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Brief of Appellees

No. 9924

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

B. T. McCAULEY, Director of Game of the State of Washington, B. M. BRENNAN, Director of Fisheries of the State of Washington, E. M. BENN, Inspector of the Department of Fisheries of the State of Washington, and GUY BURNHAM, Game Protector of the State of Washington,

Appellants,

vs.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

VANDERVEER, BASSETT & GEISNESS,
Attorneys for Appellees.

1311 Alaska Building,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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BRIEF OF APPELLEES

STATEMENT AS TO JURISDICTION

The Bill of Complaint filed by the appellees (Tr. 1 to 19 inc.) asserts that the defendants are interfering with rights possessed by the appellees under a treaty, copy of which is attached to the Complaint (Tr. 13 to 19 inc.). The pertinent provision of the treaty (12 Statutes 939) is as follows:

"The right of taking fish and of whaling or

sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * *."

It is alleged in the Complaint that the value of the right in controversy exceeds $3000.00 (Tr. 8) and this allegation is admitted in paragraph II of the Answer (Tr. 27).

Jurisdiction of the United States District Court rests upon Art. III, Sec. 2, Cl. 1, of the United States Constitution and 28 U.S.C.A. Sec. 41(1).

STATEMENT OF THE CASE

The appellees, the Makah Indian Tribe and the members of the Tribal Council, sued to prevent interference with the exercise of privileges asserted by virtue of a treaty between the tribe and the United States of America. In substance the following facts are alleged in the Bill of Complaint:

By a treaty made January 31, 1855, the Makah Indians ceded all lands occupied by them, including, of course, their fishing places, to the United States Government. The treaty reserved a certain area for the Indians and also promised and secured to the Indians and to their posterity and successors the right of taking fish at usual and accustomed grounds and stations. From time immemorial the Makah Indians have been accustomed to fish in the Hoko River from its mouth up to its spawning grounds. The Makahs ceded the Hoko River to the United States Government and it is not part of the reservation, but both the reserva-

tion and the river are in the northwest portion of Clallam County, Washington.

By virtue of the guarantee contained in the treaty, the Makah Indians fished in the Hoko River with specified Indian gear until stopped by the appellants. In violation of the rights secured to the appellees by the treaty, the appellants, who are officers and employees of the State of Washington, threatened to arrest and confiscate the fishing gear of any Makah Indians fishing in the Hoko River and have intentionally prevented any fishing by the Makah Indians in any part of the Hoko River.

From the time of the treaty until about 1933 the State of Washington and its agents and employees recognized and acquiesced in the fishing rights claimed by the appellees, and the members of the Makah Indian Tribe continuously exercised them without interference. The appellees prayed that the treaty rights be established and declared by the Court and that injunctive relief be granted.

After answering, the appellants move for judgment upon the pleadings. A three-judge statutory court disclaimed jurisdiction, an inescapable conclusion under *Beard Truck Line Co. v. Smith*, 12 F. Supp. 964 (D.C. Tex. 1935), and *Ex parte Bransfor*, 310 U. S. 354, 84 L. ed. 1249. The appellees at no time requested that a statutory court be convened and, on the contrary, contended that such a court would not have jurisdiction, but it was stipulated, as in *Beard Truck Line Co. v. Smith, supra*, that the motion for judgment on the pleadings might be determined by a statutory court and that if such court should find

that it lacked jurisdiction the motion might be determined and disposed of by a single district judge without further hearing. Pursuant to this stipulation the motion was thereupon submitted to Judge Bowen who made a written memorandum decision favorable to the appellees found on pp. 35 to 43 of the Transcript of Record.

After reciting that "it was stated in open court by the respective counsel for the plaintiffs and the defendants that they intend and expect that the decision upon said motion for judgment upon the pleadings shall result in a final decree in this cause and evidence was adduced in support of the allegations in the Bill of Complaint, without objections from the defendants" (Tr. 44), the Court made Findings of Fact, Conclusions of Law and a Decree. The Findings of Fact follow the allegations of the Complaint and the Decree accords the relief prayed for by the appellees.

Aside from questions pertaining to jurisdiction, three basic questions are presented:

(1) What is the meaning of Article IV of the Treaty which reads:

> "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States * * *."

Does this language mean that the Indians have an absolute right to fish although the Whites may share the privilege, or does it mean that the right of the Indians to fish may be restricted or taken away alto-

gether if a like limitation is imposed upon fishing by the Whites?

(2) If the Treaty be interpreted as attempting to reserve a right which the State may not take away even in the exercise of its police power, is the Treaty provision invalid as an improper impairment of State sovereignty or because it places the State upon an unequal footing with the original states?

(3) Have the Indians lost rights they previously had under the treaty provision in question, by reason of the grant to them of United States citizenship?

The appellees do not deny that the appellants assume to act under state statutes.

SUMMARY OF ARGUMENT

Jurisdiction

(1) This action is not one against the State. It is an action to enjoin conduct violative of the supreme law of the land, although the actors against whom relief is sought are state officers.

(2) It is immaterial to jurisdiction that the appellees are citizens.

(3) While the United States Attorney may act on behalf of the Indians, they are not disabled from bringing an action in their own behalf by their own counsel.

ON THE MERITS

(1) The treaty should be interpreted as the Indians understood it. It means that the Indians have an absolute right to fish, although the privilege may be shared by the Whites, and the State, in the exercise

of the police power, may not prevent the exercise of that right. If the Treaty is ambiguous, the Court is bound to the interpretation advanced by the appellees, due to the manner in which the case has come to this Court.

(2) The Treaty was a proper exercise of the treaty making power. Such a treaty is the supreme law of the land. Inconsistent state enactments, although in the exercise of the police power, are invalid. This is true of all states and the treaty in question does not therefore place the State of Washington upon an unequal footing.

The State cannot abrogate a treaty of the United States government to effectuate its conservation policies.

(3) No fishing rights were divested by granting citizenship to the Indians.

ARGUMENT AS TO JURISDICTION

I.

The Action Is Not One Against the State of Washington

It is contended that the United States District Court lacked jurisdiction because the suit is one against the State of Washington. In fact, the suit is against persons who are officers of the State of Washington and seeks to enjoin conduct, violative of rights under a treaty of the United States of America, which the State of Washington has no power to authorize and legalize. It is now well established that such a suit is not a suit against the state in such a sense as to

deprive the federal courts of jurisdiction otherwise possessed.

Hughes Fed. Pro., Sec. 3036, p. 219;

Cyc. of Fed. Pro., Sec. 27, p. 99;

107 Foster Fed. Proc. (6th ed.) Sec. 105c, p. 664;

Pennoyer v. McConnaughy, 140 U.S. 1, 10, 35 L. ed. 353;

Ex parte Young, 209 U.S. 123, 52 L. ed. 714;

Tindal v. Wesley, 167 U.S. 204, 219-220, 42 L. ed. 137;

Prout v. Starr, 188 U.S. 537, 543, 47 L. ed. 584;

Scott v. Donald, 165 U.S. 58, 41 L. ed. 632;

Smyth v. Ames, 169 U.S. 466, 42 L. ed. 819.

Under the foregoing authorities, a suit against a state officer is not a suit against the state merely because the state officers acted under color of their office or under a purported but unvalid authority from the state—specifically an authority invalid because in conflict with the Constitution of the United States or statutes or treaties made thereunder.

In U. S. C. Ann., Constitution, part 2, paragraph 56, a multitude of cases are assembled and the rule is accurately stated by the editors:

> "A suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of this (the Eleventh) amendment."

Likewise a Federal Court of equity may enjoin uncon-

stitutional action taken by a duly constituted state commission under a constitutional statute. *Greene v. Louisville and Interurban Railroad Co.*, 244 U. S. 499, 61 L. ed. 1280. At p. 1285 of the L. ed. report the controlling rules are stated:

> "A fundamental contention of appellants is that the present actions, brought to restrain them in respect of the performance of duties they are exercising under the authority of the State of Kentucky, are in effect suits against the state. Questions of this sort have arisen many times in this court but the matter was set at rest in *Ex parte Young*, 209 U. S. 123, 150, 155, 52 L. ed. 714, 725, 727, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, where it was held that a suit to restrain a state officer from executing an unconstitutional statute, in violation of the plaintiff's rights and to his irreparable damage, is not a suit against the state and that 'individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the law of the state, and who threaten and are about to commence proceedings either of a civil or criminal nature, to enforce against parties affected an unconstitutional act violating the Federal Constitution may be enjoined by a Federal court of equity from such action.'
>
> "In repeated decisions since *ex parte Young*, that case has been recognized as setting these cases at rest. (citing cases)
>
> "The principle is not confined to the maintenance of suits for restraining the enforcement of statutes, which, as enacted by the state legislature, are in themselves unconstitutional. *Reagan v. Farmers Loan & T. Co.*, 154 U. S. 362, 390, 38

L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, was a case not of an unconstitutional statute, but a confiscatory, and therefore unconstitutional action taken by a state commission under a constitutional statute."

II.

The Citizenship of Appellees Does Not Affect Jurisdiction

Suit by the appellees against the State of Washington to enforce a state liability could not be entertained by the Federal courts, whatever their citizenship. *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842. The citizenship of the appellees seems immaterial.

III.

The Plaintiffs Have Capacity to Sue

It is true, as argued by the appellants, that the United States District Attorney may bring an action on behalf of Indians. On the other hand, Indians have undoubted capacity to sue on their own behalf by their own counsel. In fact, the very statute under which the plaintiff tribal corporation is organized (25 U.S.C.A. Supp. Sec. 475, 48 Stat. 987) specifically authorizes the employment of legal counsel by the tribe. There can, however, be no serious doubt as to the capacity of the individual appellees to bring this action on their own behalf by their own counsel.

Sampson v. Brennan, 39 F. Supp. 74;

Deere v. New York, 22 F. (2d) 851;

Lane v. Santa Rosa, 249 U. S. 110, 63 L. ed. 504;

Y-ta-tah-wah v. Rebeck, 105 Fed. 257.

ARGUMENT ON THE MERITS

In both divisions of the Western District of Washington other actions have been brought by Indian tribes presenting precisely the same issues as presented in this case. In each case the decision of the court has been favorable to the Indians upon all points. In 1937 members of the Nisqually Tribe of Indians brought such an action entitled "*Chief Peter Kalama, et al., v. Brennan, et al.*, Cause No. 598" in the Western District of Washington, Southern Division and Judge Cushman overruled a motion to dismiss and issued a preliminary injunction. Thereafter, in 1939, in *Sampson v. Brennan*, 39 F. Supp. 74, Judge Bowen, in the Northern Division of the Western District of Washington, wrote the following opinion:

> "This is an action against state officers for relief from their alleged unlawful acts under state laws asserted to be invalid because in conflict with plaintiffs' Indian fishing rights under an Indian treaty with the United States. The action is not one in its essential nature and effect against the state to enforce a state liability, and so is not repugnant to the Eleventh Amendment. *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 11 S. Ct. 699, 35 L. ed. 363; *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 14 Ann. Cas. 764; *Ex parte New York*, 256 U. S. 490, 500, 41 S. Ct. 588, 65 L. ed. 1057. Plaintiff Indians being citizens of the United States, 8 U.S.C.A. Sec. 3, may as other citizens employ counsel of their own choice. They may also in federal court institute and prosecute an action to enforce their rights under the Constitution, laws or treaties of the United States.

Deere v. New York, D.C., 22 F. (2d) 851. The motion to dismiss will be denied.

"In view of the rulings by Judge Cushman of this court in *Mason v. Sams*, 5 F. (2d) 255, and in *Chief Peter Kalama, et al., v. Brennan, et al.*, Cause No. 598, Western District of Washington, Southern Division, order of November 3, 1937, plaintiffs' motion for temporary injunction herein will be granted. Plaintiffs' allegation of requisite jurisdictional amount is not controverted."

Both of the foregoing cases present identically the same issues as the one now before the court.

We have already referred the attention of the Court to the well considered opinion of Judge Bowen in the instant case.

In the following arguments addressed to the merits we propose to maintain the important distinction between the construction of the treaty, on the one hand, and, on the other, the asserted police power of the state to prohibit fishing no matter what the meaning of the treaty. We will argue those questions separately. It is our impression that the appellants' argument does not at all times observe this distinction and that there is some resulting confusion to the reader.

I.

Construction of the Treaty

The appellees charge in their complaint that the appellants have altogether prevented the exercise by them of their treaty rights to fish in the Hoko River. *We are not now concerned with the power of the state to impose some type of regulation.* Whatever power it may have to regulate the exercise of the fishing

rights, may it go further and altogether prevent their exercise?

Laying aside for the moment all questions concerning the power of the state to divest the Indians of treaty rights, a question which, as we have already indicated, will be separately discussed, we submit that the treaty properly construed does not mean merely that the Indians can fish until the local government of the Whites divests them of the right. The true meaning of the treaty surely was that the Indians reserved their fishing privileges, reserved the right to continue fishing as they always had in the past, although it was understood, too, that the Whites might also fish in the same places.

The general principles governing the construction of treaties are stated by the Supreme Court in *Nielsen v. Johnson* (1929) 279 U. S. 47, 73 L. ed. 607, 49 S. Ct. 223, and provide a significant background for consideration of the treaty here before the Court:

> "Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan v. Tashiro*, 278 U. S. 123; *Geofroy v. Riggs*, 133 U. S. 258, 271; *In re Ross*, 140 U. S. 453, 475; *Tucker v. Alexandroff*, 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura v. Seattle*, 265 U. S. 332; *Tucker v. Alexandroff*, *supra*; *Geofroy v. Riggs*, *supra*, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so con-

> strued is not restricted by any necessity of avoiding possible conflict with state legislation, and when so ascertained must prevail over inconsistent state enactments. See *Ware v. Hylton*, 3 Dall. 199, 1 L. ed. 568; *Jordan v. Tashiro, supra, cf. Cheung Sum Shee v. Nagle*, 268 U. S. 336, 69 L. ed. 985, 45 Sup. Ct. Rep. 539. When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter and to their own practical construction of it."

In addition to the foregoing rules of construction applicable to treaties in general, it is well established that treaties with Indian tribes are to be interpreted with a peculiar liberality to carry into effect the meaning given to the treaty by the Indians themselves. In *Seufert Brothers Company v. United States*, 249 U. S. 194, 63 L. ed. 555, 39 S. Ct. 203, the court quoted from *U. S. v. Winans*, 198 U. S. 371, 25 S. Ct. 662, 49 L. ed. 1089:

> "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 superior justice which looks only to the substance of the right, without regard to technical rules.' 119 U.S. 1; 175 U.S. 1."

See also:

U. S. v. Shoshone Tribe of Indians (1938) 304 U.S. 111, 82 L. ed. 1213;

U. S. ex rel. Marks v. Brooks (D. C. Ind. 1940) 32 F. Supp. 422;

Jones v. Meehan, 175 U.S. 1, 20 S. Ct. 1, 44 L. ed. 491.

In the light of the foregoing principles, the circumstances under which the treaty was executed, the negotiations leading up to it and the subsequent interpretation placed upon the treaty are overwhelmingly persuasive.

In connection with this argument it should be borne in mind that factual questions are not before the court. Appellants' motion for judgment upon the pleadings admitted all facts alleged by the appellees. *Wyman v. Wyman* (C.C.A. 9th 1940) 109 F. (2d) 473. And the recitation of the District Court in the introductory part of the Findings of Fact and Conclusions of Law, repeated in the like part of the Decree, makes clear that appellees' construction of the treaty, a question of fact if the language is ambiguous, must be adopted, unless the Court can say that as a matter of law the treaty upon its face means something different. The facts we will mention are for the most part admitted or of general knowledge and in any event give point to our argument that the treaty should not be interpreted against our contentions as a matter of law.

The Makah Indians and the other groups living on the Western part of the Olympic Peninsula were almost exclusively dependent upon fish for their livelihood. In negotiating the treaty with the Federal Government the Indians were not primarily concerned with land; land was not used by them as a source of livelihood, but merely provided them with living quarters and a place to dry their fish. It was essential to them that they continue fishing as in the past. They

could survive no matter what the quality or area of the land reserved to them, but there was no prospect of survival by their own efforts if their fishing rights at usual and accustomed places were substantially impaired. These circumstances are reflected in conversations occurring during the negotiation of the treaty, a summary of which Judge Bowen incorporated in his opinion:

> "On January 30, 1855, in the proceedings leading up to the above-mentioned treaty, Kalchote of Neah Bay said that he thought he ought to have right to fish and take whale and get food where he liked. Keh-Tehook of the Stone House (Tatoosh Island) spoke next, saying that what Kalchote had said was his wish, that his country extended up to Hoke-Ho (Hoko River) and that he did not wish to leave the salt water. Governor Stevens then informed them that instead of wishing to stop their fisheries he wished to send them oil kettles and fishing apparatus. Klah-Prathoo of Neah Bay then replied that he was willing to sell his land; all he wanted was the right of fishing."

At the time the treaty was made the Act of Congress establishing the territory of Washington had been in effect less than two years. A period of almost thirty-five years was to elapse before the organization of the State of Washington. The Makahs lived in the extreme northwesterly tip of the state, a region which is still comparatively isolated. It is inconceivable that they had the slightest conception of either state or territorial sovereignty or that they were even aware of the existence of a territorial government.

They said to Governor Stevens, in substance, that they were not concerned with keeping their land, although they wanted to stay on the salt water, but that they did want to continue fishing. He, in turn, assured them he did not wish to stop their fishing but, on the contrary, wished to assist them by furnishing apparatus.

The treaty is to be construed liberally and as the Indians understood it. The white men now say that the State of Washington is a sovereign state, although completely unknown to the Indians at the time the treaty was made, and that it possesses police power, and that it is perfectly consistent with the treaty to take away the Indian's treasured right to fish, by virtue of that power. We respectfully submit that such an interpretation of the treaty does violence to the Indians' understanding of the right conferred.

In his opinion in this case Judge Bowen emphasized the fact that the fishing rights were not *granted* to the Indians by the treaty but were instead reserved to them, and it has been so held in other cases. *U. S. v. Winans*, 198 U.S. 371, 381 S. Ct. 662, 492 L. ed. 1089; *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 244 Pac. 557. The Indians enjoyed the right to fish in usual and accustomed places when the treaty was made. The language of the treaty is not in terms a grant of fishing rights but provides that such rights are "further secured to the Indians." The purpose was to reserve inviolate existing rights. It could hardly be said that those rights would be preserved inviolate if the state did not permit them to be exercised at all. The police power of the state cannot properly be ap-

plied to a right which was never acquired by the state or nation but, on the contrary, was specifically reserved to the Indians by treaty.

The appellants rely strongly upon *Ward v. Race Horse*, 163 U.S. 504, 41 L. ed. 244, 16 S. Ct. 1076, and *State ex rel. Kennedy v. Becker*, 241 U.S. 556, 60 L. ed. 1166, 36 S. Ct. 705. We believe that both of those cases, critically read, support our position.

In *Ward v. Race Horse*, the treaty in question provided that the Indians should "have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the Whites and Indians on the borders of the hunting districts." The Court emphasized that the right to hunt thus promised to the Indians was dependent upon the continuity of certain conditions, vacancy of the lands and existence of peace. The rights were described as "essentially perishable and intended to be of limited duration." The Court said:

> "The right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified. Indeed, it made the right dependent upon whether the land in the hunting districts was unoccupied public land of the United States. This, as we have said, left the whole question subject entirely to the will of the United States, since it provided, in effect, that the right to hunt should cease the moment the United States parted with title to the land in the hunting districts."

The Court so construed the treaty that the rights conferred were terminated by the enabling act by

authority of which the State of Wyoming was admitted into the Union. The Court makes it clear that its opinion applies only to rights of a similar conditional and perishable nature, and it concedes, for the sake of argument, "*that where there are rights created by Congress, during the existence of a territory, which are of such a nature as to imply their perpetuity, and the subsequent purpose of Congress to continue them in the state, after its admission, such continuation will, as a matter of construction be upheld, although the Enabling Act does not expressly so direct.*"

Continuing, the Court said:

> "Here the nature of the right created gives rise to no such implication of continuance, since by its terms, it shows that the burden imposed on the territory was essentially perishable and intended to be of a limited duration. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious. But the argument goes further than this, since it insists that, although by the treaty the hunting was to cease whenever the United States parted merely with the title to any of its lands, yet that privilege was to continue, although the United States parted with its entire authority over the capture and killing of game."

There is certainly a strong implication at least that rights which are not "essentially perishable and intended to be of a limited duration" but which, like the Makahs', are permanently reserved, cannot be destroyed by the state.

The appellants also argue from this case that the Enabling Act by virtue of which the State of Washington was formed abridged the treaty, insofar as the treaty restricts state regulation of Indian fishing and that the treaty must give way before the police power of the state. These points will be separately discussed. We are now considering the *Race Horse* case only so far as it bears upon treaty interpretation and it can readily be seen that it strongly supports the appellees in that regard.

State ex rel. Kennedy v. Becker, 241 U. S. 556, 36 S. Ct. 705, 60 L. ed. 1166, arose out of a treaty made by Robert Morris, or by the Government on his behalf, with the Seneca Tribe, under which the tribe granted certain lands to him, excepting from the grant "the privilege of fishing and hunting on said tract of land hereby intended to be conveyed." The privilege applied to the whole immense tract and was not confined to usual and accustomed places. The right itself was one which might well have been construed as temporary, applying, as it did, to the whole area in question, and was, as the court said, irreconcilable with state sovereignty. So far as appears, the right was never sanctioned by continued usuage or by state recognition or acquiescence. But the Court's construction of the treaty, permitting the state to exercise its police power, rests primarily upon another factor. The court said that the modern fish and game regulations were not within the contemplation of the parties, "*but the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty whether*

fully appreciated or not." At the time of the treaty, 1797, the Seneca Indians were entirely familiar with the sovereignty of the State of New York. It had existed as a state for twenty years and there had been an organized, well-established government for well over a century before that. The Supreme Court found, in substance, that the Senecas were aware of that sovereignty, and, in the light of the circumstances and the nature of the blanket privilege, must have understood that such privilege was subject to the sovereign power of the state. In the instant case, such an implication would be preposterous.

It is of no significance that the Indians did or did not appreciate the sovereign power of the United States Government. It must be conceded that the United States Government may impair the treaty rights, if it chooses, although as stated by Justice Brown in a dissenting opinion in the *Race Horse* case, the abrogation of a public treaty ought not to be inferred from doubtful language, but the intention of Congress to repudiate it ought clearly to appear. We are here concerned with the power of the *state* and the question is whether the Indians understood that their right to fish was subject to the sovereign power of the state. However, only by recourse to fancy can it be conceived that the Indians understood that the United States Government itself could, without violence to the treaty, abrogate the fishing rights in question, in the name of conservation. (In fact, it is most probable that the Makahs had no conception at all of sovereignty as we understand it. The tribe itself was notable for its lack of any organized govern-

ment and for its existence without governmental authority. Governor Stevens announced that he was acting for the "Great Father," so we may judge that the Makahs' conception of his principal was embraced in that term.)

In considering the meaning of this treaty, we must keep before us the rule that the treaty is to be interpreted as the Indians understood it. What did they understand by the provisions in question? They unquestionably understood that they were to have the *right to fish*, although the Whites could fish in the same places. They certainly did not understand that they were to have the right to fish with the Whites *unless* the Whites decided that neither Indians or Whites should fish in those places. There is nothing in the phrase "in common with all citizens of the United States," implying that the fishing right could be abrogated by a future state government. It meant to the Indians that they would have the right to fish, together with the Whites. To them, it was an unconditional right. They were induced to sign the treaty on the basis of that understanding. We submit that it is not only inconsistent with the established principles governing treaty construction, to which we have referred, but a plain moral outrage to permit the State of Washington to say to the Indians that there was a radical limitation upon the right, of which the Makahs must have been fully aware, because they could scarcely have thought in terms of a "dual sovereignty" over the accustomed fishing places and must have understood that a territorial government was being organized and that a state eventually would come

into being, possessing the essential attributes of sovereignty. Obviously, the Indians did not think of those things, and even if they had any concept of "sovereignty" at all, it could not have been a concept of state sovereignty. The substance of it clearly was that they wanted to fish where they had fished and they thought they were getting that right *as against the whites*, although in common with them.

We wish to emphasize that we are not now concerned with the authority of the state, under the treaty, to promulgate some kind of regulations effective over the Indians; we are concerned with the right of the state to take away the fishing privilege and we contend that any reasoning that reaches such a result is simply a legalistic justification for breach of a solemn promise as Judge Mackintosh (in *State v. Meninock*, 115 Wash. 528, 197 Pac. 641) said in a dissenting opinion:

> "MACKINTOSH, J. (dissenting). No argument based upon the theory that the State has a right, in exercising the protection of its game and fish, to violate a solemn treaty made with Indian tribes, can receive the sanction of my conscience or my reason. I am unalterably of the opinion that the decision of this court in the *Towessnute* case is incorrect, and that the majority opinion in the instant case, following that decision, is wrong.
>
> "I have no patience with the violation of plain treaty provisions based in fact upon the strength of the violator and the weakness of the violated, but supported in theory by ingenious reasons and excuses. Such conduct is more fittingly engaged in by Hun than by the civilized.

> "My inclination would be to go more extensively into an argument on this question were it not for the fact that the Legislature of this State, in session in the present year passed an act (Chapter 58, Session Laws 1921) recognizing the injustice of the *Towessnute* decision and seeking to keep faith with the Yakima Nation. I content myself, therefore, with merely dissenting from the majority opinion."

It is true that in *U. S. v. Winans, etc.*, 198 U. S. 371, 25 S. Ct. 662, 49 L. ed. 1089, the court, referring to a treaty similar to the one at bar, said,

> "* * * nor does it restrain the state unreasonably if at all, in the regulation of the right."

The statement is *dicta* because the case involved merely the right of the Indians as against a private individual who had acquired title to the fishing place and was licensed by the state to erect a fish wheel which made it impossible for the Indians to fish, and the Court upheld the Indians as against the individual. The circumstances surrounding the negotiation of the treaty were not discussed and the case surely can not be considered a decision by the Court that the treaty at bar does not restrain the state in the regulation of the fishing right. But, in any event, the Court does not by any means convey the idea that the state might altogether abrogate the right of the Indians. In fact, in another part of the opinion, the reasoning would indicate that the Court had the contrary thought in mind. In discussing a contention that the treaty provision only allowed the Indians to fish in common with the Whites, that the white men and the Indians might, according to their different

capacities, devise and make use of instrumentalities to enjoy the common right and that the means devised by the white men, the fish wheel, is simply such a device used by the white men in the enjoyment of the common right, the Court said:

> "But the result does not follow that the Indians may be absolutely excluded. It needs no argument to show that the superiority of a combined harvester over an ancient sickle neither increased nor decreased rights to the use of land held in common. In the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does. Besides the fish wheel is not relied upon alone. Its monopoly is made complete by a license from the state. The argument based on the inferiority of the Indians is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess."

If the language of the treaty means only that the state may take away the right and no other interpretation is permissible, it is apparent that the United States Supreme Court in the *Race Horse* case would not have discussed the precarious and perishable nature of the rights granted, nor in *Kennedy v. Becker* would it have discussed the Indians' knowledge of state sovereignty at the time the treaty was made. Such considerations would be quite immaterial.

The appellants refer to a series of decisions by the Supreme Court of the State of Washington. A ma-

jority of the state court have consistently ruled against the Indians in cases in which the state regulated rights secured by treaty. The result has been reached by a divided court and there have been very vigorous dissents, one of which we have already quoted in part. The last decision, *State of Washington v. Tulee*, 7 Wn.(2d) 124, 109 P.(2d) 280, found five judges favoring the majority decision and three judges dissenting. The ninth judge did not participate, presumably because he had previously represented the Indians in the same case while U. S. District Attorney. In a dissenting opinion, Judge Simpson said, after referring to statements made by Governor Stevens in negotiating the treaty:

> "All of these statements were made in good faith by Governor Stevens at a time when the northwest was very much of a wilderness. They were made at a time when Indians and white men alike hunted and fished as they desired without let or hindrance from the federal or territorial governments. Regulations of fish and game were neither known nor dreamed of. The Indians had from time immemorial fished for salmon on the banks of the Columbia river. The catching of salmon was necessary for the sustenance of themselves and their families. Neither Governor Stevens nor the Indian Chiefs could possibly have visualized the present day conditions and present day restrictions. They entered into the treaty agreement under situations which existed at that time. We should interpret and construe the treaty and the rights of appellant in the light of the surroundings present at that time.
>
> "Without any doubt whatever, Governor Stev-

ens and the Indians signed the treaty with the definite understanding that the Indians should be forever allowed to catch salmon from the Columbia river without any restrictions whatsoever. We should so construe the treaty.

"It may be conceded that there is an ambiguity contained in the treaty. However, that ambiguity, if there is one, should be resolved in favor of the Indians. *Winters v. United States*, 207 U.S. 564.

"The state is not in a position, nor does it have the power, to modify or abrogate a treaty made by authority of the Congress of the United States."

It is important in considering the decisions of the state court to note that the majority have not arrived at their conclusion on the basis of construing the treaty but have held instead that regardless of what the treaty meant to the contracting parties at the time it was made the state has power to regulate Indian fishing. These cases cannot, therefore, be taken as supporting the appellants in their contentions as to the *meaning* of the treaty.

The appellants also refer to a series of old decisions by the Federal Court in this district, including *The James G. Swan*, 50 Fed. 108; *U. S. v. Winans*, 73 Fed. 72, and *U. S. v. Alaska Packers*, 79 Fed. 152. In *U. S. v. Alaska Packers* the Court said:

"In decisions heretofore rendered, both for and against the government, I have given the same interpretation to similar treaties with other tribes of Indians in Washington Territory. *U. S. v. The James G. Swan*, 50 Fed. 108; *U. S. v. Winans*, 73 Fed. 72. Up to the present time these decisions stand unreversed."

Subsequently, *U. S. v. Winans* was reversed by the United States Supreme Court in the decision to which we have referred, so the cited cases have little or nor value as authorities.

II.

Supremacy of the Treaty

For a period of about a hundred years the United States Government dealt with the Indians by means of treaties. The Indian Tribes were not considered foreign states or states of the United States within the provision of the Constitution governing the judicial power but in a certain domestic sense and for certain municipal purposes they have been treated as states. *Holden v. Joy*, 17 Wall. 211, 21 L. ed. 523, 533. In 1871 this policy was terminated by a statute (25 U.S.C.A. Sec. 77, R.S. 2079) reading as follows:

> "No Indian nation or trible within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Prior to the enactment of this statute, the power of the Government to make treaties with Indian tribes was coextensive with the power to make treaties with foreign nations. *U. S. v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 197, 23 L. ed. 846.

Article VI, Clause 2 of the Constitution of the United States is specific:

> "This Constitution, and the Laws of the United

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

A treaty, whether or not with Indians, is supreme over state statutes.

Fellows v. Denniston (1861) 23 N.Y. 427, reversed on other grounds (1867) 5 Wall. 761, 18 L. ed. 708;

Worcester v. Georgia (1832) 6 Peters 515, 8 L. ed. 483;

Todak v. United State Bank of Howard (1930) 281 U.S. 449, 74 L. ed. 956;

U. S. v. City of Salamanca (D.C. N.Y. 1939) 27 F. Supp. 541;

27 Am. Jur. 538, Sec. 10.

The appellants contend that the state may take away the fishing rights in the exercise of the police power. It is well established, however, that the state cannot, even in the exercise of its police power, curtail treaty rights. In 63 C.J. p. 844, Sec. 27, the rule is stated:

"A treaty must be regarded as a part of the law of a state as much as are the state's own local laws and constitution, and is effective and binding on the state legislature. So a treaty may override the power of the state even in respect of the great body of private relations which usually fall within the control of the state; and the treaty-making power is superior to the reserved powers of the state, including the police power, provided the subject matter of the treaty

> is not arbitrary and disconnected and remote from international intercourse."

In *Missouri v. Holland*, 252 U.S. 416, 64 L. ed. 641, affirming *U. S. v. Samples*, 258 Fed. 479, there was involved a conflict between state statutes regulating the hunting of birds and an Act of Congress giving effect to a treaty between the United States and Great Britain. The specific contention was made that the state's police power could not be limited by reason of a treaty between the United States Government and another nation. As digested by the editors of Law Edition the argument ran:

> "The treaty-making power of the national government is limited by other provisions of the Constitution, including the Tenth Amendment. It cannot, therefore, divest a state of its police power or take away its ownership or control of the wild game. (Citing *Ward v. Race Horse* and other cases)"

The Court held that the treaty was supreme over the state hunting laws. The Court stated that it was not meant to imply that there were no qualifications to the treaty-making power and went on to discuss the appropriateness of the treaty power to the subject matter there at hand. On that point there can be no serious contention made that the treaty in the instant case was not a proper exercise of the treaty-making power of the United States Government. *Holden v. Joy, supra, United States v. Forty-three Gallons of Whiskey, supra.*

The appellants contend that the Enabling Act took away the rights possessed by the Indians as against the police power of the state. The majority in *State v.*

Tulee, 7 Wn. (2d) 124, reached a like conclusion, based upon *Ward v. Race Horse*. There is language in the *Race Horse* case that suggests that the Enabling Act might have such an operation but the Court could not have intended to so hold. If it had, there would have been no point in saying more, because the question would then have been decided. The Court, on the contrary, discussed at great length the perishable and temporary nature of the right there granted to the Indians and reached a conclusion that the treaty properly *construed* did not give a permanent privilege or one that could not be curtailed by the state. When we consider that all states are subject to treaties in a like manner, there is surely little substance to the argument that abridgment of the police power by a treaty is inconsistent with state sovereignty and that a state is not accepted into the Union on an equal footing if its statutes are inferior to an existing treaty. In fact, such an argument ignores the foundation scheme of our system under which sovereign powers are divided between state and federal governments.

A similar contention was considered in *Dick v. United States*, 208 U.S. 340, 52 L. ed. 520. In that case the treaty ceding lands of the Nez Perce Indians to the United States Government contained a provision that the federal laws prohibiting the introduction of intoxicating liquors into Indian country should apply to the ceded lands for a period of twenty-five years. The Court sustained this provision and held that the federal laws were applicable within the area despite the sovereignty of the State of Idaho. The

Court said that this requirement of the treaty "was not inconsistent, in any substantial sense, with the constitutional principle that a new state comes into the Union upon entire equality with the original states."

In *U. S. v. 43 Gallons of Whiskey, supra,* the Court likewise held that Congress possessed power to exclude spirituous liquors, not only from existing Indian country, but from that which was ceded to the United States and that the exclusion might be effected by a provision in a treaty ceding the territory. The Court said:

> "This stipulation was not only a reasonable one to which the contracting parties had the right to agree, but was due from a strong government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that federal jurisdiction must be the same, under the same circumstances, in every State, has not been departed from in this case, for the prohibition does not rest on any ground which makes a distinction between the States, and the fact that the ceded territory is within the limits of Minnesota is a mere incident and not the foundation of the prohibition."

It is difficult to determine the exact ground upon which the majority opinion in the *Race Horse* case is based. It is perhaps enough for our present purpose that the decision by very specific pronouncement of the Court can apply only to cases in which the treaty in question confers a temporary and precarious right. The Court evidently proceeded in part upon the theory

also that creation of the state rendered the lands *occupied* within the meaning of the treaty and thereby ended their hunting rights. Justice Brown indicates in his dissenting opinion that he understands the majority to rest their decision, in part, upon this theory. In any event, the result is made to depend upon the existence of a circumstance, the temporary and uncertain nature of the privilege, exactly the reverse of what we have here.

So far as the *Race Horse* case may be taken to hold that no treaty of the United States may abridge the police power of the state it must be considered overruled by *Missouri v. Holland*, 252 U.S. 416, 64 L. ed. 641. Likewise, the decision in *Missouri v. Holland* does not permit the contention, also founded upon the *Race Horse* case, that any restriction of state regulation of hunting and fishing within its boundaries is inconsistent with the existence of that police power possessed by all the states. Finally, in view of the foregoing, there is nothing left to the argument that the Enabling Act abridged the treaty, or at least gave the state power to abridge the treaty, because all reasons given in support of such a conclusion are gone, all states being equally subject to the supremacy of treaties.

Thus, it will be seen that if the treaty means what we, in the first part of our argument upon the merits, urge that it means, the fishing right cannot be taken away by state laws even though enacted in the exercise of police power.

Even if it were true, and it is in fact vigorously

denied, that the Indians are an important factor in the depletion of fish, the state may not protect that interest, however vital, by overriding a treaty. The United States Government alone possesses that power.

III.

The Grant of Citizenship to the Indians Has Not Affected Their Treaty Rights.

It is argued that the rights of the Indians under the treaty provision in question were abrogated by the grant to the Indians (in 1924) of citizenship. Such a conclusion runs counter to the principle previously mentioned that an Act of Congress is not to be deemed an abrogation of a treaty unless such an intention is clearly expressed. Furthermore, the grant of citizenship does not by any means imply a loss of rights. It was intended as a grant of a privilege, intended to confer rights and privileges, not take them away.

In *Mason v. Sams* (D.C. Wash. 1925) 5 F.(2d) 255, Judge Cushman said:

> "These Indians have been, by the Act of June 2, 1924 (42 Stat. at large 1923-1924, part 1, page 253c. 233), made citizens of the United States with this proviso:
>
> " 'That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.'
>
> "Under the rule favoring the Indians in the interpretation of treaties and laws effecting them, already alluded to, any fishing rights of plaintiff under the treaty are preserved by this proviso."

Finally, as stated by the appellants in their brief,

the Indian is in the novel position of dual citizenship. He remains a member of a tribe and a ward of the United States Government. The statement of Mr. Justice Vandevanter in *United States v. Nice*, 241 U.S. 591, 60 L. ed. 1192, quoted by the appellants, is definite:

> "Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relations may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection."

In *U. S. v. City of Salamanca* (D.C. N.Y. 1939) 27 F. Supp. 541, the Court in determining the right of the United States to sue on behalf of Indians, reviewed the history of the relation between the United States and the Indians, described the status of the Indians as separate communities and as wards of the United States and said:

> "The allotment did not dissolve the tribal relation, *U. S. v. Nice*, 241, U.S. 591, 60 L. ed. 1192, 36 S. Ct. 696, nor has the granting of citizenship terminated this status, *U. S. v. Boylan, supra.*"

The Court concluded that the United States could maintain the action on behalf of the Indians.

Nor is the guardianship of the United States terminated by grant of state citizenship and state political rights.

U. S. v. Dewey County (S.D. 1926) 14 F. (2d) 784; Affirmed (C.C.A. 1928) 26 F. (2d) 434.

For our purposes, the Indians stand in no different position than previously. During the period that the treaty in question was made Indian tribes were not considered as foreign nations.

United States v. Kagama, 118 U.S. 375, 30 L. ed. 228.

In the case just mentioned the Court said:

"Perhaps the best statement of their position is found in the two opinions of this court by *Chief Justice* Marshall in the case of the *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S. Bk. 8, L. ed. 25), and in the case of *Worcester v. Georgia*, 6 Pet. 536 (31 U.S. bk. 8, L. ed. 492). These opinions are exhaustive; and in the separate opinion of *Mr. Justice* Baldwin in the former is a very valuable *resume* of the treaties and statutes concerning the Indian Tribes previous to and during the confederation.

"In the first of the above cases it was held that these Tribes were neither States nor Nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend

her laws and the jurisdiction of her courts over them.

"In the opinions in these cases they are spoken of as 'wards of the Nation,' 'pupils,' as local independent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by Acts of Congress. This is seen in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes:

" 'No Indian Nation or Tribe, within the territory of the United States, shall be acknowledged, or recognized as an independent Nation, Tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian Nation or Tribe prior to March 3, 1871, shall be hereby invalidated or impaired'."

As an original proposition it might be doubted that a treaty could be made with an Indian tribe, its status being as above described. However, the cases we have already mentioned establish beyond any doubt the power of the United States to deal with the Indian tribes by treaty as well as by legislation.

The substance of the matter is that the Indians are subject to complete control by the Government of the United States. As held in the *Kagama* case, *supra*, this control is not limited to that granted in the commerce clause and it is not derived from any specific provision in the United States Constitution, but it is a plenary authority. It can be exercised by treaty or

by statute, and since 1871 the latter method has been exclusively employed. The Act of 1871, changing the method of regulating the Indians, specifically preserved all existing treaties. No matter what their degree of independence, nor whether they are citizens or not, the Indians remain wards of the Government, their status being unchanged. Any provision of treaty or Federal statute governing the Indians is supreme over state law. Their citizenship is, therefore, qualified by the rule that they are wards of the United States Government and by treaties and statutes executing the guardianship.

Thus, it is certain that there is no necessary inconsistency between the vesting of citizenship and preservation of a certain immunity from state police power. A repeal by implication cannot, therefore, arise under the well established rule "that repeals by implication are not favored and will not be held to exist if there be any other reasonable construction." *Ward v. Race Horse, supra.* There is, in fact, no more reason to find a repeal of the treaty privilege by implication than to find a repeal of all of the statutes regulating the Indians, except, perhaps, those which might be sustained under the commerce clause. This would mean a termination of the wardship which, as we have seen, has not occurred.

The Indians are, as appellants say, entitled to the privileges and subject to the duties of citizenship, *except* as those privileges and duties are qualified by treaties or statutes of the United States. The claim of the appellees rests upon one such qualification.

CONCLUSION

The relevant history is not a tribute to the Whites. The only purpose of the covenant in the first place was to protect the Indians in the enjoyment of their ancient source of livelihood against the newcomers who were entering the territory. Since the time of the treaty the newcomers have increased enormously. There are mills, dams, deforested areas, sewage, as well as modern fishermen, all destroying the fish supply. Following a familiar pattern, a defenseless minority has been singled out for blame and there has been a great hue and cry against the Indians, although their activities are a comparatively insignificant factor in the depletion of fish. The treaty rights asserted by the Makahs were recognized for nearly eighty years; they are rights arising out of immemorial customs of the Makahs, an essential part of their way of life. We respectfully urge that the decree of the District Court protecting those rights be affirmed.

Respectfully submitted,

VANDERVEER, BASSETT & GEISNESS,
Attorneys for Appellees.

Due and timely service of the within brief, by the receipt of three copies thereof, is hereby admitted this.....
day of....., 1942

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Attorney.... for.....