Court has, however, rendered a few notable victories for tribal interests and recognized tribal property interests are protected by the Just Compensation Clause of the Fifth Amendment.⁵

On the other hand, a camp of critics advocating for rejection of the plenary power doctrine and increased use of international human rights norms has not had any influence on the Court to date. This line of scholarship accurately depicts explicit racism in many of the Court's Indian law decisions and calls for rejection of many of the fundamental colonial assumptions that influence federal Indian law.⁶ While recognizing that the Supreme Court is the ultimate arbiter of Indian law controversies (subject of course to congressional override), these critics urge continued confrontation of federal Indian law's racist and colonial roots as a path to increased protection of tribal sovereignty. There is little evidence that the modern Court is influenced by this line of scholarship as it continues to chip away at tribal jurisdiction over nonmembers.⁷

Professor Frickey advanced an approach, distinct from either modern camp, built upon a "ground up" method of "practical reason."⁸ He defined this approach as a nonformalistic, multi-faceted review of modern context, historical understanding of legislative motivation, and the evolution of the legal discourse over time.⁹ This approach draws upon canons of construction to assist the courts in determining the appropriate outcome in cases where treaties and agreements are silent or ambiguous on a disputed matter,¹⁰ and recognizes the importance of contemporary context as important in treaty interpretation.

The most significant problem in litigating Indian water rights is how to interpret Indian treaties and agreements that rarely, if ever, deal explicitly with water rights. In 1908, the Supreme Court in *Winters v. United States* considered this issue in a way similar to Professor Frickey's "ground up" approach: the

4. See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

5. See *United States v. Lara*, 541 U.S. 193 (2004); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

6. See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON, THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

7. The critics' theory was squarely presented to the Court on behalf of Respondent Hicks in the briefing in *Nevada v. Hicks* but did not draw comment from any member of the Court. Concurring Justices in *Hicks* and a four-member concurrence/dissent in *Plains Commerce Bank* adhered to a foundationalist approach as they argued in favor of tribal jurisdiction over nonmembers.

8. See Frickey, *Congressional Intent*, *supra* note 1, at 1205–08.

9. See *id.* at 1208.

10. *Id.* at 1228.

Court recognized a default rule that water rights are implied when necessary to fulfill the purposes of an Indian reservation.¹¹ The Court filled a critical gap in an agreement between the United States and the Fort Belknap Indian Community by looking at the agreement in the context of bilateral negotiations, evaluating the “traditions, preunderstandings, and context” (which are the primary components of Professor Frickey’s practical reasoning), and rejecting formalist arguments that would have defeated this practical understanding.¹²

While litigation of Indian water rights persists, there has been a strong trend favoring congressionally approved Indian water settlements. A multifaceted approach emphasizing “practical reasoning,” much like that which Professor Frickey advocated, has brought about most of these settlements. This strategy points the way for more progress in the current era of climate change and changing patterns of water use.

I

INDIAN WATER RIGHTS IN THE SUPREME COURT

Over the past century, the Court has only handed down two substantive decisions on the nature and scope of Indian reserved water rights (*Winters v. United States*¹³ and *Arizona v. California* [*Arizona I*]¹⁴), one decision dealing with Indian allotments (*United States v. Powers*¹⁵), two procedural cases limiting opportunities to bring additional claims (*Arizona v. California* [*Arizona II*]¹⁶ and *Nevada v. United States*¹⁷), and three cases describing the circumstances under which state courts may adjudicate tribal water rights without tribal consent (*Colorado River Water Conservation District v. United States*,¹⁸ *Arizona v. San Carlos Apache Tribe*,¹⁹ and *United States v. Idaho*²⁰). The Supreme Court has said precious little directly on the merits, and has invited state courts to adjudicate federal and tribal reserved rights through its broad interpretation of the McCarran Amendment.²¹ At the same time, federal

11. 207 U.S. 564, 576–77 (1908).

12. *Id.* (rejecting an argument that tribal rights were defeated based on the Equal Footing Doctrine, because “it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones”); see Frickey, *Congressional Intent*, *supra* note 1, at 1232.

13. 207 U.S. 564.

14. 373 U.S. 546 (1963).

15. 305 U.S. 527 (1939).

16. 460 U.S. 605 (1983).

17. 463 U.S. 110 (1983).

18. 424 U.S. 800 (1976).

19. 463 U.S. 545 (1983).

20. 508 U.S. 1 (1993).

21. The McCarran Amendment provides:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or

courts may continue to exercise jurisdiction over reserved right claims in the absence of a state court general stream adjudication or if the state court adjudication has not substantially advanced.²² Under these circumstances, it is not surprising that there are many gray areas and some areas of outright conflict among the approaches of the various state and federal courts.

A. Historic and Legal Context of Indian Water Rights

As mentioned, there is not a great deal of settled law from the U.S. Supreme Court surrounding many of the important issues that arise in Indian water rights. Consequently, understanding federal Indian law in the water rights context requires understanding the few Supreme Court cases dealing with the merits, the solid trends in lower court decisions, and, most importantly, the past congressional approaches. In light of these challenges to understanding Indian water rights, this Section provides a brief context for a discussion of Supreme Court jurisprudence on the issue, touching on state law, federal government policy, and two foundational Supreme Court decisions.

All of the western states follow some form of the prior appropriation doctrine.²³ The doctrine generally rewards the first party who physically removes water from a stream for beneficial use by granting that party a senior right to divert that amount of water in perpetuity. In periods of shortage, the date of initial diversion determines priority among competing use rights.²⁴ Typically, the water appropriator may lose the water-use right by abandonment, which generally requires proof of intent to no longer use the water. The appropriator may also lose the right by forfeiture, which is the failure to use the water for a specified period of time—in common colloquial parlance, “use it or lose it.” In short, states generally require continuous beneficial use of the water to maintain the right.

In the late nineteenth and early twentieth centuries, the federal government embarked on a policy of assimilating Indians into the general

is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

Department of Justice Appropriation Act of 1953, Pub. L. No. 82-495, § 208(a), 66 Stat. 549, 560 (codified at 43 U.S.C. § 666(a) (2006)). *See infra* text accompanying notes 82–90.

22. *United States v. Adair*, 723 F.2d 1394, 1400, 1402 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

23. For a discussion of the basic elements of the doctrine and a list of the eighteen states that follow the doctrine, see ROBERT E. BECK & AMY K. KELLEY, *WATERS AND WATER RIGHTS*, §§ 11.01, 12.02 (3d ed. 2009).

24. *Id.*

population with an expectation that traditional modes of life and decision making would fall by the wayside.²⁵ Establishing reservation homelands as bases for agricultural economies was one important part of the federal assimilation policy, and another was the “allotment policy.”²⁶ Prior to the policy, tribal lands were generally held in common and tribal law and custom determined individual use rights.²⁷ The new allotment policy authorized the breakup of tribal lands into individual parcels for distribution among tribal members in order to encourage agricultural pursuits.²⁸ In general, the United States would hold in trust for each individual Indian the legal title to each allotment for a period of time, usually twenty-five years. During the trust period, state and local governments could not tax the land and the Indian owner could not alienate it. At the conclusion of the trust period, the Indian would receive a fee simple patent that he could alienate freely to both Indians and non-Indians.²⁹

This assimilation policy was largely abandoned in 1934, when Congress passed the Indian Reorganization Act (IRA).³⁰ The IRA prohibited further allotment of Indian reservation land and extended existing restrictions on alienation of trust land.³¹ It was premised on the notion that the assimilation policy had failed and that the breakup of communal tribal lands into individual parcels had worsened the economic and social conditions within Indian reservations.³² However, the federal government had already allotted millions of acres of tribal land to individual Indians, and non-Indians had acquired many allotments that had passed from trust status.

Federal promises of permanent homelands were often insufficient to obtain tribal consent to vast land cessions. Many tribes secured treaty guarantees of off-reservation hunting and fishing rights. In *United States v. Winans*, the Supreme Court considered the rights of Yakama Tribe³³ members

25. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 75–84 (Nell Jessup Newton et al. eds., 2005 & 2009 Supp.). At the same time, Indians and their lands remained generally beyond the reach of state law—including state water law. *Id.* § 6.01[2], at 501–06.

26. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

27. See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

28. The General Allotment Act of 1887, 24 Stat. 388, authorized the allotment of tribal lands without the consent of the affected tribe. Tribal lands within reservations that were not allotted were often deemed “surplus” and returned to the public domain for disposition under the federal public land laws. See *Solem v. Bartlett*, 465 U.S. 463, 466–68 (1984) (describing impacts of allotment and surplus land acts).

29. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 16.03[2][b], at 1041–42.

30. Indian Reorganization Act (Wheeler-Howard Act), Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461–79 (2006)).

31. 25 U.S.C. §§ 461, 462.

32. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 1.05, at 84–87.

33. The Nation changed the spelling of Yakima to Yakama in 1994 by Resolution T-053-94. U.S. ARMY CORPS OF ENGINEERS, FEDERALLY-RECOGNIZED TRIBES OF THE COLUMBIA-SNAKE BASIN 7, available at <http://stories.washingtonhistory.org/treatytrail/teaching/pdfs/Yakama>

to cross privately owned land in order to exercise off-reservation treaty rights to fish at usual and accustomed grounds and stations.³⁴ The confederated tribes of the Yakama Reservation had ceded most of their land to the United States in 1855 in exchange for exclusive rights to occupy a smaller reservation, along with “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.”³⁵ The private landowners argued that because their patents from the United States government said nothing about an easement for access to Indian fishing sites on the now private land, one should not be implied.

The Court rejected the argument, noting that the treaty reserved rights “to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein.”³⁶ The Court reasoned that the reserved easement followed from the principle that Indian treaties are “not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted.”³⁷ This implied reservation theory quickly ran up against the state-based rights of non-Indian water users.

B. Indian Reserved Water Rights

Indian water rights are rooted in the landmark case of *Winters v. United States*, which held that when the federal government set aside land for the Fort Belknap Indian Reservation in Montana, it impliedly reserved sufficient water from the Milk River to fulfill its purpose for creating the reservation, which was to provide a permanent tribal homeland with an agricultural economy.³⁸ Nonetheless, non-Indians who had settled upstream of the reservation claimed paramount rights to use water from the Milk River based on the state law of prior appropriation. If the state law applied, the Fort Belknap Indians would lose water rights because the reservation’s actual use of the river water occurred later than that of the non-Indian settlers. The Court found, however, that the Indians’ agreements with the federal government impliedly created water rights for the Indians that trumped the non-Indians’ state law water rights. In

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34. *United States v. Winans*, 198 U.S. 371 (1905). A number of treaties between the United States and Pacific Northwest tribes used the phrase “usual and accustomed grounds stations.” It simply refers to the locations at which tribal members customarily fished. FAY G. COHEN ET AL., *TREATIES ON TRIAL* 37–38 (1986).

35. Treaty with the Yakamas of 1855, art. III, 12 Stat. 951.

36. *Winans*, 198 U.S. at 381. The Court found, “[t]he right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.” *Id.*

37. *Id.*

38. 207 U.S. 564, 577 (1908). See JOHN SHURTS, *INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S–1930S* (2000). For a comprehensive review of the Indian reserved rights doctrine, see COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 25, § 19.03, at 1174–201.

Winters, the United States, as trustee to the tribes, sued the non-Indians, arguing that in 1888 Congress had reserved sufficient water under federal law to fulfill the purposes for establishing the reservation, which were to encourage farming by Indians and to serve as a homeland for the tribes. The argument was simple. If the Indians were to become farmers as contemplated by the agreement creating the reservation, they would need water being used by non-Indians. The Supreme Court ruled that the federal government had the power to exempt waters from appropriation under state water law, and that the United States intended to reserve the waters of the Milk River to fulfill the purposes of the agreement between the Indians and the United States.³⁹ The Court accordingly upheld an injunction limiting non-Indian use to the extent it interfered with the current needs of the tribes.

The ruling in *Winters* was a departure from the federal government's usual deference to state water law in the arid West. Moreover, the open-ended nature of the tribes' reserved water rights became a source of great discontent among the western states and non-Indian water users, because Indian reserved rights could effectively get to the front of the line ahead of state water rights. Thus, state-law appropriators could establish rights relative to one another but never be certain if an upstream or downstream Indian tribe might have a senior reserved right, and if so, of its quantity. These users feared that unquantified Indian reserved rights could someday destroy or undermine their investments in infrastructure to use the water under state law.⁴⁰ Some early to mid twentieth century cases in lower federal courts also recognized implied Indian reserved water rights but similarly did not quantify the amount reserved with any finality.⁴¹ While *Winters* set out the basic parameters of the Indian reserved water rights doctrine, there have been few other Supreme Court cases dealing with the nature of the rights. And aside from the modern Indian water rights settlements,⁴² Congress has not spoken to the substance of Indian water rights.

The situation in *Winters* is typically described as a case where the United States reserved the water through Congress's establishment of the Fort Belknap

39. 207 U.S. at 576-77; see generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.02, at 1171-73.

40. There was in fact little interference with state law rights due to the general lack of development of Indian water rights on the ground. The National Water Commission in 1973 concluded that "[i]n the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sordid chapters." NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE - FINAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 475 (G.P.O. 1973); see also Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399 (2006).

41. See *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957). The Ninth Circuit in both cases recognized reserved rights that could increase as tribal needs expanded.

42. See appendix for a list of all such settlements.

Reservation. There is, however, language in *Winters* indicating that it was instead the tribe that did the reserving.⁴³ Recall that under the *Winans* rationale, courts need not look to congressional action *conferring* water rights on a tribe if the tribe was the original owner of an area. Instead, the *Winans* inquiry looks to whether the tribe surrendered such rights by treaty or through other congressional action.⁴⁴ In most modern cases, however, and as the Supreme Court found in both *Winters* and *Arizona I*, the question is whether a reservation of water should be implied from congressional action to fulfill the purposes of the reservation.⁴⁵

Furthermore, *Winters* exemplified how the Indian law canons of construction may serve as important tiebreakers between a conflict of implications.⁴⁶ If one were to take a formalist approach after *Winans*, one could forcefully argue that because there was no explicit surrender of water on the reservation, the tribes continued to own it all. The courts have instead determined ownership of water rights in a fashion that takes into account at some level the background principles of state water law, the expectations of the parties when the relevant treaty was negotiated, and modern circumstances of the parties. In short, courts appear to be engaged in “practical reasoning.”

The Supreme Court’s next Indian reserved water rights case examined a provision of the allotment legislation. In *United States v. Powers*, the Court

43. “The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, ‘and grazing roving herds of stock,’ or turned to agriculture and the arts of civilization. Did they give up all this?” *Winters v. United States*, 207 U.S. 564, 576 (1908). In its brief to the Court, the United States stated that the Indians retained or were granted by the United States the right to divert and use for domestic, irrigation, and other beneficial purposes the amount of Milk River waters sufficient to meet their needs and carry out the objects of their agreement. Brief for the United States at 12, *Winters v. United States*, 207 U.S. 564 (1908) (No. 158); see BECK, *WATERS AND WATER RIGHTS*, *supra* note 23, at § 37.01(b)(2) (noting the ambiguity); see also Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 402 (1993) [hereinafter Frickey, *Marshalling Past and Present*] (noting the roots of *Winans* and *Winters* in Chief Justice Marshall’s recognition of retained tribal sovereignty in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). The Court may have glossed over this point because in *Winters*, and in most Indian water rights cases, a priority date as of the date of the federal action setting aside land will be sufficiently early to precede any competing state rights.

44. Any surrender of such rights must be clear and express. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 2.02[1], at 120 (“[T]ribal property rights and sovereignty are preserved unless Congress’s intent to the contrary is clear and unambiguous.”).

45. *Winters v. United States*, 207 U.S. 564, 567, 577–78 (1908); *Arizona v. California*, 373 U.S. 546, 599 (1963). See *supra* note 43 for a possible reason that the *Winans* rationale is often ignored.

46. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government . . .

Winters, 207 U.S. at 576–77.

addressed whether non-Indian successors to allotment owners acquired any right to use a portion of the water right originally reserved by a tribe under the *Winters* doctrine.⁴⁷ The United States allotted the Crow Reservation early in the twentieth century and developed an irrigation project to serve approximately 20,000 acres of reservation land—including some allotments—but not all reservation lands and allotments. The federal government argued that because the allotments at issue (which non-Indians had acquired) were not included within the original irrigation project area, the non-Indian owners had not gained any reserved water right and thus should be enjoined from taking water from the Little Big Horn River and Lodge Grass Creek. In other words, the government claimed that the Secretary of the Interior had effectively allocated the water in the Little Big Horn River and Lodge Grass Creek to the exclusion of the allotments that were served by upstream diversions—including the former allotments now held by the non-Indian parties. The Court rejected the government's arguments, stating that "when allotments of land were duly made for exclusive use [of individual tribal citizens] and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the [new] owners."⁴⁸ Because the issue was not properly framed, the Court did "not consider the extent or precise nature of respondents' rights in the waters."⁴⁹ While the Court denied the federal government's requested injunction, language in the opinion indicates that the allotments and the non-Indian successors could have been limited, but only by the development of "rules and regulations" under the Dawes Act, 25 U.S.C. § 381 (2006).⁵⁰

The Supreme Court did not revisit the Indian reserved rights doctrine until 1963, when it rendered a one-hundred-page decision in *Arizona v. California* (*Arizona I*), a case dealing primarily with the division of the water in the Colorado River among the affected upper and lower basin states.⁵¹ The United States intervened on behalf of several Colorado River Indian tribes and asserted claims for full and permanent allocations of water rights to the tribes.⁵² The claims went a step beyond the ruling of *Winters*, which had resulted in an injunction against certain uses, but had left the tribes with an indeterminate right and an open-ended decree. The Supreme Court agreed with the United States that a final quantification was desirable and endorsed the practicably

47. *United States v. Powers*, 305 U.S. 527 (1939). For background on the allotment legislation, see *supra* text accompanying notes 25–28.

48. *Id.* at 532.

49. *Id.* at 533.

50. *Id.* at 530. This issue has vexed the Department of the Interior ever since. See, e.g., *Entitlements to Water Under the Southern Arizona Water Rights Settlement Act*, Sol. Op. M-36982 (Mar. 30, 1995).

51. *Arizona v. California* (*Arizona I*), 373 U.S. 546 (1963).

52. The tribes were the Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe. *Id.* at 595 n.97.

irrigable acreage (PIA) doctrine,⁵³ which allowed a quantification of reserved water rights for the present and future needs of the several Indian reservations. In general, the PIA test awards water for present and historical irrigation, for those tribal lands capable of sustaining irrigation in the future, and for growing crops in an economically feasible manner.⁵⁴ The *Arizona I* Court concurred with the position the United States urged before the Special Master.

We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.⁵⁵

The Court explained its agreement with the Special Master by noting a number of practical factors, such as the establishment of reservations in areas where water was essential to allow the Indians to survive, and by emphasizing fairness and feasibility as justifications for reliance on irrigable acreage as the measure.⁵⁶ The Court could have simply followed the *Winters* rule and provided for current use, subject to future expansion as the Indians' needs increased. In the context of a division of the waters of the Colorado River among the various states, however, it would have made no sense to leave potentially large claims unquantified. Thus, instead of following a formal rule, the Court engaged in practical reasoning in order to provide a final resolution of the water rights controversy before it. In so doing, however, it continued the mode of analysis used by the Court in *Winters* nearly fifty years earlier—interpreting the legal instruments establishing the various reservations broadly to fulfill the purpose of creating permanent tribal homelands with agricultural economies. At the same time, the Court approved the use of agricultural water

53. *Id.* at 600–01.

54. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, at § 19.03[5], at 1184–88.

55. 373 U.S. at 600–01. The Court referred to Special Master Simon H. Rifkind's conclusions on pages 264–65 of his report ("Rifkind Report") to the Supreme Court in *Arizona I*. The report is available at Western Waters Digital Libraries, <http://www.westernwaters.org> (search for "Rifkind") and at the Colorado River Central Arizona Project Collection, Arizona State University, <http://digital.lib.asu.edu/cdm4/browse.php> (search for "Rifkind"). See also Note, *The Irrigable Acres Doctrine*, 15 NAT. RESOURCES J. 375 (1975) (describing alternative proposals to measure Indian water rights for present and future needs). For a discussion of the PIA standard, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, §19.03[5][b], at 1185–86.

56. *Arizona I*, 373 U.S. at 599–600.

for other purposes as time and the desires of the tribes changed.⁵⁷

The only other case to reach the Court on the merits, besides *Arizona I*, was *Wyoming v. United States*, which involved Wyoming's general adjudication of water rights to the Big Horn River, including the rights of the Shoshone and Arapahoe Tribes.⁵⁸ Although the Court granted review to consider the Wyoming Supreme Court's application of the PIA standard, there was no Opinion for the equally divided Court. Part II considers this case, along with other lower court decisions.

C. Non-Indian Reserved Rights

In a development that would later have far-reaching repercussions for Indian reserved rights, the *Arizona I* Court also applied the reserved rights doctrine to land set aside as federal reservations for non-Indian purposes.⁵⁹ While the amount of water awarded for the non-Indian federal reservations was relatively insignificant,⁶⁰ the Master had "ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests"⁶¹ and the Supreme Court agreed that "the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."⁶²

The Court took up the question of non-Indian federal reserved water rights again, thirteen years later, in *Cappaert v. United States*,⁶³ which involved the federal government's claim that groundwater pumping conducted in accordance with state law unlawfully interfered with water rights reserved by the United States for the protection of the desert pupfish. The district court had enjoined non-Indian groundwater pumpers located over two miles from an underground pool from depleting the aquifer below a point that would endanger survival of the fish.⁶⁴ On appeal, the Supreme Court upheld the district court decision, concluding that the establishment of Devil's Hole National Monument carried with it an implied reservation "in unappropriated water which vests on the date

57. *Arizona v. California*, 439 U.S. 419, 422–23 (1979) (supplemental decree).

58. *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam), *aff'g by an equally divided Court In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Syst.*, 753 P.2d 76 (Wyo. 1988).

59. The Court held in *Fed. Power Comm'n v. Oregon*, 349 U.S. 435, 448 (1955), that the Desert Land Act, which generally authorized the application of state water law to grantees of federal land, did not apply to water rights on federally reserved land.

60. See *Arizona v. California*, 376 U.S. 340, 345–46 (1964) (decree).

61. *Arizona v. California (Arizona I)*, 373 U.S. 546, 601 (1963). For a review of the evolution of the doctrine, see John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. DENV. WATER L. REV. 271, 288 (2001).

62. *Arizona I*, 373 U.S. at 601.

63. 426 U.S. 128 (1976).

64. *Id.* at 133, 136.

of the reservation and is superior to the rights of future appropriators.”⁶⁵ Because Congress established the Monument for the singular purpose of protecting the desert pupfish fish and its habitat, it followed naturally, according to the Court, that Congress intended to reserve water to fulfill the purpose of the Monument. The Court cited *Winters* to reject the notion that the reserved rights doctrine called for a balancing of interests between state law water users and the federal water rights.⁶⁶ Further, the Court described the district court’s injunction as tailored to the “minimal need” required to protect the pool and thus the pupfish.⁶⁷ While this language appeared to be more descriptive of what was done by the lower court, it took on a life of its own in the next federal reserved water rights case before the Court.

In *United States v. New Mexico*,⁶⁸ the Court signaled a shift in its treatment of non-Indian reserved rights when it narrowly construed reserved water rights for national forests by making it clear that such rights would only be implied where needed to fulfill the “primary purposes” of the reservation and only if the primary purposes would be “entirely defeated” without an implied reservation of water.⁶⁹ It accordingly held that water was reserved in national forests for dual primary purposes: “to preserve the timber or to secure favorable water flows for private and public uses under state law.”⁷⁰ The Court conveyed a sense of hostility toward non-Indian federal reserved rights when it noted that in the case of fully appropriated rivers, “federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators.”⁷¹ Justice Rehnquist’s opinion for the Court stated, “[e]ach time this Court has applied the ‘implied-reservation-of-water doctrine,’ it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.”⁷² The statement was hardly true; for example, *Arizona I* devoted but two sentences to non-Indian federal reserved rights issues for five different federal reservations.⁷³ Nevertheless, the cautionary language in

65. *Id.* at 138.

66. *Id.* at 138–39.

67. *Id.* at 141.

68. 438 U.S. 696 (1978).

69. *Id.* at 700. In the associated footnote, the Court cited to *Winters*, noting that “[w]ithout water to irrigate the lands, however, the Fort Belknap Reservation would be ‘practically valueless’ and ‘civilized communities could not be established thereon.’ The purpose of the Reservation would thus be “‘impair[ed] or defeat[ed].”’ *Id.* at 700 n.4 (internal citation omitted).

70. *Id.* at 718.

71. *Id.* at 705; see 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 5:36 (Thomson/West 2007) (providing a comprehensive review of federal reserved water rights litigation after *United States v. New Mexico*).

72. 438 U.S. at 700.

73. *Cappaert* contributes little to Justice Rehnquist’s argument, because the Proclamation on its face reserved the pool for the pupfish, and the limiting “minimal need” language was simply a quotation from the district court’s opinion.

Cappaert and *New Mexico* regarding non-Indian federal reserved rights opened the door for some courts to construe narrowly Indian reserved rights as well.⁷⁴ Before reviewing the substantive application of the doctrine, however, it is necessary to review a series of important cases dealing with state court jurisdiction.

D. Reopening Decrees and Tribal Intervention

The Court's later cases have been largely procedural, but extremely significant, and the Court's several rulings in favor of state court jurisdiction are consistent with the negative attitude the Court expressed toward non-Indian federal reserved rights in *United States v. New Mexico*. Indian tribes, on the other hand, have generally viewed state court jurisdiction as inconsistent with fundamental notions of tribal sovereignty and the historic tribal immunity from state law. The Supreme Court's broad interpretation of the McCarran Amendment (discussed in Part I.E, below) permitting jurisdiction over tribal claims is generally viewed as inconsistent with countervailing Indian law principles limiting state court jurisdiction over Indian tribes and their property in the absence of express delegation of such authority to the states.

In 1983, the Court reemphasized the importance of finality in water rights litigation when it rejected claims by the United States and tribes to reopen the 1963 *Arizona I* decree in order to seek water for lands omitted from the 1963 claims.⁷⁵ In rejecting the effort, the Court explained that "[a] major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system."⁷⁶ The Court also noted, "[t]he standard for quantifying the reserved water rights [in *Arizona I*] was also hotly contested by the States, who argued that the Master adopted a much too liberal measure."⁷⁷ The Court cautioned that reopening the decree to allow claims might also allow the states to pursue arguments that the quantified tribal share should be circumscribed.⁷⁸

Significantly, the Court recognized the right of the tribes to intervene in the case to assert their own rights and not depend solely on the United States' representation of them as trustee. The States had argued that tribal intervention was barred by Eleventh Amendment immunity from suit. The Court rejected the States' argument in one of the few positive rulings for tribes since 1963:

74. See *infra* text accompanying notes 97–98.

75. *Arizona v. California (Arizona II)*, 460 U.S. 605 (1983).

76. *Id.* at 620.

77. *Id.* at 617 (citation omitted). In the latest iteration of this case, the Supreme Court held that the Quechan tribe of the Fort Yuma Reservation could assert additional claims for lands within reservations with disputed boundaries at the time of the 1963 proceeding. *Arizona v. California*, 530 U.S. 392 (2000). The Court approved a final settlement of these claims in 2006 and thus ended this long-running litigation. *Arizona v. California*, 547 U.S. 150 (2006).

78. *Arizona II*, 460 U.S. at 617.

The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 745, n. 21 (1981).⁷⁹

This ruling cleared the way for direct tribal participation in the many general stream adjudications commenced throughout the West.

The importance of tribal intervention was made apparent by the ruling in *Nevada v. United States* less than two months later, when the United States' failure to assert all tribal claims in an adjudication precluded a later attempt to assert those claims. The *Nevada* Court rejected efforts by the United States and the Pyramid Lake Paiute Tribe to reopen the Orr Ditch decree of 1946 in which the federal government had failed to assert all tribal claims.⁸⁰ Despite the existence of a clear conflict of interest on the part of the United States, the Court held that principles of *res judicata* precluded both the Tribe and the United States from asserting a claim for water for tribal fisheries.⁸¹ Consequently, most tribes now intervene in state general stream adjudications to ensure that *all* their reserved water right claims are presented and not just those that the U.S. Department of Justice deems merit worthy.

E. Interpretation of the McCarran Amendment

Another group of Supreme Court cases involving federal Indian reserved rights interpreted the McCarran Amendment.⁸² In these cases, the Court read the Amendment broadly to provide states with authority to adjudicate federal water rights.⁸³ The Court also held that the Amendment requires that the adjudications be comprehensive—inclusive of the rights of all owners on a given stream—for a state court to assert jurisdiction over federal claims.⁸⁴

79. *Id.* at 614.

80. *Nevada v. United States*, 463 U.S. 110 (1983).

81. *Id.* at 142–44; see also Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1341–55 (2003) (discussing the *Nevada* opinion).

82. See *supra* note 21.

83. See, e.g., *Dugan v. Rank*, 372 U.S. 609 (1963). For a comprehensive pre- and post-enactment history of the amendment, see John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355 (2005) [hereinafter Thorson, *Dividing Western Waters*] and John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299 (2006) [hereinafter Thorson, *Dividing Western Waters, Part II*].

84. In dismissing the claims in *Dugan*, the Court noted:

that the United States may be joined in suits “for the adjudication of rights to the use of water of a river system or other source,” is not applicable here. Rather than a case involving a *general* adjudication of “all of the rights of various owners on a given stream,” S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), it is a private suit to determine water rights solely between the respondents and the United States and the local

Although the statute on its face says nothing about state court authority to adjudicate federal *reserved* rights, or Indian *reserved* water rights,⁸⁵ the Court interpreted the McCarran Amendment to allow states to assert jurisdiction over both federal⁸⁶ and Indian reserved water rights.⁸⁷ Even states that had disclaimed jurisdiction over Indian lands in enabling acts as a condition for their entry into the Union could now assert jurisdiction over reserved water rights under the Amendment.⁸⁸ And while tribal sovereign immunity stood as a separate bar to joining tribes without their consent, tribes would now be bound by any decree in which the United States as trustee was properly brought into a general stream adjudication.⁸⁹ In its latest word on the joinder of the United States, and thereby on tribal rights, the Court cautioned the following:

State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.⁹⁰

II

INDIAN RESERVED RIGHTS IN THE LOWER COURTS

Given the Court's endorsement of the PIA doctrine in *Arizona I*, it was not surprising that the doctrine would be the centerpiece of the substantive law for the measure of Indian water rights in *Wyoming v. United States*.⁹¹ In the Wyoming Supreme Court, the parties had agreed that PIA consisted of "those acres susceptible to sustained irrigation at reasonable costs."⁹² The Wyoming

Reclamation Bureau officials.

372 U.S. at 618.

85. General rules of Indian law preclude the exercise of state regulatory or adjudicatory jurisdiction over Indian tribes, their members and their property within Indian country. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 6.01, at 499-514.

86. *See* United States v. Dist. Court (*Eagle County*), 401 U.S. 520 (1971).

87. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The *Colorado River* Court also held that while the Amendment does not deprive federal courts of jurisdiction over Indian water rights cases, they should abstain from asserting jurisdiction over water rights disputes when a state is asserting jurisdiction over the same matter. *Id.* at 819-21; *see also* United States v. Idaho, 508 U.S. 1 (1993) (holding that the McCarran Amendment waiver does not permit States to require federal government to pay exorbitant state court filing fees).

88. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

89. *Nevada v. United States*, 463 U.S. 110, 135 (1983).

90. *San Carlos Apache Tribe*, 463 U.S. at 571.

91. *Wyoming v. United States*, 492 U.S. 406 (1989), *aff'g* by an equally divided Court *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Syst., 753 P.2d 76 (Wyo. 1988). *See supra* text accompanying note 58. According to the United States' Brief to the Court, as of 1990, the PIA standard was a central component in more than a dozen water Indian rights cases in the western states. Brief for the United States at 49 n.46, *Wyoming v. United States*, 492 U.S. 406 (No. 88-309).

92. *Big Horn River System*, 753 P.2d at 101 (internal quotation marks omitted).

Supreme Court recognized a substantial reserved right for the tribes,⁹³ and the U.S. Supreme Court affirmed the decision in a 4-4 vote.⁹⁴ In his brief to the Supreme Court in *Wyoming*, the Solicitor General pointed out that “the PIA standard has generated significant expectations, reliance, and investment, both legal and financial. For example, it forms the basis of proof in ongoing litigation, or is the cornerstone of current settlement negotiations, in virtually all western water rights quantifications.”⁹⁵ There has been no further word from the Court on the substance of the quantification of Indian reserved water rights, although a draft opinion for the Court by Justice O’Connor before her recusal advocated change in administration of the PIA standard.⁹⁶

The critical determination in any Indian reserved water rights case, and the area of greatest disagreement among the lower courts, is the determination of the purposes of an Indian reservation.

The Court’s intervening decisions regarding non-Indian federal reserved rights, especially *United States v. New Mexico*,⁹⁷ have affected the analysis due to then-Justice Rehnquist’s emphasis on the historical primacy of state water law and his observation that the federal reserved rights doctrine “is [treated as] an exception to Congress’ explicit deference to state water law in other areas.”⁹⁸ As noted in the leading Indian law treatise, results have been mixed,

93. The court recognized about 290,000 acre feet of water for historic and current irrigation and 210,000 acre feet for future irrigation of lands never irrigated. It applied the PIA analysis to both classes of lands. *Id.* at 101–09. In its petition for review, the State of Wyoming described the State Supreme Court’s holding:

A closely divided Wyoming Supreme Court (3-2) affirmed the judgment of the district court, except for (1) an increase of 21,000 acre-feet in the amount of the 1868 reserved water right based on the future projects, reversing a 10% reduction recommended by the Master and adopted by the district court and increasing the total award to 500,420 acre feet.

Petition for Certiorari at 9, *Wyoming v. United States*, 492 U.S. 406 (No. 88-309). The United States responded in its merits brief:

The Wyoming Supreme Court affirmed most of the district court’s rulings and awarded the Tribes 500, 717 acre-feet per year based strictly on agricultural use. In each instance, the Wyoming courts determined the Tribes’ reserved water rights for agricultural use through the application of the ‘practicably irrigable acreage’ (PIA) standard—the same standard that this Court employed in [*Arizona*]. Wyoming, which initially argued that if a reserved water right exists, it should be quantified through the PIA standard, now thinks that this was a mistake.

Brief for the United States, *supra* note 91, at 2–3 (citation omitted).

94. See *Wyoming*, 492 U.S. at 407.

95. Brief for the United States, *supra* note 91, at 48–49 (citations omitted).

96. See Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683 (1997); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1640–41 (1996).

97. 438 U.S. 696 (1978); see *supra* text accompanying notes 71–74.

98. 438 U.S. at 715. Even Justice Powell’s partial dissent—joined by three others—began by stating, “I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress’ general policy of deference to state water law.” *Id.* at 718 (Powell, J., dissenting in part); cf. Mergen & Liu, *supra* note 96 (criticizing proposed “sensitivity analysis” as inconsistent

with some lower courts, such as the Arizona Supreme Court, rejecting application of the *New Mexico* test to the Indian reserved rights context, but looking to it for guidance. Other courts, such as the Ninth Circuit, have stated that they would apply the test, but did so in a generous fashion given the Indian law canons of construction, while the Wyoming Supreme Court applied *New Mexico* to limit strictly the purposes for which water was reserved.⁹⁹

A. Ninth Circuit Precedent

In litigation involving the Confederated Tribes of the Colville Indian Reservation, the Ninth Circuit found reserved rights to water for both agricultural and fisheries purposes.¹⁰⁰ The court stated:

We apply the *New Mexico* test here. The specific purposes of an Indian reservation, however, were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.¹⁰¹

After concluding that the reservation, like most in the West, had been set aside for agricultural purposes, the court supplemented its award of water under the PIA standard with water for instream flows to support tribal fisheries, due to the tribe's demonstrated traditional reliance on fisheries resources.¹⁰²

with Supreme Court precedent and detrimental to atmosphere in which Indian water rights settlements have flourished).

99. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.03[4]–[5][a], at 1181–85 (citing cases); see also WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 379–84 (5th ed. 2009). Although Judge Canby's work is part of the nutshell series, it has received glowing reviews in earlier editions that remain applicable. See, e.g., Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, *supra* note 1.

100. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47–49 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). The Executive Order creating the reservation provided: "It is hereby ordered that the country . . . bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon." Executive Order of July 2, 1872, *reprinted in* 1 Kappler, *Indian Affairs and Treaties*, 916 (2d ed. 1904).

101. *Colville Confederated Tribes*, 647 F.2d at 47 (citations omitted).

102. *Id.* at 48. The court also stated that "Congress envisioned agricultural pursuits as only a first step in the 'civilizing' process" and that "[t]his vision of progress implies a flexibility of purpose." *Id.* at 47 n.9 (citing 11 Cong. Rec. 905 (1881)). For a state court following a similar approach, see *State Department of Ecology v. Yakima Reservation Irrigation District*, 850 P.2d 1306 (Wash. 1993) (en banc):

A right to water may be reserved for any primary purpose of the reservation and there may be more than one such purpose.

. . . .

The "controlling" purpose of the treaty was to "make possible the permanent settlement of the Yakima Indians and their transformation into an agricultural people." . . . All of the parties to this litigation agree that the Yakima Indians are entitled to water for irrigation purposes and, at least at one time, were entitled to water for the preservation of fishing rights. The disagreement here is the extent of the treaty rights remaining.

Id. at 1316–17 (citations omitted).

Application of the narrow *New Mexico* standard for non-Indian federal reservations seems wrong.¹⁰³ While it may be appropriate to limit implied reserved water rights when construing federal actions establishing federal reservations, the instruments creating Indian reservations are governed by canons of construction that require ambiguities to be interpreted in favor of the Indians. Moreover, the Indian tribes were preexisting owners of the lands reserved for their permanent use and occupancy. As such, the notion that they reserved all rights except those explicitly ceded to the United States argues for a broad interpretation of Indian reserved rights as opposed to non-Indian federal reserved rights.¹⁰⁴

Similarly, in *United States v. Adair*, the Ninth Circuit considered claims by the United States and the Klamath Tribes to water for instream flows and lake levels to protect treaty rights to fish, wildlife, and plants.¹⁰⁵ The court applied the *Winans* rationale in evaluating the Klamath Tribe's water rights: "[T]he 1864 Treaty [with the Klamaths] is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation." Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights.¹⁰⁶

The Klamath Tribes also claimed reserved water to provide irrigation for individual Indians who had received allotments of tribal land. The court stated "*New Mexico* and *Cappaert*, while not directly applicable to *Winters* doctrine rights on Indian reservations . . . establish several useful guidelines."¹⁰⁷ The court explained, "[w]hile the purpose for which the federal government reserves other types of lands may be strictly construed . . . the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained."¹⁰⁸ Other lower courts have taken different, and inconsistent approaches to evaluating the purposes of Indian reservations.

B. Inconsistency Among State Courts

The decisions of the Arizona Supreme Court and the Wyoming Supreme Court present an interesting contrast to the Ninth Circuit's approach. In the general stream adjudication of the Gila River, the Arizona Supreme Court endorsed a "homeland" approach that has superficial appeal in its interpretive

103. See *supra* text accompanying note 99.

104. See *supra* discussion at notes 34–37.

105. 723 F.2d 1394, 1397 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

106. *Id.* at 1414. (citing *Washington v. Wash. State Commercial Fishing Vessel Ass'n*, 443 U.S. 658, 678–81 (1979)).

107. *Id.* at 1408 (citations omitted).

108. *Id.* at 1408 n.13 (quoting WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 245–46 (1981)).

analysis that looks to the general purpose behind the treaty.¹⁰⁹ The court concluded that the essential purpose of Indian reservations is to provide Indian tribes with a permanent home and abiding place that is a “livable” environment, but expressed concern that awarding “too much water” under the PIA analysis to tribes would be inconsistent with the “minimal need” approach it borrowed from the non-Indian federal reserved water cases.¹¹⁰ The answer to this, of course, is that once a federal reserved water right is recognized under a PIA or any other consumptive use standard, the water may be marketed to other users or used for other purposes by the tribe.¹¹¹ Relegating the PIA measure to a matter merely for consideration as part of a total award focused on “minimal need” seems to invite trial courts to balance Indian reserved rights against non-Indian uses to avoid adverse effects on state water rights—an approach rejected by the U.S. Supreme Court in *Cappaert*.¹¹² Leading commentators also share pessimism regarding the fairness of the Arizona approach, but it remains to be seen whether it will ever be implemented.¹¹³

On the other hand, the Wyoming Supreme Court, in the *Big Horn* case, adhered strictly to the PIA standard and rejected claims for other uses such as

109. *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 74, 77–79 (Ariz. 2001) (en banc).

110. *Id.* at 78 (“Another concern with PIA is that it forces tribes to pretend to be farmers in an era when ‘large agricultural projects . . . are risky, marginal enterprises.’”). It is doubtful that a tribe would undertake an agricultural operation if it would not at least break even financially (as required to demonstrate PIA), thus obviating the Arizona Supreme Court’s concern that a tribe would somehow be “forced” into an uneconomic activity, or to “pretend to be farmers.”

111. The only relevant U.S. Supreme Court decision permitted a change in use of agricultural water to other uses. *Arizona v. California*, 439 U.S. 419, 422 (1979) (approving agreement quantifying rights and recognizing potential for non-agricultural uses); see also Rifkind Report, *supra* note 55, at 265–66; CANBY, *supra* note 99, at 481; cf. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 835 P.2d 273, 279 (Wyo. 1992) (change in use not permitted).

112. The Arizona Supreme Court stated:

The PIA standard also potentially frustrates the requirement that federally reserved water rights be tailored to minimal need. Rather than focusing on what is necessary to fulfill a reservation’s overall design, PIA awards what may be an overabundance of water by including every irrigable acre of land in the equation.

....

The court’s function is to determine the amount of water necessary to effectuate this [homeland] purpose, tailored to the reservation’s minimal need. We believe that such a minimalist approach demonstrates appropriate sensitivity and consideration of existing users’ water rights, and at the same time provides a realistic basis for measuring tribal entitlements.

Gila River, 35 P.3d at 79, 81. See *supra* text accompanying note 69 for the relevant discussion of *Cappaert*.

113. CANBY, *supra* note 99, at 480 (“The fact that [the Arizona Supreme Court’s] formula is likely to lead to a lower award to the tribes is suggested by the fact that they and the United States urged adherence to the standard of practicably irrigable acreage.”); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.03[5][b], at 1187 (“Although the Arizona court’s approach avoids the problems inherent in PIA, its focus on minimal needs may ultimately leave some tribes with less water than the imperfect PIA standard.”). In 2004, the claims of several Arizona tribes were settled. Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478 (2004) (*Gila River*, Tohono O’odham, San Carlos).

instream flows for fisheries or mineral and industrial development.¹¹⁴ However, the court's approach is plainly incorrect in that it ignores the Indian law canons of construction and thus narrowly construes the purposes of a reservation.¹¹⁵ While the court did find that other uses such as municipal, domestic and commercial uses were subsumed within the agricultural right,¹¹⁶ the court later compounded its error in narrowly construing the treaty by refusing to permit the tribe to change the use of a portion of its agricultural water to instream flows to enhance fisheries habitat.¹¹⁷

III

INDIAN WATER RIGHTS SETTLEMENTS

Despite the hundreds of treaties establishing, enlarging, and diminishing Indian land reservations, which rarely mention water, Congress as a general matter has said even less than the Supreme Court on the subject of Indian reserved water rights. The Dawes Act of 1887 provides the Secretary of the Interior with authority to make an equitable distribution of water for irrigation purposes to allottees on reservations.¹¹⁸ The McCarran Amendment of 1952 says nothing explicitly about federal or Indian reserved water rights. However, Congress has enacted twenty-three modern Indian water rights settlement statutes, ratifying federal-state-tribal agreements.

Although there was little development of water resources for tribes in the aftermath of the Supreme Court's landmark decision in *Winters v. United States*,¹¹⁹ an increase in litigation involving both the McCarran Amendment and potential threats to extant non-Indian uses led to the settlement of a number of Indian water rights controversies in the late twentieth and early twenty-first centuries. Since 1978, Congress has approved twenty-three Indian water rights settlements;¹²⁰ two other agreements were not subject to congressional

114. See, e.g., *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 98–99 (Wyo. 1988) (applying primary purpose test strictly), *aff'd by an equally divided Court*, *Wyoming v. United States*, 492 U.S. 406 (1989).

115. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.03[4], at 1183.

116. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 99 (Wyo. 1988).

117. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 835 P.2d 273 (Wyo. 1992). There was no single opinion explaining the court's rationale.

118. See *supra* text accompanying note 50.

119. See 207 U.S. 564 (1908); see also NAT'L WATER COMM'N, *supra* note 40; Anderson, *supra* note 40.

120. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19, at 1212 n.327. In addition to the settlements cited in COHEN, Congress in 2009 approved the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement and a settlement of the Navajo Nation's rights to the San Juan River Basin in New Mexico. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 10301–704, 123 Stat. 991, 1367–405 (Navajo Nation); §§ 10801–09, 123 Stat. at 1405–14 (Shoshone-Paiute Tribes). Legislation introduced in the first session of the 111th Congress would settle claims of the White Mountain Apache Tribe,

ratification.¹²¹ In addition, there are approximately twenty-five tribes currently involved in eighteen settlement negotiations,¹²² all of which are the result of litigation.

Given the paucity of both Supreme Court precedent and general congressional legislation on the issues, the question arises as to the precedential value of these settlements. The first modern settlement, Ak Chin, contained no disclaimer at all.¹²³ The Fort McDowell Indian Community Water Rights Settlement Act of 1990 has a simple disclaimer apparently designed to protect similarly situated tribes from any unintended legal effects: “Nothing in the Agreement or this title shall be construed in any way to quantify or otherwise adversely affect the land and water rights, claims or entitlements to water of any Arizona Indian tribe, band or community, other than the Community.”¹²⁴

On the other hand, most of the recent settlements contain disclaimers purporting to limit any precedential effect. For example, the Soboba Band of Luiseño Indians Settlement Act provides:

(d) PRECEDENT.—Nothing in this Act establishes any standard for the quantification or litigation of Federal reserved water rights or any other Indian water claims of any other Indian tribes in any other judicial or administrative proceeding.

(e) OTHER INDIAN TRIBES.—Nothing in the Settlement Agreement or this Act shall be construed in any way to quantify or otherwise

S. 313; Crow Tribe, S. 375; Taos Pueblo, S. 965; and Pueblos of Nambe, Pojoaque, San Ildefonso & Tesuque, S. 1105. See Appendix for a state-by-state list of settlements.

121. These are the Fort Peck Compact and a settlement at Warm Springs. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.05[2], at 1212 n.327. The Warm Springs agreement was subsequently incorporated into a state court decree. *In re The Determination of Relative Rights to the Use of the Waters of the Deschutes River and Its Tributaries*, No. 99CCV0380ST (Cir. Ct. Deschutes Co. Jan. 7, 2003). Litigation over groundwater on the Lummi Indian Reservation in Washington was settled with a consent decree entered with the court. *United States ex rel. Lummi Indian Nation v. Washington*, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007) (groundwater on Lummi Indian reservation), *aff’d*, 328 Fed. App’x. 462 (9th Cir. 2009) (unpublished decision approving consent decree).

122. The negotiation figure is derived from the list of “Federal Water Rights Negotiation Teams for Indian Water Rights Settlements” (Sept. 21, 2009) kept by the Secretary of the Interior’s Indian Water Rights Office. The tribes involved in negotiations are Pueblos of Nambe, Pojoaque, San Ildefonso, Tesuque, Jemez, Zia, Acoma, Laguna, Taos, Santa Ana & Zuni, Blackfeet Tribe, Crow Tribe, Confederated Salish & Kootenai Tribes, Gros Ventre & Assiniboine Tribes, Hopi Tribe, San Juan Southern Paiute Tribe, Navajo Nation, Lummi Nation, Soboba Band of Luiseno Indians, Tule River Indian Tribe, San Carlos Apache Tribe, Walker River Paiute Indian Tribe, Bridgeport Indian Colony, Yerington Paiute Tribe, and White Mountain Apache Tribe. See Thorson, *Dividing Western Waters*, *supra* note 83, at 449–58. A useful table setting forth the status of all western state general stream adjudications can be found in Thorson, *Dividing Western Waters, Part II*, *supra* note 83, at 439–42.

123. See Act of July 28, 1978, Pub. L. No. 95-328, 92 Stat. 409 (1978) (settling water rights claims of the Ak-Chin Indian community against the United States). The Jicarilla Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-441, 106 Stat. 2237 (1992), also does not contain a disclaimer.

124. Pub. L. No. 101-628, § 413, 104 Stat. 4469, 4480, 4492 (1990).

adversely affect the water rights, claims, or entitlements to water of any Indian tribe, band, or community, other than the Soboba Tribe.¹²⁵

In similar fashion, the Snake River Water Rights Act of 2004 provides, “Nothing in this Act—(A) establishes any standard for the quantification of Federal reserved water rights or any other Indian water claims of any other Indian tribes in any other judicial or administrative proceeding”¹²⁶

Likewise, the recent act codifying the San Juan River Basin settlement between the Navajo Nation, New Mexico, and the United States provides:

Except as provided in paragraph (2), nothing in the Agreement, the Contract, or this section quantifies or adversely affects the land and water rights, or claims or entitlements to water, of any Indian tribe or community other than the rights, claims, or entitlements of the Nation in, to, and from the San Juan River Basin in the State of New Mexico.¹²⁷

Parallel to the disclaimers are Congress’s findings in the various settlements. In the Shoshone-Paiute Settlement, Congress found that “quantifying rights to water and development of facilities needed to use tribal water supplies is essential to the development of viable Indian reservation economies and the establishment of a permanent reservation homeland.”¹²⁸ The Yavapai-Prescott Indian Tribe Water Rights Settlement contains a finding that Congress supports the settlement to further the “goals of Federal Indian policy and to fulfill the trust responsibility of the United States to the Tribe . . . so as to enable the Tribe to utilize fully its water entitlements in developing a diverse, efficient reservation economy.”¹²⁹ The Truckee-Carson-Pyramid Lake Water Rights Settlement provides authority for acquisition of water for fisheries and habitat protection¹³⁰ despite the adverse ruling to the United States and Pyramid Lake Paiute Tribe in *Nevada v. United States*.¹³¹ Indeed, even in situations in which all the details of a settlement have not yet been reached, Congress has also acted to encourage a final agreement.¹³²

125. Pub. L. No. 110-297, § 9, 122 Stat. 2965, 2981–83 (2008).

126. Pub. L. No. 108-447, tit. X, § 11, 118 Stat. 2809, 3431, 3440 (2004).

127. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 10701(f)(1), 123 Stat. 991, 1401; *see also* San Juan River Basin in New Mexico: Navajo Nation Water Rights Settlement Agreement (Apr. 19, 2005), *available at* <http://www.ose.state.nm.us/water-info/NavajoSettlement/NavajoSettlement.pdf>.

128. Omnibus Public Land Management Act § 10801(2). The Act contains a disclaimer of application to other situations similar to that in the Soboba Settlement quoted above. *See id.* § 10809(b).

129. Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. No. 103-434, § 102(a)(9), 108 Stat. 4526, 4527.

130. Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, § 201, 104 Stat. 3289, 3294 (1990).

131. 463 U.S. 110 (1983); *see supra* text accompanying note 80.

132. Congress has been flexible in approving settlements of various types. In the San Luis Rey Indian Water Rights Settlement Act, for example, Congress provided for a settlement of a long-running piece of litigation even though the parties had only reached an agreement in

As much as, if not more than, in any other area, negotiations of Indian water rights are conducted “from the ground up,”¹³³ meaning that all parties to litigation and negotiations quite naturally look to what has been done before, regardless of disclaimer language in prior legislated settlements. This is exactly how it should be. As demonstrated above, there is not a great deal of settled law from the Supreme Court surrounding many of the important issues that arise in Indian water rights litigation. There is, however, a good deal of guidance, albeit not completely consistent, from the lower courts.¹³⁴ When parties leave it to the courts to decide these critical issues, they take a tremendous risk, which sometimes results in even more ambiguity, as with the Arizona Supreme Court’s 2001 ruling in *Gila River*.¹³⁵ Thus, understanding federal Indian law in the water rights context requires a thorough comprehension of the few Supreme Court cases dealing with the merits, solid trends in lower court decisions,¹³⁶ and

principle. Pub. L. No. 100-675, § 103(a)(1),(6), 102 Stat. 4000, 4000-01 (1988) (affecting “the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians”). Although the agreement was not yet final, the congressional action was a key demonstration of support and encouragement toward the final settlement.

133. See Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 651 (2006). Frickey states:

If, as legal realism suggests, the law that counts is the law in action, and the law in action should be measured by a bottom-up consequential calculus rather than some top-down consistency with abstract doctrine, the legal community cannot hope to understand, much less appreciate, federal Indian law without a much better sense of grounded reality.

Id.

134. The chief difference relates to the inquiry into the determination of the purposes of a reservation. However, even that difference is relatively narrow since it arises from two state supreme courts—Arizona and Wyoming—and the Arizona approach has never been applied to a concrete fact situation. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 25, § 19.03[4], at 1183 (“The approach of the majority of courts is more consistent with the Indian law canons of construction that call for the documents creating an Indian reservation to be construed liberally in favor of the Indians.”).

135. See *supra* text accompanying notes 113–117.

136. In the category of solid trends, I place recognition of tribal instream flows for protection of fisheries habitat. Thus, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), the court supplemented its award of water under the PIA standard with water for instream flows to support tribal fisheries. The Ninth Circuit reached the same outcome in *United States v. Adair*, 723 F.2d 1394 (1984). In the same vein, the Washington Supreme Court recognized that tribes with treaty language or history reflecting a reservation of aboriginal rights to fish also have water rights for instream flow habitat protection. State Dep’t of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1317 (Wash. 1993) (en banc) (“Water to fulfill the fishing rights under the treaty may be found to have been reserved, if fishing was a primary purpose of the reservation.”); see also Joint Bd. of Control of Flathead Irrigation Dist. v. United States, 832 F.2d 1127, 1132 (9th Cir. 1987); *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *aff’d in part, rev’d in part*, 736 F.2d 1358 (9th Cir. 1984) (water reserved to maintain favorable temperature conditions to support fishery); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985) (court acted appropriately in ordering release of water to protect habitat for treaty fishery); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 764–66 (Mont. 1985) (tribal reserved rights may include water for fisheries as well as agriculture and other purposes). On the other hand, a state district court in Idaho rejected Indian reserved rights for instream flows. *In re*

most importantly, the past congressional approaches. While federal Administrations of both political parties have complained about the cost of Indian water rights settlements, many of the intractable problems faced in the arid West today are the result of a more than a century of federal neglect of tribal water needs and a corresponding encouragement of non-Indian development.¹³⁷ As a consequence, the tribes and other parties to litigation look to the United States to help settle conflicts that, in the view of the non-federal parties, the federal government did the most to create in the first instance. The bulk of the harm from the federal government's action (and inaction) most often was inflicted on the tribes, while non-Indian irrigation projects and state law appropriators have only recently begun to feel pressure as a result of the assertion of federal reserved rights, climate change, drought, and other environmental laws such as the Endangered Species Act.

At least on paper, the federal government's participation in Indian water settlements negotiations is guided by formal criteria and procedures for Indian water settlements that were established in 1991.¹³⁸ Non-federal parties generally regard these as unhelpful tools in promoting settlements, except to the extent they express a general federal policy promoting settlement of Indian water right claims. Like formal scholarly approaches to Indian water rights that foundationalists or critics might advocate, the guidelines provide a jumping off point for the exploration of settlement alternatives among motivated parties. As noted elsewhere, the criteria do not appear to have played any substantive role in the comprehensive settlement of the Snake River Basin Adjudication,¹³⁹ but in testimony in 2008 on the Navajo-San Juan Settlement, the Bush Administration relied heavily on the criteria in its formal opposition to the Settlement: "The Administration did not participate in the drafting of the water rights settlement embodied in S. 1171, and does not support a water settlement under these circumstances. For these reasons, the Administration opposes the cost and cannot support the legislation as written."¹⁴⁰ Lawmakers reintroduced the Settlement in the 111th Congress and it became law early in the Obama

SRBA, Case No. 39576, Consolidated Subcase No. 03-10022 (Idaho Dist. Ct., Nov. 10, 1999). Congress mooted the controversy by approving an Indian water rights settlement, the Snake River Basin Adjudication, which provided for instream flow protection. Snake River Water Rights Act of 2004, Pub. L. No. 108-447, tit. X, § 11, 118 Stat. 2809, 3431.

137. See NAT'L WATER COMM'N, *supra* note 40; Anderson, *supra* note 40.

138. Criteria and Procedures for the Participation of the Federal Government in the Negotiations for the Settlement of Indian Water Rights, 55 Fed. Reg. 9223 (March 12, 1990).

139. See Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 TULSA L. REV. 23, 33-35 (2006).

140. S. REP. NO. 110-401, 2d Sess., at 35 (2008). The Bush Administration's statement at least gave lip-service to flexibility, but the position appeared to be primarily cost driven. *Id.* at 37 ("The Administration believes that the policy guidance found in the Criteria and Procedures . . . provides a flexible framework in which we can evaluate the merits of this bill. . . . As we have testified previously, the Criteria is [sic] a tool that allows the Administration to evaluate each settlement in its unique context while also establishing a process that provides guidance upon which proponents of settlements can rely.").

Administration.¹⁴¹ It is not clear whether the new Administration will rely on the guidelines as a ready source of opposition to pending settlements on fiscal grounds, but preliminary indications in testimony regarding the proposed Aamodt Litigation Settlement Act are promising.¹⁴² The Aamodt Settlement Act, along with two other Indian water rights settlements, passed the House of Representatives with apparent Administration support as H.R. 3342 on Jan. 21, 2010.¹⁴³ In a letter to Senate Indian Affairs Committee Chairman Byron Dorgan, Commissioner of Reclamation Michael Connor stated that the Obama Administration “would like to work with Congress to identify and implement clear criteria for going forward with future settlements on issues including cost-sharing and eligible costs.”¹⁴⁴ The willingness of the Administration to discuss the core elements of the Criteria and Procedures with Congress (and presumably the tribes and other constituents) is a welcome sign of flexibility and indicates great potential for resolution of other difficult water rights disputes. It is certainly a major improvement over the Bush Administration’s practice of sometimes sitting on the sidelines with no official input, and then simply appearing at Committee hearings to voice last-minute opposition as dictated by the Office of Management and Budget.

Another encouraging development is the establishment of the Reclamation Water Settlement Fund¹⁴⁵ to fund Indian water rights settlements without either decimating the budget of the Bureau of Indian Affairs or completely reordering the Bureau of Reclamation’s operations. While the Fund is not scheduled to provide a funding stream until 2020, its creation is a significant step in the right direction, and the current Administration is reliably rumored to favor advancing the timing of its availability. Access to this fund is a response to years of efforts by Indian and non-Indian advocates to encourage increased federal support for Indian water settlements.¹⁴⁶

The momentum in favor of settlements owes a great deal to federal executive branch policy, congressional action, and the realization that lengthy

141. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 10701, 123 Stat. 991, 1396.

142. See S. REP. NO. 111-115, 2d Sess., at 12 (2010) (statement of Michal Connor, Commissioner, Bureau of Reclamation, regarding S. 1105). This proposed settlement involves the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque in New Mexico.

143. H.R. 3342, 111th Cong. (as passed by House, Jan. 21, 2010); see H. Rep. No. 111-399, 2d Sess. (2010) (reporting the Taos, Aamodt, and White Mountain Apache Settlements for passage by the House). For committee reports on the Aamodt settlement, see H. Rep. 111-390, 2d Sess., at 28–29 (2010), and S. Rep. 111-115, 2d Sess. (2010); for the Taos reports, see S. Rep. 111-117, 2d Sess. (2010), and H. Rep. 111-395, 2d Sess. (2010); and for the White Mountain Apache Tribe Settlement, see S. Rep. 111-119, 2d Sess. (2010), and H. Rep. 111-391, 2d Sess. (2010).

144. S. Rep. 111-115, 2d Sess., at 15 (2010).

145. Omnibus Public Land Management Act § 10501.

146. These efforts have been led by the Native American Rights Fund and the Western States Water Council. See Western States Water Council – Celebrating Our 40th Anniversary, at 21–22 (2005), available at <http://www.westgov.org/wswc/ca-westernstates.pdf>.

state court litigation under the McCarran Amendment is not a panacea to water rights disputes.¹⁴⁷ Perhaps more important is an understanding that the history of Indian water settlements is generally a successful one. To be sure, there are cases where full funding has taken longer than expected, and Congress may need to occasionally revisit some of the settlements. That should not, however, hinder the use of settlements in the future. The problems of water use and supply are ongoing, and the need for innovative solutions will only increase as climate change alters the hydrograph of the arid West. Many scholars, in documenting the specifics of Indian water settlements, have suggested approaches for the complex and multi-disciplinary effort to find such solutions.¹⁴⁸

CONCLUSION

For years, federal courts, scholars, tribes, and the federal government have interpreted the “purposes” of Indian reservations in a generous manner in the water rights context.¹⁴⁹ This broad interpretive approach is what Professor Frickey calls “purposivism, which implements actual or presumed public-policy purposes attributed to a rational, public-spirited legislature.”¹⁵⁰

147. The State of Washington’s so-called *Acquavella* litigation is ongoing in 2010—thirty-four years after its commencement in 1975—and is only an adjudication of surface water; ground water may be next. See *Dep’t of Ecology v. Acquavella*, 935 P.2d 595 (Wash. 1997). The last order entered by the trial court was a default judgment against a number of parties who were named as defendants and served, but never appeared in the action. *Dep’t of Ecology v. Acquavella*, Order of Default and Entry of Default Judgment (Yakima County Super. Court No. 77-2-01484-5) (Dec. 10, 2009). Some might consider Idaho’s Snake River Basin Adjudication fast-track litigation since the Nez Perce tribal claims took only twenty years of litigation before a settlement was reached. For Idaho Law Review’s collection of articles regarding the Snake River Basin Adjudication and the Nez Perce Water Rights Settlement, see generally 42 IDAHO L. REV. 547–793 (2006).

148. See *Nez Perce Water Rights Settlement Articles*, *supra* note 147; JOHN E. THORSON ET AL., TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS (2006); BONNIE G. COLBY ET AL., NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST (2005); DANIEL W. MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA (2002); Reid Peyton Chambers & John E. Echohawk, *Implementing the Winters Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic Development Without Injuring Non-Indian Water Users?*, 27 GONZ. L. REV. 447 (1991–92); *Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in the Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223 (Mar. 12, 1990); Barbara A. Cosens, *The 1997 Water Rights Settlement Between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy’s Reservation: The Role of Community and of the Trustee*, 16 UCLA J. ENVTL. L. & POL’Y 255, 257 (1998). All of the Montana Tribal-State Compacts are collected in a publication of the Montana Reserved Water Rights Compact Commission, MONTANA WATER COMPACTS (2008).

149. The Supreme Court recently reiterated the principle that when interpreting treaties courts must “look beyond the written words to the larger context that frames the Treaty, including ‘the history of the treaty, the negotiations, and the practical construction adopted by the parties.’” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943)).

150. Frickey, *Marshalling Past and Present*, *supra* note 43, at 406–07 n.112.

Congressional action ratifying Indian water settlements is consistent with this approach. Such action reflects the reality that while litigation may be necessary to frame issues and provide a framework within which settlement discussions may occur, the negotiation process achieves better outcomes. As Professor Frickey notes:

In the last analysis, negotiation seems to promise to bring Indians into Indian law far better than does adjudication. Negotiation turns not on incoherent or misunderstood legal doctrines, but on practical realities. Negotiation gives people . . . a piece of the legal action and a chance to own, if only partially, both the resolution of particular disputes and a greater sense of the structure and efficacy of the long-term relationships between the parties.¹⁵¹

Anyone involved in the litigation, settlement, or study of Indian water rights can see the wisdom in Professor Frickey's words. Critical to achieving success in the settlement of these controversies is a practical approach premised on the secure foundation of the reserved rights doctrine, coupled with an eye on the history of each situation and the helpful participation of the United States. Federal participation must not only include zealous legal representation of tribal interests as trustee in litigation, but also a willingness to assist resolution of discrete controversies with creative approaches and financial support. Practical reasoning in the Indian water rights context requires general acknowledgement of the validity of Indian reserved rights claims. The United States should support settlements that tribal and non-federal parties achieve as a mechanism to give meaning to treaty promises unfulfilled for too many years, and to avoid unproductive and contentious litigation.

151. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1783 (1996) (citations omitted).

APPENDIX: INDIAN WATER RIGHTS SETTLEMENTS*

Arizona

Arizona Water Settlements Act (Gila River, Tohono O'odham, San Carlos), Pub. L. No. 108-451, 118 Stat. 3478 (2004).

Zuni Indian Tribe Water Rights Settlement Act of 2003 (Zuni Heaven), Pub. L. No. 108-34, 117 Stat. 782.

Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. 103-434, tit. I, 108 Stat. 4526, amended by Pub. L. No. 104-91, § 201, 110 Stat. 7 (1996).

San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, tit. XXXVII, 106 Stat. 4600, 4740, amended by Pub. L. No. 103-435, § 13, 108 Stat. 4566, 4572 (1994), amended by Pub. L. No. 104-91, § 202, 110 Stat. 7, 14 (1996), amended by Pub. L. No. 104-261, § 3, 100 Stat. 3176, 3176 (1996), amended by Pub. L. No. 105-18, § 5003, 111 Stat. 158, 181 (1997).

Southern Arizona Water Rights Settlement Act of 1982 (Tohono O'odham), Pub. L. No. 97-293, tit. III, 96 Stat. 1261, 1274, amended by Southern Arizona Water Rights Settlement Technical Amendments Act of 1992, Pub. L. No. 102-497, § 8, 106 Stat. 3255, 3256, amended by Arizona Water Rights Settlement Act, Pub. L. No. 108-451, 118 Stat. 3478 (2004).

Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549, amended by Technical Amendments to Various Indian Laws Act of 1991, Pub. L. No. 102-238, § 7, 105 Stat. 1908, 1910.

Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, tit. IV, 104 Stat. 4469, 4480.

Act of July 28, 1978 (Ak-Chin), Pub. L. No. 95-328, 92 Stat. 409, amended by Pub. L. No. 98-530, 98 Stat. 2698 (1984), amended by Ak-Chin Water Use Amendments Act of 1992, Pub. L. No. 102-497, § 10, 106 Stat. 3255, 3258, amended by Ak-Chin Water Use Amendments Act of 2000, Pub. L. No. 106-285, 114 Stat. 878.

California

San Luis Rey Indian Water Rights Settlement Act (La Jolla, Rincon, San Pasquale, Pauma, and Pala Bands of Mission Indians), Pub. L. No. 100-675, tit. I, 102 Stat. 4000 (1988), amended by Pub. L. No. 102-154, 105 Stat. 990 (1991), amended by Pub. L. No. 105-256, § 11, 112 Stat. 1896, 1899 (1998), amended by Pub. L. 106-377, § 211, 114 Stat. 1441 (2000).

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Soboba Band of Luiseño Indians Settlement Act, Pub. L. No. 110-297, 122 Stat. 2975 (2008).

Colorado

Colorado Ute Indian Water Rights Settlement Act of 1988 (Southern Ute and Ute Mountain Ute), Pub. L. No. 100-585, 102 Stat. 2973, amended by Pub. L. No. 104-46, tit. V, § 507, 109 Stat. 402, 419 (1995), amended by Pub. L. No. 106-554, tit. III, 114 Stat. 2763 (2000).

Florida

Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, § 7, 101 Stat. 1556, 1560 (1987).

Idaho

Snake River Water Rights Act of 2004 (Nez Perce Tribe), Pub. L. No. 108-447, tit. X, 118 Stat. 2809, 3431.

Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, 104 Stat. 3059.

Montana

Chippewa Cree Tribe of The Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, 113 Stat. 1778.

Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, 106 Stat. 1186, amended by Pub. L. No. 103-263, § 1(a), 108 Stat. 707, 707 (1992).

Fort Peck-Montana Compact (Assiniboine and Sioux Tribes of the Fort Peck Reservation), Mont. Code Ann. § 85-20-201 (1985).

Nevada

Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, tit. II, 104 Stat. 3289, 3294 (1990).

Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, tit. I, 104 Stat. 3289, 3289, amended by Native American Technical Corrections Act of 2006, Pub. L. No. 109-221, § 104, 120 Stat. 336.

Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act, Pub. L. 111-11, tit. X, §§ 10801-09, 123 Stat. 1405, 1405-14 (2009).

New Mexico

Jicarilla Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-441,

106 Stat. 2237 (1992), amended by Pub. L. No. 104-261, § 2, 110 Stat. 3176, 3176 (1996), as amended, Pub. L. No. 105-256, § 10, 112 Stat. 1896 (1998).

Northwestern New Mexico Rural Water Projects Act (Navajo San Juan Settlement), Pub. L. 111-11, tit. X, §§ 10301-05, 123 Stat. 1367-71 (2009).

Oregon

Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement (1997), entered as consent decree in *In the Matter of the Determination of Relative Rights to the Use of the Waters of the Deschutes River and Its Tributaries*, No. 99CCV0380ST (Cir. Ct. Deschutes Co. Jan. 7, 2003).

Utah

Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Pub. L. No. 106-263, 114 Stat. 737 (2000).

Reclamation Projects Authorization and Adjustment Act of 1992 (Ute), Pub. L. No. 102-575, tit. V, 106 Stat. 4600, 4650.

Washington

United States ex rel. Lummi Indian Nation v. Washington, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007) (order approving consent decree governing groundwater on Lummi Indian reservation), *aff'd*, 328 Fed. App'x 462 (9th Cir. 2009) (unpublished decision).

Pending Settlements--111th Congress

Aamodt Litigation Settlement Act, S. 1105 (introduced May 20, 2009) (Pueblos of Nambe, Pojoaque San Ildefonso and Tesuque), Passed House of Representatives, H.R. 3342 (Jan. 20, 2010).

Crow Tribe Water Rights Settlement Act of 2009, S. 375 (introduced Feb. 4, 2009).

Taos Pueblo Indian Water Right Settlement Act, S. 965 (introduced May 4, 2009), Passed House of Representatives, H.R. 3254 (Jan. 20, 2010).

White Mountain Apache Tribe Water Rights Quantification Act of 2009, S. 313 (introduced Jan. 26, 2009), Passed House of Representatives, H.R. 1065 (Jan. 20, 2010).

INDIAN CANON ORIGINALISM

Indian treaties are “quasi-constitutional” documents.¹ So why not read them like constitutions? In fact, scholars of Indian law have urged federal judges to interpret Indian treaties “in the same manner as [they do] constitutional provisions.”² But no scholar has ever explained *how* the principles of constitutional interpretation would actually apply to an Indian treaty — and whether those principles might change in that new environment. This Note attempts to do just that.

In constitutional interpretation, there is a “long history” of debate over the appropriate role for the “original meaning” of the text.³ Originalists believe that the “discoverable meaning of the Constitution at the time of its initial adoption [should be] authoritative for purposes of constitutional interpretation in the present,”⁴ while nonoriginalists would also consider the document’s contemporary meaning, judicial precedent, morality, fundamental social values, civic interests, and so on.⁵ Surprisingly, however, this stormy dispute has yet to reach the shores of federal Indian law.

The most likely reason for the tranquility is that the federal courts long ago established a special method for interpreting Indian treaties: the Indian canon of construction,⁶ first announced by the Supreme Court in 1832.⁷ The Indian canon instructs judges to abandon the

¹ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408 (1993). Like the Constitution, Indian treaties are “fundamental, constitutive document[s]” that affirm the sovereignty of their signatory tribes. *Id.*; see also CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 104 (1987). And just as the U.S. Constitution “functions in part as a ‘treaty’ among formerly sovereign states that structures the relations of the national government,” an Indian treaty is understood to link a tribe to the United States as “two sets of ‘We the People’” under the same government framework. Frickey, *supra*, at 408–09. Finally, alongside the Constitution, treaties between the United States and Indian tribes are among the oldest binding laws regularly enforced in federal courts today — several even predate the federal government itself. See, e.g., Treaty with the Delaware Nation, U.S.-Delaware, Sept. 17, 1778, 7 Stat. 13. For a survey of Supreme Court citations to Indian treaties over the past two centuries, see Charles D. Bernholz, *American Indian Treaties and the Supreme Court: A Guide to Treaty Citations from Opinions of the United States Supreme Court*, 30 J. GOV’T INFO. 318 (2004).

² WILKINSON, *supra* note 1, at 104; see also Frickey, *supra* note 1, at 408–11.

³ Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599, 610 (2004).

⁴ *Id.* at 599.

⁵ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853–54 (1989).

⁶ See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02, at 119 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN’S HANDBOOK].

⁷ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

usual rules of statutory construction in Indian law matters.⁸ “The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.”⁹ Because judges applying the Indian canon interpret treaty language based on the *tribe’s* perspective, rather than that of “a reasonable speaker of English . . . at the time the . . . provision was adopted,”¹⁰ this fundamental principle of Indian law may have simply seemed incompatible with originalist methodology.

This Note is an attempt to rebut that assumption. It will demonstrate that, far from being incompatible with the Indian canon, originalist theory actually *justifies* it: a treaty should be read as the tribe would have understood it because this method reflects the most faithful application of the original meaning of the treaty text.¹¹ First, Part I presents background on the Indian canon. Next, Part II draws a framework for comparison between the Indian canon and originalist methodology by tracing the two dimensions across which Indian treaty interpretation takes place: the dimension of time and the dimension of culture. Part III then demonstrates that the Indian canon, just like originalism, traverses the temporal dimension of interpretation by assigning authoritative significance to the understanding of the treaty text at the time of its enactment. However, Part IV acknowledges that the Indian canon departs from originalist methodology in regard to the cultural dimension — the canon favors the tribe’s understanding of the treaty while originalism looks to the public meaning of the Constitution’s text. Nevertheless, this Part argues that the principles of originalist theory, as applied in the unique context of an Indian treaty, justify the Indian canon’s deviation from traditional originalist methodology. Finally, the Note concludes with the suggestion that recognizing “Indian canon

⁸ See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); see also Frickey, *supra* note 1, at 402 (explaining that the Indian canon instructs judges to “interpret[] words to denote something other than their ordinary meanings”).

⁹ *Worcester*, 31 U.S. (6 Pet.) at 582 (McLean, J., concurring). While this quotation comes from Justice McLean’s concurrence, rather than from the Chief Justice Marshall majority opinion that truly created the Indian canon, it is the language that has generally been quoted by subsequent cases. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 151 (2010).

¹⁰ Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001).

¹¹ This Note does not argue for a qualitatively different application of the Indian canon — it merely provides a firmer, originalist justification for it. In that sense, its argument is analogous to the one recently put forward by Professor Steven Calabresi and Julia Rickert, which argues, contra *United States v. Virginia*, 518 U.S. 515 (1996), that the original public meaning of the Fourteenth Amendment bans gender-based discrimination. See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

originalism” as a form of ordinary originalism would provide stronger theoretical footing for a revitalized Indian canon.

I. THE INDIAN CANON OF CONSTRUCTION

Chief Justice Marshall announced the Indian canon of construction in his landmark 1832 opinion in *Worcester v. Georgia*.¹² The case required the Court to interpret the Cherokee Nation’s treaties with the federal government, particularly the Treaty of Hopewell of 1785,¹³ in order to determine if the tribe had surrendered its inherent sovereignty and power of self-government to the United States.¹⁴ In his majority opinion, Chief Justice Marshall emphasized that the Indian signatories could neither read nor write English, and that the English-language treaty had been interpreted to them.¹⁵ Because “the Cherokee chiefs were not very critical judges of the [treaty] language,”¹⁶ the Chief Justice chose to read the text as “this unlettered people”¹⁷ would have understood it.

For instance, the Treaty of Hopewell defined the boundaries of Cherokee territory, describing the land as “hunting ground” that had been “allotted” to the tribe.¹⁸ This wording might have suggested that all the Cherokee land actually belonged to the United States, and that the federal government had simply allowed the tribe to use some of it for hunting. But the Chief Justice rejected this construction. Although the word “allotted” carried special significance in American legal discourse, Marshall explained that the Cherokee “might not [have] underst[oo]d the term employed, as indicating that, instead of granting, they were receiving lands.”¹⁹ Therefore, he read the term from the tribe’s perspective, as merely establishing a “dividing line between the two nations.”²⁰ So too with the phrase “hunting grounds.” Marshall recounted that “[h]unting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other.”²¹ The Cherokee would have believed that reserving territory as “hunting grounds” implied full ownership of the land, and so Marshall read the text accordingly.

¹² 31 U.S. (6 Pet.) 515.

¹³ Treaty with the Cherokees, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18.

¹⁴ See Frickey, *supra* note 1, at 393–94, 399.

¹⁵ See *Worcester*, 31 U.S. (6 Pet.) at 551.

¹⁶ *Id.*

¹⁷ *Id.* at 582 (McLean, J., concurring).

¹⁸ *Id.* at 552 (majority opinion) (quoting Treaty with the Cherokees, *supra* note 13, art. IV) (internal quotation marks omitted).

¹⁹ *Id.* at 553.

²⁰ *Id.* at 552.

²¹ *Id.* at 553.

In a later section, the Treaty of Hopewell gave American officials the right to “manage[] all [Cherokee] affairs, as they think proper.”²² But Chief Justice Marshall again cabined the authority conferred on the United States through this language, emphasizing that the provision was principally addressed to trade.²³ He believed that the Cherokee could not “have supposed themselves . . . to have divested themselves of the right of self-government on subjects not connected with trade” and so he limited the scope of the federal government’s power to regulating commerce with the tribe.²⁴ The Chief Justice also noted that the treaty addressed the Cherokee as a sovereign nation with an independent political existence, and that this “spirit” weighed against abrogating the tribe’s autonomy unless such an intent was “openly avowed.”²⁵

Chief Justice Marshall’s method of Indian treaty interpretation has since developed into a fundamental principle of federal Indian law. Through the rest of the nineteenth century, the Supreme Court applied the canon to Indian treaties,²⁶ and in the early 1900s, the Court extended the rule to statutes affecting Indians.²⁷ While the Court did not explain — or even acknowledge — this expansion of the canon’s applicability, it was likely a response to the federal government’s decision in 1871 to begin using the legislative process, rather than the treaty-making process, to make Indian policy.²⁸ Federal courts continue to use the Indian canon today,²⁹ although some commentators worry that it has “degraded” from a strong preference in favor of the tribe into “a weak end-of-the-game tiebreaker.”³⁰ Indeed, the Supreme Court recently suggested that the Indian canon is not a “mandatory rule[,]” but is instead merely a “guide[] that ‘need not be conclusive.’”³¹ Although the canon remains settled law, the Court sometimes seems to “disregard[]” it.³²

²² Treaty with the Cherokees, *supra* note 13, art. IX.

²³ *Worcester*, 31 U.S. (6 Pet.) at 553–54.

²⁴ *Id.* at 554.

²⁵ *Id.*

²⁶ See, e.g., *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Choctaw Nation v. United States*, 119 U.S. 1, 27–28 (1886); *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866).

²⁷ See *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

²⁸ See *Conway v. United States*, 149 F. 261, 265–66 (C.C.D. Neb. 1907); see also ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW* 90–92 (2d ed. 2010) (describing the end of Indian treaty making).

²⁹ See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200 (1999); *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

³⁰ Frickey, *supra* note 1, at 423; see also *id.* at 418–423.

³¹ *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

³² *Montana v. United States*, 450 U.S. 544, 569 (1981) (Blackmun, J., dissenting in part).

Surprisingly, almost two hundred years after *Worcester*, the precise content of the Indian canon of construction remains unclear. Professor Felix Cohen's *Handbook of Indian Law* counts four "Indian law canons of construction."³³ Judges should: (1) interpret Indian treaties "as the Indians would have understood them," (2) construe them "liberally . . . in favor of the Indians," (3) resolve all ambiguities in the Indians' favor, and (4) preserve tribal property rights and sovereignty unless a contrary intent is clearly stated.³⁴ But Supreme Court cases very often conflate the first rule — that treaties should be read from the tribe's perspective — with the other three canons, switching from one to another without recognizing any principled distinction between them.³⁵

In practice, the apparent multiplicity of "Indian canons" is ultimately reducible to the single rule of construction, often emphasized by the Supreme Court, that Indian treaties should be interpreted from the perspective of the signatory tribe. Because the vast cultural differences between federal judges and the Indians of the treaty era make it difficult, if not impossible,³⁶ for judges to determine the tribe's understanding of the text, the latter three canons of construction serve as interpretive assumptions that help judges divine how the Indians would have read these documents. For instance, because the tribes presumably would have attempted to obtain the most favorable treaty terms possible, judges construe textual ambiguities liberally and in their favor in order to approximate their intent.³⁷ Similarly, tribal sovereignty and tribal land were central to the Indians' well-being,³⁸ and so judges presume that tribes would not have surrendered these assets without saying so explicitly as another way to deduce their understandings of the treaties.³⁹

³³ COHEN'S HANDBOOK, *supra* note 6, § 2.02(1), at 119–20.

³⁴ *Id.*

³⁵ See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938).

³⁶ See *Whitefoot v. United States*, 293 F.2d 658, 667 n.15 (Ct. Cl. 1961).

³⁷ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552 (1832) (construing a protection provision in an Indian treaty in favor of the tribe on the ground that "[t]he Indians perceived in this protection only what was beneficial to themselves"). The fact that the Indians might not have expected that the treaty would be interpreted in their favor is not inconsistent with the assumption that they would have tried to obtain the most favorable terms possible for themselves. In other words, the tribe's understanding of the *meaning* of the treaty provisions can be distinguished from how they might have expected that an unsympathetic American court would *apply* those provisions. Cf. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–97 (2007) (distinguishing between the "original meaning" and the "original expected application" of a legal text).

³⁸ See, e.g., Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth" — How Long a Time Is That?*, 63 CALIF. L. REV. 601, 604–06 (1975).

³⁹ *Worcester*, 31 U.S. (6 Pet.) at 554 ("Is it credible, that [*the Indians*] should have considered themselves as surrendering to the United States the right to dictate their future cessions . . . ? It is

The Supreme Court describes the Indian canon as “rooted in the unique trust relationship between the United States and the Indians.”⁴⁰ It has justified the canon’s continued application on two distinct grounds. First, it has held that the canon protects “the weak and defenseless [Indians] who are the wards of the nation, dependent upon its protection and good faith.”⁴¹ From this perspective, the Indian canon is only “the most conspicuous example” of the more “general idea” that courts should “resolve interpretive doubts in favor of disadvantaged groups” in order to compensate for the “stereotypes,” “prejudices,” and “[d]ifficulties of organization and mobilization” that often hinder them.⁴² Second, the Supreme Court has suggested that the Indian canon protects the quasi-constitutional, structural principle of tribal “sovereignty and . . . independence.”⁴³ Professor Philip Frickey compares this theory of the canon to the application of clear statement rules in disputes over federalism: just as courts read statutes to disfavor erosion of the Constitution’s federalist structure, so too do judges use the Indian canon to protect the principle of tribal sovereignty reflected in Indian treaties.⁴⁴ “Both techniques [are] justified by the centrality to these disputes of a constitutive document of sovereignty — an Indian treaty . . . and the American Constitution”⁴⁵

Unfortunately, there are significant problems with each of these justifications for the Indian canon. Some contemporary jurists reject the characterization of Indians as a disadvantaged minority requiring government protection, considering it either “outmoded”⁴⁶ or counterproductively “normative.”⁴⁷ This approach to the canon “is not [one] . . . that Native American leaders would likely embrace” and is so “value-laden” that it is “easily trumped by federalism principles.”⁴⁸ Conditioning judicial acceptance of the canon on this rationale also undermines its relevance for judges less sympathetic to “fuzzy, liberal” reasoning.⁴⁹ But the tribal sovereignty justification for the Indian canon is also imperfect. Frickey, a supporter of the structural justifica-

equally inconceivable that they *could have supposed themselves* . . . to have divested themselves of the right of self-government *Had such a result been intended*, it would have been openly avowed.” (emphases added).

⁴⁰ *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

⁴¹ *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)) (internal quotation mark omitted).

⁴² Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 483–84 (1989).

⁴³ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

⁴⁴ See Frickey, *supra* note 1, at 413–17.

⁴⁵ *Id.* at 417.

⁴⁶ See COHEN’S HANDBOOK, *supra* note 6, § 2.02(2), at 122.

⁴⁷ Frickey, *supra* note 1, at 424.

⁴⁸ *Id.*

⁴⁹ *Id.*

tion, claims that it protects “values rooted in the spirit of Indian treaties,” but he never identifies any explicit source for the canon in constitutional or treaty text.⁵⁰ Therefore, that approach to the canon may render it vulnerable to the same kind of critiques launched against the federalism jurisprudence to which it has been compared, as a kind of “‘strong purposivism’ . . . that goes well beyond [the] carefully drawn text” of the treaty.⁵¹

II. THE TWO DIMENSIONS OF TREATY INTERPRETATION

At first glance, the Indian canon and originalism could not appear more different as methods of interpretation. But a closer examination reveals that these two interpretive methods are essentially the same: the Indian canon is simply originalist methodology applied in the unique context of an Indian treaty. To begin, one must clarify the relationship between these two approaches by identifying the two dimensions across which constitutional and Indian treaty interpretation occur. First, Indian treaties, like the Constitution, must be read across the dimension of *time*. Second, Indian treaties, unlike the Constitution, must be read across the dimension of *culture*.

Unraveling these two interpretive dimensions clarifies how the Indian canon fits alongside the principles of originalist methodology. In the first, temporal axis of interpretation, both originalism and the Indian canon assign authoritative significance to the “original meaning” of the text over its “contemporary meaning.” In Part III, this Note demonstrates that just as originalism values the original meaning of the Constitution, so too does the Indian canon privilege the original meaning of an Indian treaty. However, the second, cultural axis presents a more complicated case — the Indian canon considers only the “tribal meaning” of the treaty text, but originalists search for the “public meaning” of the Constitution. Nevertheless, Part IV demonstrates that this apparent difference is actually perfectly faithful to the principles of originalism when they are applied in the unique context of an Indian treaty.

III. THE TEMPORAL DIMENSION: ORIGINAL VERSUS CONTEMPORARY MEANING

Legal documents as old as nineteenth-century Indian treaties must be read across the dimension of time, due to the “long temporal dis-

⁵⁰ *Id.* at 417.

⁵¹ John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1666 (2004) (quoting John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3, 7 (2001)).

tance between ratification and interpretation of [the] text.”⁵² Although the text remains the same, the intervening years often will have changed the meaning conveyed by that text, so that the contemporary meaning of the words on the page differs dramatically from the original meaning of those words when the document was written and approved centuries earlier.⁵³ This temporal axis of interpretation is the one with which originalist methodology is traditionally associated. In the Constitution, for instance, the Fourteenth Amendment’s guarantee of the “equal protection of the laws”⁵⁴ would likely mean something different to a twenty-first-century judge than it did when those words were added to the Constitution in 1868. An originalist would argue that the meaning of the Equal Protection Clause in 1868 should bind a judge two centuries later. Given their antiquity, most Indian treaties have become similarly “time-warped,” such that the meaning of their words may have strayed in the time since their adoption.⁵⁵ To take just one example, the Wolf River Treaty of 1854⁵⁶ guaranteed to the Menominee Tribe a tract of land “to be held as Indian lands are held”⁵⁷ — a phrase that may have meant something quite different in the nineteenth-century American West than it does 150 years later.⁵⁸ Applying originalist interpretation to an Indian treaty requires that one take the nineteenth-century meaning as authoritative in the contemporary era.

Originalist constitutional interpretation and the Indian canon of construction each adopt the same approach to the temporal axis of interpretation. Both methods instruct judges to interpret text based on its *original* meaning, rather than its *contemporary* meaning. Of course, Chief Justice Marshall announced the Indian canon in 1832, contemporaneously with the signing of many Indian treaties, and so he did not need to address the temporal dimension of interpretation. But subsequent cases have made clear that the tribe’s understanding of the treaty *at the time of its enactment* should control.⁵⁹

⁵² Adam M. Samaha, *Originalism’s Expiration Date*, 30 CARDOZO L. REV. 1295, 1297 (2008).

⁵³ See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 614–15 (2008).

⁵⁴ See U.S. CONST. amend. XIV, § 1.

⁵⁵ WILKINSON, *supra* note 1, at 13.

⁵⁶ Treaty with the Menomonee Tribe, U.S.-Menominee, May 12, 1854, 10 Stat. 1064.

⁵⁷ *Id.* art 2.

⁵⁸ Compare Stephen J. Herzberg, *The Menominee Indians: From Treaty to Termination*, 60 WIS. MAG. HIST. 267, 268–79 (1977) (describing early nineteenth-century Menominee Indian society as led by tribal chiefs and primarily based around hunting, fishing, logging, and small-scale farming), with Stephen J. Herzberg, *The Menominee Indians: From Termination to Restoration*, 6 AM. INDIAN L. REV. 143, 158–59 (1978) (describing mid-twentieth-century Menominee Indian society as organized around a written constitution with an elected legislative council and based on communal ownership of “a lumber mill, power plants, schools, and medical facilities”).

⁵⁹ See *Or. Dep’t of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (explaining that courts applying the Indian canon should interpret treaty language “in historical context”);

*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*⁶⁰ vividly illustrates this approach. The case asked whether an 1856 treaty guaranteeing a tribe's right to fish "in common with all citizens of the Territory"⁶¹ meant that the Indians were merely guaranteed *access* to the fishing sites alongside non-Indian fishermen, or whether they were promised the broader privilege to harvest a *minimum share* of the available fish.⁶² The Supreme Court observed that when the treaty negotiations took place, the inhabitants of the territory were mostly Indian, the tribes depended on fish for subsistence and commerce, and the Indian negotiators were eager to protect their right to fish.⁶³ Because the fish were abundant and the population was sparse, sharing the shores with non-Indians "was not understood as a significant limitation on [the tribe's] right to take fish."⁶⁴ And since the mere right to fish alongside "thousands of newly arrived individual settlers . . . would hardly have been sufficient to compensate [the Indians] for the millions of acres they ceded to the Territory," it was "inconceivable" that the original Indian signatories would have "deliberately agreed to authorize future settlers to crowd [them] out of any meaningful use of their accustomed places to fish."⁶⁵ "[A]t the time of the treaties the [fish were] necessary to the Indians' welfare," so the Court concluded that the treaty protected the tribe's ability to obtain some minimum quantity of fish.⁶⁶

IV. THE CULTURAL DIMENSION: PUBLIC VERSUS TRIBAL MEANING

Reading a document negotiated with a foreign civilization also requires an interpreter to consider how differences in culture can create differences in understanding of the same legal text. Words that mean one thing to one culture sometimes signify something quite different to another. Indian treaties present an especially difficult challenge.⁶⁷

see also, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195–98 (1999); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405–06, 406 n.2 (1968); *United States v. Winans*, 198 U.S. 371, 371–72 (1905).

⁶⁰ 443 U.S. 658 (1979).

⁶¹ Treaty with the Nisqually and Other Tribes, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1132.

⁶² *See Washington*, 443 U.S. at 675.

⁶³ *Id.* at 664–66.

⁶⁴ *Id.* at 668.

⁶⁵ *Id.* at 676–77.

⁶⁶ *Id.* at 685 (emphasis added).

⁶⁷ *See* David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 406–07 (1994); *see also* Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111, 114–38 (2008) (discussing the role of American Indian languages and cultures in treaty interpretation).

American Indian and Anglo-American civilizations developed independently for thousands of years and rested upon fundamentally different assumptions about society, governance, and intercultural exchange.⁶⁸ “A great and unbridgeable void existed between the language and culture of the two races.”⁶⁹ At the time most treaties were signed, the Indian tribes were unfamiliar with English — the only language in which Indian treaties were written.⁷⁰ Treaty terms were sometimes “imposed upon” the tribes by federal officials rather than explained to them.⁷¹ Accordingly, tribes likely understood various treaty provisions very differently from how Anglo-Americans might have construed them. Certainly, the Indians would not have appreciated the legal significance of technical terms that would have been apparent to American lawyers, such as when a treaty “allotted” rather than “marked out” a boundary.⁷² At the same time, the tribes may have attached special importance to other words, such as “hunting grounds,” which their American counterparts would not have understood.⁷³ Because Indian treaties were the products of agreement between two very different civilizations, interpreters of the documents must navigate the unique cultural divide between the “public meaning” and the “tribal meaning” of the treaty text.

The Indian canon and originalist methodology appear to diverge in their approaches to the cultural dimension of interpretation. Originalist methodology rejects the semiotic effects of culture: prominent originalists claim to seek the “public,” “objective” meaning of the Constitution.⁷⁴ But the Indian canon instructs judges to assign meaning to a treaty based only on the *tribe’s* understanding. Nevertheless, this Part argues that originalist theory should actually lead judges to interpret the text based on its original “tribal” meaning.⁷⁵ First, it performs an originalist analysis of the “protection provisions” included in many Indian treaties, which, at the time that they were enacted, instructed judges to interpret the treaty texts based on how the tribes

⁶⁸ See generally JAMES WILSON, *THE EARTH SHALL WEEP* 43–289 (1998).

⁶⁹ *Whitefoot v. United States*, 293 F.2d 658, 667 n.15 (Ct. Cl. 1961); see also WILKINSON, *supra* note 1, at 15.

⁷⁰ See Wilkinson & Volkman, *supra* note 38, at 610–11.

⁷¹ *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630–31 (1970).

⁷² *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552–53 (1832).

⁷³ *Id.* at 553.

⁷⁴ E.g., Barnett, *supra* note 10, at 105.

⁷⁵ The fact that the Indian canon reflects a search for “tribal,” as opposed to “public,” meaning also justifies, from an originalist perspective, why it instructs judges to read treaties in accordance with the “spirit” of the document. See Frickey, *supra* note 1, at 403–04. This approach seems to contradict originalists’ focus on individual words and rejection of broader, purposivist readings of the Constitution. However, because the tribes were not “critical judges of the language” in the treaties they signed, *Worcester*, 31 U.S. (6 Pet.) at 551, interpreting the text at a higher level of generality likely comes closer to capturing their understanding of the document.

would have understood them. Second, it demonstrates how the justifications for originalism — when adjusted to the unique contours of an Indian treaty — actually counsel in favor of looking to tribal, rather than public, meaning.

A. The Original Public Meaning of Indian Treaty Protection Provisions

Nearly every Indian treaty establishing a relationship between a tribe and the federal government contains language in which the signatory tribe places itself under the “protection” of the United States and the United States agrees to extend its “protection” to the tribe.⁷⁶ But no scholar has ever examined the significance of this recurring language. In fact, the original public meaning of these provisions was to create a “protectorate” relationship between the tribe and the federal government, with a corresponding obligation on the federal government to interpret the agreement from the tribe’s perspective. Therefore, the original “public meaning” of these Indian treaties should be understood to include an instruction to judges to read their words in accordance with their “tribal meaning.”

The legal concept of a “protectorate,” or a “dependent state,” is “one of the oldest features of international relations.”⁷⁷ The arrangement dates back at least to the seventeenth century, when renowned jurists such as Hugo Grotius and Emmerich de Vattel described the phenomenon of “unequal alliances” in which a “weaker” state acknowledged its “inferiority” before a “superior[]” neighbor, and submitted to a set of “burdensome” conditions in return for the “protection or assistance” of the “more powerful” party.⁷⁸ The widely read American legal scholar Henry Wheaton⁷⁹ explained in 1836 how “[t]reaties of unequal alliance, guarantee, mediation, and protection” served to “limit[] and qualify[]” the “sovereignty of the inferior ally.”⁸⁰ In the nineteenth century, a protectorate was generally formed through a bilateral treaty between the two states involved in the relationship, “under which the

⁷⁶ See Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 497 (1979); COHEN’S HANDBOOK, *supra* note 6, § 1.03(1), at 28.

⁷⁷ JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 286 (2d ed. 2006).

⁷⁸ 2 EMMERICH DE VATTEL, *THE LAW OF NATIONS* ch. XII, § 175, at 200–01 (Joseph Chitty ed. & trans., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758); see also 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* ch. XVI, § XIV, at 159–60 (A.C. Campbell ed. & trans., Pontefract, B. Boothroyd 1814) (1625).

⁷⁹ Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 9 & n.18 (1999).

⁸⁰ HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* ch. II, § 2, at 51 (Philadelphia, Carey, Lea & Blanchard 1836).

stronger Power . . . grant[ed] its protection to the weaker State.”⁸¹ International legal jurists writing at the time made clear that “treaties of protection” were a subcategory of the “unequal alliances” described by Grotius and Vattel.⁸² In return for the protection of the stronger party, the weaker state “surrendered . . . the conduct of its foreign relations . . . together with various rights of internal intervention . . . without being annexed or formally incorporated into the territory of the [stronger state].”⁸³

The “superior” or “protector” state had a special set of responsibilities — not only the obligations spelled out in the treaty, but also under customary international law. When the protector state interpreted a protectorate treaty, the settled rule by the early nineteenth century was to read the text in favor of the *protected party’s* interest and understanding. Grotius suggested that constraints on the rights of the weaker party in an unequal alliance should be “limited to [their] proper signification[s], lest the treaty should operate as too great a restraint upon the liberty of that power.”⁸⁴ According to Grotius, when a party surrenders a right via treaty, “though he expresses himself in the most general terms, his words are usually restricted to that meaning, which it is probable he intended.”⁸⁵ Indeed, Grotius even suggested stretching the language in such treaties so far that one could abandon the words’ plain meanings and consider interpretations based on “figurative expression.”⁸⁶ Vattel confirmed that treaties establishing unequal alliances should be construed to the benefit of the protected party: “In unequal treaties, and especially in unequal alliances, all the clauses of inequality, and principally those that [burden] the inferior ally are odious. . . . [W]e ought in case of doubt to extend what leads to equality, and restrict what destroys it”⁸⁷

Scholarship on the original understanding of the federal government’s legal relationship with the Indians remains thin, but it has been convincingly demonstrated that the Founding Fathers regarded the

⁸¹ I TRAVERS TWISS, *THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES: ON THE RIGHTS AND DUTIES OF NATIONS IN TIME OF PEACE* § 26, at 27 (Oxford, Oxford Univ. Press 1861).

⁸² *See id.* § 229, at 363–64; WHEATON, *supra* note 80, ch. II, § 2, at 63.

⁸³ CRAWFORD, *supra* note 77, at 287.

⁸⁴ GROTIUS, *supra* note 78, ch. XVI, § XIV, at 160. Grotius provides two specific examples of this approach by suggesting the correct interpretations of provisions in an ancient treaty between the Romans and the Carthaginians. *See id.* ch. XVI, §§ XIV–XV, at 160–61.

⁸⁵ *Id.* ch. XVI, § XII, at 155 (emphases omitted).

⁸⁶ *Id.*

⁸⁷ VATTEL, *supra* note 78, ch. XVII, § 301, at 264. Like Grotius, *see supra* note 84, Vattel illustrates this interpretive technique by applying it to a treaty between the Romans and the Carthaginians. *See* VATTEL, *supra* note 78, ch. XVII, § 309, at 268–69.

tribes as political, not racial, entities.⁸⁸ And legal practice at the time made clear that American treaties with these indigenous nations sounded in international law. The United States government gave Indian treaties “the same legal status as treaties with foreign nations,” and enacted them pursuant to the Constitution’s Treaty Clause, requiring the advice and consent of two-thirds of the Senate.⁸⁹ Chief Justice Marshall explained: “The words ‘treaty’ and ‘nation’ are words of our own language, selected . . . by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”⁹⁰

In the Treaty of Hopewell — along with nearly every other treaty establishing an official relationship between the United States and an Indian tribe — the signatory tribe acknowledged that it was “under the protection of the United States of America,” and the Americans agreed to “receive them into the favor and protection of the United States of America.”⁹¹ According to the background nineteenth-century

⁸⁸ See generally Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN’S L. REV. 153 (2008).

⁸⁹ ANDERSON ET AL., *supra* note 28, at 45; see also U.S. CONST. art. II, § 2, cl. 2.

⁹⁰ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–60 (1832); see also COHEN’S HANDBOOK, *supra* note 6, § 1.03(1), at 27–28.

⁹¹ Treaty with the Cherokees, *supra* note 13, pmb., art. 3; see also Treaty with the Navajo Tribe, U.S.-Navajo, art. I, Sept. 9, 1849, 9 Stat. 974; Treaty with the Stockbridge Tribe, U.S.-Stockbridge, art. I, Nov. 24, 1848, 9 Stat. 955; Treaty with the Comanches and Other Tribes, U.S.-Comanche, art. I, May 15, 1846, 9 Stat. 844; Treaty with the Menomonee Nation, U.S.-Menominee, art. 1, art. 6, Feb. 8, 1831, 7 Stat. 342; Treaty with the Crow Tribe, U.S.-Crow, arts. 1–2, Aug. 4, 1825, 7 Stat. 266; Treaty with the Mandan Tribe, U.S.-Mandan, arts. 2–3, July 30, 1825, 7 Stat. 264; Treaty with the Ricara Tribe, U.S.-Arikara, arts. 2–3, July 18, 1825, 7 Stat. 259; Treaty with the Cheyenne Tribe, U.S.-Cheyenne, arts. 1–2, July 6, 1825, 7 Stat. 255; Treaty with the Peoria and Other Tribes, U.S.-Peoria, art. 3, Sept. 25, 1818, 7 Stat. 181; Treaty with the Quapaw Tribe, U.S.-Quapaw, art. 1, Aug. 24, 1818, 7 Stat. 176; Treaty with the Pawnee Republic, U.S.-Pawnee, art. 3, June 20, 1818, 7 Stat. 174; Treaty with the Poncarar Tribe, U.S.-Ponca, art. 3, June 25, 1817, 7 Stat. 155; Treaty with the Ottoes Tribe, U.S.-Otoe, art. 3, June 24, 1817, 7 Stat. 154; Treaty with the Winnebago Tribe, U.S.-Winnebago, art. 3, June 3, 1816, 7 Stat. 144; Treaty with the Siouxs, U.S.-Sioux, art. 4, June 1, 1816, 7 Stat. 143; Treaty with the Kansas Tribe, U.S.-Kansa, art. 3, Oct. 28, 1815, 7 Stat. 137; Treaty with the Teeton Tribe, U.S.-Teton, art. 3, July 19, 1815, 7 Stat. 125; Treaty with the Chippewa and Other Nations, U.S.-Chippewa, art. V, Nov. 25, 1808, 7 Stat. 112; Treaty with the Great and Little Osage Nations, U.S.-Osage, art. 10, Nov. 10, 1808, 7 Stat. 107; Treaty with the Ottaway and Other Nations, U.S.-Ottawa, art. VII, Nov. 17, 1807, 7 Stat. 105; Treaty with the Piankishaw Tribe, U.S.-Piankishaw, art. II, Dec. 30, 1805, 7 Stat. 100; Treaty with the United Tribes of Sac and Fox Indians, U.S.-Sauk and Fox, art. 1, Nov. 3, 1804, 7 Stat. 84; Treaty with the Kaskaskia Tribe, U.S.-Kaskaskia, art. 2, Aug. 13, 1803, 7 Stat. 78; Treaty with the Creek Nation, U.S.-Creek, art. II, Aug. 7, 1790, 7 Stat. 35; Treaty with the Shawanoe Nation, U.S.-Shawnee, art. V, Jan. 31, 1786, 7 Stat. 26; Treaty with the Chickasaw Nation, U.S.-Chickasaw, pmb., art. II, Jan. 10, 1786, 7 Stat. 24; Treaty with the Choctaw Nation, U.S.-Choctaw, pmb., art. II, Jan. 3, 1786, 7 Stat. 21; Treaty with the Wiandot and Other Nations, U.S.-Wyandot, art. II, Jan. 21, 1785, 7 Stat. 16; Treaty with the Six Nations, U.S.-Six Nations, pmb., Oct. 22, 1784, 7 Stat. 15.

legal principles against which these treaties were written and enacted, the protection provisions created a protectorate relationship between the tribe and the federal government.⁹² In 1823, New York's highest court, citing Vattel, interpreted the language of protection in an Oneida Nation Indian treaty accordingly: "Vattel says, that a weak state, which has bound itself by unequal alliance to a more powerful one, under whose protection it has placed itself for safety, does not, therefore, cease to be a sovereign state These Indian tribes or nations have formed such unequal alliances with our government."⁹³ Less than a decade later, in *Worcester*, the United States Supreme Court confirmed this understanding, explicitly analogizing the effect of "the articles so often repeated in Indian treaties; extending to them . . . the protection of . . . the United States" to Vattel's description of protectorate agreements in the Old World.⁹⁴ The Court explained: "[T]he settled doctrine of the law of nations is, that . . . [a] weak state . . . may place itself under the protection of one more powerful Examples of this kind are not wanting in Europe."⁹⁵ Wheaton made the parallel overt just a few years after *Worcester*, when he explained that "[t]he political relation of the Indian nations on this continent towards the United States is that of semi-sovereign States, under the exclusive protectorate of another Power."⁹⁶ At the outbreak of the Civil War, the Choctaw and Chickasaw Nations abandoned their treaty relationship with the United States and gave their allegiance to the seceded Confederate States in a treaty that explicitly recognized the relationship between the language of "protection" and the tribe's status as a protectorate: "The Choctaw and Chickasaw Nations of Indians acknowledge themselves to be under the protection of the Confederate States of America . . . and the said Confederate States do hereby assume and accept the said protectorate"⁹⁷

Fidelity to the original public meaning of an Indian treaty therefore requires judges to interpret the text from the perspective of the tribe. Originalists may give technical effect to legal terms of art that carried

⁹² Accord FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW ch. 3, § 3.B.1, at 41 (1942) (noting that, in addition to the Treaty of Hopewell with the Cherokee, "[t]reaties with many of the other tribes left no doubt of the protectorate of the United States over them").

⁹³ *Goodell v. Jackson*, 20 Johns. 693, 695–96 (N.Y. 1823) (emphases omitted) (citation omitted).

⁹⁴ *Worcester*, 31 U.S. (6 Pet.) at 560–61.

⁹⁵ *Id.*; see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 53 (1831) (Thompson, J., dissenting); Collins, *supra* note 76, at 497.

⁹⁶ HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW ch. II, § 15, at 73 (Philadelphia, Lea & Blanchard 3d ed. 1846).

⁹⁷ Treaty with the Choctaw and Chickasaw Nations, C.S.A.—Choctaw and Chickasaw, art. II, July 12, 1861, reprinted in THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 311 (James M. Matthews ed., Richmond, R.M. Smith 1864).

a specialized meaning at the time they were enacted — such as, for example, the Due Process Clause.⁹⁸ At the time that the federal government and the tribes ratified Indian treaties containing protection provisions, one legal consequence of that language was that each treaty had to be read in the protected party's — the tribe's — favor. In *Worcester*, Chief Justice Marshall explained that a protection provision in an Indian treaty “bound the [tribe] . . . as a dependent ally, claiming the protection of a powerful friend and neighbour, and *receiving the advantages of that protection*.”⁹⁹ One of those advantages was the Indian canon. The Supreme Court drew the connection between the tribes' protected status and the Indian canon in an Indian law case just a few decades after *Worcester*:

The recognized relation between the parties to this controversy . . . is that between a superior and inferior, whereby the latter is placed under the care and control of the former, and which . . . recognizes . . . such an interpretation of [the United States's] acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection.¹⁰⁰

This understanding of the obligation imposed by the protection provisions might also help to explain the extension of the canon from Indian treaties to statutes affecting Indians — the federal government's duty to protect a tribe could be understood to require favorable constructions of *all* the legal texts that govern the relationship between protector and protected.

Of course, it is unlikely that the American negotiators, or the senators who voted for the treaties, would have intended or even considered that judges would read their agreements with the Indians in this way.¹⁰¹ However, according to “public meaning” originalism, the subjective intentions of the ratifiers of a legal text are irrelevant — only the public meaning conveyed by the language of protection they included in the Indian treaties became enforceable law.¹⁰² Furthermore, originalists such as Professor Jack Balkin have distinguished between the “original meaning” and the “original expected application” of the constitutional text.¹⁰³ Only the *words* of the constitutional text are binding law, not the Founding generation's *expectations* about how

⁹⁸ See Balkin, *supra* note 37, at 304.

⁹⁹ *Worcester*, 31 U.S. (6 Pet.) at 552 (emphasis added).

¹⁰⁰ *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886).

¹⁰¹ Indeed, if the government ever actually intended to keep its treaty promises to the Indians, see VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* 32 (1969), it often failed to do so, and federal policy toward the Indians alternated between forcible assimilation and violent removal throughout the nineteenth century. See ANDERSON ET AL., *supra* note 28, at 44–130.

¹⁰² See Barnett, *supra* note 10, at 105–08.

¹⁰³ Balkin, *supra* note 37, at 295–97.

that text would apply.¹⁰⁴ According to this theory, the legal principles associated with the protectorate relationship control, regardless of how government officials at the time anticipated that they would be implemented.

*B. The Application of Originalist Theory in
the Context of an Indian Treaty*

The original public meaning of the Indian treaty “protection provisions” provides a powerful originalist argument for applying the Indian canon to the treaties that actually contain language of protection. Moreover, because *Worcester* established a background interpretive principle against which subsequent Indian treaties were drafted and ratified, an originalist would also apply the canon to treaties enacted after 1832.¹⁰⁵ However, not every treaty establishing a relationship between the federal government and an Indian tribe before 1832 contained a protection provision.¹⁰⁶ Federal judges therefore would not have the same interpretive obligation to those tribes under this analysis. Nevertheless, there are still good originalist arguments for interpreting Indian treaties based on their original tribal meanings. Even for treaties that do not contain protection provisions, the *justifications* for originalism, when applied in the context of an Indian treaty, actually support looking to the tribe’s perspective on the document.

1. *The Lack of Treaty Amendment Procedures.* — Indian treaties, unlike the United States Constitution, are not amendable via an ordinary democratic process. While the federal government may unilaterally abrogate its treaty obligations to the Indian tribes, and often has, the tribes are effectively bound by their agreements unless they can obtain the government’s consent to amend them. In the context of this procedural imbalance, originalists concerned with the democratic legitimacy of the judiciary should use the Indian canon in order to ensure that the treaty terms accurately reflect the popular will.

Justices Rehnquist and Scalia, as well as Judge Bork, argue that originalism is the method of constitutional interpretation “more compatible with the nature and purpose of a Constitution in a democratic system.”¹⁰⁷ In American constitutional democracy, “[t]he people are the ultimate source of authority; they have parceled out the authority

¹⁰⁴ *Id.* at 295.

¹⁰⁵ *Cf.* *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–99 (1979) (finding that Title IX of the Education Amendments of 1972 included an implied right of action, because Title VI of the Civil Rights Act of 1964, on which Title IX had been modeled, had previously been construed to create a private remedy, and “[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law,” *id.* at 696–97).

¹⁰⁶ *See, e.g.*, Treaty with the Delaware Nation, *supra* note 1.

¹⁰⁷ Scalia, *supra* note 5, at 862.

that originally resided entirely with them by adopting the original Constitution and by later amending it.”¹⁰⁸ Because “judges derive [their] authority from the Constitution, and the Constitution derives [its own] authority from the majority vote of the ratifiers, . . . the role of the judge is to carry out the will of the ratifiers.”¹⁰⁹

Nonoriginalist constitutional interpretation shades into policy-making that permits the judiciary to “displace executives and legislators as our governors,” a role that betrays “[t]he orthodoxy of our civil religion, which the Constitution has aptly been called, [which] holds that we govern ourselves democratically.”¹¹⁰ When it does come time to alter the Constitution’s text, the Article V amendment procedure gives that power only to representative institutions, not to unelected judges.¹¹¹ Rather than the judiciary, the appropriate “instrumentality of [constitutional] change” is the democratic amendment process prescribed by the document itself.¹¹²

But Indian treaties do not have an amendment process comparable to Article V of the United States Constitution. Instead, there are two ways to alter an Indian treaty. First, the parties can renegotiate their agreement.¹¹³ Many Indian tribes have signed several rounds of treaties with the federal government, each of which amends and updates their previous agreements.¹¹⁴ Of course, amendment through renegotiation requires the consent of both parties. Second, either party may abrogate its commitments under the treaty. Courts regard the federal government’s compliance with Indian treaties as they do its obligations under international treaties.¹¹⁵ Just like a treaty with a foreign state, the federal government may unilaterally rescind its Indian treaty

¹⁰⁸ William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696 (1976).

¹⁰⁹ DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 386 (1990).

¹¹⁰ ROBERT H. BORK, THE TEMPTING OF AMERICA 153 (1990).

¹¹¹ U.S. CONST. art. V.

¹¹² ANTONIN SCALIA, A MATTER OF INTERPRETATION 47 (Amy Gutmann ed., 1997).

¹¹³ Some Indian treaties contain provisions providing that changes to the treaty — almost always specified as further land cessions by the tribe — may be made only with the consent of a certain proportion of tribal members. See, e.g., Treaty with the Crow Tribe, U.S.-Crow, May 7, 1868, art. XI, 15 Stat. 649; Treaty with the Kiowa and Comanche Tribes, U.S.-Kiowa and Comanche, Oct. 21, 1867, art. XII, 15 Stat. 581. Notably, these provisions do *not* specify a process by which the Indians could *gain* greater power against the federal government — for instance, by securing more rights of sovereignty or more land.

¹¹⁴ See, e.g., Treaty with the Kansas Tribe, U.S.-Kansa, Mar. 16, 1862, 12 Stat. 1221; Treaty with the Kansas Tribe, U.S.-Kansa, Oct. 5, 1859, 12 Stat. 1111; Treaty with Kansas Indians, U.S.-Kansa, Jan. 14, 1846, 9 Stat. 842; Treaty with the Kansas Tribe, U.S.-Kansa, Aug. 16, 1825, 7 Stat. 270; Treaty with the Kansas Nation, U.S.-Kansa, June 3, 1825, 7 Stat. 244; Treaty with the Kansas Tribe, U.S.-Kansa, Oct. 28, 1815, 7 Stat. 137.

¹¹⁵ See Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 583–87 (1995).

commitments so long as it is willing to bear the political fallout of such a decision,¹¹⁶ which in the international realm would mean controversy or even war.¹¹⁷

There is almost no scholarship on the mechanics of tribal withdrawal from a treaty, perhaps because it is effectively impossible for a tribe to take such an action. In the nineteenth century, the government violently crushed tribes that rejected their treaty commitments,¹¹⁸ and in the twenty-first it has responded to organized Indian resistance by threatening to cut off millions of dollars of federal funds from the recalcitrant tribes.¹¹⁹ Any attempt by a tribe to withdraw from or abrogate its treaty commitments would be a disaster; in reality, a tribe *must* obtain the federal government's consent in order to change the terms of its relationship with the United States. By contrast, the federal government has not hesitated to exercise its power to abrogate its treaty commitments to the Indian tribes.¹²⁰ To abrogate a treaty commitment to the Indians, the federal government must make its intent to do so clear¹²¹ and it must pay just compensation to the tribe for the resulting loss,¹²² but its ultimate ability to redefine its relationship with a tribe far surpasses the tribe's own power to do the same.

This democratic imbalance between the United States and the tribes means that pro-democracy originalism actually requires reading an Indian treaty in accordance with its "tribal" meaning. When a judge interprets an Indian treaty, it is not so easy to suggest, as Justice Scalia has with regard to the Constitution, that if the tribe does not like the original meaning of the text it can simply amend it. The tribe is bound by the judge's interpretation of the treaty unless it can convince the United States to allow it to renegotiate. Conversely, the United States is effectively free to abrogate its treaty commitments whenever it makes the judgment that the terms no longer suit its policy preferences. If a judge applies treaty text according to its "public" meaning, the signatory tribe could fairly object that it is being bound by terms that it no longer accepts but that it lacks the ability to change. But interpreting the text based on its "tribal" meaning still

¹¹⁶ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

¹¹⁷ See David E. Wilkins, *The Reinvigoration of the Doctrine of 'Implied Repeals': A Requiem for Indigenous Treaty Rights*, 43 AM. J. LEGAL HIST. 1, 4 (1999).

¹¹⁸ See *id.* at 20.

¹¹⁹ See Rob Capriccioso, *HUD Denies Cherokee Funding over Freedmen Issue*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 8, 2011), <http://indiancountrytodaymedia.network.com/2011/09/08/hud-denies-chokeee-funding-over-freedmen-issue-52650>.

¹²⁰ See ANDERSON ET AL., *supra* note 28, at 113–121; Wilkins, *supra* note 117, at 20–21.

¹²¹ See *United States v. Dion*, 476 U.S. 734, 738–39 (1986).

¹²² See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 422 (1980).

permits the United States Congress to unilaterally abrogate — or push the tribe to renegotiate — any terms that it does not like.

For originalists who believe that judges should simply “carry out the will of the ratifiers,”¹²³ the Indian canon ensures that the treaties most accurately reflect the will of their signatories by assigning meaning in favor of the tribes, who are the parties least able to amend the texts. At the same time, because judges applying the canon still hew to the treaties’ original meanings, this approach still ensures that the judiciary does not become an “instrumentality of change.”¹²⁴ The Indian canon therefore shifts the responsibility to alter the treaty to the one representative branch with the power to change the text: the United States Congress.

2. *The “Englishness” of Indian Treaties.* — The fact that Indian treaties were written in English, a language unfamiliar to the tribes, gave the United States significant leverage when negotiating treaty terms. If read according to its plain meaning, the resulting text would often give the federal government an overwhelming advantage in its relationship with the signatory tribe. Therefore, judges who favor originalism as a constraint on lawmakers must interpret Indian treaties from the perspective of the tribal signatory in order to ensure that the documents can effectively restrain the federal government’s powers over the Indians.

Professor Randy Barnett argues that originalist methodology “follows naturally . . . from the commitment to a written text.”¹²⁵ Barnett identifies several reasons for putting a constitution in writing, the most important of which is that a written constitution “better constrain[s] the political actors it empowers to accomplish various ends.”¹²⁶ Writing down the Constitution provided evidence of the original plan for the federal government, thereby “lock[ing] in” the powers and limits of the new state so that the authorities who governed under its mandate could not claim new, or greater, powers in the future.¹²⁷ As Justice Scalia has explained, “[the Constitution’s] whole purpose is to prevent change — to embed certain rights in such a manner that future generations cannot readily take them away.”¹²⁸

From this perspective, the “writtenness” of the Constitution is “just another structural feature of our constitutional order along with separation of powers and federalism.”¹²⁹ A written, fixed constitution en-

¹²³ FARBER & SHERRY, *supra* note 109, at 386.

¹²⁴ SCALIA, *supra* note 112, at 47.

¹²⁵ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 100 (2004).

¹²⁶ *Id.* at 103.

¹²⁷ *Id.*

¹²⁸ SCALIA, *supra* note 112, at 40.

¹²⁹ BARNETT, *supra* note 125, at 107.

tures “the functional separation of lawmaking and constituent powers” — a tradition with deep roots in Anglo-American political culture.¹³⁰ But writing down the constitution only constrains future lawmakers if the meaning of its words remain fixed from the date of enactment — meaning cannot be “locked in’ and governors checked and restrained if the written words mean only what legislatures or judges want them to mean today.”¹³¹ Barnett argues that “[w]rittenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment.”¹³² Therefore, the nation’s written Constitution instructs adherence to its original meaning.

It is a fundamental principle of federal Indian law that Indian tribes enjoy the right of self-governance based on their inherent sovereignty — an Indian treaty serves as “a grant of rights *from* a tribe *to* the United States,” with all rights not granted reserved to the tribe.¹³³ So, much like the Constitution enumerates and restricts the powers of the federal government over the nation, an Indian treaty also serves as “a fundamental framework within which [federal] governmental power [over the tribe] is structured and limited.”¹³⁴ In both cases, a written charter provides an independent source of governing authority that separates the lawmaking and constituent powers so that government officials cannot “make the laws by which they make law.”¹³⁵

But Indian treaties were not just written down — they were written down *in English*,¹³⁶ a language whose subtleties were easy for American negotiators but were hardly apparent to nineteenth-century Indian tribes. The Supreme Court has emphasized the advantage that the United States enjoyed as a result, explaining that while the American negotiators were “masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; [and] the treaty [was] drawn up by them and in their own language,” the Indians had “no written language and [were] wholly unfamiliar with all the forms of legal expression, and [their] only knowledge of the terms in which the treaty [was] framed [was] that imparted to them by the interpreter employed by the United States.”¹³⁷ Even when federal of-

¹³⁰ *Id.* at 104.

¹³¹ *Id.* at 104–05.

¹³² *Id.* at 106.

¹³³ Frickey, *supra* note 1, at 402 (emphases added).

¹³⁴ *Id.* at 410.

¹³⁵ BARNETT, *supra* note 125, at 103.

¹³⁶ See *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

¹³⁷ *Id.*

officials attempted to conduct negotiations in a language that they believed the Indians would understand, they were often mistaken.¹³⁸

Because the “Englishness” of the Indian treaties created a power imbalance between the two sides, an interpretation of the treaties based on the “public” meaning of their words would undermine the all-important separation between the lawmaking and constituent powers. First, the federal officials whom the treaty was written to constrain could use their superior bargaining ability to effectively dictate terms to the signatory tribe. Second, the federal officials could conceal the legal implications of treaty provisions by using terms of art unfamiliar to the tribe and by interpreting the language inaccurately. Construing the treaty language based on its public meaning, rather than its tribal meaning, facilitates this kind of constitutional self-dealing, allowing the federal government to “make the law by which [it] make[s] law” over the Indian tribes.¹³⁹ It would be as if the Founding Fathers had written and published the original Constitution in ancient Greek; the general public’s inability to decipher the text would have allowed their future leaders to greatly empower themselves at the expense of the people.

Early Supreme Court concurrences, in which individual Justices unsuccessfully advocated for a public meaning interpretation of Indian treaties, illustrate the degree to which such a reading would have undermined the treaties’ written constraints on the federal government. Justice Johnson interpreted the Treaty of Hopewell based on how “the commissioners of the United States express[ed] themselves”¹⁴⁰ and concluded that “every provision of [the] treaty operates to strip [the tribe] of its sovereign attributes.”¹⁴¹ Justice Baldwin similarly construed the treaty as “it was understood by [C]ongress,” and found that a provision empowering the federal government to manage a tribe’s affairs constituted a complete surrender of tribal self-government.¹⁴² The limitless federal power that would have been unleashed by these interpretations demonstrates that in order for a written treaty to serve its restraining purpose, interpreters must account for how its “Englishness” undermines those restraints. Only by interpreting the English treaty language based on its tribal meaning can judges restore a true separation between the federal government’s lawmaking powers over the Indians and the constituent powers reflected in the treaty text.

¹³⁸ Wilkinson & Volkman, *supra* note 38, at 610.

¹³⁹ BARNETT, *supra* note 125, at 103.

¹⁴⁰ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 22 (1831) (Johnson, J., concurring).

¹⁴¹ *Id.* at 25; *see also id.* at 22–25.

¹⁴² *Id.* at 38 (Baldwin, J., concurring).

CONCLUSION

Scholars of Indian law describe Indian treaties as “quasi-constitutional” documents¹⁴³ and argue that they should be interpreted like constitutions.¹⁴⁴ Debates over constitutional interpretation are currently dominated by the theory of originalism, which asserts that the Constitution’s meaning remains fixed at the date of its enactment. But the federal courts have long applied a special method for interpreting Indian treaties — the Indian canon of construction, which instructs judges to interpret treaties as the Indian signatories would have understood them. This approach to treaty interpretation initially appears to contradict originalist methodology, but a closer examination reveals that the Indian canon is actually ordinary originalism adjusted to the unique contours of Indian treaties.

Because some Supreme Court Justices have recently expressed skepticism toward the Indian canon,¹⁴⁵ scholars have emphasized the two justifications for the continued relevance of this approach to treaty interpretation. Professor Charles F. Wilkinson argues that the judiciary must protect American Indians as a discrete and insular minority,¹⁴⁶ but this approach seems unlikely to convert any judges not already sympathetic to the Indian tribes. Alternatively, Professor Philip Frickey has called for a “revival” of the canon by emphasizing the structural value of tribal sovereignty reflected in the spirit of each Indian treaty.¹⁴⁷ But judges wary of this kind of atextual, purposivist approach to legal interpretation are almost certain to remain unpersuaded by Frickey’s argument.

Grounding the Indian canon in the principles of originalism would provide a more effective justification for a revitalized Indian canon. Originalism offers an especially promising way to renew the judiciary’s commitment to the Indian canon given that the recent skepticism toward the canon coincided with the advent of the more originalist Rehnquist Court.¹⁴⁸ The Indian canon rests on far more secure foundations than liberal values or structural inferences — it reflects judicial fidelity to the original meaning of the Indian treaties themselves.

¹⁴³ Frickey, *supra* note 1, at 408.

¹⁴⁴ See WILKINSON, *supra* note 1, at 104–05; Frickey, *supra* note 1, at 408–11.

¹⁴⁵ See, e.g., Frickey, *supra* note 1, at 418–37.

¹⁴⁶ See Robert A. Williams, Jr., *The Hermeneutics of Indian Law*, 85 MICH. L. REV. 1012, 1017–18 (1987) (book review).

¹⁴⁷ See Frickey, *supra* note 1, at 413–17, 437–39.

¹⁴⁸ See *id.* at 418–37.

Treaty between the United States of America and the Crow Tribe of Indians; Concluded May 7, 1868; Ratification advised July 25, 1868; Proclaimed August 12, 1868.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

May 7, 1868.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING :

WHEREAS a Treaty was made and concluded at Fort Laramie, in the Territory of Dakota, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman, Brevet Major-General William S. Harney, Brevet Major-General Alfred H. Terry, Brevet Major-General C. C. Augur, John B Sanborn, and S. F. Tappan, commissioners, on the part of the United States, and Che-Ra-Pee-Ish-Ka-Te, Chat-Sta-He, and other chiefs and headmen of the Crow tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit :—

Preamble.

Articles of a treaty made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and headmen of and representing the Crow Indians, they being duly authorized to act in the premises.

Contracting parties.

ARTICLE I. From this day forward peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

Peace and friendship.

Offenders among the whites to be arrested and punished;

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they refuse wilfully so to do the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

among the Indians, to be given up to the United States, or, &c.

Rules for ascertaining damages.

TREATY WITH THE CROW INDIANS. MAY 7, 1868.

- Reservation.
Boundaries
- Who not to reside thereon.
- Buildings to be erected by the United States.
- Reservation to be permanent home of the Indians.
- Agent to make his home and reside where.
- His duties.
- Heads of family, desiring to commence farming, may select lands, &c.
- ARTICLE II. The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone river; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employés of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.
- ARTICLE III. The United States agrees, at its own proper expense, to construct on the south side of the Yellowstone, near Otter creek, a warehouse or storeroom for the use of the agent in storing goods belonging to the Indians, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other building, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.
- The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle machine attached, the same to cost not exceeding eight thousand dollars.
- ARTICLE IV. The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.
- ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building; that he shall reside among them and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.
- ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "Land Book," as herein directed, shall cease to be held in common, but

TREATY WITH THE CROW INDIANS. MAY 7, 1868.

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the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it. Effect of such selection.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed. Persons not heads of families.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow Land Book." Certificate of selection to be delivered, &c.; to be recorded.

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper. Survey.
Alienation and descent of property.

ARTICLE VII. In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are, or may be, settled on said agricultural reservation; and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years. Children between six and sixteen to attend school.
Duty of agent.
School-houses and teachers.

ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum. Seeds and agricultural implements.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required. Instruction in farming

ARTICLE IX. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservation herein provided for, on the first day of September of each year for thirty years, the following articles, to wit: Delivery of articles in lieu of money and annuities.

For each male person, over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks. Clothing

For each female, over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton

goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

Census.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent, each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

Annual appropriations in money for ten years,

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indicate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing, under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually

may be changed.

Army officer to attend the delivery of goods.

detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation, and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated, that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them, who shall remove to the reservation herein described, and commence farming, one good American cow and one good, well-broken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

Subsistence.

Cow and oxen to each family.

Physician, teachers, &c.

ARTICLE X. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

Cession of reservation not to be valid, unless, &c

ARTICLE XI. No treaty for the cession of any portion of the reservation herein described, which may be held in common, shall be of any force or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interested in the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article VI. of this treaty.

Annual presents for most valuable crops.

ARTICLE XII. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent, may grow the most valuable crops for the respective year.

W. T. SHERMAN, *Lt. Genl.*
 WM. S. HARNEY,
Bvt. Majr. Gen. & Peace Commissioner.
 ALFRED H. TERRY, *Bvt. M. Genl.*
 C. C. AUGUR, *Bvt. M. Genl.*
 JOHN B. SANBORN.
 S. F. TAPPAN.

ASHTON S. H. WHITE, *Secretary.*

TREATY WITH THE CROW INDIANS. MAY 7, 1868.

CHE-RA-PEE-ISH-KA-TE, Pretty Bull,	his x mark,	SEAL.
CHAT-STA-HE, Wolf Bow,	his x mark,	SEAL.
AH-BE-CHE-SE, Mountain Tail,	his x mark,	SEAL.
KAM-NE-BUT-SA, Black Foot,	his x mark,	SEAL.
DE-SAL-ZE-CHO-SE, White Horse,	his x mark,	SEAL.
CHIN-KA-SHE-ARACHE, Poor Elk,	his x mark,	SEAL.
E-SA-WOOR, Shot in the Jaw,	his x mark,	SEAL.
E-SHA-CHOSE, White Forehead,	his x mark,	SEAL.
— ROO-KA, Pounded Meat,	his x mark,	SEAL.
DE-KA-KE-UP-SE, Bird in the Neck,	his x mark,	SEAL.
ME-NA-CHE, The Swan,	his x mark,	SEAL.

Attest:

GEORGE B. WILLIS, *Phonographer.*
 JOHN D. HOWLAND.
 ALEX. GARDNER.
 DAVID KNOX.
 CHAS. FREEMAN.
 JAS. C. O'CONNOR.

And whereas the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit: Ratification.

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, }
 July 25, 1868. }

Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Crow Indians of Montana Territory, made the seventh day of May, eighteen hundred and sixty-eight.

Attest: GEO. C. GORHAM,
Secretary.
 By W. J. McDONALD,
Chief Clerk.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty. Proclamation.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the City of Washington, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, [SEAL.] and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.

By the President:
 W. HUNTER,
Acting Secretary of State.

TREATY OF FORT LARAMIE WITH SIOUX, ETC., 1851.

Sept. 17, 1851.
11 Stats., p. 749.

Articles of a treaty made and concluded at Fort Laramie, in the Indian Territory, between D. D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickaras, parties of the second part, on the seventeenth day of September, A. D. one thousand eight hundred and fifty-one.^a

Peace to be observed.

ARTICLE 1. The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace.

Roads may be established.

ARTICLE 2. The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories.

Indians to be protected.

ARTICLE 3. In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty.

Depredations on whites to be satisfied.

ARTICLE 4. The aforesaid Indian nations do hereby agree and bind themselves to make restitution or satisfaction for any wrongs committed, after the ratification of this treaty, by any band or individual of their people, on the people of the United States, whilst lawfully residing in or passing through their respective territories.

Boundaries of lands.

ARTICLE 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:

Sioux.

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Butte, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

Grosventre, etc.

The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.

Assiniboin.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of

^a This treaty as signed was ratified by the Senate with an amendment changing the annuity in Article 7 from fifty to ten years, subject to acceptance by the tribes. Assent of all tribes except the Crows was procured (see Upper Platte C., 570, 1853, Indian Office) and in subsequent agreements this treaty has been recognized as in force (see post p. 776).

Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

Blackfoot.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

Crow.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Butte, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fé road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

Cheyenne and Arrapaho.

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

Rights in other lands.

ARTICLE 6. The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations, through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.

Head chiefs of said tribes.

ARTICLE 7. In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs, the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per annum for the term of ten years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations.

Annuities.

ARTICLE 8. It is understood and agreed that should any of the Indian nations, parties to this treaty, violate any of the provisions thereof, the United States may withhold the whole or a portion of the annuities mentioned in the preceding article from the nation so offending, until, in the opinion of the President of the United States, proper satisfaction shall have been made.

Annuities suspended by violation of treaty.

In testimony whereof the said D. D. Mitchell and Thomas Fitzpatrick commissioners as aforesaid, and the chiefs, headmen, and braves, parties hereto, have set their hands and affixed their marks, on the day and at the place first above written.

D. D. Mitchell
Thomas Fitzpatrick
Commissioners.

TREATY WITH THE CHICKASAW, 1852.

Sioux:

Mah-toe-wha-you-whey, his x mark.
 Mah-kah-toe-zah-zah, his x mark.
 Bel-o-ton-kah-tan-ga, his x mark.
 Nah-ka-pah-gi-gi, his x mark.
 Mak-toe-sah-bi-chis, his x mark.
 Meh-wah-tah-ni-hans-kah, his x mark.

Cheyennes:

Wah-ha-nis-satta, his x mark.
 Voist-ti-toe-vetz, his x mark.
 Nahk-ko-me-ien, his x mark.
 Koh-kah-y-wh-cum-est, his x mark.

Arrapahoes:

Be-ah-te-a-qui-sah, his x mark.
 Neb-ni-bah-seh-it, his x mark.
 Beh-kah-jay-beth-sah-es, his x mark.

In the presence of—

A. B. Chambers, secretary.
 S. Cooper, colonel, U. S. Army.
 R. H. Chilton, captain, First Drags.
 Thomas Duncan, captain, Mounted Rifle-
 men.
 Thos. G. Rhett, brevet captain R. M. R.
 W. L. Elliott, first lieutenant R. M. R.
 C. Campbell, interpreter for Sioux.
 John S. Smith, interpreter for Chey-
 ennes.
 Robert Meldrum, interpreter for the
 Crows.

Crows:

Arra-tu-ri-sash, his x mark.
 Doh-che-pit-seh-chi-es, his x mark.

Assinaboines:

Mah-toe-wit-ko, his x mark.
 Toe-tah-ki-eh-nan, his x mark.

Mandans and Gros Ventres:

Nochk-pit-shi-toe-pish, his x mark.
 She-oh-mant-ho, his x mark.

Arickarees:

Koun-hei-ti-shan, his x mark.
 Bi-at-ah-tah-wetch, his x mark.

H. Culbertson, interpreter for Assini-
 boines and Gros Ventres.
 Francois L'Etalie, interpreter for Arick-
 arees.
 John Fizelle, interpreter for the Arrapa-
 hoes.
 B. Gratz Brown.
 Robert Campbell.
 Edmond F. Chouteau.

TREATY WITH THE CHICKASAW, 1852.

June 22, 1852.

10 Stat., 974.
 Ratified Aug. 13,
 1852.
 Proclaimed, Feb. 24,
 1853.

Articles of a treaty concluded at Washington, on the 22nd day of June, 1852, between Kenton Harper, commissioner on the part of the United States, and Colonel Edmund Pickens, Benjamin S. Love, and Sampson Folsom, commissioners duly appointed for that purpose, by the Chickasaw tribe of Indians.

Agent to reside
 among the Chicka-
 saws.

ARTICLE 1. The Chickasaw tribe of Indians acknowledge themselves to be under the guardianship of the United States, and as a means of securing the protection guaranteed to them by former treaties, it is agreed that an Agent of the United States shall continue to reside among them.

Sale of Chickasaw
 lands.

ARTICLE 2. That the expenses attending the sale of the land ceded by the Chickasaws to the United States, under the treaty of 1832, having, for some time past, exceeded the receipts, it is agreed that the remnant of the lands so ceded and yet unsold, shall be disposed of as soon as practicable, under the direction of the President of the United States in such manner and in such quantities, as, in his judgment, shall be least expensive to the Chickasaws, and most conducive to their benefit: Provided, That a tract of land, including the grave-yard near the town of Pontotoc, where many of the Chickasaws and their white friends are buried, and not exceeding four acres in quantity, shall be, and is hereby set apart and conveyed to the said town of Pontotoc to be held sacred for the purposes of a public burial-ground forever.

Burial ground in
 Pontotoc.

Settlement of title
 of Chickasaws to a
 tract in Tennessee.

ARTICLE 3. It is hereby agreed that the question of the right of the Chickasaws, so long contended for by them, to a reservation of four miles square on the River Sandy, in the State of Tennessee, and particularly described in the 4th article of the treaty concluded at Old-town, on the 19th day of October, 1818, shall be submitted to the Secretary of the Interior who shall decide, what amount, if any thing, shall be paid to the Chickasaws for said reservation: Provided, however, That the amount so to be paid shall not exceed one dollar and twenty-five cents per acre.

Proviso.

TREATY WITH THE CROW TRIBE.

Aug. 4, 1825.
Proclamation,
Feb. 6, 1826.

For the purpose of perpetuating the friendship which has heretofore existed, as also to remove all future cause of discussion or dissension, as it respects trade and friendship between the United States and their citizens, and the Crow tribe of Indians, the President of the United States of America, by Brigadier-General Henry Atkinson, of the United States' army, and Major Benjamin O'Fallon, Indian agent, with full powers and authority, specially appointed and commissioned for that purpose, of the one part, and the undersigned Chiefs, Head men and Warriors, of the said Crow tribe of Indians, on behalf of their tribe, of the other part, have made and entered into the following Articles and Conditions; which, when ratified by the President of the United States, by and with the advice and consent of the Senate, shall be binding on both parties—to wit :

ARTICLE 1.

Supremacy of
U. S. acknow-
ledged.

It is admitted by the Crow tribe of Indians, that they reside within the territorial limits of the United States, acknowledge their supremacy, and claim their protection.—The said tribe also admit the right of the United States to regulate all trade and intercourse with them.

ARTICLE 2.

Indians re-
ceived into pro-
tection of U. S.

The United States agree to receive the Crow tribe of Indians into their friendship, and under their protection, and to extend to them, from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States.

ARTICLE 3.

Places for
trade to be de-
signated by the
President.

All trade and intercourse with the Crow tribe shall be transacted at such place or places as may be designated and pointed out by the President of the United States, through his agents; and none but American

TREATY WITH THE CROWS. 1825

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citizens, duly authorized by the United States, shall be admitted to trade or hold intercourse with said tribe of Indians.

ARTICLE 4.

That the Crow tribe may be accommodated with such articles of merchandize, &c. as their necessities may demand, the United States agree to admit and licence traders to hold intercourse with said tribe, under mild and equitable regulations: in consideration of which, the Crow tribe bind themselves to extend protection to the persons and the property of the traders, and the persons legally employed under them, whilst they remain within the limits of their district of country. And the said Crow tribe further agree, that if any foreigner or other person, not legally authorized by the United States, shall come into their district of country, for the purposes of trade or other views, they will apprehend such person or persons, and deliver him or them to some United States' Superintendent or agent of Indian Affairs, or to the commandant of the nearest military post, to be dealt with according to law. And they further agree to give safe conduct to all persons who may be legally authorized by the United States to pass through their country, and to protect in their persons and property all agents or other persons sent by the United States to reside temporarily among them; and that they will not, whilst on their distant excursions, molest or interrupt any American citizen or citizens, who may be passing from the United States to New Mexico, or returning from thence to the United States.

Regulation of trade.

ARTICLE 5.

That the friendship which is now established between the United States and the Crow tribe, should not be interrupted by the misconduct of individuals, it is hereby agreed, that for injuries done by individuals, no private revenge or retaliation shall take place, but instead thereof, complaints shall be made, by the party injured, to the superintendent or agent of Indian affairs, or other person appointed by the President; and it shall be the duty of said Chiefs, upon complaint being made as aforesaid, to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished, agreeably to the laws of the United States. And, in like manner, if any robbery, violence, or murder, shall be committed on any Indian or Indians belonging to the said tribe, the person or persons so offending shall be tried, and, if found guilty, shall be punished in like manner as if the injury had been done to a white man. And it is agreed, that the Chiefs of said Crow tribe shall, to the utmost of their power, exert themselves to recover horses or other property, which may be stolen or taken from any citizen or citizens of the United States, by any individual or individuals of said tribe; and the property so recovered shall be forthwith delivered to the agents or other person authorized to receive it, that it may be restored to the proper owner. And the United States hereby guaranty to any Indian or Indians of said tribe, a full indemnification for any horses or other property which may be stolen from them by any of their citizens: *Provided*, That the property stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States. And the said tribe engage, on the requisition or demand of the President of the United States, or of the agents, to deliver up any white man resident among them.

Course to be pursued in order to prevent injuries to individuals, &c.

Chiefs to exert themselves to recover stolen property.

Proviso.

ARTICLE 6.

And the Chiefs and Warriors, as aforesaid, promise and engage that their tribe will never, by sale, exchange, or as presents, supply any

No guns, &c. to be furnished by them to enemies of U. S.

nation, tribe, or band of Indians, not in amity with the United States, with guns, ammunition, or other implements of war.

Done at the Mandan Village, this fourth day of August, A. D. 1825, and of the Independence of the United States the fiftieth.

In testimony whereof, the Commissioners, Henry Atkinson and Benjamin O'Fallon, and the Chiefs and Warriors, of the Crow tribe of Indians, have hereunto set their hands and affixed their seals.

H. ATKINSON, *Br. Gen. U. S. Army.*
BENJ. O'FALLON, *U. S. Agt. Ind. Aff.*

Chiefs.

E-she-huns-ka, or the long hair.	Co-tah-bah-sah, the one that runs.
She-wo-cub-bish, one that sings bad.	Bah-cha-na-mach, the one that sits in the pine.
Har-rar-shash, one that rains.	He-ran-dah-pah, the one that ties his hair before.
Chay-ta-pah-ha, wolf's paunch.	Bes-ca-bar-ru-sha, the dog that eats.
Huch-che-rach, little black dog.	Nah-puch-kia, the little one that holds the stick in his mouth.
Mah-pitch, bare shoulder.	Bah-da-ah-chan-dah, the one that jumps over every person.
Esh-ca-ca-mah-hoo, the standing lance.	Mash-pah-hash, the one that is not right.
Che-rep-con-nes-ta-chea, the little white bull.	
Ah-mah-shay-she-ra, the yellow big belly.	

In presence of A. L. Langham, Sec. to the Com. H. Leavenworth, Col. U. S. Army. S. W. Kearney, Br. Maj. 1st Inf. D. Ketchum, Maj. U. S. Army. R. B. Mason, Capt. 1st Inf. G. C. Spencer, Capt. 1st Inf. J. Gantt, Capt. 6th Inf. Thos. P. Gwynn, Lieut. 1st Inf. Saul MacRee, Lieut. and A. Camp. Thomas Noel, Lieut. 6th Inf. Wm. L. Harris, 1st Inf. John Gale, Surg. U. S. A. J. V. Swearengen, Lieut. 1st Inf. R. Holmes, Lt. 6th Inf. M. W. Batman, Lieut. 6th Inf. R. M. Coleman, U. S. A. J. Rogers, Lieut. 6th Inf. Wm. Day, Lieut. 1st Inf. G. H. Kennerly, U. S. S. Ind. Ag't. B. Riley, Capt. 6th Inf. Wm. S. Harney, Lieut. 1st Inf. Jas. W. Kingsbury, Lieut. 1st Reg. Inf. George C. Hutter, Lieut. 6th Inf. Wm. Armstrong, Capt. 6th Reg. Inf.

To the Indian names are subjoined a mark and seal.

TREATY WITH THE BLACKFOOT INDIANS. Oct. 17, 1855.

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FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA,

Oct. 17, 1855.

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, GREETING :

WHEREAS, a treaty was made and concluded at the council ground on the Upper Missouri, near the mouth of the Judith River, in the territory of Nebraska, on the seventeenth day of October, in the year one thousand eight hundred and fifty-five, between A. Cumming and Isaac I. Stevens, commissioners on the part of the United States, and the Blackfoot and other tribes of Indians, which treaty is in the words and figures following, to wit :—

Articles of agreement and convention made and concluded at the council ground on the Upper Missouri, near the mouth of the Judith River, in the territory of Nebraska, this seventeenth day of October, in the year one thousand eight hundred and fifty-five, by and between A. Cumming and Isaac I. Stevens, commissioners duly appointed and authorized, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the following nations and tribes of Indians, who occupy, for the purposes of hunting, the territory on the Upper Missouri and Yellow Stone Rivers, and who have permanent homes as follows: East of the Rocky Mountains, the Blackfoot nation; consisting of the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians. West of the Rocky Mountains, the Flathead nation; consisting of the Flathead, Upper Pend d'Oreille, and Kootenay tribes of Indians, and the Nez Percé tribe of Indians, the said chiefs, headmen and delegates, in behalf of and acting for said nations and tribes, and being duly authorized thereto by them.

Title.

ARTICLE 1. Peace, friendship and amity shall hereafter exist between the United States and the aforesaid nations and tribes of Indians, parties to this treaty, and the same shall be perpetual.

Peace to exist with U. States.

ARTICLE 2. The aforesaid nations and tribes of Indians, parties to this treaty, do hereby jointly and severally covenant that peaceful relations shall likewise be maintained among themselves in future; and that they will abstain from all hostilities whatsoever against each other, and cultivate mutual good-will and friendship. And the nations and tribes aforesaid do furthermore jointly and severally covenant, that peaceful relations shall be maintained with and that they will abstain from all hostilities whatsoever, excepting in self-defence, against the following named nations and tribes of Indians, to wit: the Crows, Assinebens, Crees, Snakes, Blackfeet, Sans Arce, and Aunce-pa-pas bands of Sioux, and all other neighboring nations and tribes of Indians.

Peace to exist with each other and with certain other tribes.

ARTICLE 3. The Blackfoot nation consent and agree that all that portion of the country recognized and defined by the treaty of Laramie as Blackfoot territory, lying within lines drawn from the Hell Gate or Medicine Rock Passes in the main range of the Rocky Mountains, in an easterly direction to the nearest source of the Muscle Shell River, thence to the mouth of Twenty-five Yard Creek, thence up the Yellow Stone River to its northern source, and thence along the main range of the Rocky Mountains, in a northerly direction, to the point of beginning, shall be a common hunting-ground for ninety-nine years, where all the nations, tribes and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted privileges of hunting, fishing and gathering fruit, grazing animals, curing meat and dressing robes. They further agree that they will not establish villages, or in any other way exercise exclu-

Blackfoot Territory recognized as common hunting ground.

sive rights within ten miles of the northern line of the common hunting-ground, and that the parties to this treaty may hunt on said northern boundary line and within ten miles thereof.

Provided, That the western Indians, parties to this treaty, may hunt on the trail leading down the Muscle Shell to the Yellow Stone; the Muscle Shell River being the boundary separating the Blackfoot from the Crow Territory.

No settlements to be made thereon.

And provided, That no nation, band or tribe of Indians, parties to this treaty, nor any other Indians, shall be permitted to establish permanent settlements, or in any other way exercise, during the period above mentioned, exclusive rights or privileges within the limits of the above-described hunting-ground.

Vested rights, not interfered with.

And provided further, That the rights of the western Indians to a whole or a part of the common hunting-ground, derived from occupancy and possession, shall not be affected by this article, except so far as said rights may be determined by the treaty of Laramie.

Certain territory to belong to the Blackfoot nation.

ARTICLE 4. The parties to this treaty agree and consent, that the tract of country lying within lines drawn from the Hell Gate or Medicine Rock Passes, in an easterly direction, to the nearest source of the Muscle Shell River, thence down said river to its mouth, thence down the channel of the Missouri River to the mouth of Milk River, thence due north to the forty-ninth parallel, thence due west on said parallel to the main range of the Rocky Mountains, and thence southerly along said range to the place of beginning, shall be the territory of the Blackfoot nation, over which said nation shall exercise exclusive control, excepting as may be otherwise provided in this treaty. Subject, however, to the provisions of the third article of this treaty, giving the right to hunt, and prohibiting the establishment of permanent villages and the exercise of any exclusive rights within ten miles of the northern line of the common hunting-ground, drawn from the nearest source of the Muscle Shell River to the Medicine Rock Passes, for the period of ninety-nine years.

Provided also, That the Assiniboins shall have the right of hunting, in common with the Blackfeet, in the country lying between the aforesaid eastern boundary line, running from the mouth of Milk River to the forty-ninth parallel, and a line drawn from the left bank of the Missouri River, opposite the Round Butte north, to the forty-ninth parallel.

How to enter and leave the common hunting ground.

ARTICLE 5. The parties to this treaty, residing west of the main range of the Rocky Mountains, agree and consent that they will not enter the common hunting-ground, nor any part of the Blackfoot Territory, or return home, by any pass in the main range of the Rocky Mountains to the north of the Hell Gate or Medicine Rock Passes. And they further agree that they will not hunt or otherwise disturb the game, when visiting the Blackfoot Territory for trade or social intercourse.

Indians to remain in their respective territories except, &c.

ARTICLE 6. The aforesaid nations and tribes of Indians, parties to this treaty, agree and consent to remain within their own respective countries, except when going to or from, or whilst hunting upon, the "common hunting-ground," or when visiting each other for the purpose of trade or social intercourse.

Citizens may pass through and live in the Indian territory.

ARTICLE 7. The aforesaid nations and tribes of Indians agree that citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them. And the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit.

Protection against depredations.

Roads, telegraph lines, and military posts, &c. may be established.

ARTICLE 8. For the purpose of establishing travelling thoroughfares through their country, and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree, that the United States may, within the countries respectively occupied and claimed by them, construct roads of every

TREATY WITH THE BLACKFOOT INDIANS. Oct. 17, 1855.

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description; establish lines of telegraph and military posts; use materials of every description found in the Indian country; build houses for agencies, missions, schools, farms, shops, mills, stations, and for any other purpose for which they may be required, and permanently occupy as much land as may be necessary for the various purposes above enumerated, including the use of wood for fuel and land for grazing, and that the navigation of all lakes and streams shall be forever free to citizens of the United States.

ARTICLE 9. In consideration of the foregoing agreements, stipulations, and cessions, and on condition of their faithful observance, the United States agree to expend, annually, for the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians, constituting the Blackfoot nation, in addition to the goods and provisions distributed at the time of signing this treaty, twenty thousand dollars, annually, for ten years, to be expended in such useful goods and provisions, and other articles, as the President, at his discretion, may from time to time determine; and the superintendent, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto: *Provided, however,* That if, in the judgment of the President and Senate, this amount be deemed insufficient, it may be increased not to exceed the sum of thirty-five thousand dollars per year.

Annual payment for benefit of Blackfoot nation.

ARTICLE 10. The United States further agree to expend annually, for the benefit of the aforesaid tribes of the Blackfoot nation, a sum not exceeding fifteen thousand dollars annually, for ten years, in establishing and instructing them in agricultural and mechanical pursuits, and in educating their children, and in any other respect promoting their civilization and christianization: *Provided, however,* That to accomplish the objects of this article, the President may, at his discretion, apply any or all the annuities provided for in this treaty: *And provided, also,* That the President may, at his discretion, determine in what proportions the said annuities shall be divided among the several tribes.

Same subject.

ARTICLE 11. The aforesaid tribes acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and to commit no depredations or other violence upon such citizens. And should any one or more violate this pledge, and the fact be proved to the satisfaction of the President, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. The aforesaid tribes are hereby bound to deliver such offenders to the proper authorities for trial and punishment, and are held responsible in their tribal capacity, to make reparation for depredations so committed.

Provisions to secure peace, and indemnity against Indian depredations.

Nor will they make war upon any other tribes, except in self-defence, but will submit all matters of difference between themselves and other Indians to the government of the United States, through its agent, for adjustment, and will abide thereby. And if any of the said Indians, parties to this treaty, commit depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

War not to be made on other tribes except in self-defence.

Provision against depredations of other Indians.

Criminals to be surrendered.

ARTICLE 12. It is agreed and understood, by and between the parties to this treaty, that if any nation or tribe of Indians aforesaid, shall violate any of the agreements, obligations, or stipulations, herein contained, the United States may withhold for such length of time as the President and Congress may determine, any portion or all of the annuities agreed to be paid to said nation or tribe under the ninth and tenth articles of this treaty.

Annuities may be stopped in case of violation of this treaty.

ARTICLE 13. The nations and tribes of Indians, parties to this treaty, desire to exclude from their country the use of ardent spirits or other

Provision against intoxicants.

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tion or the intro- intoxicating liquor, and to prevent their people from drinking the same. Therefore it is provided, that any Indian belonging to said tribes who is guilty of bringing such liquor into the Indian country, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

This treaty to be in full for compensation. **ARTICLE 14.** The aforesaid nations and tribes of Indians, west of the Rocky Mountains, parties to this treaty, do agree, in consideration of the provisions already made for them in existing treaties, to accept the guarantees of the peaceful occupation of their hunting-grounds, east of the Rocky Mountains, and of remuneration for depredations made by the other tribes, pledged to be secured to them in this treaty out of the annuities of said tribes, in full compensation for the concessions which they, in common with the said tribes, have made in this treaty.

The Indians east of the Mountains, parties to this treaty, likewise recognize and accept the guarantees of this treaty, in full compensation for the injuries or depredations which have been, or may be committed by the aforesaid tribes, west of the Rocky Mountains.

Annuities not to be taken for debts **ARTICLE 15.** The annuities of the aforesaid tribes shall not be taken to pay the debts of individuals.

ARTICLE 16. This treaty shall be obligatory upon the aforesaid nations and tribes of Indians, parties hereto, from the date hereof, and upon the United States as soon as the same shall be ratified by the President and Senate.

In testimony whereof the said A. Cumming and Isaac I. Stevens, commissioners on the part of the United States, and the undersigned chiefs, headmen, and delegates of the aforesaid nations and tribes of Indians, parties to this treaty, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

A. CUMMING. [L. s.]
ISAAC I. STEVENS. [L. s.]

Piegans.

NEE-TI-NEE, or "the only chief," now
called the Lame Bull, his x mark. [L. s.]
MOUNTAIN CHIEF, his x mark. [L. s.]
LOW HORN, his x mark. [L. s.]
LITTLE GRAY HEAD, his x mark. [L. s.]
LITTLE DOG, his x mark. [L. s.]
BIG SNAKE, his x mark. [L. s.]
THE SKUNK, his x mark. [L. s.]
THE BAD HEAD, his x mark. [L. s.]
KITCH-EEPONE-ISTAH, his x mark. [L. s.]
MIDDLE SITTER, his x mark. [L. s.]

Bloods.

ONIS-TAY-SAY-NAH-QUE-IM, his x mark. [L. s.]
THE FATHER OF ALL CHILDREN, his x mark. [L. s.]
THE BULL'S BACK FAT, his x mark. [L. s.]
HEAVY SHIELD, his x mark. [L. s.]
NAH-TOSE-ONISTAH, his x mark. [L. s.]
THE CALF SHIRT, his x mark. [L. s.]

Gros Ventres.

BEAR'S SHIRT, his x mark. [L. s.]
LITTLE SOLDIER, his x mark. [L. s.]
STAR ROBE, his x mark. [L. s.]

TREATY WITH THE BLACKFOOT INDIANS. Oct. 17, 1855.

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SITTING SQUAW,	his x mark.	[L. S.]
WEASEL HORSE,	his x mark.	[L. S.]
THE RIDER,	his x mark.	[L. S.]
EAGLE CHIEF,	his x mark.	[L. S.]
HEAP OF BEARS,	his x mark.	[L. S.]

Blackfeet.

THE THREE BULLS,	his x mark.	[L. S.]
THE OLD KOOTOMAS,	his x mark.	[L. S.]
POW-AH-QUE,	his x mark.	[L. S.]
CHIEF RABBIT RUNNER,	his x mark.	[L. S.]

Nez Percés.

SPOTTED EAGLE,	his x mark.	[L. S.]
LOOKING GLASS,	his x mark.	[L. S.]
THE THREE FEATHERS,	his x mark.	[L. S.]
EAGLE FROM THE LIGHT,	his x mark.	[L. S.]
THE LONE BIRD,	his x mark.	[L. S.]
IP-SHUN-NEE-WUS,	his x mark.	[L. S.]
JASON,	his x mark.	[L. S.]
WAT-TI-WAT-TI-WE-HINCK,	his x mark.	[L. S.]
WHITE BIRD,	his x mark.	[L. S.]
STABBING MAN,	his x mark.	[L. S.]
JESSE,	his x mark.	[L. S.]
PLENTY BEARS,	his x mark.	[L. S.]

Flathead Nation.

VICTOR,	his x mark.	[L. S.]
ALEXANDER,	his x mark.	[L. S.]
MOSES,	his x mark.	[L. S.]
BIG CANOE,	his x mark.	[L. S.]
AMBROSE,	his x mark.	[L. S.]
KOOTLE-CHA,	his x mark.	[L. S.]
MICHELLE,	his x mark.	[L. S.]
FRANCIS,	his x mark.	[L. S.]
VINCENT,	his x mark.	[L. S.]
ANDREW,	his x mark.	[L. S.]
ADOLPHE,	his x mark.	[L. S.]
THUNDER,	his x mark.	[L. S.]

Piegans.

RUNNING RABBIT,	his x mark.	[L. S.]
CHIEF BEAR,	his x mark.	[L. S.]
THE LITTLE WHITE BUFFALO,	his x mark.	[L. S.]
THE BIG STRAW,	his x mark.	[L. S.]

Flathead.

BEAR TRACK,	his x mark.	[L. S.]
LITTLE MICHELLE,	his x mark.	[L. S.]
PALCHINAH,	his x mark.	[L. S.]

Bloods.

THE FEATHER,	his x mark.	[L. S.]
THE WHITE EAGLE,	his x mark.	[L. S.]

TREATY WITH THE BLACKFOOT INDIANS. Oct. 17, 1855.

Executed in presence of—

JAMES DOTY, *Secretary.*
 ALFRED J. VAUGHAN, Jr.
 E. ALW. HATCH, *Agent for Blackfeet.*
 THOMAS ADAMS, *Special Agent Flathead Nation.*
 R. H. LANSDALE, *Indian Agent Flathead Nation.*
 W. H. TAPPAN, *Sub-Agent for the Nez Percés.*
 JAMES BIRD,
 A. CULBERTSON, } *Blackfoot Interpreters.*
 BENJ. DEROCHE, }
 BENJ. KISER, his x mark, }
 Witness, JAMES DOTY, } *Flat Head Interpreters.*
 GUSTAVUS SOHON, }
 W. CRAIG, }
 DELAWARE JIM, his x mark, } *Nez Percé Interpreters.*
 Witness, JAMES DOTY, }
 A CREE CHIEF, (BROKEN ARM,) his mark.
 Witness, JAMES DOTY.
 A. J. HOEKEBOERSG,
 JAMES CROKE,
 E. S. WILSON,
 A. C. JACKSON,
 CHARLES SHUCETTE, his x mark.
 CHRIST. P. HIGGINS,
 A. H. ROBLE,
 S. S. FORD, Jr.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the fifteenth day of April, eighteen hundred and fifty-six, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

April 15, 1856.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded between the United States and the Blackfeet and other tribes of Indians, at the council ground on the Upper Missouri River, October seventeenth, eighteen hundred and fifty-five.

Attest:

ASBURY DICKINS, *Secretary.*

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the fifteenth day of April, one thousand eight hundred and fifty-six, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-fifth day of April,
 [L. s.] A. D. one thousand eight hundred and fifty-six, and of the independence of the United States the eightieth.

FRANKLIN PIERCE.

By the President:

W. L. MARCY, *Secretary of State.*

TREATY WITH THE FLATHEADS, &c. JULY 16, 1855.

and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Boundaries.

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

Whites not to reside thereon unless, &c.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied if with the permission of the owner or claimant.

Indians to be allowed for improvements on lands ceded.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. *And provided*, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

Roads may be made through reservation.

ARTICLE III. *And provided*, That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways.

Rights and privileges of Indians.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Payments by the United States.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars in the following manner — that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for

TREATY WITH THE FLATHEADS, &c. JULY 16, 1855.

the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

How to be applied.

ARTICLE V. The United States further agree to establish within said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop; and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide with the necessary furniture the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

United States to establish schools.

mechanic's shops.

saw and grind mills.

a hospital.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

to pay salary to head chiefs.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Certain expenses to be borne by the United States and not charged on annuities.

ARTICLE VI. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Lots may be assigned to individuals.

Vol. x. p. 1044.

ARTICLE VII. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

Annuities not to pay individual debts of Indians. Indians to preserve friendly relations.

ARTICLE VIII. The aforesaid confederated tribes of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should

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Indians to pay for depredations.

not to make war except, &c

to surrender offenders.

Annuities to be reserved from those who drink, &c., ardent spirits.

Guaranty of reservation against certain claims of Hudson Bay Company. Vol. ix. p. 870.

Bitter Root Valley to be surveyed, and portions may be set apart for reservation.

meanwhile not to be opened for settlement.

When treaty to take effect.

Signatures, July 16, 1855.

any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to guaranty the exclusive use of the reservation provided for in this treaty, as against any claims which may be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading post on the Pru-in River by the servants of that company.

ARTICLE XI. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo fork, shall be opened to settlement until such examination is had and the decision of the President made known.

ARTICLE XII. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac L Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC L. STEVENS, [L. s.]
Governor and Superintendent Indian Affairs W. T.

VICTOR, <i>Head chief of the Flathead Nation,</i>	his x mark.	[L. s.]
ALEXANDER, <i>Chief of the Upper Pend d'Oreilles,</i>	his x mark.	L. s.
MICHELLE, <i>Chief of the Kootenays,</i>	his x mark.	L. s.
AMBROSE,	his x mark.	L. s.
PAH-SOH,	his x mark.	L. s.
BEAR TRACK,	his x mark.	L. s.
ADOLPHE,	his x mark.	L. s.
THUNDER,	his x mark.	L. s.
BIG CANOE,	his x mark.	L. s.
KOOTEL CHAH,	his x mark.	L. s.
PAUL,	his x mark.	L. s.

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ANDREW,
MICHELLE,
BATTISTE,

his x mark. [L. S.]
his x mark. [L. S.]
his x mark. [L. S.]

Kootenays.

GUN FLINT,
LITTLE MICHELLE,
PAUL SEE,
MOSES,

his x mark. [L. S.]
his x mark. [L. S.]
his x mark. [L. S.]
his x mark. [L. S.]

JAMES DOTY, *Secretary.*
R. H. LANSDALE, *Indian Agent.*
W. H. TAPPAN, *Sub Indian Agent.*
HENRY R. CROSIRE,
GUSTAVUS SOHON, *Flathead Interpreter.*
A. J. HOECKEN, *Sp. Mis.*
WILLIAM CRAIG.

And, whereas, the said treaty having been submitted to the Senate of the United States for their constitutional action thereon, the Senate did, on the eighth day of March, eighteen hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit :

Consent of
Senate, March 8,
1859.

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and Chiefs, Headmen and Delegates of the confederate tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, who are constituted a nation under the name of the Flathead Nation, signed 16th day of July, 1855.

"Attest:

"ASBURY DICKINS, *Secretary.*"

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

Proclamation,
April 18, 1859.

In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the [SEAL.] eighty-third.

JAMES BUCHANAN.

By the President
LEWIS CASS, *Secretary of State.*