Court Cases Related to Administration of the Range Resource on Lands Administered by the Forest Service

Forest Service
U.S. Department of Agriculture

Washington, D.C. August 1964

Court Cases Related to Administration of the Range Resource on Lands Administered by the Forest Service

Forest Service
U.S. Department of Agriculture

Introduction

The Secretary of Agriculture has authority to permit, regulate, or prohibit livestock grazing on all lands administered by the Forest Service. This authority has been conferred on the Secretary by the Act of June 4, 1897 (30 Stat. 35), the Act of April 24, 1950 (64 Stat. 82), and Title III of the Bankhead-Jones Farm Tenant Act (50 Stat. 525). Under regulations promulgated by the Secretary, the Forest Service allows use of the National Forest ranges for grazing that is properly coordinated with other uses such as timber production, watershed protection, recreation, and wildlife.

This handbook contains representative cases argued and adjudged when this authority has been questioned, particularly in regard to such basic issues as the privilege of grazing Forest Service lands, purported contracts of sale and purchase in transfer of grazing permits and preferences, meaning of "arbitrary and capricious" actions of officers and employees of the Government, rights of Indians, and trespass. Those issues included certainly do not exhaust the subject, but they do provide some guidance for the resolution of later issues. Some cases that no longer represent the law are included for historical purposes. Users should secure legal assistance in applying the principles of these cases to specific factual situations and to insure that the law has not been changed and is still applicable.

Contents

PRIVILEGE OF GRAZING NATIONAL FOREST LANDS

Buford v. *Houtz*

SUPREME COURT OF THE UNITED STATES

133 U.S. 320 (1890)

EDITOR'S NOTE: As a result of the custom of nearly 100 years of free use by the people of open and unenclosed public lands of the United States, especially those suitable for grazing domestic animals, an implied license has arisen, and no act of the United States Government forbids their use. The laws of the Territory of Utah permit domestic animals to run at large, when not dangerous.

In equity. The bill was dismissed and the plaintiffs appealed. The case is stated in the opinion.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from the Supreme Court of the Territory of Utah.

The bill was originally filed by the appellants in the Third Judicial District Court of Utah Territory in and for Salt Lake County, and in that court a demurrer was filed setting forth two grounds of objection to the bill; first, that it does not state facts sufficient to constitute a cause of action, and, second, that several causes of action have been improperly united in this that said complaint states a separate cause of action against each individual defendant, and nowhere states or attempts to state a cause of action against all of the defendants. This demurrer was sustained, and a decree rendered dismissing the bill at the costs of plaintiffs, and on appeal to the Supreme Court of the Territory that decree was affirmed.

The case is here on an appeal from that judgment. The complainants were M. B. Buford, J. W. Taylor, Charles Crocker and George Crocker, copartners under the firm name and style of the Promontory Stock Ranch Company. The defendants were John S. Houtz and Henry and Edward Conant, under the firm name and style of Houtz & Conant, the Box Elder Stock and Mercantile Company, a corporation, and twenty individuals whose names are given in the bill.

The plaintiffs allege that they are the owners of certain sections and parts of sections of land in the Territory of Utah, which they describe specifically by the numbers and the style of their Congressional subdivisions, very much of which is derived from the Central Pacific Railroad Company, to which they were granted by the Congress of the United States. These lands were alternate sections of odd numbers according to the Congressional grant to the railroad company, and they with the other tracts mentioned in the plaintiffs' bill are said to amount to over 350,000 acres, "and extend over an area of forty

miles in a northerly and a southerly direction, by about thirty-six miles in an easterly and westerly direction."

The allegation is, that these lands are very valuable for pasturage and the grazing of stock, and are of little or no value for any other purpose, and were held by the plaintiffs, and are now held by them, for that purpose solely. That owing to their character, the scarcity of water and the aridity of the climate where these lands are situated, they can never be subjected to any beneficial use other than the grazing of stock. That plaintiffs own and are possessed of large numbers of horned cattle, to wit, 20,000 head, of the value of $100,000, and are engaged in the sole business of stock raising. That for a long time they have had and now have all said cattle running and grazing upon these lands. That all the even numbered sections in each and all of the townships and fractional townships above mentioned belong to and are part of the public domain of the United States. That the defendants have not, nor has either of them, any right, title, interest or possession or right of possession, of or to any of the lands embraced in any of the townships or fractional townships above mentioned, nor have they ever had any such right, title, interest or possession. That none of the lands included within said townships or fractional townships are fenced or enclosed, except a small portion owned by plaintiffs, which they have heretofore enclosed with fences for use as corrals, within which to gather from time to time their cattle in order to brand the young thereof. They allege that for various reasons they cannot fence and enclose their lands without enclosing large portions of the lands of the United States, and without rendering large and valuable portions of their own of no value, by reason of the shutting off and preventing their own cattle from obtaining necessary water. That the defendants, Houtz and Conant, now and for a long time past, have owned a large number, to wit, 15,000 head of sheep, and each of the other defendants to this action is now and for a long time past has been the owner of a large flock or herd of sheep. The smallest number owned by any one party exceeds, as plaintiffs believe, five thousand, and the aggregate number of sheep so held exceeds two hundred thousand.

It is then alleged that the official survey of the United States has been extended over all land within the townships and fractional townships mentioned in the bill, and that there are seven well-defined and well-known travelled highways over those lands, four of which run in a northerly and southerly direction, and three in an easterly and westerly direction, entirely across the lands embraced in said townships and fractional townships, along which the sheep of the defendants may be driven without injury to plaintiffs' lands, notwithstanding which each of said defendants claims and asserts that he has the lawful right and is entitled to drive all sheep owned by him over and across any of said lands of these plaintiffs, and to pasture and graze his sheep thereon whenever and wherever he may desire so to do. That all of said defendants respectively rely upon and set up a common, though not a joint, pretended right to drive, graze and pasture his sheep thereon, and each of said defendants bases his pretended right to drive, graze and pasture his sheep upon the lands of the plaintiffs upon precisely the same state of facts as that relied upon by each of the other defendants. That is to say, each of said defendants claims that all the even numbered sections in each of said townships and

fractional townships being unoccupied public domain of the United States, he has an implied license from the government of the United States to drive, graze and pasture his sheep thereon, and that he cannot do this without having them run, graze and pasture upon the lands of the plaintiffs. Therefore each of said defendants claims and asserts that he is entitled to have his said sheep run, graze and pasture upon the lands of the plaintiffs as aforesaid; and that during the year past each of said defendants did repeatedly drive large bands and herds of sheep over, upon and across the lands of these plaintiffs, and graze and pasture the same thereon, to the great injury and damage of the said plaintiffs, and that they and each of them threaten to continue to do this and will do it unless restrained by order of the court.

It is then alleged that the sheep, in grazing upon the lands, do it a permanent injury, and drive away the cattle from such lands, whereby, if the defendants are permitted to drive and pasture their sheep on the lands of the plaintiffs, those lands will be greatly damaged, and, for a long period of time in the future rendered valueless for the purpose of grazing and pasturing their cattle. They then allege that they have no adequate way of estimating the damage which they will suffer should defendants, or either of them, do as they have threatened to do as herein stated, for the reason, among others, that the destruction of the food grasses and herbage on plaintiffs' lands will result in depriving plaintiffs' cattle of necessary food, thereby causing great deterioration in flesh and consequent value, which loss and deterioration cannot be adequately determined by witnesses; which will result in the destruction of plaintiffs' business, will waste and impair their freehold, and obstruct them and each of them in the use of their said property. They allege, therefore, that they have no plain, adequate and speedy remedy at law; and that it will be impossible to establish the amount of damages which said plaintiffs will suffer by the wrong or trespass of any particular one of said defendants.

The prayer of the plaintiffs is for a judgment and decree of the court:

1st. That said defendants have not, nor has either of them, any right of way for any of his or their sheep over said lands of plaintiffs or any part thereof, except over and along the highways aforesaid; that they have not, nor has either of them, any right to graze or pasture any of his or their sheep thereon or on any part thereof.

2nd. That, pending this action, said defendants and each of them, their and each of their agents, servants and employes, be enjoined from driving any of his or their sheep upon any of said lands, except over and along said highways, or permitting any of them to go, graze or pasture thereon, and that upon the final decree herein said injunction be made perpetual.

3rd. For such other and further relief as may be just and equitable, together with their costs in this behalf incurred.

The Supreme Court of the Territory, in affirming the judgment of the court of the Third Judicial District, did not consider the question of the misjoinder of defendants, but rested its judgment upon the want of equity in the bill. It might be difficult to sustain a bill which, like this, united fifteen or twenty different defendants, to restrain them from committing a trespass where, if the parties are guilty or should attempt to commit the trespass, they do it without concert of action, at different times, in different parts of a large district of country such

as here described, and each in his own way and by his own action, or that of his servants. But, waiving this question, we are of opinion that the bill has no equity in it.

The appellants being stock-raisers, like the defendants, whose stock are raised and fattened on the unoccupied public lands of the United States mainly, seek by the purchase and ownership of parts of these lands, detached through a large body of the public domain, to exclude the defendants from the use of this public domain as a grazing ground, while they themselves appropriate all of it to their own exclusive use. This they propose to do, not by any act of Congress or of any legislative body whatever, but by means of this bill in chancery, obtaining an injunction against the defendants, whom they allege to be the owners of 200,000 sheep grazing upon these public lands, which shall exclude defendants from the use of them, and thereby secure to themselves the exclusive right to pasture their 20,000 head of cattle upon the same lands.

If we look at the condition of the ownership of these lands, on which the plaintiffs rely for relief, we are still more impressed with the injustice of this attempt. A calculation of the area from which it is proposed to exclude the defendants by this injunction under the allegation that it is forty miles in one direction and thirty-six in another, shows that it embraces 1440 square miles, or 921,000 acres, all of which, as averred by the bill, is unenclosed and unoccupied except for grazing purposes. Of this 921,000 acres of land the plaintiffs only assert title to 350,000 acres; that is to say, being the owners of one-third of this entire body of land, which ownership attaches to different sections and quarter-sections scattered through the whole body of it, they propose by excluding the defendants to obtain a monopoly of the whole tract, while two-thirds of it is public land belonging to the United States, in which the right of all parties to use it for grazing purposes, if any such right exists, is equal. The equity of this proceeding is something which we are not able to perceive.

It seems to be founded upon the proposition that while they, as the owners of the 350,000 acres thus scattered through the whole area, are to be permitted for that reason to exercise the right of grazing their own cattle upon all of the land embraced within these 1440 square miles, the defendants cannot be permitted to use even the lands belonging to the United States, because in doing this their cattle will trespass upon the unenclosed lands of plaintiffs. In other words, they seek to introduce into the vast regions of the public domain, which have been open to the use of the herds of stock-raisers for nearly a century without objection, the principle of law derived from England and applicable to highly cultivated regions of country, that every man must restrain his stock within his own grounds, and if he does not do so, and they get upon the unenclosed grounds of his neighbor, it is a trespass for which their owner is responsible.

We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use. For many years past a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The

government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.

The whole system of the control of the public lands of the United States as it had been conducted by the government, under acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable. They have always been open to sale at very cheap prices. Laws have been enacted authorizing persons to settle upon them, and to cultivate them, before they acquire any title to them. While in the incipiency of the settlement of these lands, by persons entering upon them, the permission to do so was a tacit one, the exercise of this permission became so important that Congress, by a system of laws, called the preëmption laws, recognized this right so far as to confer a priority of the right of purchase on the persons who settled upon and cultivated any part of this public domain. During the time that the settler was perfecting his title, by making the improvements which that statute required and paying, by instalments or otherwise, the money necessary to purchase it, both he and all other persons who desired to do so had full liberty to graze their stock upon the grasses of the prairies and upon other nutritious substances found upon the soil.

The value of this privilege grew as the population increased, and it became a custom for persons to make a business or pursuit of gathering herds of cattle or sheep, and raising them and fattening them for market upon these unenclosed lands of the government of the United States. Of course the instances became numerous in which persons purchasing land from the United States put only a small part of it in cultivation, and permitted the balance to remain unenclosed and in no way separated from the lands owned by the United States. All the neighbors who had settled near one of these prairies or on it, and all the people who had cattle that they wished to graze upon the public lands, permitted them to run at large over the whole region, fattening upon the public lands of the United States, and upon the unenclosed lands of the private individual, without let or hindrance. The owner of a piece of land, who had built a house or enclosed twenty or forty acres of it, had the benefit of this universal custom, as well as the party who owned no land. Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs and sheep could run and graze.

It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds, or else would be liable for their trespasses upon the unenclosed grounds of his neighbors. Such a principle was ill-adapted to the nature and condition of the country at that time. Owing to the scarcity of means for enclosing lands, and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous, and permitted to go where their dangerous character might produce evil results. Indeed, it is only within a few years past, as the country has been settled and become highly cultivated, all the land nearly being so used by its owners or by their tenants, that the question of compelling the owner of cattle to keep them confined has been the subject of agitation.

Nearly all the States in early days had what was called the fence law, a law by which a kind of fence, sufficient in a general way to protect the cultivated ground from cattle and other domestic animals which were permitted to run at large, was prescribed. The character of this fence in most of the statutes was laid down with great particularity, and unless it was in strict conformity to the statute there was no liability on the part of the owner of cattle if they invaded the enclosure of a party and inflicted injury on him. If the owner of the enclosed ground had his fence constructed in accordance with the requirements of the statute, the law presumed then that an animal which invaded this enclosure was what was called a *breachy* animal, was not such animal as should be permitted to go at large, and the owner was liable for the damages done by him. Otherwise the right of the owner of all domestic animals, to permit them to run at large, without responsibility for their getting upon the lands of his neighbor, was conceded.

The Territory of Utah has now, and has always had, a similar statute, section 2234 of the compiled laws of Utah, 1888, Vol. I. p. 789. It is now a matter of occasional legislation in the States which have been created out of this public domain, to permit certain counties, or parts of the State, or the whole of the State, by a vote of the people within such subdivisions, to determine whether cattle shall longer be permitted to run at large and the owners of the soil compelled to rely upon their fences for protection, or whether the cattle owner shall keep them confined, and in that manner protect his neighbor without the necessity on the part of the latter of relying upon fences which he may make for such protection.

Whatever policy may be the result of this current agitation can have no effect upon the present case, as the law of Utah and its customs in this regard remain such as we have described it to be in the general region of the Northwest; and the privileges accorded by the United States for grazing upon her public lands are subject alone to their control.

These principles were very clearly enunciated by the Supreme Court of Ohio in 1854 in the case of *Kerwhacker* v. *The C.C. & C. Railroad Company*, 3 Ohio St. 172, 178–9. In discussing this question, the court expresses so well the principle which we are considering that we venture to make an extensive quotation from the opinion.

"Admitting the rule of the common law of England in relation to cattle and other live stock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this State, and in accordance with their habits, understandings and necessities. If this be the law in Ohio now it has been so since the first settlement of the State, and every person who has allowed his stock to run at large and go upon the uninclosed grounds of others has been a wrong-doer, and liable to an action for damages by every person on whose lands his creatures may have wandered. What has been the actual situation of affairs, and the habits, understandings and necessities of the people of this State from its first settlement up to the present period in this respect? Cattle, hogs and other kinds of live stock not known to be breachy and unruly, or dangerous, have been allowed at all times and in all parts of the State to run at large and graze on the range of uncultivated and uninclosed lands. * * * So that it has been the general custom of the people of this State, since its first settlement, to allow

their cattle, hogs, horses, etc., to run at large, and range upon the uninclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were tortfeasors, and liable in damages for letting their stock thus run at large. The existence or enforcement of such a law would have greatly retarded the settlement of the country, and have been against the policy of both the general and the state governments.

"The common understanding upon which the people of this State have acted since its first settlement has been that the owner of land was obliged to inclose it with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running at large; and that to leave uncultivated lands uninclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances and condition of the people of this State, but inconsistent with the habits, the interests, necessities and understanding of the people."

In the case of *Seeley* v. *Peters*, 10 Illinois (5 Gilman), 130, 142, in the Supreme Court of Illinois in 1848, six years earlier than the Ohio case, the court in reference to the same subject by Judge Trumbull uses the following language:

"Perhaps there is no principle of the common law so inapplicable to the condition of our country and people as the one which is sought to be enforced now for the first time since the settlement of the State. It has been the custom in Illinois, so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large. Settlers have located themselves contiguous to prairies for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon uninclosed ground is universally conceded. No man has questioned this right, although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages on account of the insufficiency of the fences through which their stock have broken, and never till now has the common law rule, that the owner of cattle is bound to fence them up, been supposed to prevail or to be applicable to our condition. The universal understanding of all classes of the community, upon which they have acted by inclosing their crops and letting their cattle run at large, is entitled to no little consideration in determining what the law is, and we should feel inclined to hold, independent of any statutes upon the subject, on account of the inapplicability of the common law rule to the condition and circumstances of our people, that it does not and never has prevailed in Illinois. But it is unnecessary to assume that ground in this case. The legislature [legislation] upon this subject, from the time when we were a part of the Indiana Territory down to the last law contained in the Revised Statutes, clearly shows that the legislature never supposed that this rule of the common law prevailed in Illinois, or intended that it should."

The same principle is asserted in the case of *Comerford* v. *Dupuy*, 17 California, 308, 310; and in the case of *Logan* v. *Gedney*, 38 California, 579, the court distinctly held that "the rule of the law of England, that every man is bound to keep his beasts in his own close under the penalty of answering in damages for all injuries resulting from their being permitted to range at large, never was the law in

California." This decision is the more in point, as California, like Utah, was acquired from Mexico by the same treaty. See also *Studwell* v. *Ritch*, 14 Connecticut, 292.

As evidence of the liberality with which the government of the United States has treated the entire region of country acquired from Mexico by the treaty of Guadalupe Hidalgo, it is only necessary to refer to the fact that while by the laws of Mexico every discoverer of a mine of the precious metals was compelled to pay a certain royalty to the government for the use of the mine in extracting its minerals, as soon as the country came under the control of the United States, an unlimited right of mining by every person who chose to enter upon and take the risks of the business was permitted without objection and without compensation to the government; and while this remained for many years as a right resting upon the tacit assent of the government, the principle has been since incorporated into the positive legislation of Congress, and to-day the larger part of the valuable mines of the United States are held by individuals under the claim of discovery, without patent or any other instrument from the government of the United States granting this right, and without tax or compensation paid to the governmen for the use of the precious metals.

As showing this extreme liberality on the part of the general government, reference may be had to the case of *Forbes* v. *Gracey*, 94 U.S. 762. In that case a mining company which had no title whatever from the United States, and which was taking out mineral ore of immense value from the lands of the United States, sought to enjoin the State of Nevada from taxing the ore thus taken, on the ground that it was the property of the United States, and not taxable by the State of Nevada. But this court, reverting to the liberality of the government in that regard, decided that the moment the ore became detached from the main vein in which it was imbedded in the mine, it became the property of the miner, the United States having no interest in it, and was therefore subject to state taxation.

Upon the whole, we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run at large over the lands of the United States and feed upon the grasses found in them, while, under pretence of owning a small proportion of the land which is the subject of controversy, they themselves obtain the monopoly of this valuable privilege.

The decree of the Supreme Court of Utah is therefore

Affirmed.

United States v. *Grimaud*

Same v. *Inda*

Error to the District Court of the United States for the Southern District of California

Supreme Court of the United States

220 U.S. 506 (1911)

Editor's Note: The provisions of law which authorize the Secretary of Agriculture to regulate the use and occupancy of National Forests and make it a criminal offense to violate the Secretary's regulations do not constitute an unconstitutional delegation of legislative power, nor do the administrative regulations become legislation because the violation thereof is punishable as a public offense. The implied license by which the United States has suffered the public domain to be used for grazing by domestic animals was modified by Congress to the extent that such privileges should not be exercised in contravention of the regulations governing the use of the National Forests. The Secretary of Agriculture had authority to issue regulations requiring the payment of fees for the privilege of grazing domestic animals on National Forest lands, and such regulations have the force and effect of law.

By the act of March 3, 1891, c. 561 (26 Stat. 1103), the President was authorized, from to time, to set apart and reserve, in any State or Territory, public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public forest reservations. And by the act of June 4, 1897, c. 2 (30 Stat. 35), the purposes of these reservations were declared to be "to improve and protect the forest within the reservation, and to secure favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." * * * "All waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder." (30 Stat. 36.)

It is also provided that nothing in the act should "be construed as prohibiting the egress and ingress of actual settlers residing within the boundaries of such reservations, * * * nor shall anything herein * * * prohibit any person from entering upon such forest reservation for all proper and lawful purposes, * * * provided that such persons comply with the rules and regulations covering such forest reservation."

There were special provisions as to the sale of timber from any reserve (except those in the State of California, 30 Stat. 35, c. 2; 31 Stat. 661, c. 804), and a requirement that the proceeds thereof and from any other forest source should be covered into the Treasury, the act of February 1, 1905, 33 Stat. 628, c. 288, providing that "all money received from the sale of any products or the use of any land or resources of said forest reserve shall be covered into the Treasury of the United States for a period of five years from the passage of this act, and shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement and extension of Federal Forest Reserves."

The act of 1905 as to receipts arising from the sale of any products or the use of any land was, in some respects, modified by the act of

March 4, 1907, c. 2907, 34 Stat. 1256, 1270. It provided that all moneys received after July 1, 1907, by or on account of forest service timber; or from any other source of forest reservation revenue, shall be covered into the Treasury, "provided that ten per cent of all money received from each forest reserve during any fiscal year, including the year ending June 30, 1906, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated, to be expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads in the county or counties in which the forest reserve is situated."

The jurisdiction, both civil and criminal, over persons within such reservation was not to be affected by the establishment thereof "except so far as the punishment of offenses against the United States therein is concerned; the intent being that the State shall not by reason of the establishment of the reserve lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duty as citizens of the State."

The original act provided that the management and regulation of these reserves should be by the Secretary of the Interior, but in 1905 that power was conferred upon the Secretary of Agriculture (33 Stat. L. 628), and by virtue of those various statutes he was authorized to "make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . ; and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as prescribed in Rev. Stat., § 5388," which, as amended, provides for a fine of not more than five hundred dollars and imprisonment for not more than twelve months or both, at the discretion of the court. 26 Stat., 1103, c. 561; 30 Stat. 34; c. 235; 31 Stat. 661, c. 804; 33 Stat. 36; 7 Fed. Stat. Anno. §§ 310–317, 296, Supp. 1909, p. 634.

Under these acts the Secretary of Agriculture, on June 12, 1906, promulgated and established certain rules for the purpose of regulating the use and occupancy of the public forest reservations and preserving the forests thereon from destruction, and among those established was the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers and travelers and milch or work animals, not exceeding a total of six head, owned by *bona fide* settlers residing in or near a forest reserve, which are excepted and require no permits."

The defendants were charged with driving and grazing sheep on a reserve, without a permit. The grand jury in the District Court for the Southern District of California, at the November term, 1907, indicted Pierre Grimaud and J. P. Carajous, charging that on April 26, 1907, after the Sierra Forest Reserve had been established, and after regulation 45 had been promulgated, "they did knowingly, wilfully and unlawfully pasture and graze and cause and procure to be pastured and grazed certain sheep (the exact number being to the grand jurors unknown) upon certain land within the limits of and a part of said Sierra Forest Reserve, without having theretofore or at any time secured or obtained a permit or any permission for said pasturing or

grazing of said sheep or any part of them, as required by the said rules and regulations of the Secretary of Agriculture," the said sheep not being within any of the excepted classes. The indictment concluded, "contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States."

The defendants demurred, upon the ground (1) that the facts stated did not constitute a public offense, or a public offense against the United States, and (2) that the acts of Congress making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional, in that they are an attempt by Congress to delegate its legislative power to an administrative officer." The court sustained the demurrers, (170 Fed. Rep. 205), and made a like ruling on the similar indictment in *United States* v. *Inda*, 216 U.S. 614. Both judgments were affirmed by a divided court. Afterwards petitions for rehearing were granted.

Mr. Assistant Attorney General Fowler, with whom *Mr. Loring C. Christie* was on the brief, for the United States. *Mr. Solicitor General Bowers* on the original argument:

Congress has power to enact legislation for the protection of its public lands, and, if it deems advisable, to enact criminal laws to prevent trespasses thereon. *Camfield* v. *United States*, 167 U.S. 518, 525.

A violation of the regulations prescribed by the Secretary of Agriculture upon which, and the statute authorizing them, this indictment is based, constitutes an offense, and renders the offender liable to punishment in accordance with the terms of the statute. *United States* v. *Bailey*, 9 Pet. 238, 252, 254, 256.

A certain act upon the part of a person becomes a criminal offense in consequence and by virtue of a regulation adopted by the executive officer where such officer's action in adopting such regulation is essential to the existence of the offense. *Caha* v. *United States*, 152 U.S. 211, 218; *United States* v. *Eaton*, 144 U.S. 677, distinguished; and see *In re Kollock*, 165 U.S. 526; *United States* v. *Breen*, 40 Fed. Rep. 402; *St. Louis & Iron Mt. Ry. Co.* v. *Taylor*, 210 U.S. 281.

The act of Congress under which the Secretary of Agriculture promulgated the regulation in question did not involve an improper attempt to delegate legislative power to an administrative officer. *Brown* v. *Turner*, 70 N. Car. 93, 102; *Union Bridge Co.* v. *United States*, 204 U.S. 364, 382; *Dastervignes Case*, 122 Fed. Rep. 30, 34; *West* v. *Hitchcock*, 205 U.S. 80; *Interstate Com. Comm.* v. *Chi., R.I. & P.R.R. Co.*, 218 U.S. 88; *Tilley* v. *Savannah &c. Ry. Co.*, 5 Fed. Rep. 641; *Chicago &c. Ry. Co.* v. *Dey*, 35 Fed. Rep. 866; *Interstate Com. Comm.* v. *Ill. Cent. R.R. Co.*, 215 U.S. 452; Willoughby on the Constitution, § 781.

The act was unlawful irrespective entirely of regulation 45 or of any other rule of the Department. It was an entry and trespass on the lands of the United States. *Camfield* v. *United States*, *supra; Buford* v. *Houtz*, 133 U.S. 320, 326, distinguished, and see *Wilcox* v. *McConnel*, 13 Pet. 496, 512. The Secretary did not attempt to make unlawful that which, but for such rules, would have been lawful, as in *United States* v. *Moody*, 164 Fed. Rep. 269.

Congress has a much more exclusive control over public forest lands and reservations, and a much wider range of means in exercising it, than it has in respect to its more general functions under the Consti-

tution. See as to other similar powers, *Oceanic Nav. Co.* v. *Stranahan*, 214 U.S. 320; *Ex parte Reed*, 100 U.S. 13; *Smith* v. *Whitney*, 116 U.S. 167; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U.S 301, 309; *Butte City Water Co.* v. *Baker*, 196 U.S. 119, 125.

The general theory of government that there should be no union between the several departments does not apply any more than it did in *Union Bridge Co.* v. *United States*, 204 U.S. 364, and *Oceanic Nav. Co.* v. *Stranahan*, *supra.*

The fact that the Secretary has the power to change the regulations in question, and has from time to time had in force regulations different in some respects to the present one, does not render the act of Congress invalid.

The Government's contention is sustained by the weight of authority among the lower United States courts. As to the validity of the Secretary's regulation for civil purposes see, *United States* v. *Shannon*, 151 Fed. Rep. 863; *S.C.*, 160 Fed. Rep. 870; *Dastervignes* v. *United States*, 122 Fed. Rep. 30; *United States* v. *Dastervignes*, 118 Fed. Rep. 199. The following have held indictment for violation of the regulation supportable: *United States* v. *Deguirro*, 152 Fed. Rep. 568; *United States* v. *Domingo*, 152 Fed. Rep. 566; *United States* v. *Bale*, 156 Fed. Rep. 687. On the other hand, the following held such an indictment bad: *United States* v. *Blasingame*, 116 Fed. Rep. 654; *United States* v. *Bale*, 156 Fed. Rep. 687; *United States* v. *Rizzinelli*, 182 Fed. Rep. 675; *Dent* v. *United States*, 8 Arizona, 413; *United States* v. *Reder*, 69 Fed. Rep. 965; *United States* v. *Williams*, 6 Montana, 379; *United States* v. *Trading Company*, 109 Fed. Rep. 239; *United States* v. *Ormsbee*, 74 Fed. Rep. 207; *United States* v. *Moody*, 164 Fed Rep. 269; *Van Lear* v. *Eisle*, 126 Fed. Rep. 823; *United States* v. *Slater*, 123 Fed. Rep. 115; *Stratton* v. *Oceanic Steamship Co.*, 140 Fed. Rep. 829.

As to other instances in which Congress has conferred upon executive officers equally broad powers to be exercised in administering the laws relating to public lands, see act of June 3, 1878, c. 150, 20 Stat. 88; act of June 3, 1878, c. 151, 20 Stat. 89; act of March 3, 1891, c. 561, as amended by the act of March 3, 1891, c. 559, 26 Stat. 1093; act of October 1, 1890, c. 1263, 26 Stat. 650; act of February 28, 1899, c. 221, 30 Stat. 908; § 2478, Rev. Stat.

A criminal indictment lies for transgression of the department regulation concerning stock grazing upon a forest reservation, 22 Ops. Atty. Gen. 266.

Mr. J. M. Hodgson, with whom *Mr. W. W. Kaye* and *Mr. Robert P. Stewart* were on the brief, for defendants in error:

The law is unconstitutional, as it does not sufficiently define, or define at all, what acts done or omitted to be done, within the supposed purview of the said act, shall constitute an offense or offenses against the United States. *State* v. *Mann*, 2 Oregon, 238, 241; *State* v. *Smith*, 30 La. Ann. 846; *United States* v. *Eaton*, 144 U.S. 677; *United States* v. *Grimaud*, 170 Fed. Rep. 206; *Cook* v. *State.* (Ind.), 59 N.E. Rep. 489; *United States* v. *Reese*, 92 U.S. 214, 256; *Sarlls* v. *United States*, 152 U.S. 571; *Todd* v. *United States*, 158 U.S. 278; *Augustine* v. *State* (Tex.), 52 S.W. Rep. 80; *State* v. *Partlow*, 91 N. Car. 550; *McGuire* v. *Dist. of Col.*, 65 L.R.A. 430; *Tozer* v. *United States*, 52 Fed. Rep. 917; *Louisville & Nash. R.R. Co.* v. *Commonwealth* (Ky.), 33 L.R.A. 209; *Drake* v. *Drake*, 4 Dev. 110; *Commonwealth* v. *Bank*, 3 Watts & S. 173;

4 Blackstone's Comm. 5; 12 Cyc. 129; *Ex parte McNulty*, 77 California, 164; *Peters* v. *United States*, 36 C.C.A. 105.

The law under which the indictments were found is unconstitutional, as it is not within the power of Congress to delegate to the Secretary of the Interior or the Secretary of Agriculture or any other person, authority or power to determine what acts shall be criminal; and the act in question is a delegation of legislative power to an executive officer to define and establish what shall constitute the essential elements of a crime against the United States. *United States* v. *Matthews*, 146 Rep. Fed. 306; *United States* v. *Maid*, 166 Fed. Rep. 650; *United States* v. *Blasingame*, 166 Fed. Rep. 654; *United States* v. *Eaton*, 144 U.S. 677; *United States* v. *Bridge Co.*, 45 Fed. Rep. 178; *United States* v. *Rider*, 50 Fed Rep. 106; *O'Neil* v. *Am. Fire Ins. Co.*, 166 Pa. St. 72; *Adams* v. *Burdge*, 95 Wisconsin, 390; *Dowling* v. *Lancashire Ins. Co.*, 92 Wisconsin, 63; *Anderson* v. *Manchester Fire Ins. Co.*, 59 Minnesota, 182; *Ex parte Cox*, 63 California, 21; *Harbor Com'r* v. *Excelsior Redwood Co.*, 88 California, 491; *Schaezlein* v. *Cabaniss*, 135 California, 466; *Kilbourn* v. *Thompson*, 103, U.S. 168, 191; *United States* v. *Wiltberger*, 5 Wheat. 85.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

The defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture. They demurred on the ground that the Forest Reserve Act of 1891 was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make rules and regulations and made a violation thereof a penal offense. Their several demurrers were sustained. The Government brought the case here under that clause of the Criminal Appeals Act (March 2, 1907, c. 2564, 34 Stat. 1246), which allows a writ of error where the "decision complained of was based upon the invalidity of the statute."

The Federal courts have been divided on the question as to whether violations of those regulations of the Secretary of Agriculture constitute a crime. The rules were held to be valid for civil purposes in *Dastervignes* v. *United States*, 122 Fed. Rep. 30; *United States* v. *Dastervignes*, 118 Fed. Rep. 199; *United States* v. *Shannon*, 151 Fed. Rep. 863; *S.C.*, 160 Fed. Rep. 870. They were also sustained in criminal prosecutions in *United States* v. *Deguirro*, 152 Fed. Rep. 568; *United States* v. *Domingo*, 152 Fed. Rep. 566; *United States* v. *Bale*, 156 Fed. Rep. 687; *United States* v. *Rizzinelli*, 182 Fed. Rep. 675. But the regulations were held to be invalid in *United States* v. *Blasingame*, 116 Fed. Rep. 654; *United States* v. *Matthews*, 146 Fed. Rep. 306; *Dent* v. *United States*, 8 Arizona, 138.

From the various acts relating to the establishment and management of forest reservations it appears that they were intended "to improve and protect the forest and to secure favorable conditions of water flows." It was declared that the acts should not be "construed to prohibit the egress and ingress of actual settlers" residing therein nor "to prohibit any person from entering the reservation for all proper and lawful purposes, including that of prospecting, and locating and developing mineral resources; provided that such persons comply with the rules and regulations covering such forest reservation." (Act of 1897, c. 2, 30 Stat. 36.) It was also declared that the

Secretary "may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; *and any violation of the provisions of this act or such rules and regulations shall be punished*" as is provided in § 5388, c. 3, p. 1044 of the Revised Statutes, as amended.

Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another.

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances and regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes nor fix penalties therefor.

By whatever name they are called they refer to matters of local management and local police. *Brodbine* v. *Revere*, 182 Massachusetts, 598. They are "not of legislative character in the highest sense of the term; and as an owner may delegate to his principal agent the right to employ subordinates, giving them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature [authorities] the determination of minor matters." *Butte City Water Co.* v. *Baker*, 196 U.S. 126.

It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat. 1, 42, where he was considering the authority of courts to make rules. He there said: "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, power which the legislature may rightfully exercise itself." What were these non-legislative powers which Congress *could* exercise but which might also be delegated to others was not determined, for he said: "The line has not been exactly drawn which separates those important subjects, which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and

regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. *Int. Com. Comm.* v. *Ill. Cent. R.R.*, 215 U.S. 452; *Int. Com. Comm.* v. *Chicago, Rock Island &c. R.R.*, 218 U.S. 88. Congress provided that after a given date only cars with drawbars of uniform height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. *St. Louis & Iron Mountain R.R.* v. *Taylor*, 210 U.S. 281, 287. In *Union Bridge Co.* v. *United States*, 204 U.S. 364; *In re Kollock*, 165 U.S. 526; *Buttfield* v. *Stranahan*, 192 U.S. 470, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect.

The defendants rely on *United States* v. *Eaton*, 144 U.S. 677, where the act authorized the Commissioner to make rules for carrying the statute into effect, but imposed no penalty for failing to observe his regulations. Another section (5) required that the dealer should keep books showing certain facts, and providing that he should conduct his business under such surveillance of officers as the Commissioner might by regulation require. Another section declared that if any dealer should knowingly omit to do any of the things "required by law" he should pay a penalty of a thousand dollars. Eaton failed to keep the books required by the regulations. But there was no charge that he omitted "anything required by law," unless it could be held that the books called for by the regulations were "required by law." The court construed the act as a whole and proceeded on the theory that while a violation of the regulations might have been punished as an offense if Congress had so enacted, it had, in fact, made no such provision so far as concerned the particular charge then under consideration. Congress required the dealer to keep books rendering return of materials and products, but imposed no penalty for failing so to do. The Commissioner went much further and required the dealer to keep books showing oleomargarine received, from whom received and to whom the same was sold. It was sought to punish

the defendant for failing to keep the books required by the regulations. Manifestly this was putting the regulations above the statute. The court showed that when Congress enacted that a certain sort of book should be kept, the Commissioner could not go further and require additional books; or, if he did make such regulation, there was no provision in the statute by which a failure to comply therewith could be punished. It said that, "if Congress intended to make it an offense for wholesale dealers to omit to keep books and render returns required by regulations of the Commissioner, it would have done so distinctly"—implying that if it had done so distinctly the violation of the regulations would have been an offense.

But the very thing which was omitted in the Oleomargarine Act has been distinctly done in the Forest Reserve Act, which, in terms, provides that "any violation of the provisions of this act or such rules and regulations of the Secretary shall be punished as prescribed in section 5388 of the Revised Statutes as amended."

In *Union Bridge Co.* v. *United States*, 204 U.S. 364, 386, Mr. Justice Harlan, speaking for the court, said:

"By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

And again he said in *Field* v. *Clark*, 143 U.S. 649, 694:

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." See also *Caha* v. *United States*, 152 U.S. 211; *United States* v. *Bailey*, 9 Pet. 238; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U.S. 309; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 333; *Roughton* v. *Knight*, 219 U.S. 537 (Decided this Term); *Smith* v. *Whitney*, 116 U.S. 167; *Ex parte Reed*, 100 U.S. 22; *Gratiot* v. *United States*, 4 How. 81.

In *Brodbine* v. *Revere*, 182 Massachusetts, 598, a boulevard and park board was given authority to make rules and regulations for the control and government of the roadways under its care. It was there held that the provision in the act that breaches of the rules thus made should be breaches of the peace, punishable in any court having jurisdiction, was not a delegation of legislative power which was unconstitutional. The court called attention to the fact that the punishment was not fixed by the board, saying that the making of the rules was administrative, while the substantive legislation was in the statute which provided that they should be punished as breaches of the peace.

That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the inegrity and maintenance of the system of government ordained by the Constitution."

Field v. *Clark*, 143 U.S. 649, 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes, from which we have quoted, declare, that the privilege of using reserves for "all proper and lawful purposes" is subject to the proviso that the person so using them shall comply "with the rules and regulations covering such forest reservation." The same act makes it an offense to violate those regulations, that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in *Buford* v. *Houtz*, 133 U.S. 326, was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. *Wilcox* v. *Jackson*, 13 Pet. 498, 513.

If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of the Government's property. In doing so they thereby made themselves liable to the penalty imposed by Congress.

It was argued that, even if the Secretary could establish regulations under which a permit was required, there was nothing in the act to indicate that Congress had intended or authorized him to charge for the privilege of grazing sheep on the reserve. These fees were fixed to prevent excessive grazing and thereby protect the young growth, and native grasses, from destruction, and to make a slight income with which to meet the expenses of management. In addition to the general power in the act of 1897, already quoted, the act of February 1, 1905, c. 288, p. 628, clearly indicates that the Secretary was authorized to make charges out of which a revenue from forest resources was expected to arise. For it declares that "all money received from the sale of any products or the use of any land or resources of said forest reserve" shall be covered into the Treasury and be applied toward the payment of forest expenses. This act was passed before the promulgation of regulation 45, set out in the indictment.

Subsequent acts also provide that money received from "any source of forest reservation revenue" should be covered into the Treasury, and a part thereof was to be turned over to the treasurers of the respective States to be expended for the benefit of the public schools and public roads in the counties in which the forest reserves are situated. (C. 2907, 34 Stat. 684, 1270.)

The Secretary of Agriculture could not make rules and regulations for any and every purpose. *Williamson* v. *United States*, 207 U.S. 462. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

The indictment charges, and the demurrer admits that Rule 45 was promulgated for the purpose of regulating the occupancy and use of the public forest reservation and preserving the forest. The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, "contrary to the laws of the United States and the peace and dignity thereof." The demurrers should have been overruled. The affirmances by a divided court heretofore entered are set aside and the judgments in both cases

Reversed.

Omaechevarria v. *State of Idaho*

SUPREME COURT OF THE UNITED STATES

246 U.S. 343 (1918)

Editor's Note: The police power of the State of Idaho under a statute which provides that it is a misdemeanor for any person to allow sheep in his charge to graze on range previously occupied by cattle extends to the public domain of the United States to the extent that it is not in conflict with Federal legislation. The Idaho statute, which made no attempt to grant a right to use the public domain for grazing, merely excludes sheep from certain ranges under certain conditions, and does not interfere with the rights of citizens of the United States since Congress has not conferred upon citizens the right to graze livestock on the public domain but merely suffered that the lands be so used.

The case is stated in the opinion.

Mr. Frank P. Prichard and *Mr. Shad L. Hodgin* for plaintiff in error.

Mr. T. A. Walters, Attorney General of the State of Idaho, and *Mr. William Healy* for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

For more than forty years the raising of cattle and sheep have been important industries in Idaho. The stock feeds in part by grazing on the public domain of the United States. This is done with the Government's acquiescence, without the payment of compensation, and without federal regulation. *Buford* v. *Houtz*, 133 U.S. 320, 326. Experience has demonstrated, says the state court, that in arid and semi-arid regions cattle will not graze, nor can they thrive, on ranges where sheep are allowed to graze extensively; that the encroachment of sheep upon ranges previously occupied by cattle results in driving out the cattle and destroying or greatly impairing the industry; and that this conflict of interests led to frequent and serious breaches of the peace and the loss of many lives.[1] Efficient policing of the ranges is impossible; for the State is sparsely settled and the public domain is extensive, comprising still more than one-fourth of the land sur-

[1] *Sweet* v. *Ballentyne*, 8 Idaho, 431, 447; *Pyramid Land & Stock Co.* v. *Pierce*, 30 Nevada, 237, 253–255. Report of National Conservation Commision, 1909, vol. III (60th Cong., 2nd sess., Senate Doc. No. 676), p. 357. Conference of Governors (1908), p. 143.

face.[2] To avert clashes between sheep herdsmen and the farmers who customarily allowed their few cattle to graze on the public domain near their dwellings, the territorial legislature passed in 1875 the so-called "Two Mile Limit Law." It was enacted first as a local statute applicable to three counties, but was extended in 1879 and again in 1883 to additional counties, and was made a general law in 1887.[3] After the admission of Idaho to the Union, the statute was reenacted and its validity sustained by this court in *Bacon* v. *Walker*, 204 U.S. 311. To avert clashes between the sheep herdsmen and the cattle rangers, further legislation was found necessary; and in 1883 the law (now § 6872 of the Revised Codes,) was enacted which prohibits any person having charge of sheep from allowing them to graze on a range previously occupied by cattle.[4] For violating this statute the plaintiff in error, a sheep herdsman, was convicted in the local police court and sentenced to pay a fine. The judgment was affirmed by an intermediate appellate court and also by the Supreme Court of Idaho. 27 Idaho, 797. On writ of error from this court the validity of the statute is assailed on the ground that the statute is inconsistent both with the Fourteenth Amendment and with the Act of Congress of February 25, 1885, c. 149, 23 Stat. 321, entitled, "An act to prevent unlawful occupancy of the public lands."

First: It is urged that the statute denies rights guaranteed by the Fourteenth Amendment, namely: Privileges of citizens of the United States, in so far as it prohibits the use of the public lands by sheep owners; and equal protection of the laws, in that it gives to cattle owners a preference over sheep owners. These contentions are, in substance, the same as those made in respect to the "Two Mile Limit Law," in *Bacon* v. *Walker*, *supra;* and the answer made there is applicable here. The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject.[5] We cannot say that the measure adopted by the State is

---

[2] The land area of Idaho is approximately 53,346,560 acres [U.S. Census (1910), vol. VI, p. 401], of which 20,000,000 acres were specifically classified as grazing lands. Report of Secretary of Interior (1890), vol. I, p. XCI. In 1883 about 50,000,000 acres still formed a part of the public domain. "The Public Domain," by Thomas Donaldson (1884), pp. 528, 529, 1190. On July 1, 1914, there were still unappropriated and unreserved 16,342,781 acres. Report of Department of Interior (1914), vol. I, p. 207. The population of Idaho in 1880 was 32,610; in 1910 it was 325,594.

[3] Acts of January 14, 1875; February 13, 1879; January 31, 1883; Revised Statutes, 1887, § 1210 *et seq.* The first session of the territorial legislature convened December 7, 1863. Idaho was admitted to the Union July 3, 1890.

[4] Revised Codes of Idaho, 1908, § 6872:

"Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

[5] The advisability of regulation by some system of leasing or licensing has been repeatedly recommended to Congress, and bills to that end have been introduced, but none has been enacted. Report of the Department of Interior (1902, vol. I, pp. 167–175. Cong. Rec., vol. 35 (1901–1902), pp. 291, 1048. Report of Public Lands Commission, Senate Doc. (1905), 58th Cong., 3rd sess., No. 189, pp. XX–XXIII, 5–61. Cong. Rec., vol. 40 (1905–1906) pp. 54, 1164. Letter from the Acting Secretary of Interior, House Doc. No. 661 (March, 1906). Report of Department of Interior (1907), vol. I, pp. 78–81. Cong. Reg., vol. 42 (1907–1908), p. 14. Report of Department of Interior (1908), vol. I, p. 15. Action of the American

unreasonable or arbitrary. It was found that conflicts between cattle rangers and sheep herders on the public domain could be reconciled only by segregation. In national forests, where the use of land is regulated by the Federal Government, the plan of segregation is widely adopted.[6] And it is not an arbitrary discrimination to give preference to cattle owners in prior occupancy without providing for a like preference to sheep owners in prior occupancy.[7] For experience shows that sheep do not require protection against encroachment by cattle, and that cattle rangers are not likely to encroach upon ranges previously occupied by sheep herders. The propriety of treating sheep differently than cattle has been generally recognized.[8] That the interest of the sheep owners of Idaho received due consideration is indicated by the fact that in 1902 they opposed the abolition by the Government of the free ranges.[9]

Second: It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guarantee by the Fourteenth Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a "range" or for determining what length of time is necessary to constitute a prior occupation a "usual" one within the meaning of the act. Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States.[10] This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court.

National Live Stock Association relative to the Disposition of the Unappropriated Public Lands of the United States (1908). Report of Department of Interior (1911) vol. I, p. 9. Cong. Rec., vol. 48 (1911–1912), p. 69. Hearings before the House Committee on Public Lands on H.R. Bill 19857 (1912). Report of Department of Interior (1912), vol. I, p. 5. Cong. Rec., vol. 50 (1913), p. 2365; vol. 51 (1913–1914), pp. 939, 3814. Report of Department of Agriculture (1914) pp. 8–10. Hearing before a subcommittee of the House Committee on Public Lands on H.R. 9582, February 12, 1914, pp. 7–8. "Practical Application of the Kent Grazing Bill to Western & Southwestern Grazing Ranges," address by J. J. Thornber before the American National Live Stock Association, Denver, Colo., January 22, 1914. Report of Department of Agriculture (1915), p. 47. Cong. Rec., vol. 53 (1915–1916), p. 21. Report of Department of Agriculture (1916), pp. 18–19.

[6] National Forest Manual (1913), pp. 13, 28. Hearing before House Committee on H.R. 9582 and H.R. 10539, on Grazing on Public Lands (1914), p. 73. Grazing in Forest Reserves, by F. Roth, Yearbook of Department of Agriculture (1901), pp. 333, 338, 343. Grazing of Live Stock on Forest Reserves, by Gifford Pinchot, Report National Live Stock Association (1902), pp. 274, 275.

[7] In the prolonged discussion of the proposal to correct the abuses of "open range" by leasing government grazing lands, the propriety of safeguarding "rights" as determined by priority of occupancy and use has been generally insisted upon. See Conference of Governors (1908), p. 347; Report of Department of Interior (1902), p. 174; Report of Public Lands Commission, Senate Doc. (1905), 58th Cong., 3rd sess., No. 189, pp. 14, 60 (par. 13); National Forest Manual, June 4, 1913, pp. 53, 58.

[8] Reports of the Department of Interior (1898), vol. I, p. 87; (1899), vol. I, pp. XX, 105–112; (1900), vol. I, p. 390; (1901), vol. I, p. 127. Utah (1853), Laws 1851–1870, c. 60, p. 90; Washington, Laws, 1907, p. 78; Arizona, Penal Code, 1913, § 641. See statutes cited, *infra*, in note 14.

[9] Hearings before House Committee on Public Lands on Leasing Grazing Lands (1902), 57th Cong., 1st Sess., pp. 76–77.

[10] Montana, "Laws," 1871–1872, p. 287, § 87, makes it a crime to drive stock from a "range" on which they "usually" run. North Dakota, "Laws," 1891, p. 123, deals with "customary range"; Arizona, Penal Code, 1913, § 637, with "range"; Colorado, Courtright's Statutes, § 6375, with "usual range"; Texas, Penal Code Annotated, 1916, Art. 1356 (1866), with "accustomed range."

Nash v. *United States*, 229 U.S. 373, 377; *Miller* v. *Strahl*, 239 U.S. 426, 434. Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness, is removed by § 6314 of Revised Codes, which provides that: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

Third: It is further contended that the statute is in direct conflict with the Act of Congress of February 25, 1885.[11] That statute which

[11] "An act to prevent unlawful occupancy of the public lands.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited.

"SEC. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by Governmental sub-divisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district or circuit court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any United States district or circuit court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

"SEC. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided*, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

"SEC. 4. That any person violating any of the provisions hereof, whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, for each offense. [As amended by Act of March 10, 1908, c. 75, 35 Stat. 40.]

"SEC. 5. That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose.

"SEC. 6 That where the alleged unlawful inclosure includes less than one hun-

was designed to prevent the illegal fencing of public lands, contains at the close of § 1 the following clause with which the Idaho statute is said to conflict: "and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

An examination of the federal act in its entirety makes it clear that what the clause quoted from § 1 sought to prohibit was merely the assertion of an exclusive right to use or occupation by force or intimidation or by what would be equivalent in effect to an enclosure. That this was the intent of Congress is confirmed by the history of the act. The reports of the Secretary of the Interior upon whose recommendation the act was introduced, the reports of the committees of Congress, and the debates thereon indicate that this alone was the evil sought to be remedied,[12] and to such action only does its prohibition appear to have been applied in practice.[13] Although Idaho had, by statute, excluded sheep from portions of the public domain since 1875—no reference to the fact has been found in the discussion which preceded and followed the enactment of the federal law, nor does any reference seem to have been made to the legislation of other States which likewise excluded sheep, under certain circumstances, from parts of the public domain.[14] And no case hase been found in which it was even urged that these state statutes were in conflict with this act of Congress.

The Idaho statute makes no attempt to grant a right to use public lands. *McGinnis* v. *Friedman*, 2 Idaho, 393. The State, acting in the exercise of its police power, merely excludes sheep from certain ranges under certain circumstances. Like the forcible entry and detainer act of Washington, which was held in *Denee* v. *Ankeny*, *ante*, 208, not to conflict with the homestead laws, the Idaho statute was enacted primarily to prevent breaches of the peace. The incidental protection which it thereby affords to cattle owners does not purport to secure to any of them, or to cattle owners collectively, "the exclusive use and occupancy of any part of the public lands." For every range from which sheep are excluded remains open not only to *all* cattle, but also

---

dred and sixty acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior.

"Sec. 7. That nothing herein shall affect any pending suits to work their discontinuance, but as to them hereafter they shall be prosecuted and determined under the provisions of this act.

"Approved, February 25th, 1885."

[12] Reports of Department of Interior (1882), vol. I, p. 13; (1883), vol. I, pp. XXXII, 30, 210; (1884), vol. I, pp. XVII, 17; (1885), vol. I, p. 205. Letter of Secretary of Interior (1884), Senate Ex. Doc. (1883–1884), No. 127. Report of House Committee, 48th Cong., 1st sess. (1884), No. 1325; Report of Senate Committee, 48th Cong., 2nd sess. (1885), No. 979. Cong. Rec., vol. 15 (1883–1884), pp. 4768–4783; vol. 16 (1884–1885), p. 1457.

[13] *United States* v. *Brandestein*, 32 Fed. Rep. 738, 741; Reports of Department of Interior (1885), vol. I, p. 44; (1886), vol. I, pp. 30–41; (1887), vol. I, pp. 12–13; (1888), vol. I, p. XVI; (1901), vol. I, p. 92; (1902), vol. I, pp. 11, 172–173, 306; (1903), vol. I, pp. 18–19; (1904), vol. I, pp. 20, 367; (1905), vol. I, p. 20; (1908), vol. I, p. 15; (1915), vol. I, p. 226.

Compiled Statutes, §§ 4997–5002, notes.

[14] Statutes resembling the Idaho "Two Mile Limit Law" have been passed in a number of the western States. Arizona, Act of February 12, 1875, Compiled Laws, 1864–1877, p. 561; Penal Code of Arizona, 1913, § 639; Colorado, Courtright's Statutes, § 6377 (1877); Nevada, Revised Laws, 1912, § 2317 (1901), § 2319 (1907); California, Statutes, 1869–1870, p. 304.

to horses, of which there are many in Idaho.[15] This exclusion of sheep owners under certain circumstances does not interfere with any rights of a citizen of the United States. Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used. *Buford* v. *Houtz*, *supra*. It is because the citizen possesses no such right that it was held by this court that the Secretary of Agriculture might, in the exercise of his general power to regulate forest reserves, exclude sheep and cattle therefrom. *United States* v. *Grimaud*, 220 U.S. 506; *Light* v. *United States*, 220 U.S. 523.

All the objections urged against the validity of the statute are unsound. The judgment of the Supreme Court of Idaho is

Affirmed.

Mr. Justice Van Devanter and Mr. Justice McReynolds dissent.

Bell v. *Apache Maid Cattle Co. et al.*

Circuit Court of Appeals, Ninth Circuit

94 F. 2d 847 (1938)

Editor's note: There is no law giving persons the right to graze stock on National Forest lands except such as is permitted under the regulations promulgated by the Secretary of Agriculture. Under these regulations, which have the force and effect of law, grazing rights can be relinquished but cannot be transferred to another by contract of sale. The allotting of National Forest land for grazing is exclusively for the Forest Service.

Garrecht, *Circuit Judge.*

The appellant with leave of court filed an amended bill of complaint which appellees moved to dismiss upon the grounds that said amended bill (a) did not state facts sufficient to constitute a cause of action at law or in equity, (b) was wholly without equity, (c) did not state facts sufficient to entitle plaintiff to relief by way of specific performance of the contract alleged, (d) did not state facts sufficient to entitle plaintiff to any relief, (e) upon its face shows that the contract alleged was the basis of the action is illegal, void, and unenforceable, and (f) that it appears from said amended bill that the cause of action is stale.

The motion of appellees to dismiss the amended bill of complaint was granted by the court below and a decree of dismissal was entered from which this appeal is taken.

In addition to the facts vesting the court with jurisdiction, the material allegations of the amended complaint set forth that prior to January 31, 1931, the appellant was the owner of certain real property adjacent to, and certain improvements on, the Coconino National Forest in Arizona, and was the owner of 40 head of cattle ranging and running on said forest under permits from the United States Forestry Service.

That at the same time the appellees were the owners of 283 acres of patented land adjacent to, and improvements on, said National Forest, and possessed the right under permits from the United States Forestry Service to graze 3,174 head of cattle on said National Forest.

[15] Compare U.S. Census (1910), vol. VI, p. 390; Report, Department of Agriculture (1914), p. 148.

That on or about January 31, 1931, the appellant entered into an agreement with the appellees whereby, "subject to the consent and approval of the United States Forestry Service and the officials thereof * * * defendants would sell, convey and deliver to plaintiff [appellant herein] their said patented lands and the said improvements on said Forest, together with sufficient range and area on said Forest to graze, run and maintain throughout the year no less than 960 head of cattle net by relinquishing from their said permit on said Forest sufficient range and area to so graze, run and maintain said number of cattle; and that the plaintiff [appellant herein] would purchase the same and pay to defendants [appellees herein] therefore the sum of $16.00 per head for said cattle, the sum of $4700 for improvements, and the sum of $2830 for said patented land, or a total of $22,890."

Continuing, the amended complaint alleges:

"That at the time of entering into said contract and prior thereto said Forest Service had, unknown to the plaintiff, informed defendant, Apache Maid Cattle Company, that it would be required to reduce its number of cattle and grazing preference because of the overgrazed condition of said Forest; and at the time of entering into said contract, defendants, and each of them, well knew and understood that unless defendants fully met and absorbed the reduction required by said Forest Service out of other of their said cattle running on said Forest the requirements of said Forest Service would extend to and affect the relinquishment of range for the grazing and running of 960 head of cattle to be acquired by plaintiff pursuant to said contract, by greatly reducing the number of cattle said plaintiff would actually be permitted to graze, run or maintain on said Forest, and defendants further knew and understood at said time that, in order for said defendants to comply fully with the terms of said contract and to relinquish to plaintiff sufficient range and area on said Forest to graze and run 960 head of cattle and to cause same to be allotted to him by said Forestry Service, they would in fact have to relinquish many more than said number, all of which was unknown to plaintiff, and all of which was at all times concealed by the defendants from the plaintiff."

The complaint then alleges that the plaintiff paid to defendants the total amount provided to be paid by said contract and otherwise fully performed all of its terms; and in reliance upon the contract plaintiff expended a large sum of money in the erection of fences, developments of water, and installation of other necessary improvements on the range and area on said Forest Reserve relinquished by defendants to graze and maintain 960 actual head of cattle.

The complaint further alleges:

"That said defendants on their part conveyed said patented land and said improvements in this amended complaint mentioned to plaintiff as required by the terms of said contract and pretended to relinquish sufficient range on said Forest to graze, run and maintain 960 head of cattle, and defendants advised and informed plaintiff that they had executed the necessary instruments whereby said Forest Service did allot to him range and area on said Forest sufficient to graze, run and maintain 960 head of cattle, net, as provided in said contract, but, due to said reduction in the number of defendants' cattle running on said Forest, as so ordered by said Forest Service, and the failure of defendants to absorb said reduction out of their remaining cattle on said Forest, the said pretended relinquishment of 960 head of cattle was reduced by 320 head, and said defendants did in

fact relinquish, and said Forest Service did allot to plaintiff, range and area sufficient to graze, run and maintain not more than 640 head of cattle, all of which was well known to, and understood by the defendants, and each of them, at the time of said pretended relinquishment. That during the month of October, 1933, plaintiff for the first time discovered the deception and fraud so practiced upon him by said defendants, and that defendants had not fully performed the terms of their said contract; that plaintiff thereupon immediately demanded of the defendants, and each of them, that they make further and proper relinquishment of additional area and range on said Forest in order that there might be transferred by the Forest Service to plaintiff range and area sufficient to graze, run and maintain 960 head of cattle on said Forest as provided for in said contract and as paid for by plaintiff; but defendants, and each of them have failed, neglected and refused so to do, although during all times in this amended complaint mentioned, said defendants, and each of them, have been, and are now, well able to fully perform the terms of said contract on their part to be kept and performed."

"That the United States Forestry Service and the officials thereof have heretofore consented to, and approved and do now consent to the relinquishment by defendants of range on said Forest sufficient to graze, run and maintain 960 actual head of cattle, and the granting and allotting of same by said Forest Service to plaintiff."

In reviewing the ruling of the District Court, we must have in mind certain regulations made by the Secretary of Agriculture, governing the National Forests, which in their proper sphere are given the force and effect of statutory enactments. 16 U.S.C.A. §§ 471, 472, 551; *United States* v. *Grimaud*, 220 U.S. 506, 514, 31 S. Ct. 480, 55 L. Ed. 563; *Light* v. *United States*, 220 U.S. 523, 534, 31 S. Ct. 485, 55 L. Ed. 570. Regulations G–2 and G–9 are printed in the margin.[1]

There is no law which gives an individual or corporation the right to graze stock upon National Forest lands except under the regulations promulgated by the Department of Agriculture. To secure a permit to graze stock, the applicant must have certain prescribed qualifications and be the owner of certain classes of property. Before any permit is granted, a formal application therefor must be made furnishing the Forest Service with the required information. There is no allegation that appellant made such application or that any application was denied. It is reasonable to assume that where new or additional grazing rights are desired, applications therefor are made and granted prior to the grazing season for the year intended.

According to the amended complaint, the contract was made in January, 1931, presumably to be effective that year as the relinquish-

[1] Reg. G–2: "Every person must submit an application and secure a permit in accordance with these regulations before his stock can be allowed to graze on a national forest, except as hereinafter provided and unless otherwise authorized by the Secretary of Agriculture. The forester may authorize the issuance of grazing permits for a term of years within a maximum of 10 years. A term permit shall have the full force and effect of a contract between the United States and the permittee. It shall not be reduced or modified except as may be specifically provided for in the permit itself and shall not be revoked or cancelled except for violation of its terms or by mutual agreement. The grazing regulations shall be considered as a part of every permit."

Reg. G–9: "* * * A grazing preference is not a property right. Permits are granted only for the exclusive use and benefit of the persons to whom they are issued and will be forfeited if sold or transferred in any manner for a valuable consideration."

ment of range for grazing was designated to be sufficient to maintain 960 head of cattle "throughout the year." No other year is mentioned, and since whatever relinquishment appellees did make was at the time the deal was consummated, obviously the relinquishment was intended for that year and no other.

Appellant entered into possession of the relinquished areas and he was not disturbed in any of his asserted rights until October, 1933, which is the date he alleges to have first discovered that any of his actual or supposed rights were to be curtailed.

Appellant knew or was required to know that under the regulations appellees could not convey grazing rights to him. All they could do was to relinquish. Appellant, after entering into the contract, should then have made his application to the Forest Service which alone had authority to make any allotment. If he had done so, he doubtless would have received a letter approving the relinquishment and making or refusing to make the allotments before the grazing season of 1931, certainly before 1932.

Appellant actually took possession of grazing area under the contract in 1931, and for all that appears he may have grazed the full quota of cattle thereon during the intervening time and until October, 1933, when he alleges he first discovered the number was reduced.

The allegation is not that the appellees failed to waive a preference to graze 960 head of cattle covered by their permit but that they pretended to and that the relinquishment for 960 head was reduced to 640 head by the Forest Service which had the authority so to do.

Appellant's argument is equivalent to the contention that the contract required appellees, for an indefinite future time, to relinquish from their grazing rights whatever amount might be necessary at various times to supply area sufficient for appellant to graze 960 head of cattle. When we note, that according to the regulations, grazing privileges are entirely under the control of the Forest Service which from year to year may vary the number of animals permitted to graze, that the number may be diminished or even prohibited, it seems to us that it would be unreasonable to so construe this contract.

If we assume that the contract, instead of providing for the relinquishment of the grazing privileges for the year 1931 and sufficient for 960 head of cattle, was to be a continuing obligation for an indefinite time in the future, the court would be confronted with still greater difficulties. The allotment of grazing area is exclusively for the Forest Service. The courts cannot interfere with this prerogative. It is a fact, as the prescribed regulations also indicate, that the number of cattle the range will support varies from year to year and also that different areas will furnish grazing for different numbers of cattle. The Forest Service might not agree with the court as to the extent and character of range required to graze 960 head of cattle. Furthermore, there is no description of the range rights of the appellees which appellant seeks to have relinquished or conveyed. No method is suggested how the range can be identified, and as the Forest Service has the authority to reduce the allotment even if a decree were entered, it is uncertain if it would effectuate the purpose.

So many of the elements involved are so indefinite and uncertain that the lower court properly held that the facts stated did not entitle appellant to a decree of specific performance.

The decree of the District Court is affirmed.

Osborne et al. v. *United States*

CIRCUIT COURT OF APPEALS, Ninth Circuit
145 F. 2d 892 (1944)

Editor's Note: The privilege of grazing on National Forest land under a permit issued pursuant to the regulations of the Secretary of Agriculture cannot become a property right against the sovereign and is withdrawable at any time for any governmental use without payment of compensation because there is no authority to alienate the full use of Federal lands or to make any agreement regarding them subject to the payment of compensation for its revocation.

STEPHENS, *Circuit Judge.*

The Osbornes, appellants herein, were in possession of a contiguous area of stock grazing land consisting of land owned by them, land leased by them, and land in the Kaibab National Forest under permit (36 Code of Federal Regulations, § 231.9) issued to them. Before the institution of this litigation the national forest land under permit was declared appropriated for military purposes.[1] All of such contiguous lands, except certain rights therein which need not here be noticed, were included in one eminent domain proceeding filed in the district court by the government, and the government promptly took possession.

At the trial the Osbornes sought to prove, and by proffered instructions sought to have the jury instructed to award them, damages for the value of their grazing privileges covering the national forest land taken and as well damages for severance. The court rejected such proof and such proffered instructions, and the Osbornes appeal claiming reversible error.

The error claimed does not in any manner refer to the court's rejection of proof but refers solely to the refusal of the court to give a proffered instruction and to the instruction given the jury concerning compensation and variance damages regarding the lands under the grazing permit. The government makes no point upon this score and submits the decision of the appeal upon the jury instruction points.

It was the theory of the government at the trial, and is here, that the grazing privileges were mere licenses, revokable at will without legal right to compel compensation, and that the Osbornes' only recourse is to proceed under the Act of July 9, 1942, C. 500, 56 Stat. 654, 43 U.S.C.A. § 315q. The trial court took this view of the problem. In § 315q it is provided that holders of grazing permits losing the license by government taking shall be paid such amounts "* * * as the head of the department * * * using the lands shall determine to be fair and reasonable * * *" and that "* * * such payments shall be deemed payment in full * * *" and that "* * * nothing herein

[1] Public Land Order No. 59, November 12, 1942, 7 Fed. Reg. 9749, issued by the Secretary of the Interior under authority of Executive Order No. 9146, withdrew the land involved in this case "from all forms of appropriation under the public-land laws * * * and reserved [it] for the use of the War Department for military purposes." The applicable part of Title 50 U.S.C.A. Appendix, § 632, sec. 2 (Second War Powers Act of 1942, § 201) is as follows: "The Secretary of War * * * may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes * * * upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act * * *."

[in the Act] contained shall be construed to create any liability not now existing against the United States."[2] On the other hand appellants, admitting the statutory right to apply to the Secretary of War for relief under such Act, claim that they acquired property by the issuance to them of the grazing permit and that they may rightly claim just compensation in the condemnation suit. They claim that the Secretary of War by the complaint did submit the fixing of such damages to the court in the instant case. The Osbornes assert that they will be deprived of the benefits of the Fifth Amendment to the Constitution unless they are allowed their day in court upon the issue of compensation. The benefit of that right, say appellants, quoting from *United States* v. *Miller*, 317 U.S. 369, 63 S. Ct. 276, 279, 87 L. Ed. 336: "* * * means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

Of course, if 56 Stat. 654, 43 U.S.C.A. § 315q, is appellants' exclusive legal remedy, they cannot succeed in their appeal. It would appear that Congress understood the statute to constitute the sole remedy for those having their permit revoked as the Assistant Attorney General recommending its passage said: "Damages of this kind are not recoverable under the ordinary rules of law in a condemnation case because the stockmen have no vested interest in these rights. If such payments are to be made, provision therefor must be enacted by Congress." H. Rep. No. 2290, 77th Cong., 2d Sess. And the remarks of Senator Murdock in regard to the meaning of the proposed Act when it was being considered for enactment (88 Cong. Rec. 5594), and of Representative Robinson in this same regard (88 Cong. Rec. 5652), indicate that the view-point of these members of the Congress corresponds with that of the Assistant Attorney General.

We digress at this juncture to sketch briefly the applicable legal history of stock grazing on the public lands of the United States. In the pioneer or "emigrant" days of western America immense areas of unappropriated and otherwise unused territory were freely used by stockmen for grazing. The government not only refrained from objecting to this practice but in various ways encouraged it and in time this privilege, to use the words of the Supreme Court in *Buford* v. *Houtz*, 133 U.S. 320, 326, 10 S. Ct. 305, 307, 33 L. Ed. 618, became "* * * an implied license, growing out of the custom of nearly a hundred years * * *." This license was held to be the basis of various rights as between the licensee and other private individuals but not as between the licensee and the government. The same idea is expressed in *Light* v. *United States*, 220 U.S. 523, 535, 31 S. Ct. 485, 487, 55 L. Ed. 570, wherein, after reciting the practice, it is said: "And so, without passing a statute, or taking any affirmative action on

[2] "Sec. 315q. Whenever use for war purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be canceled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war purposes. Such payments shall be deemed payment in full for such losses. Nothing herein contained shall be construed to create any liability not now existing against the United States." Title 43 U.S.C.A. § 315q.

the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent. * * * Its failure to object, however, did not confer any vested right on the complaint, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes. *Steele* v. *United States*, 113 U.S. [128], 130, 5 S. Ct. 396, 28 L. Ed. 952; *Wilcox* v. *Jackson* [ex dem. McConnel], 13 Pet. [498], 513, 10 L. Ed. [264]." The principle expressed in *Buford* v. *Houtz*, *supra*, as reasserted in the *Light* case and again in *Omaechevarria* v. *Idaho*, 246 U.S. 343, 352, 38 S. Ct. 323, 327, 62 L. Ed. 763, is applied to grazing privileges in national forest regulations, for both the *Light* and the *Omaechevarria* cases concern grazing within national forests. In the last cited case it is said: "Congress has not conferred upon citizens the right to graze stock upon the public lands. The government has merely suffered the lands to be so used. [Citing] *Buford* v. *Houtz*, *supra*. It is because the citizen possesses no such right, that it was held by this court that the Secretary of Agriculture might, in the exercise of his general power to regulate forest reserves, exclude sheep and cattle therefrom. *United States* v. *Grimaud*, 220 U.S. 506, 31 S. Ct. 480, 55 L. Ed. 563; *Light* v. *United States*, 220 U.S. 523, 31 S. Ct. 485, 55 L. Ed. 570." See *Shannon* v. *United States*, 9 Cir., 160 F. 870, 873; *Bell* v. *Apache Maid Cattle Co.*, 9 Cir., 94 F. 2d 847.[3]

Later the Congress (Title 43 U.S.C.A. §§ 315 and 315b) authorized the creation of grazing districts upon the public domain but not including areas within national forests and provided for the issuance of permits with a maximum duration of ten years and quoting from § 315b, Title 43, U.S.C.A., declared "* * * but the creation of a grazing district or the issuance of a permit pursuant to the provisions [providing therefor] shall not create any right, title, interest, or estate in or to the lands."

It may well be added for clarity that no specific provision is made by Congress for the issuance of permits for stock grazing in national forests and that it is assumed in the cases that the general right of grazing on public lands continues after they have been declared within a forest reserve subject to the authorization to the Secretary of Agriculture to make regulations for the preservation and care of the growth in the forests.

Under the last above referred to power a regulation (36 Code of Federal Regulations, § 231.9) was promulgated, providing in general terms that the grazing of stock within national forests is made subject to rules and regulations, which may be established. The next following section prescribes certain terms for grazing, and we quote the applicable part: "§ 231.2—Permits must be obtained; ownership of stock. Every person must submit an application and secure a permit in accordance with the regulations in this part before his stock can be

---

[3] *Shannon* v. *United States*, 9 Cir., 160 F. 870, 873: "But the lands included in a forest reservation are no longer public lands within the purport of that decision [*Buford* v. *Houtz*, *supra*], and the act of the government does forbid their use. The creation of such a reservation severs the reserved land from the public domain, disposes of the same, and appropriates it to a public use. *Wilcox* v. [*Jackson ex dem.*] *McConnel*, 13 Pet. 498, 10 L. Ed. 264." This case would seem to indicate a different line of reasoning but we think the same end would be reached.

allowed to graze on a national forest, except as hereinafter provided and unless otherwise authorized by the Secretary of Agriculture. The Chief of the Forest Service may authorize the issuance of grazing permits for a term of years within a maximum of 10 years. A term permit shall have the full force and effect of a contract between the United States and the permittee. It shall not be reduced or modified except as may be specifically provided for in the permit itself and shall not be revoked or canceled except for violation of its terms or by mutual agreement. The grazing regulations shall be considered as a part of every permit. All stock grazed under said permit on national forest must be actually owned by the permittee."

It will be noted that the above quoted section of the Regulation contains the following: "A term permit shall have the full force and effect of a contract between the United States and the permittee." No authorization for such provision can be found in any Congressional Act, and its literal meaning cannot be valid. We are of the opinion that by such provision the government means that it will regard the terms of its permit as binding between it and other permit seekers. Regulations exceeding statutory authority are void. *United States* v. *Doullut*, 5 Cir. 213 F. 729, 736; *United States* v. *Utah Power & Light Co.*, 243 U.S. 389, 37 S. Ct. 387, 61 L. Ed. 791; *United States* v. *City and County of San Francisco*, 310 U.S. 16, 32, 60 S. Ct. 749, 84 L. Ed. 1050.

The government in its brief refers to the last two sentences of § 231.9, 36 Code of Federal Regulations, and argues that it is a declaration to the effect that a permit is not property. Then sentences are: "A grazing preference is not a property right. Permits are granted only for the exclusive use and benefit of the persons to whom they are issued." The construction given this in the brief cannot be successfully maintained. The "grazing preference" does not refer to the permit. Permits are exclusively for the permittee and are not assignable. When the permittee sells cattle presently grazing on national forest lands a grazing preference will be given the purchaser over others seeking permits. It is this preference that the regulation refers to as not being a property right.

Since the transfer of the status of open public lands to that of national forest lands does not change the rights of stock grazing therein, except that the forest reserve service may make and enforce regulations appropriate to the preservation of the natural growth therein and may therefore exclude grazing entirely or regulate it appropriately to the benefit of such natural growth, it would seem to follow that a permit [4] or limited right of grazing granted by the service would not act to perfect any property right as against the sovereign. No grant of United States property may be made except by virtue of Congressional authorization (Art. 4, § 3, Const.; *Shannon* v. *United*

[4] Permits or licenses to graze livestock in the national forests are issued by the Forest Service under rules and regulations promulgated by the Secretary of Agriculture. 36 Code of Federal Regulations, sec. 231; *Bell* v. *Apache Maid Cattle Co.*, 1938, 9 Cir., 94 F. 2d 847. Authority for the regulations is found in the Act of June 4, 1897, c. 2, 30 Stat. 11, 35, as amended February 1, 1905, c. 288, 33 Stat. 628, 16 U.S.C.A. § 551, which provides that: "* * * he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." The rules and regulations made pursuant to and consistent with the authority conferred by that Act have the force and effect of law. *McFall* v. *Arkoosh*, 1923, 37 Idaho 243, 215 P. 978, 979; *Bell* v. *Apache Maid Cattle Co.*, 1938, 9 Cir., 94 F. 2d 847.

States, *supra*), and the mere authority given the forest service to make appropriate regulations carries with it no authority to alienate for any period of time any phase of government right over the full use of its lands or to make any agreement regarding them subject to the payment of compensation for its revocation.

It is safe to say that it has always been the intention and policy of the government to regard the use of its public lands for stock grazing, either under the original tacit consent or, as to national forests, under regulation through the permit system, as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation. Indeed concessions to individuals for the use of public property or the enjoyment of rights peculiar to the sovereign have been consistently construed with strictness against the concessionee and in favor of the sovereign.[5]

We hold, therefore, that the judgment must be affirmed.

We desire to add that we are not impressed with the government's argument that the sum or any part thereof appropriate to be awarded to the appellants by the Secretary of War, was in fact awarded by the jury under the court's instructions.

Affirmed.

CONTRACTS OF SALE AND PURCHASE IN TRANSFER OF GRAZING PREFERENCES

McFall v. *Arkoosh*

SUPREME COURT OF IDAHO

37 Ida. 243; 215 Pac. 978 (1923)

Editor's Note: A contract which purports to transfer by a contract of sale privileges to graze on National Forest lands in contravention of the Secretary of Agriculture's regulations will not be enforced.

DUNN, J. On or about April 26, 1919, appellant sold to respondent 1,640 head of sheep for $25,000. It is alleged by respondent that, for

[5] Numerous instances are to be found where permits issued by a sovereign are highly valuable as between private persons but which may be revoked by the sovereign without the payment of compensation: e.g. bridge franchises, *Louisville Bridge Co.* v. *United States*, 1917, 242 U.S. 409, 37 S. Ct. 158, 61 L. Ed. 395; *United States* v. *Wauna Toll Bridge Co.*, 1942, 9 Cir., 130 F. 2d 855; licenses to erect river and harbor structures, *United States* v. *Chicago, M., St. P. & P.R. Co.*, 1941, 312 U.S. 592, 61 S. Ct. 772, 85 L. Ed. 1064; *Willink* v. *United States*, 1916, 240 U.S. 572, 36 S. Ct. 422, 60 L. Ed. 808; *Greenleaf Johnson Lumber Co.* v. *Garrison*, 1915, 237 U.S. 251, 35 S. Ct. 551, 59 L. Ed. 939; *United States* v. *Chandler-Dunbar Water Power Co.*, 1913, 229 U.S. 53, 70, 33 S. Ct. 667, 57 L. Ed. 1063; *Berger* v. *Ohlson*, 1941, 9 Cir., 120 F. 2d 56; permits to erect and maintain telephone and power lines, *Swendig* v. *Washington Co.*, 1924, 265 U.S. 322, 44 S. Ct. 496, 68 L. Ed. 1036; *United States* v. *Colorado Power Co.*, 1916, 8 Cir., 240 F. 217, 220; licenses to occupy, lease, or sell fishing areas, *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 1913, 229 U.S. 82, 33 S. Ct. 679, 57 L. Ed. 1083.

the purpose of inducing him to purchase the sheep at the price mentioned, appellant represented and guaranteed to him that he (appellant) was the owner of a right to graze and pasture 1,750 head of sheep on the Sawtooth National Forest Reserve, and that said right was "appurtenant to the ownership of the sheep aforesaid," and that appellant agreed that if respondent would purchase the sheep at the price mentioned appellant would set over and transfer to him such grazing and pasture right "subject only to the 5 per cent. reduction made incident by such transfers by the rules and regulations of the forest reserve." The grazing right in question was estimated by respondent to be of the value of $3 per head, and such right not having been transferred to respondent by appellant respondent brought this action to recover $4,920, the total estimated value of the right. Appellant denied the making of any agreement for the transfer of the right in question.

Verdict was rendered in favor of respondent for $1,000, for which judgment was accordingly entered. The appeal is from the judgment.

At the close of the case appellant moved the court to direct the jury to return a verdict in his favor, which the court denied, and this, with other rulings of the court, was assigned as error. We think it will be necessary to examine no other assignments.

At the close of the case it had been conclusively shown that the agreement upon which respondent relied in bringing this action was one forbidden by the regulations governing national forests. 1918 Use Book, p. 113, Reg. G–18. Both parties were conclusively presumed to know that the federal statutes authorized the Secretary of Agriculture to make regulations governing the grazing of stock on national forests (U.S. Comp. Stats. §§ 823, 5126), and the courts of this state take judicial notice of such regulations. C.S. § 7933. *Caha* v. *United States*, 152 U.S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. Such regulations have the force and effect of law. *United States* v. *Grimaud*, 220 U.S. 520, 31 Sup. Ct. 480, 55 L. Ed. 569; *United States* v. *Eliason*, 16 Pet. 291, 10 L. Ed. 968.

The contract, being clearly in violation of the regulations governing national forests, no action could be maintained for its enforcement, and respondent, being in pari delicto with appellant, under the rule generally followed by the courts, could not maintain an action for money paid pursuant to such an agreement. The law leaves such parties where it finds them. *Libby* v. *Pelham*, 30 Idaho, 614, 166 Pac. 575; *Lingle* v. *Snyder*, 160 Fed. 627, 87 C.C.A. 529; 13 C.J. p. 492, § 440; 2 Page on Contracts, p. 1920, § 1089; 2 Elliott on Contracts, p. 344, § 1067.

However, there may be exceptions to what we hold to be the correct rule in this case, as stated in Ruling Case Law as follows:

"Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of parties, but of the public. It is evident, therefore, that cases may arise even under contracts of this character, in which the public interests will be better promoted by granting than by denying relief, and in such the general rule must yield to this policy. Hence, even between parties in pari delicto, relief will sometimes be granted if public policy demands it." 6 R.C.L. p. 829, § 220.

For the refusal of the court to grant the motion for a directed verdict, the judgment must be reversed. It is so ordered, and the district court is directed to dismiss the action. Costs awarded to appellant.

McCarthy and William A. Lee, JJ., and Givens, C., concur.

ACTIONS OF FOREST SERVICE OFFICERS "ARBITRARY AND CAPRICIOUS"

Dell Publishing Co., Inc. v. *Arthur J. Summerfield*

United States District Court

District of Columbia

198 F. Supp. 843 (1961)

Editor's Note: This case holds that the words "arbitrary" and "capricious," in indicating agency action which may be set aside by the courts, are used in their technical sense as meaning without rational basis.

Holtzoff, *District Judge.*

This is an action for a declaratory judgment and an injunction against the Postmaster General to set aside his order revoking second-class mail privileges of certain publications issued by the plaintiff. The matter is now before the Court on cross motions for summary judgment. Necessarily, both sides, by making such motions, concede that there is no material question of fact but that the matter should be determined as a question of law.

Section 224 of Title 39 of the United States Code[1] provides that mailable matter of the second-class shall embrace all newspapers and other periodical publications which are issued at stated intervals and as frequently as four times a year and are within the conditions named in Sections 225 and 226 of this Title.[2] The term "periodical" is not defined in the statute. It is a matter of common knowledge that mailable matter of the second-class is charged a much smaller amount for its carriage through the mails than is mailable matter of other classes.

The publications involved in this case are paper bound pamphlets containing crossword puzzles with blanks for their solutions. These pamphlets are issued bi-monthly. The Postmaster General held that they are not periodicals within the meaning of the statute, and it is contended by the plaintiff that his ruling to that effect is arbitrary and capricious.

The question to be determined by this Court is a narrow one, namely, whether the ruling of the Postmaster General that these pamphlets are not periodicals within the meaning of the statute is arbitrary or capricious in the legal sense. The words "arbitrary and capricious"

[1] 1960 Revision, see 39 U.S.C.A. § 4351.
[2] 1960 Revision, see 39 U.S.C.A. §§ 4058, 4365, 4354.

are not used in their opprobrious or popular meaning but in the technical sense as having no rational basis.

The Supreme Court has defined the term "periodical" in connection with this statute. In *Houghton* v. *Payne*, 194 U.S. 88, 97, 24 S. Ct. 590, 582, 48 L. Ed. 888, it was stated:

> "A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature or some special branch of learning or to a special class of subjects."

In that case it was held that a series of pamphlets issued at periodic intervals by well-known publishers, each containing an independent and separate literary work, the entire series known as Riverside Literature series, were not periodicals within the meaning of the statute and that the Postmaster General was justified in declining to extend second-class privileges to those publications.

In *Smith* v. *Hitchcock*, 226 U.S. 53, 59, 33 S. Ct. 6, 8, 57 L. Ed. 119, Mr. Justice Holmes stated:

> "The noun 'periodical', according to the nice shade of meaning given to it by popular speech, conveys at least a suggestion, if not a promise, of matter on a variety of topics, and certainly implies that no single number is contemplated as forming a book by itself."

In that case the Postmaster General had revoked second-class privileges for publications which were issued weekly, each containing a single story complete in itself, with the same character being carried through the series. Among these series was one named Tip Top Weekly and similar publications. The Supreme Court upheld the ruling of the Postmaster General to the effect that, since each number contained a single completed story, it could not be deemed to be a periodical in the true sense of the word merely because the pamphlets were issued at stated intervals.

The plaintiff relies on the case of *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 66 S. Ct. 456, 90 L. Ed. 586. This Court is of the opinion, however, that the Hannegan case is distinguishable. It did not involve any question as to whether the publication with which the Court was concerned was or was not a periodical. It was admitted that the publication was a periodical. The second-class mailing privileges were withdrawn from the publication, however, on the ground that the periodical bordered on the obscene. The Supreme Court held that this was not a basis for withdrawal of second-class mailing privileges. At page 158, of 327 P.S., at page 462 of 66 S. Ct., Mr. Justice Douglas stated:

> "* * * to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official. The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates."

There is no contention in this case that the contents of the publications are undesirable. It was merely held that the contents are such as not to constitute the pamphlets in which they are contained a periodical within the meaning of the statute.

The Court is unable to find that the action of the Postmaster General is lacking in a rational basis and, therefore, concludes that it was not arbitrary or capricious but that the Postmaster General acted within the bounds of proper discretion in determining the question whether the publication was a periodical. That determination must be made by the Postmaster General. The Court may not substitute its own judgment for that of the Postmaster General, and if the Postmaster General acts within the legal definitions laid down by the Supreme Court and within the bounds of reason, his action may not be set aside.

Accordingly, the plaintiff's motion for summary judgment will be denied and the defendant's motion granted.

RIGHTS OF INDIANS

United States v. *Winans*

SUPREME COURT OF THE UNITED STATES

198 U.S. 371 (1905)

Editor's Note: This case, involving fishing rights of the Yakima Indians under a treaty of 1859, holds that rights reserved by treaty are continuing ones, beyond those enjoyed by other citizens, and that Indian treaties are to be construed in a spirit consistent with the obligation to protect the interests of a dependent people.

The facts are stated in the opinion.

The Solicitor General for the United States:

The fishery involved is and always has been a famous one. It is a "usual and accustomed place" and one of the best, if not the best place, on the Columbia River. The Yakima Indians have resorted to it above all others and depended on it for the supply of fish which was their steady subsistence. The treaty was negotiated with distinct recognition of this right. The Indians objected to the transfer of their lands until assured by the Government as to the fishery rights.

Fish wheels are very destructive. They catch salmon by the ton, are not only rapidly diminishing the supply but will soon totally destroy it. But whether or not the wheels are unjustifiable *per se* and should be removed on the Indian's complaint, their grievance is greater; they are not allowed to fish at all. They do not claim exclusive rights, but rights in common with citizens. The defendants claim exclusive rights, and that if the Indians can fish at all, they must do so at other points along this stretch as these lands have been patented, and are owned by the defendants. The Indians cannot cross the lands to reach the fishery and are without any right whatever except what the defendants allow as a matter of grace. They are allowed no real rights.

The Government has always striven against disparity between our promises when obtaining treaties and the actual meaning of the instrument as it is sought to be construed when the greed of white set-

tlers is aroused. The treaty involved was not merely one of peace and amity, or of "friendship, limits and accommodation," but a treaty of cession of lands by accurate description and on considerations duly expressed, one of which was the fishery rights now contended for.

As to the spirit in which Indian treaties should be construed see *Worcester* v. *Georgia*, 6 Pet. 515, 581; *Fletcher* v. *Peck*, 6 Cr. 87; *Johnson* v. *McIntosh*, 8 Wheat. 543; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *United States* v. *Cook*, 19 Wall. 591; *Choctaw Nation* v. *United States*, 119 U.S. 1.

Defendants' title rests on patents and on contracts with the State of Washington. Before they acquired title they knew of the Indian claims. There was always notice and actual knowledge by reason of the treaty provisions, by reason of the notorious Indian use of this fishery. The patents never gave absolute title, and the fee was always conditional. The treaty gave the right. Congress has never divested the Indians of the right. An executive officer mistakenly issuing a patent without proper reservations under such circumstances cannot thus divest valid vested rights.

This is an old controversy, and has been fully adjudicated in favor of the Indians by the Washington courts. *United States* v. *Taylor*, 3 Wash. Ty. 88. And this adjudication has been recognized by the Federal courts. *United States* v. *Taylor*, 44 Fed. Rep. 2. *Alaska Packers' Assn. case*, 79 Fed. Rep. 152, was against us on the ground that the private title and the operation of fish traps under state licenses necessarily confer exclusive rights. *The James G. Swan*, 50 Fed. Rep. 108, distinguished. We are not seeking to impress a broad and vague servitude on all patented lands along the Columbia, but only a clear and limited one on this particular small tract. Under English and American rules exclusive rights to fisheries are not favored. 2 Bl. Com. 39, 40, 417 *et seq.; Weston* v. *Sampson*, 8 Cush. 346, 352; *Melvin* v. *Blazer*, 2 Bin. 475; *Yard* v. *Carman*, 2 Pen. (N.J.) 681, 686; *Melvin* v. *Whiting*, 7 Pick. 79; 1 Pingrey on Real Property, 107, 108; Washburn on Easements and Servitudes, 533; *Shrunk* v. *Schuylkill Navigation Co.*, 14 S. & R. 71; *Bickel* v. *Polk*, 5 Harr. (Del.) 325; *Hogg* v. *Beerman*, 41 Ohio St. 81; *Sloan* v. *Biemiller*, 34 Ohio St. 492. So far as the right may be exclusive, belonging to the riparian owner (in non-navigable waters), the State may restrain and regulate. *Waters* v. *Lilley*, 4 Pick. 145; *Commonwealth* v. *Chapin*, 5 Pick. 199. In either aspect, viz.: of a common right or one incident to dominion of the soil, the Indian claim here is good, because it was shared with citizens and was recognized by the Government in respect to its public dominion and title long before the private grants by patent were made. The States control navigable waters, including the soil under them and the fisheries within their limits, subject only to the rights of the General Government under the Constitution in the regulation of commerce. *Smith* v. *Maryland*, 18 How. 71; *Manchester* v. *Massachusetts*, 139 U.S. 240; *Shively* v. *Bowlby*, 152 U.S. 1; *Martin v. Waddell*, 16 Pet. 367; *McCready* v. *Virginia*, 94 U.S. 391. *Eisenbach* v. *Hatfield*, 2 Washington, 236, shows how the courts of the State of Washington construe the scope of state control. But nevertheless the state power here is subject to fundamental limitation, viz.: the organic acts affecting Washintgon as a Territory and a State. Act of August 14, 1848, 9 Stat. 323; act of March 2, 1853, 10 Stat. 172; act of February 2, 1889, 25 Stat. 676; and the constitution of the State of Washington,

Arts XVII, XXVI, taken together and construed in the light of the principle established in *Shively* v. *Bowlby*, *supra*, mean that the state right and claim to control, as by the sale of shore lands and the issue of licenses for fish wheels, are subject to all rights granted or reserved when the Federal power was in full control, during the territorial status. This doctrine embraces the grant or reservation to the Indians of these fishery rights assured by the United States under treaty stipulations, soon after that region passed from the Indian country status into the territorial condition and long before it became a State.

The Indian claim is not merely meritorious and equitable; it is an immemorial right like a ripened prescription. *Barker* v. *Harvey*, 181 U.S. 481, distinguished. A mistake in fact was made in issuing the patents, but the ground of equitable intervention is not technically that of mistake or fraud, nor does the Government endeavor, contrary to statutory limitations, to vacate and annul patents, *e.g.*, act of March 3, 1891, 26 Stat. 1093, to set aside and cancel a patent on the ground of mistake or fraud. The court will recognize the justice of the Indian claim and declare and establish by its equity powers the trust for the Indians which at all times has been an essential ingredient of private title to these lands. A patent does not invariably and inevitably convey an absolute title beyond all inquiry and free of every condition. *Eldridge* v. *Trezevant*, 160 U.S. 452. See also *Ruch* v. *New Orleans*, 43 La. Ann. 275; *Barney* v. *Keokuk*, 94 U.S. 324; *Packer* v. *Bird*, 137 U.S. 372; *Shively* v. *Bowlby*, 152 U.S. 1.

Ward v. *Race Horse*, 163 U.S. 504, recognized, as if it foresaw this case, the doctrine for which we are contending.

A decree for appellants must consider the reasonable rights of both parties; restricting the fish wheels if they can be maintained at all, as to their number, method and daily hours of operation. Nor can the Indians claim an exclusive right, and it may be just to restrict them in reasonable ways as to times and modes of access to the property and their hours for fishing. But by some proper route, following the old trails, and at proper hours, with due protection for the defendants' buildings, stock and crops, free ingress to and egress from the fishing grounds should be open to the Indians, and be kept open.

Mr. Charles H. Carey, with whom *Mr. Franklin P. Mays* was on the brief, for respondents:

Upon the acquisition of the original Oregon Territory now including Oregon, Washington, and parts of other States, the United States became invested with the fee of all the lands and waters included therein. The "Indian title" as against the United States was merely a right to perpetual occupancy of the land, with the privilege of using it as the Indians saw fit, until such right of occupany had been surrendered to the Government; and the Indian title to the reservations was of no higher character. *United States* v. *Alaska Packers' Assn.*, 79 Fed. Rep. 157; *Spalding* v. *Chandler*, 160 U.S. 394, 407.

The Indian title, even to the lands included in their reservation, is subject to the paramount control and power of Congress in the enactment of laws for the sale and disposal of the public lands. Cases *supra* and *Missouri, K. & T. Ry. Co.* v. *Roberts*, 152 U.S. 114.

Under the treaty of 1859, the Indians neither reserved nor did they acquire a title by occupancy to the lands bordering their usual and customary fishing grounds. They acquired merely an executory license or privilege, applying to no certain and defined places, and

revocable at will of the United States, to fish, hunt, and build temporary houses upon public lands, in common with white citizens, upon whom the law has conferred no title by occupancy whatever. Cases *supra* and *Ward* v. *Race Horse*, 163 U.S. 504.

The treaty of 1859 imposed no restraint upon the power of the United States to sell the lands in controversy, and such a sale under the settled policy of the Government, was a result naturally to come from the advance of the white settlements along the river, and it cannot be assumed that the Government intended by general expressions in the treaty to tie up the development of the fishing industry through a long stretch of the waters of the Columbia.

The grant of the lands bordering the Columbia River at such fishing places deprived the white citizens of all rights to go over, across, or upon them for the purpose of fishing or erecting buildings or other purposes, and the Indian rights being of no higher nature were likewise revoked and extinguished. Cases *supra* and *The James G. Swan*, 50 Fed. Rep. 108.

Upon the admission of the State of Washington into the Federal Union, "upon an equal footing with the original States," she became possessed, as an inseparable incident to her dominion and sovereignty, of all the rights as to sale of the shore lands on navigable rivers, and the regulation and control of fishing therein, that belonged to the original States.

The title to the shore and lands under water is incidental to the sovereignty of a State,—a portion of the royalties belonging thereto,—and held in trust for the public purposes of navigation and fishery, and cannot be retained or granted out to individuals by the United States; and it depends upon the law of such State to determine to what extent the State has prerogatives of ownership. Control and regulation shall be exercised subject only to the paramount authority of Congress with regard to public navigation and commerce. *Hardin* v. *Jordan*, 140 U.S. 371; *Shively* v. *Bowlby*, 152 U.S. 1.

Evidence of Indians present at the time of the execution of the treaty between the representatives of the United States Government and the federated bands of Indians known as the Yakima Nation in 1855 is incompetent and inadmissible when such evidence would tend to vary the plain stipulations of the treaty. *Anderson* v. *Lewis*, 1 Freem. Ch. (Miss.) 178; *Little* v. *Wilson*, 32 Maine, 214.

Where rights of fishing and hunting on the then vacant public lands of the United States were reserved to the whites and Indians "in common," both whites and Indians could use such implements and methods of fishing and hunting in the exercise of their common rights as they saw fit, and the use of fish wheels by the whites in the customary runways oft he fish which did not exclude the Indians from fishing elsewhere, would not deprive the Indians of their common right.

Mr. Justice McKenna delivered the opinion of the court.

This suit was brought to enjoin the respondents from obstructing certain Indians of the Yakima Nation in the State of Washington from exercising fishing rights and privileges on the Columbia River in that State, claimed under the provisions of the treaty between the United States and the Indians, made in 1859.

There is no substantial dispute of facts, or none that is important to our inquiry.

The treaty is as follows:

"Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them. . . .

"Article II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries: . . . .

"All of 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 and bands of Indians 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 tribe and the superintendent and agent. And the said confederated tribes and bands 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.

"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. . . .

"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.

"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 citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. . . .

"Article X. *And provided*, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the 'Wenatshapam fishery,' which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations." 12 Stat. 951.

The respondents or their predecessors in title claim under patents of the United States the lands bordering on the Columbia River and under grants from the State of Washington to the shore land which, it is alleged, fronts on the patented land. They also introduced in evidence licenses from the State to maintain devices for taking fish, called fish wheels.

At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands and to define rights outside of them.

The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership. Before filing their answer respondents demurred to the bill. The court overruled the demurrer, holding that the bill stated facts sufficient to show that the Indians were excluded from the exercise of the rights given them by the treaty. The court further found, however, that it would "not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing." 73 Fed. Rep. 72. The injunction that had been granted upon the filing of the bill was modified by stipulation in accordance with the view of the court.

Testimony was taken on the issues made by the bill and answer, and upon the submission of the case the bill was dismissed, the court applying the doctrine expressed by it in *United States* v. *Alaska Packers' Assn.*, 79 Fed. Rep. 152; *The James G. Swan*, 50 Fed. Rep. 108, expressing its views as follows:

"After the ruling on the demurrer the only issue left for determination in this case is as to whether the defendants have interfered or threatened to interfer with the rights of the Indians to share in the common right of the public of taking fish from the Columbia River, and I have given careful consideration to the testimony bearing upon this question. I find from the evidence that the defendants have excluded the Indians from their own lands, to which a perfect absolute title has been acquired from the United States Government by patents, and they have more than once instituted legal proceedings against the Indians for trespassing, and the defendants have placed in the river in front of their lands fishing wheels for which licenses were granted to them by the State of Washington, and they claim the right to operate these fishing wheels, which necessitates the exclusive possession of the space occupied by the wheels. Otherwise the defendants have not molested the Indians nor threatened to do so. The Indians are at the present time on an equal footing with the citizens of the United States who have not acquired exclusive proprietary rights, and this it seems to me is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States."

The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more. And we have said we will construe a treaty with the

Indians as "that unlettered people" understood it, and "as justice and reason demand in 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." 119 U.S. 1; 175 U.S. 1. How the treaty in question was understood may be gathered from the circumstances.

The 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. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

The respondents urge an argument based upon the different capacities of white men and Indians to devise and make use of instrumentalities to enjoy the common right. Counsel say: "The fishing right was in common, and aside from the right of the State to license fish wheels the wheel fishing is one of the civilized man's methods, as legitimate as the substitution of the modern combined harvester for the ancient sickle and flail." 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 the 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 on 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.

The construction of the treaty disposes of certain subsidiary contentions of respondents. The Land Department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the Department are absolute in form. They are subject to the treaty as to the other laws of the land.

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.

The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby*, 152 U.S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered through the cases, which seemed to assert a contrary view. It was said by the court, through Mr. Justice Gray:

"Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true."

* * * * * * *

"By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition. *American Ins Co.* v. *Canter*, 1 Pet. 511, 542; *Benner* v. *Porter*, 9 How. 235, 242; *Cross* v. *Harrison*, 16 How. 164, 193; *National Bank* v. *Yankton County*, 101 U.S. 129, 133; *Murphy* v. *Ramsey*, 114 U.S. 15, 44; *Mormon Church* v. *United States*, 136 U.S. 1, 42, 43; *McAlister* v. *United States*, 141 U.S. 174, 181."

Many cases were cited. And it was further said:

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory."

The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the

objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

The license from the State, which respondents plead to maintain a fishing wheel, gives no power to them to exclude the Indians, nor was it intended to give such power. It was the permission of the State to use a particular device. What rights the Indians had were not determined or limited. This was a matter for judicial determination regarding the rights of the Indians and rights of the respondents. And that there may be an adjustment and accommodation of them the Solicitor General concedes and points out the way. We think, however, that such adjustment and accommodation are more within the province of the Circuit Court in the first instance than of this court.

Decree reversed and the case remanded for further proceedings in accordance with this opinion.

Mr. Justice White dissents.

Seufert Brothers Company v. *United States, as Trustee and Guardian of the Confederated Tribes and Bands of the Yakima Indians and Nations, et al.*

United States, as Trustee and Guardian of the Confederated Tribes and Bands of the Yakima Indians and Nations, et al. v. *Seufert Brothers Company.*

Supreme Court of the United States

249 U.S. 194 (1919)

Editor's Note: This case, involving fishing rights of the Yakima Indians under a treaty of 1855, is cited in support of the general proposition that rights reserved by treaty are continuing ones, beyond those enjoyed by other citizens, and that treaties are to be broadly construed in favor of the Indians.

Mr. Justice Clarke delivered the opinion of the court.

As trustee and guardian of the Yakima Indians, the Government of the United States instituted this suit in the Federal District Court for the District of Oregon to restrain defendant, a corporation, its officers, agents and employees, from interfering with the fishing rights in a described locality on the south side and bank of the Columbia River, which it was alleged were secured to the Indians by Article III of the treaty between them and the United States, concluded June 9, 1855, and ratified by the Senate on March 8, 1859 (12 Stat. 25).

The District Court granted in part the relief prayed for and found as follows: That the "following described portion of the south bank of the Columbia river in the county of Wasco, state and district of Oregon, was at the time of the treaty, always has been, and now is, one of the usual and accustomed fishing places belonging to and possessed by the Confederated Tribes and Bands of Indians known as

the Yakima Nation." And the court further decreed that the rights and privileges to fish in common with citizens of the United States reserved by said Yakima Nation and guaranteed by the United States to it in the treaty of June 9, 1855, applied to all the usual and accustomed fishing places on the south bank or shore of the Columbia River, in the decree described.

An appeal from the decree granting an injunction brings the case here for review.

As stated by counsel for the appellant the most important question in the case is this, "Did the treaty with the Yakima tribes of Indians, ceding to the United States the lands occupied by them, on the north side of the Columbia River in the Territory of Washington," and reserving to the Indians "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory" give them the right to fish in the country of another tribe on the south or Oregon side of the river? The appeal requires the construction of the language quoted in this question, and the circumstances incident to the making of the treaty are important.

Fourteen tribes or bands of confederated Indians, which, for the purposes of the treaty were considered as one nation under the name of Yakima Nation, at the time of the making of the treaty occupied an extensive area in the Territory, now State, of Washington, which is described in the treaty, and was bounded on the south by the Columbia River. By this treaty the Government secured the relinquishment by the Indians of all their rights in an extensive region, and in consideration therefor a described part of the lands claimed by them was set apart for their exclusive use and benefit as an Indian reservation, and in addition fishing privileges were reserved to them by the following provision in Article III:

"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 citizens of the Territory, and of erecting temporary buildings for curing them.*"

This treaty was one of a group of eleven treaties negotiated with the Indian tribes of the northwest between December 26, 1854, and July 16, 1855, inclusive. Six of these were concluded between June 9th and July 16th, inclusive, and one of these last, dated June 25th, was with the Walla-Walla and Wasco tribes, "residing in Middle Oregon," and occupying a large area, bounded on the north by that part of the Columbia River in which the fishing places in controversy are located (12 Stat. 37). This treaty contains a provision for an Indian reservation and one saving fishing rights very similar in its terms to that of the Yakima treaty, viz: "That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same."

These treaties were negotiated in a group for the purpose of freeing a great territory from Indian claims, preparatory to opening it to settlers, and it is obvious that with the treaty with the tribes inhabiting Middle Oregon in effect, the United States was in a position to fulfill any agreement which it might make to secure fishing rights in, or on either bank of, the Columbia River in the part of it now under con-

sideration,—and the treaty was with the Government, not with Indians, former occupants of relinquished lands.

The District Court found, on what was sufficient evidence, that the Indians living on each side of the river, ever since the treaty was negotiated, had been accustomed to cross to the other side to fish, that the members of the tribes associated freely and intermarried, and that neither claimed exclusive control of the fishing places on either side of the river or the necessary use of the river banks, but used both in common. One Indian witness, says the court, "likened the river to a great table where all the Indians came to partake."

The record also shows with sufficient certainty, having regard to the character of evidence which must necessarily be relied upon in such a case, that the members of the tribes designated in the treaty as Yakima Indians, and also Indians from the south side of the river, were accustomed to resort habitually to the locations described in the decree for the purposes of fishing at the time the treaty was entered into, and that they continued to do so to the time of the taking of the evidence in the case, and also that Indians from both sides of the river built houses upon the south bank in which to dry and cure their fish during the fishing season.

This recital of the facts and circumstances of the case renders it unnecesary to add much to what was said by this court in *United States* v. *Winans*, 198 U.S. 371, in which this same provision of this treaty was considered and construed. The right claimed by the Indians in that case was to fishing privileges on the north part and bank of the Columbia River—in this case similar rights are claimed on the south part and bank of the river.

The difference upon which the appellant relies to distinguish this from the former case is that the lands of theYakima Indians were all to the north of the river and therefore it is said that their rights could not extend beyond the middle of that stream, and also that since the proviso we are considering is in the nature of an exception from the general grant of the treaty, whatever rights it saves must be reserved out of the thing granted, and as all of the lands of the Yakima tribes lay to the north of the river it cannot give any rights on the south bank.

But in the former case (*United States* v. *Winans*, *supra*), the principle to be applied in the construction of this treaty was given this statement:

"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.' 119 U.S. 1; 175 U.S. 1."

How the Indians understood this proviso we are considering is not doubtful. During all the years since the treaty was signed they have been accustomed habitually to resort for fishing to the places to which the decree of the lower court applies, and they have shared such places with Indians of other tribes from the south side of the river and with white men. This shows clearly that their understanding of the treaty was that they had the right to resort to these fishing grounds and make use of them in common with other citizens of the United States,—

and this is the extent of the right that is secured to them by the decree we are asked to revise.

To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of the treaty, which gives them the right "of taking fish at all usual and accustomed places, . . . and of erecting temporary buildings for curing them," and would substitute for the natural meaning of the expression used,—for the meaning which it is proved the Indians, for more than fifty years derived from it,—the artificial meaning which might be given to it by the law and by lawyers.

The suggestion, so impressively urged, that this construction "imposes a servitude upon the Oregon soil" is not alarming from the point of view of the public, and private owners not only had notice of these Indian customary rights by the reservation of them in the treaty, but the "servitude" is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them.

The only other questions argued by the appellant relate to the claims which counsel anticipated would be made on the cross-appeal by the Government, which, however, was abandoned before oral argument and must be dismissed. It results that the decree of the District Court must be *Affirmed.*

Tulee v. *State of Washington*

Supreme Court of the United States

315 U.S. 681 (1942)

Editor's Note: Under the provision of the treaty of May 29, 1855, with the Yakima Indians, reserving to the members of the tribe the right to take fish "at all usual and accustomed places, in common with the citizens" of Washington Territory, the State of Washington has the power to impose on the Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, but it can not require them to pay license fees that are both regulatory and revenue-producing. 7 Wash. 2d 124, 109 P. 2d 280, reversed.

Mr. Justice Black delivered the opinion of the Court.

The appellant, Sampson Tulee, a member of the Yakima tribe of Indians, was convicted in the Superior Court for Klickitat County, Washington, on a charge of catching salmon with a net, without first having obtained a license as required by state law.[1] The Supreme Court of Washington affirmed. 7 Wash. 2d 124, 109 P. 2d 280. The case is here on appeal under 237(a) of the Judicial Code, 28 U.S.C. 344(a), the appellant challenging the validity of the Washington

[1] "It shall be unlawful to catch, take or fish for food fish with any appliance or by any means whatsoever except with hook and line . . . unless license so to do has been first obtained. . . . " Remington's Revised Statutes of Washington, § 5693. "For each dip bag net license for the taking of salmon on the Columbia River, [the license fee shall be] five dollars. . . ." *Id.* (vol. 7, 1940 supp.), § 5703.

statute, as applied to him, on the ground that it was repugnant to a treaty made between the United States and the Yakima Indians.

In 1855, the Yakimas and other Indians owned and occupied certain lands in the Territory of Washington, which the United States wished to open up for settlers. May 29, 1855, representatives of the Government met in council with representatives of the Indians, and after extended discussions lasting until June 11, the Indians agreed to a treaty, under which they were to cede 16,920 square miles of their territory, reserving 1,233 square miles for the confederated tribes represented at the meeting. As consideration for the cession by the Indians, a cession which furthered the national program of transforming wilderness into populous, productive territory, the Government agreed to pay $200,000; to build certain schools, shops, and mills and keep them equipped for twenty years; to erect and equip a hospital; and to provide teachers and various helpers for twenty years. This agreement was ratified and proclaimed as a treaty in 1859. 12 Stat. 951.

The appellant claims that the Washington statute compelling him to obtain a license in order to fish for salmon violates the following provision of Article III of the treaty:

"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 citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The state does not claim power to regulate fishing by the Indians in their own reservation. *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 P. 557. Nor does it deny that treaty rights of Indians, whatever their scope, were preserved by Congress in the act which created the Washington Territory and the enabling act which admitted Washington as a state. 10 Stat. 172; 25 Stat. 676. Relying upon its broad powers to conserve game and fish within its borders,[2] however, the state asserts that its right to regulate fishing may be exercised at places like the scene of the alleged offense, which, although within the territory originally ceded by the Yakimas, is outside of their reservation. It argues that the treaty should not be construed as an impairment of this right, and that, since its license laws do not discriminate against the Indians, they do not conflict with the treaty. The appellant, on the other hand, claims that the treaty gives him an unrestricted right to fish in the "usual and accustomed places," free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish,[3] it forecloses the state from charging the Indians a fee of the kind in question here.

[2] *Geer* v. *Connecticut*, 161 U.S. 519; *Ward* v. *Race Horse*, 163 U.S. 504, 507; *Patsone* v. *Pennsylvania*, 232 U.S. 138; *Lacoste* v. *Dept. of Conservation*, 263 U.S. 545, 549.

[3] Cf. *Kennedy* v. *Becker*, 241 U.S. 556. See *United States* v. *Winans*, *supra*, 384.

In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States* v. *Winans*, 198 U.S. 371, this Court held that, despite the phrase "in common with citizens of the Territory," Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their "usual and accustomed places" in the ceded area; and in *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us, of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States* v. *Kagama*, 118 U.S. 375, 384; *Seufert Bros. Co.* v. *United States*, *supra*, 198–199.

Viewing the treaty in this light, we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied in this case.

The judgment of the Supreme Court of Washington is

Reversed.

Makah Indian Tribe et al. v. *Schoettler*

UNITED STATES COURT OF APPEALS, Ninth Circuit

192 F. 2d 224 (1951)

Editor's Note: Where an Indian tribe has received from the United States, by treaty, the right to fish at usual and accustomed grounds in an area, a State may not prevent or impair the exercise of that right by regulations which are not necessary for the conservation of fish.

J. Duane Vance, and Bassett & Geisness, all of Seattle, Wash., for appellants.

Smith Troy, Atty. Gen., T. H. Little, Chief Asst. Atty. Gen., John J. O'Brien, Special Asst. Atty. Gen., for appellee.

Before DENMANN, Chief Judge, and STEPHENS and ORR, Circuit Judges.

DENMANN, *Chief Judge.*

This is an appeal from a judgment dismissing a complaint of the Makah Indian Tribe seeking injunctive relief against the operation of certain Washington state fishing regulations prohibiting their accustomed fishing in the Hoko River. The regulations in question prohibit all catching of fish in that river save by one pole and line with two single hooks or one artificial bait per person.

The Hoko River is a fresh water stream of some 25 to 50 feet in width in Northwestern Washington, emptying into the Straits of Juan de Fuca at a distance of some 18 miles from the Pacific Ocean and 10 miles easterly from the Makah Indian Reservation. It is a part of the area ceded by the Makahs to the United States in their treaty of 1855 [1] in return for which they received the treaty rights in fishing, hereafter considered.

In September and October the stream has a run of silver salmon which is the subject of the Makahs suit. The respondent's witnesses admit the salmon do not eat after entering the fresh water stream and hence can be caught but rarely on a baited or lured hook. In effect, there is a closing of the stream to all taking of the fall salmon for any purpose, whether for personal or commercial use.

It also appears that the regulation is not necessary for the maintenance of the salmon run in the stream. The run could be fully perserved by a partial stopping of the fishing during the run to permit the upstream movement of a sufficient number for propagation, as is done in other streams.

The only ground given for not making such a regulation is the cost of inspection during that brief portion of the two months' fall run when the stream is to be kept closed to fishing for the passage of the breeding fish. There is no merit in this contention for if the Makahs would have to be inspected to prevent their taking of salmon during the closed portion of the two months, *a fortiori*, they now require inspection for the full two months in which they are not permitted to take any fish. Aside from the absurdity of this contention, we hold that where a treaty gives the Indians a right to fish, the state cannot deny that right because of the cost of preventing their taking of fish in excess of that right.

Furthermore, it appears that, instead of so closing to all effective Indian fishing in the Quinault, Queets, Quillaute and Hoh Rivers and at the estuaries of the Chehalis and Skagit Rivers, Washington now allows gill net fishing there.

It is also admitted that Washington entered into a cooperative non-compulsory system with the Lummi Indians for regulating fishing on the Nooksack River, the provisions of which the Indians have carried out.

We cannot commend Washington's many years of denying the Makahs the fall salmon necessary for their food and support without at least seeking to make such a cooperative agreement with them. The Director of Fisheries at the time of the trial below stated his intention to make such an agreement, strongly indicating that such is one of the forms of giving the Indians their treaty rights.

The Makahs contend that the regulations so closing the Hoko violate Article IV of their treaty of 1855 with the United States, provid-

---

[1] 12 Stat. 939.

ing, "Article IV. 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, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens."

It is admitted that in 1855 the Hoko River was a "usual and accustomed" fishing ground of the Makahs. It is also clear that the salmon of the Hoko's fall run are an essential part of the food supply and support of the 462 surviving Makah Indians.

The appellee contends that because the State of Washington has the regulatory power to close the Hoko to citizens of the United States having no treaty rights to fish there, it has the same power to close the stream to the Makahs having such a treaty. That is to say, that the treaty words "The right of taking fish * * * is further secured to said Indians" is no right at all which the state is bound to respect in making its fishing regulations.

There is no merit in this contention. The Supreme Court has repeatedly held that the Indian treaty fishing provisions accord to them rights against state interference which do not exist for other citizens. *Tulee* v. *State of Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115; *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 39 S. Ct. 203, 63 L. Ed. 555; *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089.

The Supreme Court held in the Tulee case that where a treaty guarantees certain fishing rights to Indians and a state regulation impairs this right, the state must prove that its regulation is "necessary", and further held that such proof of the regulation there involved had not been made. The Court there said that "the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish* * * *." (Emphasis supplied.) [315 U.S. 681, 62 S. Ct. 864.]

We are not here concerned, as we were in *McCauley* v. *Makah Indian* tribe, 9 Cir., 128 F. 2d 867, with any particular form of regulation. We do not question the right to enact regulations which will permit fishing in the Hoko River to the extent that will give the Makahs their treaty right to fish there without depletion of the fall run of salmon. We hold no more than that the appellee has not sustained its burden of proof that the instant regulations preventing the Makahs from the taking of fish in the Hoko are "necessary for the conservation of fish" in the fall run of salmon in that river.

The decision of the district court is reversed and that court ordered to make and enter an order restraining the appellee from enforcing such regulations.

State v. *Arthur*

SUPREME COURT OF IDAHO

74 Ido. 251

261 P. 2d 135 (1953)

Rehearing Denied Oct. 6, 1953

Certiorari Denied 347 U.S. 937

Editor's Note: Where an Indian tribe ceded lands to the United States by a treaty which reserved, to the tribe, the privilege of hunting upon open and unclaimed land in the treaty area, the reserved hunting rights survive the subsequent inclusion of some such land in a National Forest reservation, and members of the tribe may hunt thereon at any time of the year, notwithstanding provisions of State law with respect to closed seasons, etc.

THOMAS, *Justice.*

Respondent, David Arthur, hereinafter referred to as the defendant, is a Nez Perce Indian and a member of the Nez Perce tribe of Indians. He was charged with killing a deer out of season, on September 26, 1951, in Idaho County, on National Forest lands, outside the boundaries of the reservation but within the exterior boundaries of lands ceded to the federal government by such Indian tribe, in violation of Section 36–104, I.C., and the regulations of the Idaho Fish and Game Commission.

Defendant filed a demurrer to the complaint on the ground that the facts charged therein do not constitute a crime, and on the further ground that the complaint contains matters which, if true, constitute a legal bar to the action under the terms of the Treaty of 1855, negotiated between the Nez Perce tribe and other tribes and the United States government. Treaty of 1855, 12 Stat. 957, II Kappler, 702.

The demurrer was sustained and judgment entered dismissing the case and discharging defendant. This appeal was taken by the State from the order sustaining the demurrer and from the judgment dismissing the action and discharging defendant.

The only question presented on this appeal is whether the defendant, as a member of the Nez Perce tribe, was entitled to hunt wild game on lands ceded by the Nez Perce tribe to the United States by the Treaty of 1855, which lands are now a part of the Nez Perce National Forest, during the closed season in disregard of the statutory laws of Idaho.

From May 22, 1855 through June 11, 1855, a meeting between the Nez Perce and other Indian tribes, including the Yakimas, and representatives of the United States government was held at the Council Grounds in Walla Walla Valley. Governor Isaac I. Stevens, of the Territory of Washington, and General Joel Palmer, of the Territory of Oregon, represented the Federal Government, and Chiefs and various spokesmen of the tribes represented the Indians. The extended negotiations culminated in the Treaty of June 11, 1855, whereby the Indians for monetary and other considerations ceded to the United States a vast territory exceeding 16,000 square miles in area. Article 3 of the Treaty with relation to the Nez Perce tribe provides as follows:

"Article III. * * * 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; 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."

The State contends that no federal rights were reserved in the Admission Act admitting Idaho to statehood on an equal footing with the original states in all respects, Idaho Code, Vol. 1, p. 37, 26 Stat. at L. 215, ch. 656; additionally, the State contends that no such power was delegated the federal government under the Idaho Constitution, Art. 21, § 19, I.C.; also that the lands upon which the killing occurred, having been set apart and reserved as a National Forest Reserve is neither "open" nor "unclaimed" land, consequently the Nez Perce Indians are subject to the laws of this state fixing the time when wild game may be killed.

On the other hand, defendant urges that the reserved right to hunt on the ceded lands, unlike the reserved right to fish, was not in common with the citizens of the territory but constituted an unqualified, continuing property right reserved by the tribe and is not subject to state regulations but is controlled by the Treaty of 1855 which is supreme until such reserved right is extinguished by treaty, agreement, or act of Congress.

There were subsequent treaties and agreements between the Nez Perce Indians and the United States expressly continuing in full force and effect all the provisions of the Treaty of 1855 not abrogated or specifically changed or which were not inconsistent with the provisions thereunder. Nez Perce Treaty of 1863, 14 Stat. 647, II Kappler Indian Laws and Treaties 843; Nez Perce Agreement of May 1, 1893, 28 Stat. 327, I Kappler Indian Laws and Treaties 536; see also *State* v. *McConville*, 65 Idaho 46, 139 P.2d 485.

An examination of the Treaty of 1863 and the Agreement of 1893 discloses that the right or privilege of hunting upon open and unclaimed lands was not thereby extinguished or abolished; whatever the nature and scope of the right in this respect reserved in the Treaty of 1855, it still remains unless otherwise extinguished by the Admission Act admitting Idaho into the Union in 1890.

The Organic Act creating the Territory of Idaho under date of March 3, 1863, 12 Stat. 808, provides as follows in respect to Indian rights and territory:

"Section 1. * * * Provided, further, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Idaho, until said tribe shall signify their assent to the President of the United States to be included within said Terri-

tory, or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the Government to make if this act had never passed."

Section 17 of the Organic Act provides:

Treaties with Indians—Duty to keep and observe.—"All [treaties] laws, and other engagements made by the Government of the United States with the Indian tribes inhabiting the Territory embraced within the provisions of this act, shall be faithfully and rigidly observed, anything contained in this act to the contrary notwithstanding; and that the existing agencies and superintendencies of said Indians be continued with the same powers and duties which are now prescribed by law, except that the President of the United States may, at his discretion, change the location of the office of said agencies or superintendents."

Art. 21, § 19, Idaho Constitution, provides as follows:

"Religious freedom guaranteed—Disclaimer of title to Indian lands.—* * * . And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; * * *."

Nowhere within the provisions of the Admission Act or the Constitution of this State is there any expressed intention to abrogate or extinguish any of the provisions of the Treaty of 1855 nor to relieve the State of the obligations thereof. The repeal of such provisions by implication is not favored, *United States* v. *Domestic Fuel Corp.*, 71 F. 2d 424, 21 C.C.P.A., Customs, 600; a treaty entered into in accordance with the requirement of the Constitution has the force and effect of a legislative enactment and is for all purposes equivalent to an Act of Congress, becoming the law of the United States and of such state, and is binding upon each sovereignty, anything in the Constitution or laws of any state to the contrary notwithstanding, *Valentine* v. *Neidecker*, 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5; moreover, if there be a conflict between such a treaty and the provisions of a state constitution or statutory enactment, whether enacted prior or subsequent to the making of a treaty, the treaty will control. *Santovincenzo* v. *Egan*, 284 U.S. 30, 52 S. Ct. 81, 76 L. Ed. 151; *Nielsen* v. *Johnson*, 279 U.S. 47, 49 S. Ct. 223, 73 L. Ed. 607; *In re Infelise's Estate* [*Melzner* v. *Trucano*], 51 Mont. 18, 149 P. 365; 52 Am. Jur., sec. 18, p. 816, sec. 21, p. 818; Annotation 4 A.L.R. 1377.

While the Admission Act itself was silent in respect to the rights of the Indians, both the Organic Act and Constitution of Idaho recognize their rights which arose under the Treaty of 1855 and subsequent agreements and treaties prior to statehood; additionally, the Agreement of 1893, subsequent to statehood, expressly provided that the provisions of all former treaties with the Nez Perce Indians which

were not inconsistent with the Agreement of 1893 were continued in full force and effect, 28 Stat. 331; moreover, the admission of Idaho into the Union does not operate to repeal the reserved right, whatever its scope, to hunt upon "open and unclaimed land", *Winters* v. *United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340; *Tulee* v. *State of Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115; also a reservation of such rights was intended to be continued against the United States and its grantees as well as the State and its grantees, *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089; neither is such a provision in the treaty an invasion of the sovereignty of the state admitted into the Union upon an equal footing with other states. *Dick* v. *United States*, 208 U.S. 340, 28 S. Ct. 399, 52 L. Ed. 520; *Winters* v. *United States*, *supra*.

The State relies principally upon the case of *Ward* v. *Race Horse*, 163 U.S. 504, 16 S. Ct. 1076, 41 L. Ed. 244. This case was decided in 1896. Race Horse, a Bannock Indian, claimed the right to hunt under the Fort Bridger Treaty of 1868. 15 Stat. 673, II Kappler 1020. Article 4 of the treaty provides as follows:

"The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations 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 so long as peace subsists among the whites and Indians on the borders of the hunting districts."

Wyoming was admitted to the Union in 1890 and enacted a statute regulating the killing of game within the state. Race Horse was prosecuted for violation of such state law. The place where the game was killed was within the hunting district referred to in the Treaty of 1868. The Supreme Court of the United States, sustaining the position of the State of Wyoming, held that the right or privilege reserved under the treaty was temporary and precarious and that Wyoming having been admitted to statehood under the express declaration that it should have all the powers of the other states, and no express reservation having been made in favor of the Indians, the Admission Act and the State Constitution being in conflict with the treaty rights operate to impliedly repeal or abrogate the rights of the Indians under the treaty. The author of the opinion expressed the view that all the parties to the treaty contemplated the advance of civilization and that it was never intended that the right should be continuing and further the right being temporary and precarious ceased to exist when the territory ceased to be a part of the hunting district and came within and under the jurisdiction of the state. Apparently no resort was had to the minutes made preceding the execution of the treaty but the intent was determined wholly from the wording of the particular article of the treaty, the absence of any reserved rights in the Admission Act, and the changes and developments which followed rather than the conditions as they existed at the time. Upon these principles and no others the court concluded that it was quite plain that a conflict existed between the treaty and the Act of Admission resulting in a repeal of the rights under the treaty. This argument would be without force and effect in the instant case for the reason that in the Agreement of 1893, after statehood, the United States expressly recognized that the rights of the Nez Perce Indians in the Treaty of 1855 remained in full

force and effect to the extent that those rights did not conflict with any of the provisions of the Treaty of 1863 or the Agreement of 1893. There was no conflict respecting the right of hunting; moreover, it is quite clear that the United States intended that such rights should be continuing and remain until they were extinguished by appropriate means which did not include the admission of Idaho into the Union. Furthermore, later opinions of the United States Supreme Court indicate that the decision in the Race Horse case has not been followed on this proposition. See *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089; *Winters* v. *United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340; *Dick* v. *United States*, 208 U.S. 340, 28 S. Ct. 399, 52 L. Ed. 520; *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 39 S. Ct. 203, 63 L. Ed. 555; *Tulee* v. *Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115.

In the case of *United States* v. *Winans*, *supra*, the Supreme Court had under consideration the Stevens Treaty of 1855 with reference to the Yakima Indians. The language therein is the same as appertains to the Nez Perce tribe under the same date. The respondents excluded the Indians from lands bordering on the Columbia River which were within the area that the Yakimas had ceded but upon which they claimed a servitude. Respondents urged that the Race Horse case was controlling and that upon the admission of Washington to statehood the treaty reservation was repealed. This contention was rejected and the rights of the Indians sustained. In doing so the Court said [198 U.S. 371, 25 S. Ct. 664]:

> "The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. * * *
>
> "The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees."

In 1888, by agreement with the Indians, the United States set aside Fort Belknap for certain Indian tribes in Montana, one year prior to the admission of Montana as a state. An irrigation system was constructed for the reservation and diverted large quantities of water from Milk River to be used on the reservation. Defendants sought to divert some of the waters from the river above the reservation under the laws of Montana; they contended that when Montana was admitted to the Union the implied rights of the Indians to the water was repealed under the reasoning in the Race Horse case. Again the Supreme Court of the United States rejected such contention and held that by implication under the Agreement of 1888 the waters of Milk River were reserved for irrigation purposes for the benefit of the Indians on the reservation and that ceding of all the lands except a small tract set apart as a reservation was not repealed by the Admission Act. *Winters* v. *United States*, *supra.*

In the case of *Seufert Bros. Co.* v. *United States*, *supra*, a controversy again arose out of the Stevens Treaty of 1855. The Yakimas' land was on the north side of the Columbia River but they sought the right to fish on both the north and south banks thereof. The right was resisted primarily on the ground that allowing them to fish on the south bank of the river would permit them to fish at other than the usual and accustomed places provided for in the treaty.

The Supreme Court rejected such contentions thusly [249 U.S. 194, 39 S. Ct. 205]:

> "The suggestion, so impressively urged, that this construction 'imposes a servitude upon the Oregon soil,' is not alarming from the point of view of the public, and private owners not only had notice of these Indian customary rights by the reservation of them in the treaty, but the 'servitude' is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person, not negligently or willfully blind to the conditions of the property he was purchasing, must have known of them.
>
> * * * * * * *
>
> "To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of the treaty, which gives them the right 'of taking fish at all usual and accustomed places and of erecting temporary buildings for curing them,' and would substitute for the natural meaning of the expression used—for the meaning which it is proved the Indians, for more than fifty years derived from it—the artificial meaning which might be given to it by the law and by lawyers."

This decision would indicate that the doctrine set forth in the *Race Horse* case and subsequently in the case of *Kennedy* v. *Becker*, 241 U.S. 556, 36 S. Ct. 705, 60 L. Ed. 1166, each authored by Justice White, was repudiated.

It follows that whatever the original scope of the reserved rights set forth in the Treaty of 1855 may be, they still exist unimpaired by subsequent agreement, treaty, Act of Congress or the admission of Idaho to statehood.

Because of the divergent views taken in respect to the construction, meaning, scope and import of Article 3 of the Treaty of 1855, it is essential to ascertain its meaning in so far as it relates to the reserved right or privilege of hunting. In respect to this matter recourse may be had to the negotiations between the Indian tribes and the United States government relative to the subject matter and the practical construction and intent. *Nielsen* v. *Johnson*, 279 U.S. 47, 49 S. Ct. 223, 73 L. Ed. 607.

An examination of the original proceedings at the Council of Walla Walla Valley reveals that Pe-at-tan-at-tee-miner, in speaking before the Council, had this interesting statement to make:

> "I shall do you no wrong and you do me none, both our rights shall be protected forever; it is not for ourselves here that we are talking, it is for those that come that we are speaking. This is all I have to say at this present time."

Governor Stevens, speaking before the Council, said:

"You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. * * * You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation."

Governor Stevens also stated, when addressing himself to Looking Glass, one of the spokesmen of the Indians, as follows:

"I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, that he can kill game and go to buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers."

It will at once become apparent that the meaning of "open and unclaimed land", as employed in the treaty, becomes more meaningful. It was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership and was not intended to nor did it exclude lands title to which rested in the federal government, hence the National Forest Reserve upon which the game in question was killed was "open and unclaimed land."

If the right exists in the State to regulate the killing of game upon open and unclaimed lands ceded by the Nez Perce Indians to the United States, it follows that such right is to be exercised under the police power of this state. Generally stated, the police power under the American constitutional system has been left to the states. It has been considered a power inherent in and always belonging to the states and not a power surrendered by the respective states to the federal government or by the federal government restricted under the United States Constitution. It is under this further general proposition that the State claims its source and scope of power to prohibit killing deer during certain times of the year in the interests of conservation of wild life. That the State has and may exercise such power generally is not the question; this power is limited in the enactment of laws and regulations to the extent that the same are not repugnant to any constitutional provisions of either the State or the Federal Constitution. Is the law and regulation as to a closed season repugnant to rights reserved under the Treaty of 1855?

The Constitution of the United States does not contain any provisions which expressly limit the police power of any state; however, it does forbid the exercise of certain powers by the state under Art. 1, § 10, of the Federal Constitution, including the inhibition against any state passing any laws impairing the obligation of contracts; moreover, Art. 6, cl. 2 of the Federal Constitution expressly declares that the Federal Constitution and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, shall be the supreme law of the land, binding upon the judges in every state notwithstanding anything in the Constitution or laws of any state to the contrary. Hence the federal government is paramount and supreme within the scope of powers conferred upon it by the Constitution and it follows that a state must exercise its police power subject to

constitutional limitations, if any; the statute of any state enacted pursuant to its police power which conflicts with any treaty of the United States constitutes an interference with matters that are within the exclusive scope of federal power and, hence, cannot be permitted to stand. 16 C.J.S., Constitutional Law, § 196, page 565; the treaty being superior to a particular state law and regulation, though the state law and regulation involved is otherwise within the legislative power of the state, the rights created under the treaty cannot thus be destroyed; this in effect holds the application of the statute in abeyance during the existence of the obligation of the treaty. 63 C.J., § 29, pp. 844–45. This recognizes the principle that the provisions of the United States Constitution shall elevate treaties of the federal government over state legislation though the state legislation appertains to the state police power. 11 Am. Jur., § 255, p. 987.

In the case of *Tulee* v. *Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115, decided in 1942, a member of the Yakima tribe by the name of Tulee was convicted in the state court of Washington on the charge of catching salmon with a net and without a license required by the statutes of Washington. Tulee claimed that he had the right to fish without a license under the Treaty of 1855. The State of Washington admitted that the enabling act preserved the rights of the Indians but in reliance upon its inherent police powers to conserve fish and game within its borders claimed the right to regulate fishing in the area in question although within the territory originally ceded by the Yakimas but outside of their reservation. The State urged application of the holding in both the *Race Horse* case and the *Kennedy-Becker* case. Both were rejected by the United States Supreme Court which relied upon the decisions in the *Winans* case and the *Seufert Bros. Co.* case and held that the exaction of a license fee as a prerequisite to the enjoyment of fishing in the usual and accustomed places was in conflict with and could not be reconciled with a fair construction of the language of the treaty and hence the statute exacting such fee was invalid. While there is an inference in the *Tulee* case that the State may have the power to enact reasonable regulations concerning the time and manner of fishing outside the reservation, such inference was in the nature of dictum as it was only necessary for the Supreme Court of the United States to decide whether the State of Washington could exact a license for fishing. In holding that the State could not so exact the license fee the reasoning was that such an exaction would be a charge on the Indians for exercising the very right their ancestors intended to reserve and that to sanction such an exaction would be entirely out of harmony and could not be reconciled with any fair construction of the treaty. This case can stand for no more than the proposition that the Yakimas under the Treaty of 1855 could not be burdened with the license requirements under the state game laws primarily enacted in the interest of wild life conservation.

This court has had occasion to pass upon this same question as it applied to the Nez Perce Indians under this same treaty and held therein under the authority of the *Tulee* case that the State has no right to require a fishing license from a member of the Nez Perce tribe. *State* v. *McConville*, 65 Idaho 46, 139 P. 2d 485. In this case no other question of regulation under any conservation program of this state was considered or passed upon.

We are not here concerned with the general right vested in the State under its police power to enact reasonable laws for the conservation of

wild life; this right has long been recognized and whenever it can be done without violating any organic act of the land or without invasion of rights protected by constitution or treaty, it is recognized. The question here is whether or not the pre-existing ancient Indian hunting rights which were reserved to them in the Treaty of 1855 may have attached to such rights the exercise of the police power of the State. It is primarily a question of whether or not the police power here sought to be invoked by the State ever has attached to or can apply to such rights without the consent of such Indians or by positive act on the part of the federal government extinguishing the right which was reserved in the Indians and thus far has never passed from them to the people, to the state, or to the nation.

One of the primary purposes of licensing in reference to fishing and hunting is to conserve wild life; the law is essentially a regulatory act rather than a revenue act. To exact a license under the claimed police power, which the Supreme Court of the United States held could not be done in the case of *Tulee* v. *Washington*, *supra*, and which the Supreme Court of Idaho held could not be done in the case of *State* v. *McConville*, *supra*, certainly would be less onerous upon the affected Indian tribes than the enactment of legislation under the claimed police power limiting the killing of game or prohibiting fishing in certain areas or doing either during certain times of the year. While both fishing and hunting are primarily sport and recreation for most fishermen and hunters, this is not so with respect to the Indians; they have always fished and hunted to obtain food and furs necessary for their existence and have been controlled as to the time when and the area where and the amount of catch or kill by the exigencies of the occasion; while no doubt this was more so in 1855 than it is now, the fact remains that it is to a lesser extent also true today; be that as it may, their rights reserved in this respect should be determined in the light of conditions existing at the time of the treaty and the manifest intent of all contracting parties at that time. Under the holding of the *Tulee* and *McConville* cases the Supreme Court of the United States in the first case and the Supreme Court of this state in the second case have definitely held that to exact a license fee from the Indians in order to fish, and I assume the same would be true with reference to hunting, could not be reconciled with the rights reserved under the treaty. The decision in each case was not premised on burden but upon principle; surely the exaction of a $2 fishing license would not unduly burden an Indian who desires to fish nor would it likely cause him to forego this reserved right. His rights of an equal, if not of a superior nature under the treaty to hunt upon open and unclaimed lands, because less restricted by the language of the treaty should upon principle and fair dealing be protected against state laws which limit him to hunt at certain times of the year in common with all other citizens. This would mean that at certain times of the year his otherwise ancient right recognized by the treaty and never extinguished would for all practical purposes be extinguished. If the position of the State is sustained the assurance given by Governor Stevens that they could kill game when they pleased and the provision of the treaty reserving to them the right to hunt upon open and unclaimed lands is no right at all. Out of the solemn obligations of the treaty, and the express reserved property right which never passed from the Indians to anyone and which the federal government has

never extinguished but has expressly recognized before and after Idaho was admitted to the Union, the Nez Perce would now have no right in any respect different than that enjoyed by all others, except perhaps the freedom from the burden of a license fee. This was never intended under the broad, fair and liberal construction of the treaty. The Supreme Court of the United States has recognized and expressly held that the Indian treaty fishing provisions accorded to them rights which do not exist for other citizens. *Tulee* v. *Washington*, *supra; Seufert Bros. Co.* v. *United States*, *supra; United States* v. *Winans*, *supra.* What are such rights under the State's theory? Perhaps to hunt without a license. If such rights exist as to fishing most assuredly they exist as to hunting. If the State can regulate the time of year in which they may hunt then they are accorded no greater rights in this respect than exist for other citizens.

We are not here concerned with the wisdom of the provisions of the treaty under present conditions nor with the advisability of imposing upon the Indians certain regulatory obligations in the interest of conserving wildlife; that is for the Federal Government, the affected tribe, and perhaps the State of Idaho to resolve under appropriate negotiations; our concern here is only with reference to protecting the rights of the Indians which they reserved under the Treaty of 1855 to hunt upon open and unclaimed land without limitation, restriction or burden.

We hold that the rights reserved by the Nez Perce Indians in 1855, which have never passed from them, to hunt upon open and unclaimed land still exist unimpaired and that they are entitled to hunt at any time of the year in any of the lands ceded to the federal government though such lands are outside the boundary of their reservation. It necessarily follows that the judgment below should be and the same is hereby affirmed.

Porter, C.J., and Givens, Taylor and Keeton, JJ., concur.

State v. *McClure et al.*

Supreme Court of Montana

127 Mont. 534

268 P. 2d 629 (1954)

Editor's Note: Where an Indian nation ceded lands to the United States by a treaty which reserved, to the Indian nation, the privilege of hunting upon open and unclaimed lands in the treaty area, the reserved hunting rights survive the subsequent conveyance of some such land to patentees of the United States, and members of the Indian nation may hunt thereon at any time of the year, notwithstanding provisions of State law with respect to closed seasons, etc.

Bottomly, *Justice.*

This is an appeal from a judgment of conviction and fine from the district court of Sanders County.

The defendants were first arrested by an Indian policeman January 24, 1952, taken before the tribal council and there accused and found guilty by the judge of the Flathead Indian Reservation tribal

court of violating their ordinance 9–A, killing antelope on the reservation during the closed season, each defendant being fined, the fine paid and they were released. Defendants were then arrested March 12, 1952, and taken before justice of the peace James L. Adams, Sanders County, on complaint that defendants had in their possession an antelope which was killed during the closed season for hunting antelope under state law. They were each found guilty of having possession of the same antelope that they had been fined for killing by the tribal council and each fined $100. Defendants appealed to the district court of Sanders County. A jury being waived, the issues were tried to the judge without a jury. After trial the judge found each defendant guilty as charged in the complaints and fined each defendant $150. This appeal is from the judgment filed December 11, 1952, and the order assessing fine of January 26, 1953.

Defendants Lindy McClure and Jim Carpentier are Indians and enrolled members of the Flathead Tribe and wards of our Federal Government. Their cases were consolidated for trial in the district court and upon argument here. They were each charged with the same alleged offense, and the law and facts applicable are the same.

The Indians of the Flathead reservation elected to and did come under the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U.S.C.A. § 461 et seq. It was stipulated by the state that the Indian tribes of the Flathead reservation had complied with the federal regulations and laws; that they are duly organized and have the authority to pass ordinances to conduct their internal affairs in pursuance of the Wheeler-Howard Act.

The witness James J. Swaney testified, inter alia, that he resided at the Flathead Indian Agency at Dixon; that he was the secretary-treasurer of the tribal council; that he knew the procedure of said council; that the tribal council of the Flathead Indian Reservation received a charter from the Secretary of Interior and thereunder adopted a constitution and bylaws; that under such charter tribal courts were set up on the Flathead Indian Reservation; that they have two judges, all under the authority of federal law.

The council on March 1, 1951, passed ordinance No. 9–A, which was approved the same date. Said ordinance provided as far as pertinent here as follows:

"Ordinance of the Governing Body of the Confederated Salish & Kootenai Tribes of the Flathead Reservation, an Indian Chartered Corporation

"Be It Enacted by the Council of the Confederated Salish & Kootenai Tribes of the Flathead Reservation that:

"1. We are hereby closing the entire reservation to hunting and killing of antelope.

"2. Both Tribal and State Game Wardens shall have authority to arrest anyone violating this ordinance and to bring them to the proper courts for punishment.

"3. This closure shall remain in effect until such time as it is mutually agreed by the Tribal Council and the State Game Commission to have an open season.

"4. At the time of any open season the permits shall be equally divided between the Indians and white people.

"Certificate

"The foregoing ordinance was on February 23, 1951, duly adopted by a vote of 9 for and 1 not voting, by the Tribal Council of the Confederated Salish & Kootenai Tribes of the Flathead Reservation, in accordance with Section 1(a), (N), Art. VI of the constitution, of the Tribes, ratified by the Tribes on October 4, 1935, and approved by the Secretary of the Interior on October 28, 1935, pursuant to Sec. 16 of the Act of June 18, 1934 (48 Stat. 984).

"(Signed) WALTER H. MORIGEAU,
"*Chairman, Tribal Council.*

"Attest:

"(Signed) PHIL HAMEL,
"*Secretary, Tribal Council.*

"Approved March 1, 1951.
"(Signed) C. C. WRIGHT,
"*Superintendent Flathead Agency.*"

James J. Swaney, secretary-treasurer of the tribal council, testified: "Q. Now go back to this agreement that was talked about here. As secretary of the tribe, would you know if there was an agreement between the Fish and Game Commission and the Flathead tribe regarding antelope on the Flathead reservation? A. That was brought up in a council meeting at one time, and there never was an agreement between the State Fish and Game Commission and the Flathead tribe to plant the antelope within the boundaries of the reservation. Q. So what actually happened, they just put them here? A. Apparently so, because I have never seen an agreement of any kind."

At the close of the testimony in the district court defendants moved the court for an order of dismissal for the reason that the State of Montana did not have jurisdiction, and asserting the rights of defendants under the treaty of July 16, 1855.

The court, January 26, 1953, after finding each of the defendants guilty as charged in each complaint, then entered the following order: "It was thereupon ordered by the court that the above defendants, Lindy McClure and Jim Carpentier each pay a fine in the amount of $150.00, and if said fine is not paid same to be served in the county jail at the rate of one day for each two dollars of said fine." Defendants were thereupon remanded to the custody of the sheriff until said fine was paid. The court on the same day, January 26, 1953, made the further order as follows: "At this time it is ordered that money on deposit as bonds of defendants in the sum of $100.00 each, be applied toward payment of the fine of defendants, said fine being in the amount of $150.00 each, and that defendants have three days from this date within which to pay the balance of said fines, monies so paid to be held by the clerk of this court as bond or undertaking pending appeal to Supreme Court."

From the judgment and orders fining defendants, this appeal was perfected.

It was stipulated that the game animals, to wit, the antelope, were killed on patented and fee land and within the exterior boundaries of the Flathead Indian Reservation.

Defendants base their defense upon the terms of the treaty of July 16, 1855. This treaty was one of a group of eleven treaties negotiated with the Indian nations and tribes of the northwest between December

26, 1854, and July 16, 1855. Most of the treaties were with coast Indians of the territories of Washington and Oregon, and with those Indians the prime consideration was in protecting and reserving their fishing rights and grounds which provided their major food supply. However, the Flathead and other prairie Indian nations' primary interest was to protect and reserve their hunting rights and grounds which provided their major food and clothing. The form of the treaty, however, was almost identical in each instance.

The question presented here on this appeal is whether the defendants, as members of the Flathead Indian Reservation, with a superintendent thereof in charge, and being wards of our Federal Government, were, as far as state law is concerned, entitled to hunt, kill and take and possess game animals during the closed season on a parcel of land lying wholly within the exterior boundaries of the Flathead Indian Reservation, said parcel of land being patented in fee by the Federal Government.

There is no substantial dispute of facts, or none that is important to our inquiry.

The negotiations and proceedings and council held by Governor Stevens representing the President of the United States, and the Chiefs of the Flathead, Pend d'Oreille and Kootenai tribes, were held at Hell Gate in the Bitterroot Valley, Washington Territory, commencing July 7th and concluded July 16, 1855. This treaty with the Flathead Nation was ratified by the Senate of the United States March 8, 1859, and proclaimed by President James Buchanan April 18, 1859, 12 Stat. 975, 979. By this treaty the Flathead Indian Reservation was established and has continuously so existed under the direction of the superintendent thereof to this date.

Such a treaty solemnly entered into is a contract between two independent nations, in this case, the United States of America and the Flathead Nation, and such a treaty is regarded as a part of the law of the state as much as the state's own laws and Constitution and is effective and binding on state legislatures. Such a treaty is superior to the reserved powers of the state, including the police power. 63 C.J., Treaties, §§ 27, 28, 29, pp. 844, 845. Compare *State of Missouri* v. *Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A.L.R. 984, and cases therein cited; *State* v. *Arthur*, 74 Idaho 251, 261 P. 2d 135.

The above treaty of July 16, 1885, contained the following, after describing the boundaries of the Flathead reservation, "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 said reservation without permission of the confederated tribes, and the superintendent and agent." (Italics supplied.)

Article 3 thereof provides, as far as pertinent here: "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." It should be borne in mind that this treaty with the Flathead Nation was not a grant of rights from our government to the Indians but it

was a grant by the Indians of a vast domain to our government, reserving to them all they did not cede and grant.

At the time this treaty of 1855 was entered into, these Indians were in possession of and claimed all the lands that were ceded by the treaty as well as all the lands reserved. They had always exercised their right to hunt and fish thereon from time immemorial. It was their ancestral home. The treaty confirmed their ownership and their rights. The treaty acknowledged the same and by the treaty our Federal Government guaranteed this ancient and exclusive right to hunt and take game and fish within the exterior boundaries of their reservation which they had always exercised. The treaty then went further and acknowledged and assured the Indians the right to fish at all usual and accustomed places outside the reservation in common with citizens of the Territory. Also assured was the Indians' right to hunt and take game outside the reservation on all open and unclaimed lands. These rights have never passed from the Indians to the people generally, nor to the state nor to the Federal Government.

This same provision in a similar treaty in regard to Indians' fishing rights *outside* their reservation was considered in *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662, 663, 49 L. Ed. 1089, wherein the court interpreted Article 3 of that treaty, being Article 3 quoted above. That suit was brought to enjoin respondents and their predecessors in title from keeping Yakima Indians from white man's lands which the white man claimed under patents of the United States and patents from the State of Washington to the lands bordering on the Columbia River. The court said: "At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to *limit the occupancy to certain lands, and to define rights outside of them.* * * * In other words, it was decided [in the court below] that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more. And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in 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.' [*Choctaw Nation* v. *U.S.*] 119 U.S. 1, 7 S. Ct. 75, 30 L. Ed. 306; [*Jones* v. *Meehan*] 175 U.S. 1, 20 S. Ct. 1, 44 L. Ed. 49. * * *

"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.* And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. *They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries.* There was a *right outside of those boundaries reserved* 'in common with citi-

zens of the territory.' * * * The contingency of the *future ownership of the lands*, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. * * * *And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.* * * *

"The construction of the treaty disposes of certain subsidiary contentions of respondents, *The Land Department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the department are absolute in form. They are subject to the treaty as to the other laws of the land.* * * * And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." Italics supplied. Certainly if these principles apply to lands lying outside the reservation, they apply with greater force to exclusive rights to hunt and take game on all lands within the reservation. The *Winans* Case is the leading case on this subject and has been cited as authority dozens of times as the citator shows. Compare *State* v. *Arthur*, *supra*.

In *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 39 S. Ct. 203, 205, 63 L. Ed. 555, speaking of fishing rights of the Indians on their ceded lands, the court reaffirmed what was said in the *Winans* Case, *supra*, and then stated: "The suggestion, so impressively urged, that this construction 'imposes a servitude upon the Oregon soil,' is not alarming from the point of view of the public, and private owners * * * had notice of these Indian * * * rights by the reservation of them in the treaty * * *."

In *State* v. *Tulee*, 7 Wash. 2d 124, 109 P. 2d 280, the defendant, a member of the Yakima Tribe of Indians, was convicted in the superior court on a charge of catching salmon with a net without a license as required by state law. The Supreme Court of Washington affirmed. On appeal the Supreme Court in *Tulee* v. *Washington*, 315 U.S. 681, 62 S. Ct. 862, 863, 86 L. Ed. 1115, reversed. The court said: "* * * the Indians agreed to a treaty, under which they were to cede 16,920 square miles of their territory, reserving 1,233 square miles for the confederated tribes * * *." This agreement was executed June 9, 1855, ratified by the Senate March 8, 1859, and proclaimed by the President April 18, 1859, 12 Stat. 951. This is another of the treaties negotiated by Governor Stevens. The court continues: "The appellant claims that the Washington statute compelling him to obtain a license in order to fish for salmon violates the following provision of Article III of the treaty:

" '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 citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed lands.'

"*The state does not claim power to regulate fishing by the Indians in their own reservation. Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 P. 557. Nor does it deny that treaty rights of Indians, whatever their scope, were preserved by Congress in the act which created the Washington Territory and the enabling act which admitted Washing as a state. 10 Stat. 172; 25 Stat. 676." Italics supplied. Compare *United States* v. *Romaine*, 9 Cir., 255 F. 253. Here it should be pointed out that the same Enabling Act applies to Montana.

The appellants in the *Tulee* Case argued that the treaty gives them an unrestricted right to fish in the usual and accustomed places free from state regulations of any kind. The court continues: "In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662, 664, 49 L. Ed. 1089, this Court held that, despite the phrase 'in common with citizens of the territory,' Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area; and in *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 39 S. Ct. 203, 63 L. Ed. 555, a similar conclusion was reached even with respect to *places outside the ceded area.* * * * It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States* v. *Kagama*, 118 U.S. 375, 384, 6 S. Ct. 1109, 1114, 30 L. Ed. 228; *Seufert Bros. Co.* v. *United States*, *supra*, 249 U.S. pages 198, 199, 39 S. Ct. page 205.

"Viewing the treaty in this light we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. * * * Even though this method may be both convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. * * * We therefore hold the state statute invalid as applied in this case." Emphasis supplied. Compare *Anthony* v. *Veatch*, 189 Or. 462, 220 P. 2d 493, 502, 503, 221 P. 2d 575; 27 Am. Jur., Indians, §§ 9 & 10, pp. 547, 548; 52 Am. Jur., Treaties, §§ 25–40, pp. 821–829; 63 C.J. Treaties, § 22, p. 841; *State* v. *Arthur*, *supra.*

There is no question here challenging the sovereign power and right of the state under its police power to enact all needful laws to protect and conserve for use our wild life. Everyone of us desires the conservation for use of all natural resources. There is no question but what the state has such general power. Here, however, we have rights reserved under the treaty of July 16, 1855, to these Indians, which treaty rights have never been altered or changed and are as valid today as when written, and are continuing until by mutual consent are abrogated in a lawful manner by the Indians and our Federal Government. Under the Constitution this treaty is a part of the supreme law of the land and the obligations thereunder can be released only by the concurrence of both parties thereto. Compare *United States* v. *City of Salamanca*, D.C., 27 Supp. 541; *Peters* v. *Malin*, C.C., 111 F. 244.

Our own legislature by the preamble of Chapter 198, Laws of 1947, recognized the treaty rights as fully existing, wherein they solemnly

recited: "Whereas, by treaty of July 16, 1855, between the United States of America, represented by Isaac I. Stephens [Stevens], governor and superintendent of Indian Affairs for the Territory of Washington, and the chiefs, headmen and delegates of the confederated tribes of the Flathead, Kootenai and Upper Pend d'Oreille Indians, the said Indians were given the exclusive right to fish and hunt on the Flathead Indian reservation, and the privilege of hunting in their usual hunting grounds on large areas of Montana * * *." Chapter 198, Laws of 1947, grants nothing to the Indians but what they already had under the treaty of July 16, 1855.

In *Gains* v. *Nickolson*, 9 How. 356, 50 U.S. 356, 364, 13 L. Ed. 172, the court said of the Indians' rights in an Indian reservation, that "He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation."

It is primary law that treaties with Indians are to be, and always have been, liberally construed, to the end that Indians will retain the benefits conferred by the treaty at the time of its execution and as the Indians understood them. *United States* v. *Winans*, *supra.* In this connection it is well to examine the original proceedings at the Hell Gate council which reveals Governor Stevens in answer to the Indians about their reservations, in council stated: "This treaty provides not only that no white man shall go on your land, but that no trader shall continue there without your consent. The whole of the land will be yours. * * * You have in like manner the right to gather roots and berries, to take fish and kill game." Article XII of the Treaty provides: "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."

The exclusive right to hunt and fish, under the treaty, on all of the lands within the exterior boundaries of the Flathead Indian Reservation was not granted by the United States but was reserved by the Indians. It is a right held in common by each Indian of the tribes signatory to the agreement. This right is a servitude and easement, an interest in the land, which the Indians have never alienated and which interest and right the United States or the state never owned or acquired and therefore could not convey. No patent issued by the government, either federal or state, conveyed this right and interest. *U.S.* v. *Winans*, *supra.* In the patents so issued there was no exclusion of this servitude, nor the treaty amended to permit such exclusion. The lands of this reservation and any interest therein not alienated is a trust held for each Indian in common. These lands and interests therein were not held by the United States for the state upon its admission. Compare: *United States* v. *Stotts*, D.C., 49 F. 2d 619; *United States* v. *Winans*, *supra;* R.C.M. 1947, §§ 67–601, 67–602.

The Flathead Indian Reservation has its own tribal council courts for the purpose of adjudicating the controversies of minor nature arising through the infraction of their own ordinances. The Federal Government has always recognized the Indians' right to have their own laws and courts to deal with their own minor infractions and internal affairs of their tribes. It has given the Indians the means of learning systematic methods of keeping the peace among their own people and enforcing their own regulations and ordinances, which is a healthy and democratic home rule procedure, with which the Fed-

eral Government does not interfere and the state may not, in a case such as we have here. This self-government in regard to their own internal minor affairs harks back to the explanation of the treaty of July 16, 1855, at the council of which Governor Stevens explained to them that: "On another point I wish to speak plainly; within yourselves you will be governed by your own laws. You will respect the laws which govern the white man and the white man will respect your laws. Your own laws that you will manage yourselves. * * * I think you understand the different points of the treaties."

Congress has prescribed what acts should constitute crimes when committed by Tribal Indians, wards of the government, within the exterior boundaries of a regularly constituted Indian reservation and the courts in which they shall be tried, providing that the exclusive jurisdiction thereof is in the federal courts. *State ex rel. Irvine* v. *District Court*, 125 Mont. 398, 239 P. 2d 272; *In re Blackbird*, D.C., 109 F. 139; *State* v. *Campbell*, 53 Minn. 354, 55 N.W. 553, 21 L.R.A. 169; *State* v. *Arthur*, *supra; United States ex rel. Lynn* v. *Hamilton*, D.C., 233 F. 685. All other violations by such Indians are left to the tribal courts.

The exclusive right, acknowledged by the treaty, of hunting and fishing in and upon the lands and waters within the exterior boundaries of the Flathead Indian Reservation, imposed a servitude and easement upon every piece of land therein as though specifically described. The future ownership of the lands thereof was well foreseen and provided for.

The Indians retained a right in the land, the right of hunting thereon. The right was intended to be a continuing one against the United States and its grantees as well as against the state and its grantees. No other conclusion would give effect to the treaty. Compare *United States* v. *Winans*, *supra*. It is our opinion that the rights reserved of hunting and fishing upon any and all lands and waters within the exterior boundaries of the Flathead Indian Reservation, by the treaty of July 16, 1855, 12 Stat. 975, have never been alienated, still exist unimpaired and that as far as the state laws are concerned, the Indian tribes bound by the treaty are entitled to hunt and fish therein at any time. The only restriction thereon is the ordinances and laws of their own council and the laws of the United States.

We therefore hold that the justice court and the district court were without jurisdiction to try the defendant Indians for the alleged offense for which they were here accused and convicted; that under the undisputed facts the court's purported judgment is a nullity. Accordingly the judgment of conviction and the sentences imposed are reversed and set aside as void. The complaints are ordered dismissed with prejudice. It is further ordered that any fine collected from defendants be repaid to them and that their bail and undertaking be exonerated.

FREEBOURN, J., concurs.

ADAIR, *Chief Justice* (specially concurring).

I concur in the result but not in all that is said in the foregoing opinion.

ANDERSON, *Justice.*

Without agreeing to the reasons expressed in the majority opinion, I nonetheless subscribe to the result reversing the conviction. No useful purpose would be served by expressing my thoughts on the matter and I thus reserve them.

ANGSTMAN, *Justice* (dissenting).

I find myself in disagreement with the foregoing opinion. I think the trial court was correct in its decision.

I concede that treaties with the Indians should be interpreted as "that unlettered people" understood them. Doubts should be resolved in favor of the Indians. Their rights exist not by virtue of a grant from the government but because they were reserved to them. So viewing the treaty of July 16, 1855, I do not find in it any reservation of an exclusive right in the Indians to hunt as held in the majority opinion, nor do I think the Indians as a whole think so. That is why the tribal council passed the ordinance referred to in the majority opinion.

Article 3 of the treaty is the one involved here. It provides: "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." 12 Stat. 975.

The word "exclusive" qualifies only the first sentence in the section. The second sentence expressly negatives any exclusive right in the Indians because it reserves only the right "in common with the citizens of the Territory." The third sentence does not revive the word "exclusive" as used in the first sentence. Under no possible construction of the third sentence of Article 3 were the hunting rights ever intended to be exclusive. It simply reserved the right of hunting upon "open and unclaimed land."

The land in question here was not open and unclaimed land. It was land to which a patent in fee had been given by the federal government.

Under section 4 of the Enabling Act, in speaking of Indian lands, it is provided that "until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States * * *." Ordinance 1, paragraph second of the constitution contains the same provision. Vol. 1, R.C.M. 1947, p. 293.

After title to the land has been extinguished the federal jurisdiction ceases and jurisdiction vests in the state. The rule applicable here was stated in *State* v. *Big Sheep*, 75 Mont. 219, 243 P. 1067, 1071, as follows: "If defendant is a ward of the government, and the act was committed by him upon land to which the United States has relinquished title, the state has jurisdiction * * *. We conclude, therefore, that, if the defendant * * * committed the offense upon land to which the United States has relinquished title, he is subject to the jurisdiction of the courts of this state for the offense committed; otherwise he is not."

Most of the cases cited and relied on in the majority opinion are cases involving the right to fish and pertain to a different clause in the treaty from the one we are considering here. They were considering the clause giving the Indians the reserved right to fish at all "usual and accustomed places". That is quite different from the provision before us reserving the right to hunt on all "open and unclaimed land." But even in case of fishing rights under the second sentence of paragraph 3 of the treaty the courts concede the right of the state to place reasonable regulations regarding the time of fishing.

In the case of *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662, 665, 49 L. Ed. 1089, the principal case relied on, the court was careful to point out that the treaty permitted reasonable state regulation. The court on that point said: "Nor does it restrain the state unreasonably, if at all, in the regulation of the right."

And in *Tulee* v. *Washington*, 315 U.S. 681, 62 S. Ct. 862, 864, 86 L. Ed. 1115, the court had before it the question of the right of the state of Washington to impose a license fee upon Indians for the privilege of catching fish in usual and accustomed places at a point outside the reservation but which was within the territory originally ceded by the Indians. The court stated: "We think the state's construction of the treaty is to narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

But whatever the rule may be as to fishing rights, it is clear that Article 3 of the treaty does not reserve hunting rights on patented land.

My associates place reliance on the case of *State* v. *Arthur*, 74 Idaho 251, 261 P. 2d 135, 141, which dealt with a treaty identical with Article 3 of the treaty we are considering so far as hunting rights are concerned. The defendant was there charged with killing a deer out of season on National Forest land, outside the boundaries of the Indian reservation but within the exterior boundaries of lands ceded to the federal government by the Indian tribe. The court held that defendant had the right to hunt and kill deer on the lands in question. It reached this conclusion because the land where the deer was killed was " 'open and unclaimed land' " within the meaning of the treaty. The court on this point said: "It will at once become apparent that the meaning of 'open and unclaimed land', as employed in the treaty, becomes more meaningful. It was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership and was not intended to nor did it exclude lands title to which rested in the federal government, hence the National Forest Reserve upon which the game in question was killed was 'open and unclaimed land.' "

Since the land where the antelope was killed by defendant here was not "open and unclaimed land" that case is not applicable here.

I do not attach much importance to Chapter 198, Laws of 1947, so far as this case is concerned. The preamble recites that the treaty of July 16, 1855, gave to the Indians the exclusive right to fish and hunt on the Flathead Indian reservation, and the privilege of hunting in

their usual hunting grounds on large areas of Montana. There is nothing in the treaty of July 16, 1855, which justifies such a statement. Obviously the preamble to the bill, or even the bill itself, could not alter the treaty provision. The general rule is that the preamble to a bill is not an essential part of it and that it neither enlarges nor confers powers. *Portland Van & Storage Co.* v. *Hoss*, 139 Or. 434, 9 P. 2d 122, 81 A.L.R. 1136.

Whether the tribal court had jurisdiction to impose a fine upon defendant for violating the tribal ordinance is not before us in this action. The only question here is did the lower court have jurisdiction to do what it did. I think it did. Though perhaps not material it is noteworthy that the only evidence in the record indicates that the tribal court proceeded with the proceedings after the defendant was arrested in the state court.

I may say in passing that in my opinion this case is not comparable to a case where the laws of more than one sovereignty have been violated. Here either the tribal courts or the state courts had jurisdiction. Both cannot have jurisdiction over the same offense committed at the same place. It is my view that the state court had jurisdiction and that the tribal court did not have jurisdiction. The double penalty is improper but relief in my opinion should come from the tribal court which did not have jurisdiction.

I think the district court was right and that the judgment should be affirmed.

State of Washington, Appellant v. *Robert Satiacum and James Young, Respondents*

Supreme Court of Washington

50 Wash. 2d 513

314 P. 2d 400 (1957)

Editor's Note: A State cannot, by its fish and game laws, limit or restrict the exercise of fishing rights which were reserved, to an Indian tribe, by the terms of a treaty ceding certain Indian lands to the United States.

Donworth, *Justice.*

The only question presented on this appeal involves the right of defendants, who are Puyallup Indians, to fish on the Puyallup river during the closed season (1) within the exterior boundaries of the original Puyallup Indian Reservation, and (2) "at all usual and accustomed [fishing] grounds and stations" under the Treaty of Medicine Creek of 1855. 10 Stat. 1132.

Defendants were jointly charged by amended complaint in justice court with five counts of illegal fishing, alleged to have occurred on November 10 and 11, 1954, on the Puyallup river in Pierce county.

The acts alleged to be contrary to statute were (1) use of a net for the purpose of catching food fish (salmon), contrary to the provisions of RCW 75.12.060; (2) use of a net for the purpose of catching game fish (steelhead), contrary to the provisions of RCW 77.16.060; (3) possession of game fish during the closed season, contrary to the pro-

visions of RCW 77.16.030 and rules and regulations promulgated by the State game commission under authority of RCW 77.12.010 et seq.; and (4) possession of food fish during the closed season, contrary to rules and regulations promulgated by the director of fisheries under authority of RCW 75.08.010 et seq.

After trial in justice court, James Young was found guilty on four counts, and Robert Satiacum was found guilty on two counts. They appealed to the superior court of Pierce county, and following a trial *de novo*, the court entered a judgment of dismissal, stating, in part, as follows:

> "It is ordered, adjudged and decreed that the within cause be and hereby is dismissed as to each count for want of sufficient evidence, it appearing from the oral stipulation herein that the defendants are Puyallup Indians, that they claim fishing rights under the Treaty of Medicine Creek of 1855, and that the acts herein took place at a usual and accustomed fishing ground of the Puyallup Indians, and the State having failed to introduce any evidence that as to Puyallup Indians the statutes and regulations herein involved were reasonable and necessary for the conservation of fish."

Briefly stated, the events which led to the arrest of respondents are as follows:

On November 10, 1954, law enforcement officers observed James Young tending two fixed nets located on the Puyallup river within the city limits of Tacoma. The law enforcement officers testified that on that date Mr. Young had two salmon in his possession, but they did not arrest him.

On November 11, 1954, these same officers observed both defendants on the same location tending the two nets. The officers testified that defendants had three steelhead fish in their possession on this date at which time defendants were arrested.

The parties stipulated that there is in full force and effect the Treaty of Medicine Creek of 1855, a valid treaty between the Medicine Creek tribes and the United States; that the Puyallup Indian tribe is one of the Medicine Creek tribes and a signator to the treaty of 1855; that the defendants in this action are descendants of the original Puyallup tribe of Indians and are presently on the rolls of the Puyallup tribe of Indians, a tribe recognized by the Secretary of the Interior and the Bureau of Indian Affairs as a regular, organized Indian tribe under the Wheeler-Howard Act of 1934, as amended (25 U.S.C.A. §§ 461–479); that the "lower river net" was located inside the original Puyallup Indian reservation, established by treaty with the United States, but that the land on each side of the river had been alienated by the Puyallup Indians; and that the "upper river net" was at a usual and accustomed fishing ground of the Puyallup tribe of Indians, as defined by the treaty.

In dismissing the cause, the trial court based its decision upon the recent case of *Makah Indian Tribe* v. *Schoettler*, 9 Cir., 192 F. 2d 224, wherein it was held that the state of Washington had failed to sustain the burden of proving that the regulation there in question was reasonable and necessary for the conservation of fish.

The state has appealed from the trial court's dismissal of the charges. Its sole assignment of error is directed to

"The dismissal of the case as to each count for want of sufficient evidence as to the reasonableness and necessity of the statutes and regulations involved for the conservation of fish."

Respondents contend that, while the Makah case is authority for sustaining the judgment of the trial court, the real issue presented for decision is whether the police power of the state, as expressed in the statutes above referred to, can impair the rights guaranteed to the Indians under the Treaty of She-Nah-Nam or Medicine Creek of 1855.

This treaty is one of several treaties entered into by territorial governor, Isaac I. Stevens, as representative of the United States, and the Indian tribes in the Washington territory following its creation. As a result of the Medicine Creek treaty, a vast territory was "ceded" to the United States by the Indians, and a small tract of land extending inward from the mouth of the Puyallup river was retained by the Indians as a reservation.

Article III of the treaty provides as follows:

"The right of taking fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians, *in common with all citizens of the Territory*, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: * * *." (Italics ours.) 10 Stat. 1132.

Since our decision in this case turns upon the proper construction of this article of the treaty, and since the supreme court of the United States is the only tribunal having the power to interpret authoritatively the United States constitution and treaties made thereunder, we find it necessary to review its decisions relating to the construction of Indian treaties.

All Indian treaties entered into prior to 1871 were consummated pursuant to Art. II, § 2 of the United States constitution. Article VI, commonly referred to as the "supremacy clause," provides:

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

The supreme court has consistently held that Indian treaties have the same force and effect as treaties with foreign nations, and consequently are the supreme law of the land and are binding upon state courts and state legislatures notwithstanding state laws to the contrary. *Cherokee Nation* v. *State of Georgia*, 5 Pet. 1, 8 L. Ed. 25; *Worcester* v. *State of Georgia*, 6 Pet. 515, 8 L. Ed. 483; *Blue Jacket* v. *Johnson County Commissioners* (Kansas Indians), 5 Wall. 737, 18 L. Ed. 667; *Holden* v. *Joy*, 17 Wall. 211, 21 L. Ed. 523; *United States* v. *New York Indians*, 173 U.S. 464, 19 S. Ct. 487, 43 L. Ed. 769; *Jones* v. *Meehan*, 175 U.S. 1, 20 S. Ct. 1, 44 L. Ed. 49; *Choctaw Nation* v. *United States*, 179 U.S. 494, 21 S. Ct. 149, 45 L. Ed. 291; *United States* v. *Winnans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089. See, also, 4 A.L.R. 1380, 134 A.L.R. 882–888, 11 Am. Jur. 650, § 43, 27 Am. Jur. 548, § 10.

In the *Worcester* case, *supra*, the state of Georgia had attempted to prosecute a missionary who had gone upon the Cherokee Indian reservation with the permission of the tribal council, but contrary to a state statute. The supreme court, speaking through Chief Justice Marshall, stated, in part, as follows:

> "The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. *The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties.* The words 'treaty' and 'nation,' are words of our own language, selected in our diplomatic and legislative proceedings, 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." (Italics ours.)

The statute was held void since it conflicted with the Cherokee Indian Treaty, which was declared to be the supreme law of the land.

In the case of *State of Missouri* v. *Holland*, 252 U.S. 416, 40 S. Ct. 382, 383, 64 L. Ed. 641, the supreme court construed a treaty between the United States and Great Britain which had been executed in an effort by the two nations to conserve migratory waterfowl known to traverse many parts of the United States and Canada in their annual migrations. Subsequently, Congress had enacted the Migratory Bird Treaty Act of July 3, 1918, 16 U.S.C.A. § 703 et seq., and the state brought a bill in equity to prevent a United States game warden from attempting to enforce the statute and regulations made pursuant thereto. The argument was advanced by the state of Missouri that the treaty infringed upon the constitution, was void as an interference with the rights reserved to the states by the tenth amendment, and that the acts of the United States, pursuant to the treaty, invaded the sovereign and plenary right of the state to regulate and conserve wildlife and contravened its will manifested in statutes. The supreme court, speaking through Justice Holmes, stated:

> "To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. * * *
>
> "As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds

are not enough to support Missouri's claim. *Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.'* * * *

"We are of opinion that the treaty and statute must be upheld. [Citing case.]" (Italics ours.)

(The statute referred to was the act of Congress passed to implement the treaty.)

In the case of *Asakura* v. *City of Seattle*, 265 U.S. 332, 44 S. Ct. 515, 516, 68 L. Ed. 1041, the supreme court construed a treaty with Japan, and stated:

"A treaty 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, anything in the Constitution or laws of any state to the contrary notwithstanding.' Constitution, art. 6, § 2.

"The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations. *Geofroy* v. *Riggs*, 133 U.S. 258, 266, 267, 10 S. Ct. 295, 33 L. Ed. 642; *In re Ross*, 140 U.S. 453, 463, 11 S. Ct. 897, 35 L. Ed. 581; [*State of*] *Missouri* v. *Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641. The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. *The treaty is binding within the state of Washington.* [Citing case.] The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. *It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States.* It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. [Citing cases.]" (Italics ours.)

A Seattle municipal ordinance, which purported to prevent citizens of Japan from engaging in the pawnbroking business, was held invalid, since it conflicted with the Japanese treaty.

In the case of *Nielsen* v. *Johnson*, 279 U.S. 47, 49 S. Ct. 223, 224, 73 L. Ed. 607, the supreme court construed a treaty with Denmark and stated:

"* * * Treaties are to be liberally construed, so as to effect the apparent intention of the parties. [Citing cases.] 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. [Citing cases.] And as the treaty-making power is independent of and superior to the legislative power of the states, *the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained*

must prevail over inconsistent state enactments * * *." (Italics ours.)

The court held invalid an Iowa inheritance tax statute, Code 1927, §§ 1311, 1313, 1315, I.C.A. §§ 450.7, 450.10, 450.11, which purported to levy a discriminatory tax on property inherited by a citizen of Denmark, because it violated the treaty provisions.

All Indian treaties are construed by the courts in favor of the Indians, in an endeavor to exercise toward them the highest degree of good faith, because of the dominant position of the United States. *Worcester* v. *State of Georgia*, *supra; Holden* v. *Joy*, *supra; Jones* v. *Meehan*, *supra; United States* v. *Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228; *United States* v. *Winans*, *supra; Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 39 S. Ct. 203, 63 L. Ed. 555; *United States* v. *Shoshone Tribe*, 304 U.S. 111, 58 S. Ct. 794, 82 L. Ed. 1213; *Tulee* v. *Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115; *State* v. *Arthur*, 74 Idaho 251, 261 P. 2d 135; *State* v. *McClure*, 127 Mont. 534, 268 P. 2d 629.

Keeping in mind the rules of construction heretofore cited, and after reading and analyzing the above cited cases, and many others dealing with Indian treaties in relation to state legislation enacted under the police power, we have reached the conclusion that the better reasoned cases have held state legislation invalid as to the Indians where there was a conflict with treaty stipulations.

We are not here concerned with the plenary right vested in the state under its police power to enact general laws for regulation and conservation of wildlife, as this right has long been recognized where it does not invade rights protected by the United States Constitution or a treaty. *Frach* v. *Schoettler*, 46 Wash. 2d 281, 280 P. 2d 1038; *Geer* v. *State of Connecticut*, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793; *Patsone* v. *Commonwealth of Pennsylvania*, 232 U.S. 138, 34 S. Ct. 281, 58 L. Ed. 539; State v. Tice, 69 Wash. 403, 125 P. 168, 41 L.R.A., N.S., 469.

The question presented here is whether the rights reserved to the Puyallup Indians by the Treaty of Medicine Creek of 1855, and particularly Article III thereof (quoted above), render the Indians immune from the operation of the police power herein sought to be invoked by the state of Washington, when their treaty rights have never been extinguished by the United States. 25 U.S.C.A., Indians §§ 71, 478b.

Appellant contends that the state has the power to regulate the time and manner of taking fish, in spite of a valid treaty entered into by the United States and an Indian tribe, so long as the statutory rules and regulations are necessary for the conservation of fish, citing *Tulee* v. *State of Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115 (reversing *State* v. *Tulee*, 7 Wash. 2d 124, 109 P. 2d 280), and *Ward* v. *Race Horse*, 163 U.S. 504, S. Ct. 1076, 41 L. Ed. 244.

The Tulee case involved the right of this state to enforce a regulation requiring the Yakima Indians to purchase a fishing license. The Yakima Treaty of 1859 (12 Stat. 951) contained a clause similar to the one quoted above, and the state relied upon its broad police powers to uphold the licensing act. We held the act valid (*State* v. *Tulee*, *supra*), based largely upon the rationale of *Ward* v. *Race Horse*, *supra; People of State of New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 36 S. Ct. 705, 60 L. Ed. 1166, and four of our earlier decisions;

State v. *Towessnute*, 89 Wash. 478, 154 P. 805; *State* v. *Alexis*, 89 Wash. 492, 154 P. 810, 155 P. 1041; *State* v. *Meninock*, 115 Wash. 528, 197 P. 641, and *State* v. *Wallahee*, 143 Wash. 117, 255 P. 94. The supreme court of the United States reversed our decision in the *Tulee* case and held that, although the act was regulatory as well as revenue producing, the exaction of a fee as a prerequisite to fishing at the "usual and accustomed places" could not be reconciled with a fair construction of the Yakima treaty. [315 U.S. 681, 62 S. Ct. 864.]

In the course of that opinion the supreme court, speaking through Justice Black, stated:

> "* * * that while the treaty leaves the state with power to impose on Indians *equally with others* such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish,[3] it forecloses the state from charging the Indians a fee of the kind in question here." (Italics ours.)

Footnote 3 cites the cases of *People of State of New York ex rel. Kennedy* v. *Becker*, *supra*, and *United States* v. *Winans*, *supra*.

While we believe that the language quoted is dictum, the inference contained therein, namely that the state may enact regulations necessary for the conservation of fish and impose them *equally* upon the Indians who fish outside the reservation at their "usual and accustomed places," is not applicable in the case at bar. This rationale originated in the *Race Horse* and *Kennedy* cases, *supra*. The *Race Horse* case denied the Bannock tribe of Wyoming its treaty-hunting right, based upon a repeal by implication. The *Kennedy* case denied the Senecca Indians of New York their "treaty" right to fish and hunt, unimpaired by state regulation, upon land conveyed by them to Robert Morris. The supreme court, in these two cases, held the right was not one existing against the state which it was bound to respect. These two cases are, therefore, distinguishable upon the ground either that the treaty provisions limited the Indians' reserved rights or that the Indians anticipated the future sovereign power to limit them.

In the case at bar, appellant does not contend that the treaty rights of the Puyallup Indians were repealed by implication in our enabling act. Act Feb. 22, 1889, 25 Stat. 676. Cf. *Tulee* v. *State of Washington*, *supra; State* v. *McClure*, *supra*. Nor is it at all clear that the treaty limits the Indians' reserved rights. We conclude that the *Race Horse* and *Kennedy* cases are not controlling here.

In the *Winans* case the court was concerned with an easement—not a state regulation. Therefore, the case is not authority for the proposition that the state may impose regulations against the Indians under the police power. However, the rules of construction announced therein are equally applicable in the instant case.

The argument frequently presented by the states (as in the case at bar) to the effect that general regulations may be imposed against the Indians *equally with others*, or *in common with citizens*, has been rejected by the courts. *Tulee* v. *State of Washington*, *supra; State* v. *McClure*, *supra; State* v. *Arthur*, *supra; Makah Indian Tribe* v. *Schoettler*, *supra*.

We also believe that the language previously quoted from the *Tulee* case was intended to apply only to the factual situations in the cases

from which that language was taken. This conclusion is justified because the supreme court, in that case, further stated:

> "In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662, 664, 49 L. Ed. 1089, this Court held that, despite the phrase 'in common with citizens of the territory', *Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area;* and in *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 39 S. Ct. 203, 63 L. Ed. 555, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached *we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordnace with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. United States* v. *Kagama*, 118 U.S. 375, 384, 6 S. Ct. 1109, 1114, 30 L. Ed. 228; *Seufert Bros Co.* v. *United States*, *supra*, 249 U.S. at pages 198, 199, 39 S. Ct. at page 205." (Italics ours.)

The courts have generally recognized that the treaty right of fishing at "usual and accustomed places" was given to the Indians to provide for their subsistence and as a means for them to earn a livelihood. *United States* v. *Winans*, *supra; Makah Indian Tribe* v. *Schoettler*, *supra; State* v. *McClure*, *supra.* Applying a liberal—and not a strained—construction to the Treaty of Medicine Creek as a whole, it is our opinion that the Puyallup Indians so understood Article III of the treaty, and that neither the Indians nor the United States intended that the states would or could enforce general regulations against the Indians "equally with others" or "in common with [all] citizens of the Territory" and thereby deprive them of their right to hunt and fish in accordance with the immemorial customs of their tribes. As we interpret the treaty, we believe that the phrase "in common with [all] citizens of the Territory" merely granted the white settlers and their heirs and/or grantees a right to fish at these places with the Indians, but that the Indians, thereby reserved their right to fish at these places irrespective of state regulation, so long as the right shall not have been abrogated by the United States.

No other conclusion would give effect to the treaty, since to hold that their right was *equal* to that of the citizens of the territory would be to say that they were given no right at all, except that which any citizen subject to state statutes and regulations may enjoy to fish at the "usual and accustomed grounds and stations." This interpretation would permit the state to abrogate their treaty rights at will.

We are convinced that, under the applicable decisions of the supreme court of the United States referred to herein, the statutes and regulations in the case at bar are in conflict with the treaty provisions, constitute an interference with matters that are within the exclusive scope of Federal power and, therefore, cannot be held valid as to the

Puyallup Indians, in relation to their right to fish "at all usual and accustomed [fishing] grounds and stations."

The further contention is made by appellant that since the Puyallup Indians have alienated certain lands bordering upon the Puyallup river (which were located within the exterior boundaries of the original Puyallup reservation), they have thus lost their treaty right to fish at those locations. There is nothing to indicate that their treaty right to fish in streams flowing through or bordering upon the reservation has been abrogated by the United States. This court, in the case of *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 P. 557, held that the state had no jurisdiction over the Indians, insofar as their right to fish in streams flowing through or bordering upon the reservation was secured to them by a treaty similar to the one above referred to. We are constrained to hold that alienation of the land which was, and is, within the original Puyallup reservation, and which borders upon the Puyallup river, does not alter the character of the right of the Indians to fish upon the river within the exterior boundaries of the *original Puyallup Indian reservation*, in view of the decision in the *Pioneer Packing Co.* case. Cf. *United States* v. *Winans*, *supra; State* v. *McClure*, *supra.*

That the supreme court still adheres to the views expressed by it in the decisions hereinbefore cited, is indicated by its refusal to review the recent decision of the supreme court of Idaho in *State* v. *Arthur*, 74 Idaho 251, 261 P. 2d 135, 141. That decision is directly in point. In that case there was involved a prosecution of a Nez Perce Indian for violation of a state statute forbidding the killing of deer out of season. The killing was alleged to have taken place on land ceded to the Federal government by the Nez Perce tribe. The defendant demurred to the complaint, relying on the provisions of Article III of the Treaty of 1855, which reserved to the Indians the right to hunt on open and unclaimed land. The demurrer was sustained, and the action dismissed.

The state of Idaho appealed and its supreme court affirmed the dismissal. In discussing the relative validity of the police power of the state and the treaty-making power of the United States, the court said:

> "If the right exists in the State to regulate the killing of game upon open and unclaimed lands ceded by the Nez Perce Indians to the United States, it follows that such right is to be exercised under the police power of this state. Generally stated, the police power under the American constitutional system has been left to the states. It has been considered a power inherent in and always belonging to the states and not a power surrendered by the respective states to the federal government or by the federal government restricted under the United States Constitution. It is under this further general proposition that the State claims its source and scope of power to prohibit killing deer during certain times of the year in the interests of conservation of wild life. That the State has and may exercise such power generally is not the question; this power is limited in the enactment of laws and regulations to the extent that the same are not repugnant to any constitutional provisions of either the State or the Federal Constitution. Is the law and regulation as to a closed season repugnant to rights reserved under the Treaty of 1855?

"The Constitution of the United States does not contain any provisions which expressly limit the police power of any state; however, it does forbid the exercise of certain powers by the state under Art. 1, § 10, of the Federal Constitution, including the inhibition against any state passing any laws impairing the obligation of contracts; moreover, Art. 6, cl. 2 of the Federal Constitution expressly declares that the Federal Constitution and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, shall be the supreme law of the land, binding upon the judges in every state notwithstanding anything in the Constitution or laws of any state to the contrary. Hence the federal government is paramount and supreme within the scope of powers conferred upon it by the Constitution and it follows that a state must exercise its police powers subject to constitutional limitations, if any; the statute of any state enacted pursuant to its police power which conflicts with any treaty of the United States constitutes an interference with matters that are within the exclusive scope of federal power and, hence, cannot be permitted to stand. 16 C.J.S., Constitutional Law, § 196, page 565; the treaty being superior to a particular state law and regulation, though the state law and regulation involved is otherwise within the legislative power of the state, the rights created under the treaty cannot thus be destroyed; this in effect holds the application of the statute in abeyance during the existence of the obligation of the treaty. 63 C.J., § 29, pp. 844–45. This recognizes the principle that the provisions of the United States Constitution shall elevate treaties of the federal government over state legislation though the state legislation appertains to the state police power. 11 Am. Jur., § 255, p. 987."

After discussing *Tulee* v. *State of Washington*, *supra*, and holding that the *Race Horse* and *Kennedy-Becker* cases had been rejected by the Supreme Court of the United States in subsequent decisions, the Idaho court continued:

"We are not here concerned with the general right vested in the State under its police power to enact reasonable laws for the conservation of wild life; this right has long been recognized and whenever it can be done without violating any organic act of the land or without invasion of rights protected by constitution or treaty, it is recognized. The question here is whether or not the pre-existing ancient Indian hunting rights which were reserved to them in the Treaty of 1855 may have attached to such rights the exercise of the police power of the State. It is primarily a question of whether or not the police power here sought to be invoked by the State ever has attached to or can apply to such rights without the consent of such Indians or by positive act on the part of the federal government extinguishing the right which was reserved in the Indians and thus far has never passed from them to the people, to the state, or to the nation.

"One of the primary purposes of licensing in reference to fishing and hunting is to conserve wild life; the law is essentially a regulatory act rather than a revenue act. To exact a license under the claimed police power, which the Supreme Court of the United

States held could not be done in the case of *Tulee* v. [*State of*] *Washington*, *supra*, and which the Supreme Court of Idaho held could not be done in the case of *State* v. *McConville*, *supra* [65 Idaho 46, 139 P. 2d 485], certainly would be less onerous upon the affected Indian tribes than the enactment of legislation under the claimed police power limiting the killing of game or prohibiting fishing in certain areas or doing either during certain times of the year. While both fishing and hunting are primarily sport and recreation for most fishermen and hunters, this is not so with respect to the Indians; they have always fished and hunted to obtain food and furs necessary for their existence and have been controlled as to the time when and the area where and the amount of catch or kill by the exigencies of the occasion; while no doubt this was more so in 1855 than it is now, the fact remains that it is to a lesser extent also true today; be that as it may, their rights reserved in this respect should be determined in the light of conditions existing at the time of the treaty and the manifest intent of all contracting parties at that time. Under the holding of the *Tulee* and *McConville* cases the Supreme Court of the United States in the first case and the Supreme Court of this state in the second case have definitely held that to exact a license fee from the Indians in order to fish, and I assume the same would be true with reference to hunting, could not be reconciled with the rights reserved under the treaty. The decision in each case was not premised on burden but upon principle; surely the exaction of a $2 fishing license would not unduly burden an Indian who desires to fish nor would it likely cause him to forego this reserved right. His rights of an equal, if not of a superior nature under the treaty to hunt upon open and unclaimed lands, because less restricted by the language of the treaty should upon principle and fair dealing be protected against state laws which limit him to hunt at certain times of the year in common with all other citizens. This would mean that at certain times of the year his otherwise ancient right recognized by the treaty and never extinguished would for all practical purposes be extinguished. If the position of the State is sustained the assurance given by Governor Stevens that they could kill game when they pleased and the provision of the treaty reserving to them the right to hunt upon open and unclaimed lands is no right at all. Out of the solemn obligations of the treaty, and the express reserved property right which never passed from the Indians to anyone and which the federal government has never extinguished but has expressly recognized before and after Idaho was admitted to the Union, the Nez Perce would now have no right in any respect different than that enjoyed by all others, except perhaps the freedom from the burden of a license fee. This was never intended under the broad, fair and liberal construction of the treaty. The Supreme Court of the United States has recognized and expressly held that the Indian treaty fishing provisions accorded to them rights which do not exist for other citizens. *Tulee* v. [*State of*] *Washington*, *supra; Seufert Bros. Co.* v. *United States*, *supra; United States* v. *Winans*, *supra*. What are such rights under the State's theory? Perhaps to hunt without a license. If such rights exist as to fishing most assuredly they exist as to hunting. If the State can regulate

the time of year in which they may hunt then they are accorded no greater rights in this respect than exist for other citizens."

The court concluded its opinion by holding that the treaty rights reserved by the Nez Perce Indians still existed unimpaired, and that they could hunt at any time of the year on the lands involved in the case.

The supreme court of the United States in 1954 denied the state of Idaho's petition for certiorari in that case. See 347 U.S. 937, 74 S. Ct. 627, 98 L. Ed. 1087. This action on the part of the supreme court was of unusual significance because the Idaho court was interpreting the supremacy clause of the United States constitution and a treaty made in pursuance thereof, a function which could only be authoritatively performed by the supreme court itself.

Since only the supreme court of the United States has the power to *finally* interpret the meaning of the United States constitution and treaties made in pursuance thereof, and since it has, from 1832 (*Worcester* case, *supra*) to 1954 (*Arthur* case, *supra*), directly and indirectly upheld the supremacy of rights reserved in Indian treaties over state statutes having the effect of impairing or abrogating those rights, this court is bound by its applicable decisions.

In the instant case, the statutes and regulations involved cannot be held to be applicable to the Puyallup Indians. Therefore, the trial court's judgment dismissing the action was correct even though its reason (to wit, that the state had failed to sustain the burden of showing as to the Puyallup Indians that the statutes and regulations were reasonable and necessary for the conservation of fish) was wrong. Their reasonableness, or unreasonableness, is immaterial.

Where a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition. *Kirkpatrick* v. *Department of Labor & Industries*, 48 Wash. 2d 51, 290 P. 2d 979.

One more matter must be noticed. The conclusion we have reached from our interpretation of the applicable decisions of the supreme court make necessary the overruling of four of our prior cases, namely, *State* v. *Towessnute*, *supra; State* v. *Alexis*, *supra; State* v. *Meninock*, *supra;* and *State* v. *Wallahee*, *supra.* These cases are wrong in principle, and, to the extent that they are contrary to the views stated herein, they are hereby expressly overruled. See the dissenting opinions in those cases and in *State* v. *Tulee*, *supra.*

To summarize, the Treaty of Medicine Creek of 1855 is the supreme law of the land and, as such, is binding upon this court, notwithstanding any statute of this state to the contrary, and its provisions will continue to be superior to the exercise of the state's police power respecting the regulating of fishing at the places where the treaty is applicable until:

(1) the treaty is modified or abrogated by act of Congress, or

(2) the treaty is voluntarily abandoned by the Puyallup tribe, or

(3) the supreme court of the United States reverses or modifies our decision in this case.

Judgment affirmed.

Schwellenbach, Ott, and Foster, JJ., concur.

Weaver, J., did not participate.

Rosellini, Justice (concurring in the result).

The conservation of the natural resources of this state is a matter of vital importance to all of its inhabitants. The right of the state to enforce its conservation measures is a matter that I do not think should be determined by reference to an opinion of a court of another state when that state chose to ignore language of the United States supreme court that reads:

> "The treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." *Tulee* v. *State of Washington*, 315 U.S. 681, 62 S. Ct. 862, 864, 86 L. Ed. 1115.

We have used language of similar import to this in every case in which the question of interpretation of Indian treaty rights has been considered. See *State* v. *Towessnute*, 89 Wash. 478, 154 P. 805; *State* v. *Alexis*, 89 Wash. 492, 154 P. 810, 155 P. 1041; *State* v. *Meninock*, 115 Wash. 528, 197 P. 641; *State* v. *Wallahee*, 143 Wash. 117, 255 P. 94; *State* v. *Tulee*, 7 Wash. 2d 124, 109 P. 2d 280.

Moreover, I do not think that this court is justified in assuming that because the supreme court denied certiorari in *State* v. *Arthur*, 74 Idaho 251, 261 P. 2d 135, it approved the holding of that case. That court clearly stated that such an assumption is never warranted. *Atlantic Coast Line R. Co.* v. *Powe*, 283 U.S. 401, 51 S. Ct. 498, 75 L. Ed. 1142; *United States* v. *Carver*, 260 U.S. 482, 43 S. Ct. 181, 67 L. Ed. 361; *House* v. *Mayo*, 324 U.S. 42, 65 S. Ct. 517, 89 L. Ed. 739; *Sunal* v. *Large*, 332 U.S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982.

Contrary to the Idaho holding are the cases of *Makah Indian Tribe* v. *Schoettler*, 9 Cir., 192 F. 2d 224 and *McCauley* v. *Makah Indian Tribe*, 9 Cir., 128 F. 2d 867, both of which recognize: (a) the power of the state to subject Indians to restrictions for the purpose of conservation; and (b) that their right to fish, granted by the treaty, is not an unlimited right. The majority, however, chose to ignore these decisions rendered by the federal circuit court in this state, and to adopt an interpretation of the treaty which deprives the state of all right to protect its fish for the benefit of all of its citizens.

The importance of the conservation measures adopted by the state of Washington may be better understood if some of the factors and problems involved are examined. This information, unfortunately, was not presented in evidence in the trial of this cause, but was gleaned from my own research. While these facts cannot control our decision, I do think that they emphasize the importance of the case and, therefore, should be considered before we decide that the state has no right at all to interfere with the fishing practices of Indians.

This case involves the trapping of salmon and steelhead by means of nets in the Puyallup river. There are five or six species of Pacific salmon; and there are two species of steelhead, those that migrate in the winter and those that migrate in the summer. These anadromous fish are hatched in fresh water and descend to salt water where most of their growth is attained. They have a well-developed homing instinct and return to spawn either in the streams of their birth or the streams where they are planted as fingerlings.

The Pacific salmon spawn only once and always die after spawning; the steelhead may spawn more than once. The salmon and steelhead

after remaining in the ocean from three to six years, depending upon their species, return as mature fish to the river of their origin to spawn. They spawn in the upper reaches of the rivers and bury their eggs in the gravel beds. The mature fish usually travel close to the river banks during their spawning migration.

The problems of properly managing and preventing the extinction of this vast fishery resource are of real concern to the state. The Washington department of fisheries, in its 1953 report, placed the capitalized value of fish and shell fish resources in this state at $679,-150,000. To this value must be added the contribution of salmon as a recreational asset. In recent years from 150,000 to 200,000 fishermen have participated in salt water sport angling on Puget Sound, in waters along the coast of Washington, in the Columbia river as far upstream as Wenatchee, and in other salmon producing rivers. They spend $8,500,000 annually on fishing trips. There are 160 boathouses and resorts with an investment value of $12,000,000.

The state regulations to conserve and preserve fishery are vital activities in the overall scheme of administering this resource in such a way that it can provide a constant source of food, wealth, and recreation.

The International Halibut Commission and the International Sockeye Salmon Commission have effectively demonstrated how two nearly extinct species (halibut and sockeye) have been restored by the promulgation and enforcement of conservation laws and regulations.

The methods commonly used to conserve the fish have been to regulate the season's catch and the gear used, to the end that sufficient fish escape to propagate and reproduce themselves. The fish hatchery is essential in combating the depletion of fish runs. Without artificial propagation, the maintenance and rehabilitation of this resource would be impossible. The Washington game department's record of planting and catching steelhead in the Puyallup river is persuasive of the need for this artifical propagation.

Puyallup River

Year	*Steelhead Plants*	*Year*	*Steelhead Returns*
1945	37,694	1956	56,876
1946	65,877	1947–48	1,771
1947	177,596	1948–49	3,921
1948	53,467	1949–50	[1] 4,821
1949	298,300	1950–51	4,808
1950	283,914	1951–52	[2] 14,592
1951	66,462	1952–53	14,190
1952	174,682	1953–54	16,886
1953	81,124	1954–55	13,351
1954	53,935	1955–56	18,406
1955	70,270	1956–57	([3])

[1] (1950 first true downstream migrants planted).
[2] (First return of hatchery fish).
[3] (Data not yet available).

The defendants herein had two set nylon nets in the Puyallup river. The shorter one was 80 feet in length and 20 feet in width or depth, with 6½ inch diamond-shaped webbing. The longer net was the same, except that it was 140 feet in length. The shorter net was anchored at one end to the bank by means of a rock; and the longer net was upstream from the shorter one and anchored to the bank by

means of piling. The opposite ends of each net were anchored with pilings in the stream, each net running at right angles to the bank of the river.

When fish attempt to migrate upstream, they are caught and become enmeshed by their gills in the webbing of set nets. Nylon nets are a new device; they are practically invisible in the water. Such nets are so constructed that they take practically every fish that attempts to go upstream.

Any obstruction that prevents the anadromous fish from escaping to its spawning ground will destroy that particular fish run. The regulations in question were enacted to prevent such obstructions and other interference with the fish during the spawning season. I do not think it can be seriously questioned that such laws and regulations for conservation, as generally applied, are reasonable.

The majority chose to enlarge the ruling of *Tulee* v. *State of Washington*, *supra*, that the state has no right to exact a license fee from the Indians for a privilege guaranteed to them by the treaty with the United States. It enlarged this ruling to a holding that state regulations designed to conserve the fish may not be enforced against the Indians. The majority opinion does this in spite of the fact that it recognizes the right of the state to impose such restrictions outside the reservation, and in spite of the fact that the treaty provides that the right is to be enjoyed "in common with all citizens of the Territory."

The treaty with the Indians should be construed in the light of the conditions and circumstances existing at the time it was executed. It was never anticipated nor imagined at that time that the present technological advances in the method of taking fish would be developed. Nylon net was unknown. The Indians did not possess the technical knowledge nor materials to manufacture nets in lengths sufficient to span an entire stream. The outboard motor was nonexistent.

To interpret the treaty in a manner that would permit the Indians to use the best and most advanced techniques and equipment to the extent that the fish are destroyed would, in my opinion, go far beyond what was intended either by the citizens of the Territory or the Indians. *Inherent in the treaty is the implied provision that neither of the contracting parties would destroy the very right and bounty which each sought to share.*

The argument is made that if the state may forbid fishing during certain seasons, it may forbid it altogether, but the unreasonableness of such a law should be manifest.

As a practical matter it has been determined that unless these conservation measures are enforced, the fish will become extinct and the Indians' rights will become worthless. If the Indians will accept the benefit of the state's activities directed to the preservation and replenishing of the supply of fish, they should accept also the burden incident to these measures. Surely it was never contemplated that the right given to the Indian should be used to destroy the means of his enjoying that right—a destruction that would affect not only the Indians but also the other citizens entitled to fish the waters of the state.

The trial court decided this case against the state on the ground that the state had failed to sustain the burden of proving that the regulation was reasonable and necessary or rather, that the enforcement of the regulation against the defendants was reasonable and necessary for

the preservation of fish. In doing so, the court adopted the holding of *Makah Indian Tribe* v. *Schoettler*, *supra*. It is the general rule that such a regulation is presumed to be valid and the burden of proving its invalidity is upon the party challenging the regulation. The court, however, felt that in such a case as this—where the enforcement of the regulation, if not reasonable and necessary, would infringe a treaty right of the Indian—the burden should be upon the state to show that the violation of the regulation by the Indian threatens the conservation program. I would uphold the trial court in its disposition of the cause, for it is true that the state made no attempt to show that the conservation program was seriously affected by the fishing activities of the defendants or of the Indians generally. But I would not go further, as the majority has, to say that the treaty intended that the state may never interfere with fishing by Indians in their usual and accustomed places, no matter how wasteful and destructive their fishing may be. Such a holding is unncessary to a decision of the case. Furthermore I think it is unwarranted under the facts and the law.

For these reasons, I would affirm the trial court's judgment.

Hill, C. J., and Finley and Mallery, JJ., concur.

Finley, Justice (concurring in the result).

I have signed the concurring opinion written by Judge Rosellini. and join in the views expressed therein, but wish to add the following brief comments:

Considering their length and depth, the modern nylon nets used by defendants, if placed in the river and left there, as in the instant case, unquestionably would constitute a hazard to the escapement upriver of spawning salmon and steelhead during certain periods of the year. The extent or the degree of the seriousness of the hazard in terms of conservation and rehabilitation of fish life is a matter that would be subject to proof, as in any other case.

In this connection it should be noted that the instant case focuses attention only upon defendants and their nets. Considering the matter of conservation and the equally, if not more important, matter of rehabilitation of the fish runs in the rivers and streams of this state in relation to reasonable police power regulations, the problem posed would seem to involve not only the question of the use and effect of the modern nylon nets of defendants, but the use and effect of such nets by numbers of other individuals, including other Puyallup Indians.

The majority opinion states that the Constitution of the United States and the treaties enacted or promulgated pursuant thereto unquestionably have been held to constitute the supreme or controlling law of the land. With this I agree without any reservation whatsoever. But the constitution and the treaties enacted pursuant thereto are basic documents of government. They do not in and of themselves spell out and govern specifically the myriad details and day-to-day implications which may and do arise in relation to such documents of government. Such definitive enunciation normally falls within other areas of social control; i.e., within the proper ambit of the legislature or the judiciary. Under our system of government there should no longer be any doubt as to (1) the validity of the doctrine of judicial review, (2) the supremacy of the judiciary in this respect, and (3) that interpretation and clarification of constitutional statutory or treaty provisions by the judiciary are acceptable and established principles. The problem in the instant case must be viewed in this light, and I think the funda-

mental question is the reasonableness of the police power regulation attempted by the state of Washington.

Setting aside, merely for the moment, any discussion or consideration of constitutional and treaty provisions, there should be little doubt that reasonable police power regulation as an abstract matter would be desirable, when, as, and if, necessary to prevent the depletion or absolute destruction of the fish life in the rivers and streams of this state. This should be true from the standpoint of the Indians, as well as of other residents of the state. Now, if we turn back several decades, in view of the then overabundant quantities of fish in the rivers, streams, lakes, and other waters of the Pacific Northwest, it is unlikely that the parties to the Indian treaty contemplated any necessity for scientific conservation and rehabilitation; but what would the attitude of the makers of the Indian treaty have been, if they had considered or had been confronted with the problem of conservation and rehabilitation? As to this question, the majority opinion would attribute an abysmal ignorance and lack of intelligence both to our constitution makers and to the signatories of the Indian treaties. The assumption inherent in this, I think, is unwarranted.

As to the validity of the state regulation here involved, I think the inquiry of the court should be directed to the intent and purpose of the treaty makers in the same manner that judicial inquiry is made respecting intent and purpose in the process of interpretation and application of any provisions of our state or Federal constitutions.

The basic purpose of the treaty was to preserve not to destroy the fishing rights of the Indians. As I see the problem in the case at bar, it is simply one of approach or orientation regarding (a) the interpretation and application of constitutional and treaty provisions and (b) the nature of the judicial function in relation thereto. If even one judicial eye is kept open respecting the fundamental purpose of the treaty to protect Indian fishing rights, and if this purpose is evaluated intelligently in terms of the settlement and the development of our state which has taken place most significantly in the last fifty years, then it seems to me that the state of Washington, as a matter of constitutional right, should have at least an opportunity to prove by competent factual data that the police power regulation here involved is a reasonable one, not inconsistent with the purpose of the Indian treaty but in furtherance thereof, from which the courts might or might not conclude that the regulation would be valid. In other words, as Judge Rosellini suggests, the problem is one of proof.

It may be suggested, and if so it is certainly true, that the Puyallup Indians did not encourage or sponsor, and are not to be held morally or legally responsible for the increase in population and the development of the state of Washington. However, this significant increase in population and the development of the state were not prohibited by the terms of the Indian treaty. Even if not contemplated, the changes that have taken place were perhaps inevitable. In any event, the changes have taken place and are now with us and the Indians as well.

Judicial recognition of the fundamental purpose of the treaty (i.e., the preservation of Indian fishing rights) and judicial recognition of the facts of life relative to conservation and rehabilitation of fish are not inconsistent. Such judicial action is not in derogation and in violation of the Indian treaty, but is in furtherance thereof. In his concurring opinion Judge Rosellini states that the only question in this

case is whether the state has proved by competent evidence that regulation of fishing nets in the river is reasonably designed and necessary for the preservation of fish life for the benefit of the Indians, as well as for other residents of this state. I agree. For the above reasons and those stated by Judge Rosellini, I concur in the end result reached by the majority opinion—namely, that the decision of the trial court should be affirmed.

Addenda by Hill, *Chief Justice.*

The eight judges who heard the *En Banc* argument on this case on February 13, 1957 (Judge Weaver being incapacitated at that time), are agreed that the order of the trial court dismissing the charges against the two defendants should be affirmed, but they are in disagreement as to the reason for the affirmance.

Three judges have signed Judge Donworth's opinion, and three judges have signed Judge Rosellini's opinion, and there is no majority opinion. It therefore follows that the cases which Judge Donworth's opinion states are overruled, are not in fact overruled, and nothing is decided except that the order dismissing the charges against the defendants is affirmed.

General Counsel Opinion 353, Dated October 26, 1960

United States Department of Agriculture

office of the general counsel

Washington 25, D.C.

October 26, 1960

Syllabus:

National Forests—Indians—"Open and Unclaimed Land"

Land ceded to the United States by the Nez Perce Indians under the Treaty of June 11, 1855, included within the boundaries of a national forest reservation is "open and unclaimed land" within the meaning of the treaty provision reserving to the Indians the privilege of pasturing horses and cattle on open and unclaimed land.

National Forest—Indians—Grazing Privilege

The grazing privilege reserved by treaty to the Indians is a continuing privilege beyond that enjoyed by other citizens, and as such, the Indians cannot be deprived of that privilege by merely allotting all available national-forest range to non-Indians.

National Forests—Indians—Grazing Privilege Subject to Regulation

The enjoyment of the grazing privilege may be regulated by the Secretary of Agriculture for the purposes of protecting and conserving national-forest lands.

October 26, 1960

To: R. E. McArdle, Chief, Forest Service
From: Assistant General Counsel
Subject: Permits

This is in reply to Mr. DeNio's memorandum of June 8, 1960, requesting a review of our opinion, set forth in Mr. Mynatt's letters of

May 12, 1952, and January 5, 1953, relating to the grazing rights of Indians upon lands ceded by Indian tribes to the United States by the treaties of 1855, which ceded lands are now within national forests. This matter was also considered by this office in an opinion dated January 17, 1955, to Mr. Carlile Carlson, Attorney-in-Charge, Portland, Oregon.

It appears from the file accompanying your memorandum that an application for permit to graze 20 head of cattle from June 1 to October 31, 1960, on Powwatka C&H Allotment was made by Irving Watters, who claims to be an Indian of the Nez Perce Tribe. Mr. Watters, on advice of his tribal attorney, asserts a right to graze cattle upon national-forest land under Article III of the treaty of June 11, 1855 (12 Stat. 957), by which the Nez Perce Tribe ceded lands to the United States. By letter dated May 18, 1960, the Forest Supervisor denied the application for the reasons that the national-forest range was fully stocked with cattle under preference permit, leaving no room for additional stock, and that the application did not show the applicant owned cattle or commensurate ranch property as required for issuance of grazing permits on national-forest lands. The letter further states that Indians have no right to unrestricted grazing on national-forest land under Article III of the 1855 Treaty.

While we agree with the Forest Supervisor's conclusion that Indians have no unrestricted grazing right on national-forest land under Article III of the Nez Perce Treaty of June 11, 1855, we do not agree that all the reasons assigned by him for refusing to issue the permit are valid. Because the Indians' grazing privilege is reserved by treaty they may not be deprived of that privilege merely by allotting all available national-forest range to non-Indians. However, that privilege is subject to regulation by the Secretary of Agriculture in the interest of conservation. We think the Secretary of Agriculture may require Indians to secure a grazing permit. We also think that regulations, reasonably related to conservation, governing the number of livestock, the area to be grazed, and the grazing period may be enforced. Whether a regulation is reasonably related to conservation is an administrative determination and the Forest Service may wish to consider the effect of existing regulations, such as the requirement that the applicant own commensurate ranch property, upon the Indians to determine if those regulations may not be so burdensome as to deprive the Indians of their grazing privilege.

Our previous opinions on the issues presented by this subject concerned similar treaty provisions reserving to the Indians the privilege of pasturing horses and cattle on unclaimed land. They concluded that the national forests are "open and unclaimed" lands within the meaning of the treaties of 1855 and that the privilege of the Indians under the treaties to graze livestock on the national forests is a continuing one to be enjoyed in common with other citizens. These opinions further concluded that "open and unclaimed land" referred to ceded land not disposed of by the United States or not appropriated by the United States for a public use inconsistent with the rights and privileges reserved to the Indians by treaty, and concluded that grazing was not a use inconsistent with purposes for which the national forests were established. Our previous opinions held that the Indians could not be deprived of their reserved grazing privilege by allotting all available national-forest range to non-Indians but also held that

the enjoyment of that grazing privilege by the Indians could be regulated by the Secretary of Agriculture.

We have reviewed our previous conclusions in the memoranda referred to above and in the light of the treaty with the Nez Perce Indians. The applicability of the privilege reserved by treaty to national-forest land involves (a) whether ceded land within national forests is "open and unclaimed land" within the meaning of the Nez Perce treaty; (b) if national-forest land is open and unclaimed land, whether the nature of the grazing privilege reserved to the Indians by treaty is a continuous one to be enjoyed in common with other citizens; and (c) whether the Department of Agriculture may regulate the enjoyment of that grazing privilege by Indians.

Article III, which reserves certain rights and privileges to the Nez Perce Indians in the lands ceded, provides in part:

> "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; 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.*" (Emphasis supplied.)

In *State* v. *Arthur*, 74 Ida. 251, 261 P. 2d 135 (1953), *cert. denied*, 347 U.S. 937 (1954), the Supreme Court of the State of Idaho construed "open and unclaimed land" in the Nez Perce Treaty of June 11, 1855. This case involved the killing of game out of season by an Indian on ceded lands within a national forest. The court held that ceded lands by virtue of being reserved as national forests do not cease to be "open and unclaimed land." Concerning the meaning of these words, the court at page 141 stated:

> "It was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership and *was not intended to nor did it exclude lands title to which rested in the federal government, hence the National Forest Reserve upon which the game in question was killed was 'open and unclaimed land.'*" (Emphasis supplied.)

Under the existing state of the law lands ceded by the Nez Perce Treaty of 1855 within national forests remain "open and unclaimed lands" subject to the grazing privilege of the Nez Perce Indians.

Having concluded that national-forest lands are subject to the grazing privilege reserved in the treaty, we next consider the nature of that privilege. The Supreme Court has not had before it a case involving privileges reserved to Indians by the treaties of 1855. However, the Court has defined the nature of rights reserved in those treaties in decisions which hold that rights reserved by treaty to the Indians are continuing ones, beyond those enjoyed by other citizens. *United States* v. *Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); *Tulee* v. *State of Washington*, 315 U.S. 681 (1942). In so holding, the court has reasoned that Indian treaties are not to be given the narrowest construction they will bear but should be construed in a spirit consistent with the full obligation to protect the interest of a dependent people. *United States* v.

Winans, *supra*. In view of the Court's holding respecting rights reserved by treaty we believe the grazing privilege reserved by treaty to the Indians is similarly a continuing one. We do not think the Indians can be deprived of their grazing privilege merely by allotting to non-Indians all available national-forest range.

Many treaties expressly state that this privilege is "in common with citizens." While this phrase is not found in the Nez Perce Treaty of 1855, in view, however of the other general similarities in this respect, we believe the absence of this phrase does not compel a substantially different result. Thus, while the privilege must be shared with other citizens, it may not be deemed inferior so as to be totally denied.

There remains for consideration whether the Federal government can by regulation limit the Indians' privilege of grazing on national-forest lands. The case of *Tulee* v. *State of Washington*, *supra*, involved the conviction of a Yakima Indian for catching fish with a net at a usual and accustomed place without first obtaining a license as required by the State law. The Indian claimed the State law was repugnant to the Treaty of May 29, 1855, which contains a provision reserving rights and privileges similar to Article III of the Nez Perce Treaty of 1855, and claimed the State could not regulate the Indians' right to fish at usual and accustomed places within the ceded land area. The Supreme Court held that the State of Washington could not require a license of the Indians or charge a fee. In so holding the Supreme Court at page 684 states:

> "We think the state's construction of the treaty is too narrow and the appellant's too broad, that, *while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here." (Emphasis supplied.)

In our opinion the Supreme Court recognized the necessity of regulating the use of natural resources in the interest of conservation.

The case of *Makah Indian Tribe* v. *Schoettler*, 192 F. 2d 224 (9th Cir. 1951), involved a regulation of the State of Washington which prohibited all fishing along a river within the land area ceded by a treaty securing rights and privileges similar to Article III of the Nez Perce Treaty. The court did not deny the right of the State to regulate Indian fishing in such a manner as to leave to the tribe their treaty right without endangering conservation. The court cited as authority, *Tulee* v. *State of Washington*, *supra*.

In *State* v. *Arthur*, *supra*, the Supreme Court of the State of Idaho reasoned that the statement of the Supreme Court of the United States in the *Tulee* case to the effect that the State may have the power to enact reasonable regulations concerning the time and manner of fishing outside the reservation necessary for conservation was not essential to its decision as it was only necessary for the Court to decide whether the State of Washington could exact a license for fishing, that is, the statement was dictum. On that theory, the court in the *Arthur* case denied the power of the State to regulate the hunting privilege of the Indians on national-forest lands even for the purpose of conservation. The holding of the *Arthur* case was followed by the Supreme Court of Montana in *State* v. *McClure*, 127 Mt. 534,

268 P. 2d 629 (1954). In the more recent case of *State of Washington* v. *Satiacum*, 50 W. 2d 513, 314 P. 2d 400 (1957), the Supreme Court of Washington was equally divided on whether the trial court's order dismissing the charge of illegal fishing against two Indians of the Puyallup Tribe should be affirmed because the State could not regulate the right to take fish at usual and accustomed fishing places reserved to the Puyallup Indians under the Medicine Creek Treaty of 1855 or because the State had failed to carry the burden of showing that the statute prohibiting fishing during the closed season was reasonably related to conservation.

The State court cases involved State laws and regulations rather than Federal laws and regulations. We do not think they are controlling as to Federal action. It was reasoned by the State courts that under the Constitution of the United States the Indian Treaties of 1855 are part of the supreme law of the land and that the State could not enact laws or regulations repugnant to the provisions of those treaties. By legislation Congress can alter or repeal the provisions of an Indian treaty. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902); 26 Atty. Gen. 340. The Supreme Court has recently held that a general statute in terms applying to all persons includes Indians and their property interests. *Federal Power Commission* v. *Tuscarora Indian Nation*, 4 L. Ed. 2d 584 (1960), and cases cited therein. The Congress has provided that national forests are subject to regulation for the purpose of protecting and conserving those lands (16 U.S.C. 551). In view thereof, we believe the Indians' privilege of grazing livestock on national-forest lands under the treaty of June 11, 1855, is limited to the extent necessary to protect and conserve national-forest lands; but within the restrictions necessary to conserve the national-forest range, this Department is obligated to extend to the Nez Perce Indians a fair and reasonable opportunity to enjoy their grazing privilege on ceded lands.

/s/ Ralph F. Koebel.

TRESPASS

Shannon v. *United States*

Circuit Court of Appeals, Ninth District

160 F. 870 (1908)

Editor's Note: Implied license of public to pasture on public domain is terminated by inclusion of land in National Forest which is an appropriation (disposition) to a public use. The Secretary of Agriculture is vested with authority to promulgate reasonable rules and regulations for administration of National Forests, and exercise of this authority cannot be restricted by State legislation.

Appeal from the Circuit Court of the United States for the District of Montana.

The appellant was the defendant in a suit brought by the United States to enjoin him from driving, conducting, or causing or permit-

ting to be driven or conducted, his live stock on the Little Belt Mountains Forest Reserve, and permitting the same to remain there. The bill alleged that during the month of December, 1904, and at divers times prior thereto, the appellant "wrongfully and unlawfully, and without right or authority, and without the consent and against the wishes of the complainant, the United States of America, and its officers and agents, and without having obtained a permit from the Secretary of the Interior or the Commissioner of the General Land Office or any officer or agent of complainant, and in violation of law, and in utter disregard of the rules and regulations of the Secretary of the Interior, did drive and conduct, and cause to be driven and conducted, and permitted, suffered, and allowed to go onto and upon the said reserve, three hundred head of cattle," and the bill proceeded to allege that said acts would be continued unless enjoined, and would result in permanent and irreparable damage and injury to said reserve and be destructive of the objects for which the reserve was created. Upon the filing of the bill, a citation was issued requiring the appellant to show cause why an injunction pendente lite should not issue against him. On the hearing a temporary injunction was ordered as prayed for. From that order the present appeal is taken.

The Little Belt Mountains Forest Reserve was created by the proclamation of the President on August 16, 1902. The appellant is in the possession of a tract of 320 acres, which adjoins that part of the reserve known as Lone Tree Park, of which 320 acres he acquired 160 acres under the homestead law, and the remaining 160 acres he holds by a lease from one Peterson, the owner who acquired the same under the desert land act. The grazing privileges on the reserve are divided into districts. Lone Tree Park is in District No. 4. It contains about 1,000 acres. On September 3, 1902, shortly after the reserve had been established, the appellant obtained his lease of Peterson's 160 acres. As soon as he had obtained the lease, he turned from 3,000 to 3,500 head of sheep into the 320-acre tract, and later took them out and turned in cattle. When the appellant leased the land from Peterson, Peterson's land and his own were inclosed, but the appellant made openings in the Peterson fence on the side toward the reservation, for the purpose of letting stock through on the reserve. The evidence shows that the fence was down in 7 places, and that the gaps were from 30 to 90 feet wide. In some places the wires were weighted down with poles, in others with rocks. In other places the wires were raised, and placed on top of posts, so as to enable the stock to pass underneath. The evidence shows, moreover, that if the fence were maintained in good condition, stock could not obtain access to Lone Tree Park, because of the natural barriers which surround it. Every year since 1902, the appellant has thus grazed his cattle upon the reserve, without any permit, and has disregarded the rules governing the use of the reserve, and ignored the notices to keep his cattle off the reserve, given him by the forest ranger. The evidence shows that the appellant's tract of 320 acres would not furnish pasture to more than 50 head of cattle, and that there is no water on it, and that he would turn the cattle into the inclosure, and leave them there to drift over onto the reserve where there was pasture and water.

Ransom Cooper, for appellant.

Carl Rasch, U.S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellant denies that he has at any time driven his cattle upon the reserve, and asserts that if they went there, they did so of their own accord, the reserve not being inclosed by the United States, and that he is not accountable for the acts of the cattle in straying thereupon. We do not so regard the evidence, and we think the injunction issued by the court below may well be sustained on the ground that the evidence shows that the appellant drove his cattle upon the reserve. His home ranch was some 6 to 10 miles distant from the 320 acres inclosed near the reserve. He drove large bands of cattle within the 320 acres, which was inclosed on three sides, but open on the side toward the reserve, and left them there. Of course he knew that they would not and could not remain in the inclosure, for there was no water there, nor sufficient pasture for so large a herd. They did as he evidently expected them to do. They went through the convenient openings which he had made in his fence for that purpose. In *Lazarus* v. *Phelps*, 152 U.S. 81–85, 14 Sup. Ct. 477, 478, 38 L. Ed. 363, the court said:

"So, if he lease a section of land, adjoining an uninclosed section of another, and stock his own section with a greater number of cattle than it could properly support, so that, in order to obtain the proper amount of grass, they would be forced to stray over upon the adjoining section, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance. The ordinary rule that a man is bound to contemplate the natural and probable consequences of his own act would apply in such a case."

Counsel for the appellant seek support for their contention in the implied license to pasture on public lands, growing out of the custom by which such use has been permitted from the beginning of the government, and in the decision in *Buford* v. *Houtz*, 133 U.S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618, in which the court recognized such license to use the public lands where they are left open and uninclosed, "and no act of the government forbids their use." But the lands included in a forest reservation are no longer public lands within the purport of that decision, and the act of the government does forbid their use. The creation of such a reservation severs the reserved land from the public domain, disposes of the same, and appropriates it to a public use. *Wilcox* v. *McConnell*, 13 Pet. 498, 10 L. Ed. 264. In pursuance of its policy of reserving for the public welfare, public lands on which is growing timber or undergrowth, for the preservation of the timber and the water supply, as provided in the act of March 3, 1891, c. 561, 26 Stat. 1103 (U.S. Comp. St. 1901, p. 1537), and, in order to make that act more effective, Congress passed the act of June 4, 1897, c. 2, 30 Stat. 34 (U.S. Comp. St. 1901, p. 1542), whereby it vested in the Secretary of the Interior the power to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction." It was intended that this statute should be effective, and accomplish the results for which it was enacted. In pursuance of that authority, the Secretary of the Interior has promulgated rules regulating the number of cattle and other live stock that may pasture on the reservation, and the manner in which the owners thereof may obtain permission to use the reservation for that purpose. There can be no doubt that the rules

are reasonable and are within the power so granted. In *Dastervignes* v. *United States*, 122 Fed. 30, 34, 58 C.C.A. 346, 350, this court said:

"Rule 13, promulgated by the Secretary of the Interior, is in accord with the provisions of the act of Congress, and in our opinion was a valid and legitimate exercise of the authority delegated to him to make such rules and regulations as would insure the objects of such reservations. The Secretary, in adopting this rule, acted simply as the arm that carries out the legislative will. He did not invade any of the functions of Congress. He did not make any law, but he exercised the authority given to him, and made rules to preserve the forests on the reserves from destruction. Such rules, within constitutional limits, have the force and effect of law, and it is the duty of courts to protect and enforce them, in order to uphold the law as enacted by Congress."

But the appellant contends that he was not bound to maintain a fence between his land and the government reservation, nor to keep the fence that was there in repair, that he had the right to destroy or remove a fence which was his own property, and that it was for the appellee, if it desired to exclude live stock from the reservation, to inclose the same, or to take the necessary steps under the statutes of Montana to require adjacent proprietors to join in a division fence, and cites statutes of that state from which it appears that the Legislature has in substance declared that cattle may run at large in Montana, and that all owners who neglect to fence their lands against such stock shall be without remedy against the owners of animals which may trespass thereon, and argues that those laws are binding upon the United States as a landowner to the same extent that they are binding upon the owners of other lands situated within the state, and that the government, although in some positions and under certain defined conditions is a sovereign, it is, nevertheless, in the situation here presented a mere private landowner, having the same rights, and no others, which are enjoyed by other landowners.

The federal Constitution delegates to Congress, absolutely and without limitations, the general power to dispose of and make all needful rules and regulations concerning the public domain, and this, independently of the locality of the public land, whether it be situated in a state or in a territory. *Irvine* v. *Marshall*, 20 How. 558, 15 L. Ed. 994; *Jourdan* v. *Barrett*, 4 How. 169, 11 L. Ed. 924; *United States* v. *Gratiot*, 14 Pet. 526, 538, 10 L. Ed. 573; *Gibson* v. *Chouteau*, 13 Wall. 99, 20 L. Ed. 534. The exercise of that power cannot be restricted or embarrassed in any degree by state legislation. This is the effect of the constitutional provision, unaided by the special provision usually incorporated in the compact by which the states are admitted into the Union. The provision in the Constitution of Montana, under which that state was admitted, declares "that the people of the proposed state of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof." The appellant contends that the portion of the ordinance just quoted is limited by the remainder thereof which follows:

"And to all lands lying within said limits owned or held by any Indian or Indian tribes, and until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

It is argued that from this latter provision, expressly acknowledging that the Indian land shall remain under the absolute jurisdiction and control of Congress, it was not the intention that other lands should be subject to such jurisdiction and control. But it is wholly unnecessary to enter into a discussion of the construction of this provision of the Constitution of the state of Montana. Congress had not the power to relinquish any of its jurisdiction over the public domain by any compact with that state, nor had that state the power to reserve any such control.

It is true that in *Pollard's Lessee* v. *Hagan et al.*, 3 How. 212–223, 11 L. Ed. 565, concerning the powers vested in the state of Alabama on her admission into the Union, the following language was used in the opinion of the majority of the court:

"Nothing remained to the United States according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state or elsewhere, except in the cases in which it is expressly granted."

But the doctrine so announced that the United States has no general power to take lands within the boundaries of a state by the exercise of the right of eminent domain was expressly denied in the subsequent decision in *Kohl* v. *United States*, 91 U.S. 367, 23 L. Ed. 449, and in *Gibson* v. *Chouteau*, 13 Wall. 92, 99, 20 L. Ed. 534, the court said:

"As legislation of a state can only apply to persons and things over which the state has jurisdiction, the United States are also necessarily excluded from the operation of such statutes. With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise."

In *Camfield* v. *United States*, 167 U.S. 519, 525, 17 Sup. Ct. 864, 867, 42 L. Ed. 260, the court said:

"The general government doubtless has a power over its own property, analogous to the police power of the several states, and the extent to which it may go in the exercise of such power, is measured by the exigencies of the particular case. * * * While we do not undertake to say that Congress has the unlimited power to legislate against nuisances with a state which it would have within a territory, we do not think the admission of a territory as a state deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation."

In the light of these decisions, it is clear that the state of Montana had no dominion over the public lands lying within its borders, and no power to enact legislation directly or indirectly affecting the

same. It could not give to the people of that state the right to pasture cattle upon the public domain, or in any way to use the same. Its own laws in regard to fencing and pasturing cattle at large must be held to apply only to land subject to its own dominion. No one within the state can claim any right in the public land by virtue of such a statute. The United States have the unlimited right to control the occupation of the public lands, and no obligation to fence those lands, or to join with others in fencing them for the purpose of protecting its rights can be imposed on it by a state. The rights given by the state statutes to the subjects of the state extend only to the lands of the state. They end at the borders of the government lands. At that border the laws of the United States intervene, and it is within their province to forbid trespass. Such laws being within the power of Congress, it is not necessary to discuss the question whether it is sovereign power or police power, or what may be its nature, for there is no power vested in the state which can embarrass or interfere with its exercise.

The appellant makes the further point that a court of equity cannot recognize any sovereign right or power in a suitor appearing at its bar, and that the United States, having voluntarily come into court in its proprietary capacity as a landowner, seeking a remedy, must ask and receive equity upon the same terms and conditions that any private person or corporation may. We may concede this to be true. When the United States consents to be sued in a civil court, or resorts thereto for the protection of government property, or redress for injury to the same, it becomes subject to the rules of pleading, practice, and law applicable to the case. But it does not and cannot waive any of its rights in the subject of the controversy, and those rights must be protected by the court. The government does not appear here in a sovereign capacity or otherwise than as other suitors in a court of equity. The question for adjudication is, what are its rights under the averments set forth in the bill, and has the Legislature of Montana the power to enact legislation which shall affect the public lands within the borders of that state, or interfere with the right of the government to protect those lands? In *Cotton* v. *United States*, 11 How. 229, 13 L. Ed. 675, the court said:

"Although, as a sovereign, the United States may not be sued, yet as a corporation or body politic, they may bring suits to enforce their contracts and protect their property in the state courts or in their own tribunals administering the same laws."

The appellant argues that the maintenance of the injunction will impose a greivous burden upon him. But that objection is answered in the *Camfield* Case, in which the court said:

"The inconvenience, or even damage, to the individual proprietor, does not authorize an act which is in its nature a purpresture of government lands."

And, besides, the appellant may relieve himself of the grievous burden by restoring the Peterson fence.

The order of the Circuit Court is affirmed.

Light v. *United States*

SUPREME COURT OF THE UNITED STATES

220 U.S. 523 (1911)

Editor's Note: Congress, exercising its power of control over the public lands, can establish parts of the public domain as National Forests and prohibit grazing by livestock thereon or permit grazing by authorizing the Secretary of Agriculture to make rules and regulations, such authority not being an unconstitutional delegation of legislative power. Owners who allow their livestock to trespass on the National Forests can be enjoined.

The Holy Cross Forest Reserve was established under the provisions of the act of March 3, 1891. By that and subsequent statutes the Secretary of Agriculture was authorized to make provisions for the protection against destruction by fire and depredations of the public forest and forest reservations and "to make such rules and regulations and establish such service as would insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction." 26 Stat. 1103, c. 563; 30 Stat. 35, c. 2; act of Congress February 1, 1905; 7 Fed. Stat. Ann. 310, 312, and Supp. for 1909, p. 663. In pursuance of these statutes regulations were adopted establishing grazing districts on which only a limited number of cattle were allowed. The regulations provided that a few head of cattle of prospectors, campers and not more than ten belonging to a settler residing near the forest might be admitted without permit, but saving these exceptions the general rule was that "all persons must secure permits before grazing any stock in a national forest."

On April 7, 1908, the United States, through the district attorney, filed a bill in the Circuit Court for the District of Colorado reciting the matters above outlined, and alleging that the defendant Fred Light owned a herd of about 500 cattle and a ranch of 540 acres, located two and a half miles to the east and five miles to the north of the reservation. This herd was turned out to range during the spring and summer, and the ranch then used as a place on which to raise hay for their sustenance.

That between the ranch and the reservation, was other public and unoccupied land of the United States; but, owing to the fact that only a limited number of cattle were allowed on the reservation, the grazing there was better than on this public land. For this reason, and because of the superior water facilities and the tendency of the cattle to follow the trails and stream leading from the ranch to the reservation, they naturally went direct to the reservation. The bill charged that the defendant when turning them loose knew and expected that they would go upon the reservation, and took no action to prevent them from trespassing. That by thus knowingly and wrongfully permitting them to enter on the reservation he intentionally caused his cattle to make a trespass, in breach of the United States property and administrative rights, and has openly and privately stated his purpose to disregard the regulations, and without permit to allow and, in the manner stated, to cause his cattle to enter, feed and graze thereon.

The bill prayed for an injunction. The defendant's general demurrer was overruled.

His answer denied that the topography of the country around his ranch or the water and grazing conditions were such as to cause his cattle to go on the reservation; he denied that many of them did go thereon, though admitting that some had grazed on the reservation. He admitted that he had liberated his cattle without having secured or intending to apply for a permit, but denied that he willfully or intentionally caused them to go on the reservation, submitting that he was not required to obtain any such permit. He admits that it is his intention hereafter, as heretofore, to turn his cattle out on the unreserved public land of the United States adjoining his ranch to the northeast thereof, without securing or applying for any permit for the cattle to graze upon the so-called Holy Cross Reserve; denies that any damage will be done if they do go upon the reserve; and contends that, if because of their straying proclivities, they shall go on the reserve, the complainant is without remedy against the defendant at law or in equity so long as complainant fails to fence the reserve as required by the laws of Colorado. He claims the benefit of the Colorado statute requiring the owner of land to erect and maintain a fence of given height and strength, in default of which the owner is not entitled to recover for damage occasioned by cattle or other animals going thereon.

Evidence was taken, and after hearing, the Circuit Court found for the Government and entered a decree enjoining the defendant from in any manner causing, or permitting, his stock to go, stray upon or remain within the said forest or any portion thereof.

The defendant appealed and assigned that the decree against him was erroneous; that the public lands are held in trust for the people of the several States, and the proclamation creating the reserve without the consent of the State of Colorado is contrary to and in violation of said trust; that the decree is void because it in effect holds that the United States is exempt from the municipal laws of the State of Colorado relating to fences; that the statute conferring upon the said Secretary of Agriculture the power to make rules and regulations was an unconstitutional delegation of authority to him and the rules and regulations therefore void; and that the rules mentioned in the bill are unreasonable, do not tend to insure the object of forest reservation and constitute an unconstitutional interference by the Government of the United States with fence and other statutes of the State of Colorado, enacted through the exercise of the police power of the State.

Mr. James H. Teller, with whom *Mr. John T. Barnett*, Attorney General of Colorado, *Mr. Henry M. Teller*, *Mr. C. S. Thomas*, *Mr. E. C. Stimson*, *Mr. Milton Smith*, *Mr. H. A. Hicks* and *Mr. Ralph McCrillis* were on the brief, for appellant:

The jurisdiction of a State extends over all the territory within its boundaries. *New York* v. *Miln*, 11 Pet. 139; *Pennoyer* v. *Neff*, 95 U.S. 714; *Van Brocklin* v. *Anderson*, 117 U.S. 158; *Kansas* v. *Colorado*, 206 U.S. 93.

One who asserts the existence of any exemption from this jurisdiction must point out the act of cession, or the constitutional provision from which it arises. The Government holds title to public lands, not as a sovereign, but as a proprietor merely. This, of course, applies only to public lands properly so called, and not to lands used for governmental purposes. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Woodruff* v. *N. Bloomfield G. M. Co.*, 18 Fed. Rep. 772; *People* v.

Scherer, 30 California, 658; *Camp* v. *Smith*, 2 Minnesota, 131; *Hendricks* v. *Johnson*, 6 Porter (Ala.), 472; *United States* v. *Bridge Co.*, 6 McLean, 517; *United States* v. *Chicago*, 7 How. 185; *United States* v. *Cornell*, 2 Mason, 60.

Sovereignty is not to be taken away by implication. *People* v. *Godfrey*, 17 Johns. 225. Section 8 of Article I of the Constitution, which gives the United States exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, means that these are to be purchased with the consent of the legislature. Story on Const., 5th ed., § 1227; *Ft. Leavenworth Ry. Co.* v. *Lowe*, 114 U.S. 525; *Mobile* v. *Eslava*, 16 Pet. 277; *People* v. *Godfrey*, 17 Johns. 225.

A forest reserve, however beneficial, is not in fact an instrument of government and necessary to the exercise of national sovereignty.

Even in those cases in which there is a cession of jurisdiction by the State subsequent to the adoption of a fence law, the law prevails on such lands until repealed by the General Government. *C., R.I. & P. Ry. Co.* v. *McGlinn*, 114 U.S. 542.

If the fence law would thus apply on territory of which the jurisdiction had been ceded by a State, it certainly is not ousted by the mere act of reserving public lands for forestry purposes.

The ownership by the General Government of land within a State does not carry with it general rights of sovereignty over such lands.

If the Federal Government has jurisdiction over these reservations to the extent necessary to support this decree, the State is deprived of its police power over a large portion of its territory. The police power of a State extends over all of its territory and is exclusive. *Prigg* v. *Commonwealth*, 16 Pet. 639; *The Slaughter House Cases*, 16 Wall. 63; *In re Rahrer*, 140 U.S. 554; *United States* v. *Knight*, 156 U.S. 11; *L'Hote* v. *New Orleans*, 177 U.S. 597.

The court bases the right to prevent the fencing of public lands upon the fact that such fencing would retard the settlement of the lands, which is the purpose for which the Government holds them as a trustee.

The result of this decree, as before stated, is, that state laws passed in the exercise of the police power are not operative on the public domain. See *Shannon* v. *United States*, 88 C.C.A. 52. That case, however, is not authority to the effect claimed.

Fences and the trespasses of live stock is a proper subject of legislation under the police power of the State. *Bacon* v. *Walker*, 204 U.S. 317; *Rideout* v. *Knox*, 148 Massachusetts, 368. This decree is contrary not only to the statutes of the State concerning fencing and live stock, but to the law as laid down by the state Supreme Court prior to the adoption of these laws. *Morris* v. *Fraker*, 5 Colorado, 425; *Richards* v. *Sanderson*, 39 Colorado, 278; *Buford* v. *Houtz*, 133 U.S. 320.

In 1885 a fence law was enacted, but it did no more than express in statutory form what was already the law of the State. See Session Laws, 1885, p. 220, §§ 2987 *et seq.*, Rev. Stat. Colo., 1908. The gist of the statute is that damages from trespass by animals are not recoverable unless the premises on which such trespass occurs are enclosed by a lawful fence as therein prescribed.

To limit the jurisdiction of States containing forest reserves is to deny to them that equality with other States to which they are entitled. *Escanaba Co.* v. *Chicago*, 107 U.S. 678; *Ward* v. *Race Horse*,

163 U.S. 504. This court will take judicial notice of the proclamations of the President which have set aside as forest reserves within the State of Colorado an area of 21,309 square miles, more than one-fifth of the area of the State; but see *Kansas* v. *Colorado*, to effect that the National Government cannot enter the territory of one of the newer States and legislate in respect to improving by irrigation or otherwise lands within their borders, unless it has the same power in the older States.

An act of Congress cannot restrict the sovereignty of a State except under express constitutional authority therefor. *Withers* v. *Buckley*, 20 How. 84. The equality of the States under the Federal Constitution is fundamental—a part of the very structure of our system of government. It is guaranteed by statute and exists without statute. *Ward* v. *Race Horse*, *supra*.

The auhority of Congress to dispose of and protect public lands is so limited as not to deprive one State of an attribute of sovereignty which is conceded to other States.

The lands described in the President's proclamation as constituting the Holy Cross Forest Reserve have not been legally set apart as permanent disposition thereof for the purposes in said proclamation mentioned.

The Government holds public land in trust for the people, to be disposed of so as to promote the settlement and ultimate prosperity of the States in which they are situated. This contradicts the withdrawal of lands for such purposes. *Newhall* v. *Sanger*, 92 U.S. 761; *Bardon* v. *N.P.R.R. Co.*, 145 U.S. 535; *Dobbins* v. *Commissioners*, 17 Pet. 435; *Weber* v. *Commonwealth*, 18 Wall. 57; *United States* v. *Beebee*, 127 U.S. 348; *Shively* v. *Bowlby*, 132 U.S. 49; *United States* v. *Trinidad Coal Co.*, 137 U.S. 160; *Pollard's Lessee* v. *Hogan*, *supra*.

While national authority to reclaim arid lands may be sustained, on the broad ground that their reclamation is an aid in disposing of them, reservations, on the contrary, are in effect an abandonment of the purpose of disposing of the lands included therein. Although the power to establish these reserves may be highly desirable, and may be more effectually exercised by the Federal Government than by the States, that affords no ground for asserting the existence of the power.

The system of national forest reserves violates the trust concerning public land, and denies to the States in which such reserves are established the equality with other States to which they are entitled. Report of House Judiciary Committee, 60th Congress, 1541, denying the right of the Government to purchase land for forest reserves; and see 30 Stat. 34.

This subject is not within the scope of the general welfare clause of the Constitution. Story on the Const., §§ 907, 908; Tucker's Const. of United States, § 222. If the power does exist it cannot be exercised without the consent of the States directly affected.

Mr. Ernest Knaebel for the United States:

Appellant has no standing to attack the reservation or the forest-reserve policy. He does not claim any right or interest in any of the lands reserved.

Before the reservation he doubtless enjoyed a license of pasturage there. This was a mere privilege, existing, which the Government could take away. *Shannon* v. *United States*, 160 Fed. Rep. 870, 873; *Frisbie* v. *Whitney*, 9 Wall. 187; *Yosemite Valley Case*, 15 Wall. 77.

The constitutionality of the reservation is attacked solely upon the ground of its supposed invasion of the rights and prerogatives of the State. But the State is not here objecting, and its supposed injury is no concern of the appellant. *Bacon* v. *Walker*, 204 U.S. 311, 315; *Hatch* v. *Reardon*, 204 U.S. 152, 160; *Budzisz* v. *Illinois Steel Co.*, 170 U.S. 41; *Supervisors* v. *Stanley*, 105 U.S. 305, 311; *Clark* v. *Kansas City*, 176 U.S. 114, 118; *Lampasas* v. *Bell*, 180 U.S. 276, 283, 284; *Cronin* v. *Adams*, 192 U.S. 108, 114.

The state fence law was not intended to apply to the United States. It confers no right whatever upon the cattle owner. It gives him no permission to place his cattle upon the land of another, whether fenced or unfenced. It merely vouchsafes him a reasonable assurance of immunity from what, under the common law, would be legal consequences of their trespassing, provided this shall have resulted from their straying and not directly from any act and purpose of his own. *Buford* v. *Houtz*, 133 U.S. 320; *Lazarus* v. *Phelps*, 152 U.S. 81; *Sabine &c. Ry. Co.* v. *Johnson*, 65 Texas, 389, 393; *Delaney* v. *Errickson*, 11 Nebraska, 533, 534; *Otis* v. *Morgan*, 61 Iowa, 712; *Moore* v. *Cannon*, 24 Montana, 316, 324; *St. Louis Cattle Co.* v. *Vaught*, 1 Tex. Civ. App. 388; *Larkin* v. *Taylor*, 5 Kansas, 433, 446; *Union Pacific Ry. Co. v. Rollins*, 5 Kansas, 167, 176.

It has been held by the highest court in Colorado that the willful and deliberate driving of cattle upon the premises of another is actionable. *Nuckolls* v. *Gaut*, 12 Colorado, 361; *Norton* v. *Young*, 6 Colo. App. 187; *Fugate* v. *Smith*, 4 Colorado, 201; *Sweetman* v. *Cooper*, 20 Colorado, 5; *Richards* v. *Sanderson*, 39 Colorado, 278.

Even if the United States as a property owner is subject to the same control by the State as individuals are, to the mind of the state legislature the character and functions of the Nation are not lost in the general conception of ownership.

The regulations were a valid exercise of constitutional power. It was the duty of the individual to obey them and of the courts to enforce them without regard to state laws. The State has no beneficial right whatsoever in the land; there is neither community of ownership, nor relation of trustee and *cestui que trust*. While these lands are held by the United States in trust, the people of the United States—not particular States, nor the people of particular States—are the beneficiaries. *United States* v. *Trinidad Coal Co.*, 137 U.S. 160; *United States* v. *Gratiot*, 1 McLean, 454; *S.C.*, 26 Fed. Cas. 15,249; *Turner* v. *American Baptist Union*, 5 McLean, 344; *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 159; Treat's National Land System (N.Y., Treat & Co., 1910). Like all other States carved out of the public domain, with very few exceptions, 117 U.S. 160, Colorado solemnly agreed never to tax or lay claim to any of the lands of the United States. See 18 stat. 474, § 5; 1 Mills' Ann. Stat. Colo., 111; 19 Stat. 665.

The ordinance, however, was not necessary to protect the United States from all claim of state interest in the lands. *Hartman* v. *Tresise*, 36 Colorado, 146. The Constitution by Art. IV, § 3, cl. 2, provides that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States, and the power being given without limitation, is absolute and exclusive of all state interference. *Wilcox* v. *Jackson*, 13 Pet. 498, 517; *United States* v. *Gratiot*, 14 Pet. 526; *Jourdan* v. *Barrett*,

4 How. 168, 184; *Irvine* v. *Marshall*, 20 How. 558; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *McCarthy* v. *Mann*, 19 Wall. 20; *United States* v. *Insley*, 130 U.S. 263; *Redfield* v. *Parks*, 132 U.S. 239; *Camfield* v. *United States*, 167 U.S. 518, 525; *Shively* v. *Bowlby*, 152 U.S. 1, 50, 52; *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 283; *United States* v. *Rio Grande Dam Co.*, 174 U.S. 690, 703; *Gutierres* v. *Land & Irrigation Co.*, 188 U.S. 545, 555; *Kansas* v. *Colorado*, 206 U.S. 46, 89; *United States* v. *Cleveland & Colorado Cattle Co.*, 33 Fed. Rep. 323; and see also *Shannon* v. *United States*, 160 Fed. Rep. 870.

See also decisions of other courts to the same effect. *United States* v. *Gratiot*, 1 McLean, 454; *S.C.*, 26 Fed. Cas. 15,249; *Turner* v. *Am. Baptist Union* (1852), 5 McLean, 344; *S.C.*, 24 Fed. Cas. 14,251; *Seymour* v. *Sanders*, 3 Dillon, 437; *S.C.*, 21 Fed. Cas. 12,690; *Union Mill & M. Co.* v. *Ferris*, 2 Sawyer, 176; *United States* v. *Cleveland Cattle Co.*, 33 Fed. Rep. 323, 330; *Carroll* v. *Price*, 81 Fed. Rep. 137; *Heckman* v. *Sutter*, 119 Fed. Rep. 83; *S.C.*, 128 Fed. Rep. 393; *Shannon* v. *United States*, 160 Fed. Rep. 870; *People* v. *Folsom*, 5 California, 373, 378; *Doran* v. *Central Pacific*, 24 California, 246, 257; *Miller* v. *Little*, 47 California, 348; *Vansickle* v. *Haines*, 7 Nevada, 249, 262; *Fee* v. *Brown*, 17 Colorado, 510, 519; *S.C.*, 162 U.S. 602; *Waters* v. *Bush*, 42 Iowa, 255; *David* v. *Rackabaugh*, 32 Iowa, 540; *Sorrels* v. *Self*, 43 Arkansas, 451, 452.

The real object of the clause was to make plain beyond a doubt that in respect of all the Federal property Congress is omnipotent. *Fee* v. *Brown*, 17 Colorado, 510, 519; *Wilcox* v. *Jackson*, *supra*.

As to the meaning of the words "dispose of" and what is within the power of Congress as to disposition other than sale, see *United States* v. *Gratiot*, 14 Pet. 526; 20 Stat. 88; 26 Stat. 1093; *Northern Pacific* v. *Lewis*, 162 U.S. 366; *United States* v. *United Verde Copper Co.*, 196 U.S. 207; *Kohl* v. *United States*, 91 U.S. 367; *Shively* v. *Bowlby*, 152 U.S. 1, 26; *Withers* v. *Buckley*, 20 How. 84; *United States* v. *Bridge Company*, 6 McLean, 517; *United States* v. *Chicago*, 7 How. 185.

The Nation cannot be subjected in its rights or remedies to the control of state laws.

The conservation and uses contemplated by the forest policy are natural, reasonable, and beneficient to the people of the entire country. Lands so held and administered are among the inviolable instrumentalities of the Government. *Van Brocklin* v. *Tennessee*, 117 U.S. 177.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

The defendant was enjoined from pasturing his cattle on the Holy Cross Forest Reserve, because he had refused to comply with the regulations adopted by the Secretary of Agriculture, under the authority conferred by the act of June 4, 1897 (30 Stat. 35), to make rules and regulations as to the use, occupancy and preservation of forests. The validity of the rule is attacked on the ground that Congress could not delegate to the Secretary legislative power. We need not discuss that question in view of the opinion in *United States* v. *Grimaud*, just decided, *ante*, p. 506.

The bill alleged, and there was evidence to support the finding, that the defendant, with the expectation and intention that they would do so, turned his cattle out at time and place which made it certain that they would leave the open public lands and go at once to the Reserve,

where there was good water and fine pasturage. When notified to remove the cattle, he declined to do so and threatened to resist if they should be driven off by a forest officer. He justified this position on the ground that the statute of Colorado provided that a landowner could not recover damages for trespass by animals unless the property was enclosed with a fence of designated size and material. Regardless of any conflict in the testimony, the defendant claims that unless the Government put a fence around the Reserve it had no remedy, either at law or in equity, nor could he be required to prevent his cattle straying upon the Reserve from the open public land on which he had a right to turn them loose.

At common law the owner was required to confine his live stock, or else was held liable for any damage done by them upon the land of third persons. That law was not adapted to the situation of those States where there were great plains and vast tracts of unenclosed land, suitable for pasture. And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent. *Buford* v. *Houtz*, 133 U.S. 326. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes. *Steele* v. *United States*, 113 U.S. 130; *Wilcox* v. *Jackson*, 13 Pet. 513.

It is contended, however, that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located; and it is then argued that the act of 1891 providing for the establishment of reservations was void, so that what is nominally a Reserve is, in law, to be treated as open and unenclosed land, as to which there still exists the implied license that it may be used for grazing purposes. But "the Nation is an owner, and has made Congress the principal agent to dispose of its property." * * * "Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of." *Butte City Water Co.* v. *Baker*, 196 U.S. 126. "The Government has with respect to its own land the rights of an ordinary proprietor to maintain its possession and prosecute trespassers. It may deal with such lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale." *Camfield* v. *United States*, 167 U.S. 524. And if it may withhold from sale and settlement it may also as an owner object to its property being used for grazing purposes, for "the Government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation." *United States* v. *Beebee*, 127 U.S. 342.

The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely, *Stearns* v. *Minnesota*, 179 U.S. 243. It is true that the "United States do not and cannot hold property as a monarch may for private or personal purposes." *Van Brocklin* v. *Tennessee*, 117 U.S. 158. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, § 3, Art. IV, that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property

belonging to the United States." "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property." *Kansas* v. *Colorado*, 206 U.S. 89.

"All the public lands of the nation are held in trust for the people of the whole country." *United States* v. *Trinidad Coal Co.*, 137 U.S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; not interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. Even a private owner would be entitled to protection against willful trespasses, and statutes providing that damage done by animals cannot be recovered, unless the land had been enclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. *Lazarus* v. *Phelps*, 152 U.S. 81; *Monroe* v. *Cannon*, 24 Montana, 316; *St. Louis Cattle Co.* v. *Vaught*, 1 Tex. App. 388; *The Union Pacific* v. *Rollins*, 5 Kansas, 165, 176.

Fence laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another.

This the defendant did, under circumstances equivalent to driving his cattle upon the forest reserve. He could have obtained a permit for reasonable pasturage. He not only declined to apply for such license, but there is evidence that he threatened to resist efforts to have his cattle removed from the Reserve, and in his answer he declares that he will continue to turn out his cattle, and contends that if they go upon the Reserve the Government has no remedy at law or in equity. This claim answers itself.

It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the Reserve to graze thereon. Under the facts the court properly granted an injunction. The judgment was right on the merits, wholly regardless of the question as to whether the Government had enclosed its property.

This makes it unnecessary to consider how far the United States is required to fence its property, or the other constitutional questions involved. For, as said in *Siler* v. *Louisville & Nashville R.R.*, 213 U.S. 175 "where cases in this court can be decided without reference to questions arising under the Federal Constitution that course is usually pursued, and is not departed from without important reasons." The decree is therefore

Affirmed.

United States v. *Gurley et al.*

District Court, N.D. Georgia

279 F. 874 (1922)

Editor's Note: National Forests are governed by needful rules and regulations provided for by Congress and which prevail over conflicting State laws.

Sibley, *District Judge.* The equity jurisdiction touching a multiplicity of suits affecting a common right to be established against many is, I think, sufficiently sustained. The position taken by the United States for remedy by injunction is weak, but considering the fact that all parties seem to desire to know what their rights are in the premises, and that it is really a test suit suggested by one or more of the defendants, I think it ought to be fully decided, and no quibble made touching the remedy.

The law of Georgia provides what shall be a lawful fence, and then, in section 2025, Civ. Code 1910, declares that the owner of any animal trespassing upon any other person's land shall not be liable for damages done, unless the land is protected by a lawful fence, and prohibits the owner of the land from killing the trespassing animal. The defendants contend that this law of Georgia is applicable to federal forest reserves, and the government contends the contrary—that the federal forest reserve is to be governed by regulations that are provided for by Congress.

The question was dealt with by the Constitution. The Constitution (article 4, § 3) provides that Congress shall have power to make all needful regulations touching the territory and property of the United States. The state of Georgia agreed to this, as, of course, did all other states becoming members of the Union afterwards. At that time the United States owned vast territories not in any state, and doubtless also owned lands and other property within states. They have since acquired very many other such territories and a very great quantity of such property. The needful regulations applicable to the territories outside of a state have gone to the extent of providing governments for them. Porto Rico, Philippine Islands, Alaska, the District of Columbia, are all governed to-day by virtue of this provision of the Constitution.

Land or other property within a state has not ordinarily found any such extensive regulations needful, within the meaning of the Constitution; but the Congress still has the power, under the supreme law of the land, to make such regulations as are needful, Congress being the judge of what is needful. It is probable that it is the exclusive judge of what is needful. Certainly any regulation looking to the use or disposal or the safety of the property is needful, if Congress so conceives it. It is well settled that Congress, in making regulations, may not only deal with them itself, but may, after providing a general scheme, delegate the details to some officer or commission.

This has been done with reference to the property involved in this present case. The general scheme of acquiring lands within states, and retaining and using them for the development and preservation of forests and for the supply of navigable streams, is set forth in the congressional statute; but the working out of the details of the uses that are consistent with this general scheme are now left to the Secretary of Agriculture. His regulations, having that thing in view and

reasonably adapted to it, are the regulations of Congress, and must be allowed to govern the property of the United States so situated.

Now these regulations have expressly provided that the state law shall, to a certain extent, remain of force as to persons within the reservations. By a necessary implication the state laws are not to remain of force otherwise, and all dealings with the property itself, almost in the nature of the case, must be under federal regulation. I think, in view of the evident tendency of uncontrolled grazing of the forests, that may be carried to the extent of not only ruining the forest, but also to denude the lands both of grass and undergrowth, so that it would not properly retain the rainfall, but would discharge it in floods in rivers below, there are required regulations of the sort the Secretary of Agriculture has undertaken. It is true that the particular situation disclosed here and the conduct of the particular animals involved here does not seem to involve any such consequences; but the validity and force of the regulations must be tested by the possibilities and likelihoods that may arise, rather than by the particular case that is now before the court. I think those regulations are wise. I think they are indispensable and proper. It would not be for the court to say what they ought to be; that, of course, is for the Secretary of Agriculture. I mean simply to say that they seem to me to be within his power, as delegated by Congress.

Now the result of it is that the Georgia statute, requiring a fence of a certain sort to be erected if the owner of the land desires to avoid the trespass of animals, cannot be applied to property of the United States, when the United States, by regulations, have provided otherwise. The result of it is that, if cattle belonging to citizens of Georgia get upon land of the United States, they go, not subject to the law of Georgia, but to the regulations of Congress. The general law would seem to apply, except as altered by the Congress. My recollection of the common law is that a trespassing animal does not commit his owner absolutely for the damages done, but the liability of the owner depends on negligence. As I recall the law, if the tendencies and proclivities of the animal were known to the owner, its inclination to wander and trespass upon another's property and there do damage to somebody else, he is liable; otherwise, he is not. For the mere escape of animals from confinement, or the first manifestation of hurtful tendencies, the owner is not liable. He is not liable until he has done or omitted to do something a person in the exercise of ordinary care and diligence would not have done or omitted. I suspect that is the law as to damages by animals trespassing on federal domain. It is not a defense for one to say, "You have not got a lawful fence under the law of Georgia," nor, on the other hand, does it makes a case for damages for the government to say, "Your animals got on my land"; but there must be either evidence of willfulness or negligence after notice and knowledge of the likelihood of the thing happening to make liability.

Of course, regulations doubtless could extend to the point of taking up animals found trespassing on the public domain and dealing with them in any reasonable way. No regulation has been read touching that, however. I think that, as the regulations stand, they permit citizens residing on the reservation, or within it, or adjacent to it, to let their domestic animals to the number of 10 run at large, and that they are not violating any regulation if those animals get upon the govern-

ment property. I think those who have more domestic animals than that number, or who have animals that are not for domestic use, within the language of the regulation, who turn their animals at large, take the risk of being held in damages or otherwise for the depredations of the animal. I suspect, as good citizens, that they would wish to comply with whatever their duty is, and it seems to me that the practical thing for every one to do is, at each stated period, to have an understanding with the patrols of the forest as to what domestic animals he has, and that he claims the right to let run at large without permit, and settle it beforehand, so that there will be no misunderstanding or friction about it. If any one has a lot of other animals running at large, which may likely go upon the government range, I think that he ought to either get a permit that would justify them going there, or else he would certainly take the risk of them doing what they may naturally be expected to do, together with the embarrassment, perhaps expense, resulting from it. It is best to avoid all those things by an arrangement before hand.

The decision in this case is, looking to the real object of the suit, that an injunction should issue against all except Brookshire. I think there is some foundation for the complaint made as to all the others, in the way of making a test, or for some other purpose, that might properly be met by an injunction; but as to him, while there is evidence that he raised cattle for market, I do not think there is any real indication that he has been running any on the government range contrary to government regulations. I think that all his animals spoken of, except the steer that met an untimely end, were domestic animals, to be used, or that were used for domestic purposes. The heifer that was being kept until she came into milk was within the regulation, and so was the dry milk cow that was being ranged until she came back into milk. I do not think the evidence requires a contrary conclusion, for as to those things the burden would be on the government. The injunction ought to be against defendants turning their cattle upon the government reservation, of course driving them there, or permitting them to range there, contrary to the regulations. Of course they would not be in contempt of court for their cattle going there, unless it was fairly shown that their purpose was to disobey the injunction of the court in that respect. An accident would not be contempt of court. But I think the practical way to handle the situation is the one I have indicated, for each party to ascertain what rights they really have under the law, and try to observe them and keep out of misunderstandings about it.

You may frame an injunction accordingly. I omitted to say I think the government ought to pay the costs of this case. The matter does not disclose, with one possible exception, any willfulness or recalcitrance or indifference to the regulations.

Decree

This cause came on to be heard at this term, and was argued by counsel; and thereupon upon consideration thereof it is ordered, adjudged and decreed, that the defendants, M. J. Gurley, Reed Cavender, Fred Cavender and Boyd Jones, their agents, servants and employees, and each of them, unless when acting in compliance with the rules and regulations promulgated by the Secretary of Agriculture of the United States relating to the use of National Forests for grazing

stock, be and they are hereby forever and perpetually enjoined and restrained from in any manner causing any cattle or other live stock, whether owned by them or either of them, or by another or others, to go or graze upon the lands of the United States, situated in the counties of Fannin, Union, Towns and Lumpkin, in the State of Georgia, designated and known as "Cherokee National Forest," or upon any part thereof, and from in any manner permitting any cattle or other live stock, owned by or in the care, custody or control of them, or any of them, to stray, drift, go or graze upon the aforesaid lands, or any part thereof; and from aiding, advising or counseling any person or persons to cause or permit any cattle or other live stock in the care, custody or control of such person or persons to go or graze upon the aforesaid lands, or any part thereof in any manner not authorized and permitted by the said Secretary of Agriculture in the rules and regulations promulgated by him relating to the use of National Forests for grazing stock.

Injunction is denied as to H. H. Brookshier.

United States v. *Johnston et al.*

District Court, S.D. West Virginia

38 F. Supp. 4 (1941)

Editor's Note: The court held that the grazing regulations promulgated by the Secretary of Agriculture pursuant to 16 U.S.C.A. 551 have the force and effect of law if not in conflict with express statutory provisions; that the United States is not required to comply with the fence laws of West Virginia; that the United States may make rules and regulations covering the use and control of its own lands, and adjoining landowners must comply with them; and that Congress has the constitutional right to delegate to the Secretary of Agriculture the authority to make rules and regulations.

McClintic, *District Judge.*

The United States of America, as a corporation sovereign and body politic, instituted a civil action in this court against Sol H. Johnston, Mrs. Sol H. Johnston, Mrs. Mona Bowling and Cletis Johnston, praying that these defendants be permanently enjoined, inhibited and restrained from further trespassing upon certain lands owned by the United States of America, called the Monongahela National Forest, and situate in Pocahontas County, West Virginia, within this district.

The complaint set out the title to the lands claimed to be trespassed upon, the possession thereof by the plaintiff, the laws of the United States relative thereto, and the regulations made by the Secretary of Agriculture in pursuance of such laws for the protection of the forest from depredations and fire.

The complaint also charged the defendants, and especially the defendant, Sol H. Johnston, with causing irreparable damage to the freehold and lands of the plaintiff because he permitted and caused the cattle, sheep and horses, owned by him and in his control, to graze and forage upon and over a part of the said Monongahela National Forest, and defied the officers and agents of the plaintiff to prevent the trespassing of these animals upon the lands of the United States.

The defendants answered and admitted, either in their answer or by

stipulations in the evidence, the allegations of the bill, except the defendants averred that the rules, regulations and provisions set out in the bill as having been promulgated by the Secretary of Agriculture were unreasonable and unenforceable and did not have the effect of law, and further averred that the enforcement of such rules, regulations and provisions would be tantamount to the confiscation of the properties of these defendants by the plaintiff without just compensation therefor.

The defendants further averred that they had not committed the acts of defying the officers of the United States as claimed by the plaintiff, and further averred that they owned about seven hundred acres of land adjoining the lands of the plantiff, and that of this amount about five hundred and thirty-six acres of their land were not fenced, but lay outside of their enclosure, and further averred that it would not be just to deny the defendants the right to use their lands in a lawful way, such as grazing their own stock thereon, and that they were willing to build their part of the fence between the lands of the plaintiff and the defendants as required by the laws of the State of West Virginia, and further averred that it would not be just to them for the plaintiff to require the defendants to build the whole of the fence at the expense of the defendants.

It was stipulated between the parties that the questions of fact stated in the bill of complaint, except as to paragraph eight, were agreed to. (Paragraph eight related to the allegations of damage to the freehold.) It was further stipulated that the plaintiff owned the lands claimed by it and that the defendants owned the lands, being proved to be six hundred and ninety-two acres, as claimed by them.

Evidence of witnesses was then taken, which evidence proved that the defendants owned about sixty-five sheep, eighteen cows and seven horses, which it was their custom to graze on the lands of the defendants outside of their enclosure, except at times when only part of the horses were turned out to graze thereon.

It was proven that the five hundred and thirty-six acres of defendants' lands, not enclosed, were joined on three sides with the lands of the plaintiff.

It was further proven that the plaintiff was reforesting a part of its lands by the planting of small trees thereon, and it was further proven that the stock of the defendants, while turned out by them upon their own lands, would stray over onto the lands of the plaintiff, and that there were unpleasant dealings between the agents of the plaintiff and the defendants relative to this trespassing of the stock of the defendants upon the lands of the plaintiff. There were some unnecessary actions on the part of the agents of the plaintiff in driving some of the defendants' sheep a long distance away from the lands of the defendants, and which sheep perished without any knowledge of the defendants as to what had become of them.

The Congress has declared the purposes for which national forests are established to be to improve and protect the forest within the reservation, and for the purpose of securing favorable condition of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States. 16 U.S.C.A. § 475.

The Congress authorized the Secretary of Agriculture to make such rules and regulations as would be necessary to insure the objects for the creation of such reservations, and the Congress made the violation of such rules and regulations a penal offense.

Section 551 of 16 U.S.C.A. is as follows: "The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act [sections 473–482 of this title] or such rules and regulations shall be punished as is provided for in the act of June 4, 1888, amending section 3388 of the Revised Statutes of the United States [section 104 of Title 18]."

Pursuant to the authority hereby given, the Secretary of Agriculture promulgated certain rules and regulations, as follows:

"Reg. T–6. The following acts are prohibited on lands of the United States within national forests:

"(A) The grazing upon or driving across any national forest of any livestock without permit, except such stock as are specifically exempted from permit, by the regualtions of the Secretary of Agriculture, or the grazing upon or driving across any national forest of any livestock in violation of the terms of a permit.

"(B) The grazing of stock upon national forest land within an area closed to the grazing of that class of stock.

"(C) The grazing of stock by a permittee upon an area withdrawn from use for grazing purposes to protect it from damage by reason of the improper handling of the stock, after the receipt of notice from an authorized forest officer of such withdrawal and of the amendment of the grazing permit.

"(D) Allowing stock not exempt from permit to drift and graze on a national forest without permit.

"(E) Violation of any of the terms of a grazing or crossing permit.

"(F) Refusal to remove stock upon instructions from an authorized forest officer when an injury is being done the national forest by reason of improper handling of the stock."

Further regulations were made in reference to permits which were not applicable to the case at bar.

It is well settled by numerous decisions of the courts that a regulation promulgated by a Department of Government, addressed to and reasonably adapted to the enforcement of an Act of Congress, the administration of which is confided to such Department, has the force and effect of law if it be not in conflict with express statutory provision. *Maryland Casualty Company* v. *United States*, 251 U.S. 342, 343, 40 S. Ct. 155, 64 L. Ed. 297; *United States* v. *Birdsall*, 233 U.S. 223, 231, 34 S. Ct. 512, 58 L. Ed. 930; *United States* v. *Smull*, 236 U.S. 405, 409, 411, 35 S. Ct. 349, 59 L. Ed. 641; *United States* v. *Morehead*, 243 U.S. 607, 37 S. Ct. 458, 61 L. Ed. 926.

The question whether the lands of the United States are subject to the fence laws of West Virginia, Code W. Va. 1937, § 2114 et seq., arises here, and it is claimed by the defendants that it does apply in the instant case. If the law did apply, the defendants would have to build one-half of the needed fence to enclose their lands where they adjoin the lands of the United States, and the plaintiff would have to build the other half.

The defendants claim that it is taking their property without compensation when they are not permitted to use their lands in the manner desired by them and in which they are entitled to use them, under the laws of the State of West Virginia.

I am regretfully compelled to hold that these positions on the part of the defendants are untenable.

Under the Constitution of the United States, when certain conditions are complied with, which has been done in this case, the Government of the United States is entitled to own lands and the laws of the United States alone apply to such ownership, and there is no law passed by Congress requiring the plaintiff to fence its lands.

The plaintiff, as a sovereign, has a right to make its own rules and regulations as to the use and control of its own lands, and however hard and unjust it may seem to be to the citizens owning lands adjoining those of the plaintiff, they must comply with those rules and regulations.

The constitutionality of the right of Congress to delegate to the Secretary of Agriculture the authority to make rules and regulations has been upheld by the Supreme Court in more than one case. See *United States* v. *Grimaud*, 220 U.S. 506, 31 S. Ct. 480, 55 L. Ed. 563, and *Light* v. *United States*, 220 U.S. 523, 31 S. Ct. 485, 55 L. Ed. 570.

These two cases simply affirm the doctrine as set out in the case of *Camfield* v. *United States*, 167 U.S. 518, 17 S. Ct. 864, 42 L. Ed. 260.

In the case of *Shannon* v. *United States*, 9 Cir., 160 F. 870, it was specifically held, in a case arising in the State of Montana, that the Federal Constitution delegated to Congress the general power absolutely and without limitation to dispose of and make all needful rules and regulations concerning the public domain independent of the locality of the land, whether situated in a state or territory, the exercise of which power cannot be restrained in any degree by state legislation.

In this case it was further held that public lands in the State of Montana were not subject to the stock and fence laws of the state, which were only applicable to lands subject to the state's dominion.

This opinion was rendered by the Circuit Court of Appeals for the Ninth Circuit.

Later, the District Court for the Northern District of Georgia held, in the case of *United States* v. *Gurley*, 279 F. 874, as follows:

"Woods and forests * * *—Regulations governing national forests are paramount and exclude inconsistent state laws.

"Under Const. art 4, § 3, vesting Congress with power to 'make all needful rules and regulations respecting the territory or other property belonging to the United States,' regulations prescribed by Congress, or by a department under its authority, respecting a national forest reservation within a state, whether on the public domain or on lands acquired for the purpose, are paramount, and where such regulations prohibit the general grazing of live stock on lands of the reservation, they exclude from operation as to such lands a state statute providing that the owner of animals shall not be liable for their trespass on lands not inclosed by a lawful fence."

Injunctions were sought in the two latter cases, above mentioned, and in each case an injunction was granted restraining individuals from permitting their stock to go upon the lands of the United States.

I personally know of instances in West Virginia where permits have been given to graze stock upon the lands of the United States and such stock has trespassed upon the lands owned by citizens, but apparently the only remedy the citizens have is to fence their lands against the intrusion of such permitted grazing of stock, under the laws of the United States. This is a situation which should be remedied, but it can only be done by an act of Congress.

Therefore, the injunction prayed for herein will be granted.

A proper order should be drawn.

United States v. *Maplesden*

In the United States District Court for the Northern District of California, Northern Division

Civil No. 6934

UNITED STATES OF AMERICA, PLAINTIFF

v.

BEN MAPLESDEN, DEFENDANT

MEMORANDUM AND ORDER

Editor's Note: The defendant's primary defense in this case that land of the United States was "open range," as defined by California Agricultural Code, § 391, and that this California statute is as binding upon the United States as it would be upon any private landowner is not available to the defendant because the State fence laws are not applicable to the public lands of the United States, California having early recognized that it could not affect public lands of the United States by its own legislation.

This case was submitted for decision upon stipulated facts and written arguments in the form of briefs.

Plaintiff alleges and defendant admits that defendant's cattle did graze and trample upon the lands of the plaintiff within the Klamath National Forest, without obtaining a permit from the supervisor of said national forest. Defendant does not contend that his cattle were exempt from the regulations of the United States Forest Service, therefore the admitted facts make out a *prima facie* case of violation of 36 CFR, Section 261.14.

Defendant's primary defense is that the plaintiff's land was "open range", as defined by California Agricultural Code Section 391, and since it was admittedly not fenced, defendant cannot be guilty of trespass. Defendant urges that this California statute is as binding upon the United States as it would be upon any other private land owner. But the law in this circuit is otherwise. In the case of *Shannon* v. *U.S.*, 9th Cir., 160 Fed. 870 (1908), it was held that the stock and fence laws of Montana were applicable only to lands subject to the State's dominion and not to public lands of the United States. That case is practically on all fours with the instant case. California early recognized that it could not affect public lands of the United States by its own legislation. See *Collins* v. *Bartlett* (1872), 44 Cal. 371. It was there held, at page 384, that such legisla-

tion, "* * * is void, because in conflict with the Act admitting this State into the Union."

The constitutionality of the grazing regulations was upheld in *U.S.* v. *Grimaud*, 220 U.S. 506. Other points raised by defendant are not of sufficient merit to require discussion.

Because defendant has admitted the trespass in violation of 36 C.F.R. Section 261.14, and the Court has concluded that the "open range" defense is not available to him,

It Is Ordered that plaintiff have judgment against the defendant as prayed.

Plaintiff is directed to prepare a judgment and decree along with findings and conclusions of law.

Dated: September 2, 1954

/s/ Oliver J. Carter,
United States District Judge.

Forest Service

SAN FRANCISCO 11, CALIFORNIA

Date: September 24, 1954

To: Supervisors
From: Assistant Regional Forester
Subject: G–TR–Maplesden, Ben Klamath

The following digest and court decision in a recent grazing trespass case is being sent to you for your information and guidance.

California has certain counties (Siskiyou, Lassen, Modoc and portions of Trinity and Shasta) in which the California "open range" rule prevails. The "open range" rule derives from the Fence Law of 1850 (Stats. of 1850, page 131) which reads in part as follows:

> "if any horses, mules, jacks, jennies, hogs, sheep, goats or any head of meat cattle shall break into any grounds *enclosed by a lawful fence*, the owner or manager of such animals shall be liable to the owner of said enclosed premises for all damages sustained by such trespass . . ."

The provisions of the Law of 1850 were kept in force for Siskiyou County by Section 401 of the California Agriculture CC Code which then reads in part as follows:

> "S. 401. *Acts Continued in Force.* The act entitled 'An act concerning lawful fences, and animals, trespassing upon lawfully enclosed lands, * passed March 30, 1850 . . . in so far as the provisions . . . . apply to or affect the Counties of Trinity, Shasta, except that portion described in Section 391.5, and Siskiyou, are expressly continued in force, except as to goats, swine or hogs. . . .' "

Section 401 of the California Agriculture Code was repealed by Section 4, Article 1, chapter 939, Statutes of 1953, but the language quoted above was inserted verbatim in Section 407.

The grazing trespass occurred on the Klamath Forest in Siskiyou County. Because the trespasser challenged the right of the U.S. Forest Service to trespass livestock drifting on the unfenced national forest administered lands, the matter was taken into the United States

District Court for decision in the case of the *United States of America* v. *Ben Maplesden.*

The defendants position was that the so-called "open range" rule, rather than the common law rule, prevails in a few northern counties, among them Siskiyou County; that under this "open range" rule a land owner cannot recover in trespass under circumstances such as those involved here unless his land is fenced; and that the regulations of the Secretary of Agriculture are powerless against the California "open range" rule.

The principal argument of the Government attorneys was that the "open range" rule embodied in former Section 401 of the California Agricultural Code can have no effect upon plaintiff's rights since State legislation is ineffective in so far as it conflicts with duly authorized Federal legislation and with regulations issued pursuant thereto. It was further argued that the United States would be entitled to the relief sought from Maplesden's trespassing even if Section 401 were applicable since that Code section affords no immunity to one who turns loose his cattle, as Maplesden did, under circumstances showing they were intended to graze upon the lands of another.

It is quite likely that the question of "open range" rule will arise again, particularly on those forests having lands within counties where the "open range" rule prevails. Therefore, that you will have available to show anyone who takes the position that the "open range" rule is applicable to the United States, we are attaching the memorandum and order issued by United States District Judge Oliver J. Carter under date of September 2, 1954.

/s/ R. M. DeNio

Attachment
2cc: All supervisors
Washington Office
Mr. Farr, Attorney-in-Charge

United States v. *Willoughby et al.*

Civil No. 18490–PH, in the United States District Court for the Southern District of California, Central Division

Editor's Note. Since the Government was unable to prove in this case the prevailing commercial grazing rate in the locality, an appeal was not taken from the judgment in favor of the United States for considerably less than the amount claimed; however, it would appear that if the prevailing commercial grazing rate could have been established, the Government would have recovered the full amount of its damages.

By the complaint the United States is seeking the recovery of $1008, representing the value of forage consumed without authorization from the Forest Service on Government lands in the Cleveland National Forest by cattle of the defendants Eric Barclay and Frank J. Runkle, and for which said defendants paid the aforesaid sum to the defendant, Dr. Cyril D. Willoughby.

2/6/55 Messrs. Barclay and Runkle submitted an offer in compromise of $500 in full settlement of the Government's claim of $1008 against them.

4/26/55 General Counsel in San Francisco recommended that the interests of the Government can best be served by rejecting the offer in compromise and by proceeding against all three defendants.

Further recommended defendants be notified that in the event judgment is recovered against all three defendants, the Government will attempt to effect collection from Dr. Willoughby and will bill Messrs. Barclay and Runkle only if such collection cannot be effected.

5/20/55 Above recommendation concurred in by Chief, Forest Service.

1/24/58 Court rendered judgment in favor of the United States in the amount of $352.80. Since the claim sued on amounted to $1008, recommendation requested for or against appeal.

2/14/58 Recommendation: At the trial the Government was unable to prove the prevailing commercial grazing rate in the locality. It is improbable that such proof could be established under an appeal at this time. We, therefore, conclude there would not be any basis for taking an appeal from the Court's decision.

It is the recommendation of the Forest Service that an appeal not be taken to recover the full amount of the claim sued on.

6/25/58 Case closed.

October 22, 1954

G–TR, R–5, Cleveland, Barclay and Runkle, 1953
The Honorable
The Attorney General
Dear Mr. Attorney General:

It is respectfully requested that, if in your opinion the facts warrant, the United States Attorney for the Southern District of California be authorized to take appropriate action against Dr. Cyril D. Willoughby, of 3780 Wilshire Boulevard, Los Angeles 5, California, Eric Barclay, 600 N. Sepulveda Boulevard, Los Angeles 49, California, and Frank J. Runkle of Simi, California, including the recovery of the sum of $1008, representing damages sustained by the United States as a result of the unauthorized grazing of cattle on Verdugo Grazing Allotment of the Cleveland National Forest, California, between April and August 1953.

The trespass report and related papers, which are enclosed in duplicate, disclose that Dr. Willoughby owns 253 acres on the Verdugo Potrero inside the national forest and 1360 acres in the area of Belardes Potrero outside the national forest, and that he leases certain private lands in the Belardes area. These holdings constitute a total of about 1800 acres of land under Dr. Willoughby's control. The ranch property was purchased in 1951 from one John E. Wheeler by Drs. Willoughby and Lucius E. McGee, and each party receiving an undivided one-half interest. They made application for a grazing permit in

February 1952. During a trip over the Verdugo Allotment with Dr. McGee in February 1952, he confidentially informed Ranger Munhall that he might drop out of the partnership with Dr. Willoughby. He stated he was dissatisfied with Dr. Willoughby's plan of operation, and informed the ranger that Dr. Willoughby had insisted that they lease the grazing on their lands, including the permitted grazing use on Government lands in the area. According to Dr. McGee, he advised Dr. Willoughby that this was illegal and could not be done.

Shortly thereafter the partnership seems to have been terminated and in a court action Dr. Willoughby obtained sole ownership and possession of the ranch. Dr. Willoughby then applied for and received a temporary grazing permit for 80 cattle for 264 animal months. He owned no cattle at the time of application, but declared his intention to purchase some. He failed to purchase the cattle because prices were not right and did not make use of the Government allotment during the period of that permit.

In February 1953, he again made application, and on March 6, 1953, a temporary grazing permit was issued to Dr. Willoughby to graze 40 cattle from March 15 to May 31 on the Lucas Canyon and Indian Potrero units and 80 cattle from June 1 to June 30 on the Oak Flats unit—a total of 180 animal months on the Verdugo Allotment of the national forest. This permit contained the condition that it should not be assigned in whole or in part. Dr. Willoughby did not own any cattle at that time but indicated his intention to purchase 80 head during the month of March.

No cattle were put on the Verdugo Allotment on the opening date and sometime between March 15 and March 30, 1953, Dr. Willoughby advised the ranger in a telephone conversation that he had not been able to buy cattle at the right price but would have cattle on the allotment very soon. Dr. Willoughby said nothing about leasing his lands or grazing cattle other than his own.

In the March 26, 1953, issue of the *Western Livestock Journal*, Dr. Willoughby advertised good hill pasture for lease, but no mention was made of acreage or ownership. Since Messrs. Barclay and Runkle needed pasture, they communicated with Dr. Willoughby and arranged to inspect the advertised pasture lands. After a trip to the area, a lease dated April 10, 1953, was entered into between Dr. Willoughby and Messrs. Barclay and Runkle. This instrument covered the use of 1800 acres of grazing land and the right to graze 190 head of cattle commencing April 15, 1953, for six or eight months at a fee of $2.00 per head per month.

On April 15, 1953, Messrs. Barclay and Runkle moved 188 head to Verdugo Potrero. Of these cattle, 61 belonged to Mr. Runkle, 125 head were the property of Mr. Barclay and 2 head belonged to an employee of Mr. Barclay. These cattle were mixed, grazed together, and no separation of brands was made.

On May 28, 1953, forest officers observed cattle on Dr. Willoughby's property on Verdugo Potrero, and it was assumed that they belonged to him. On June 19, 1953, forest officers observed cattle on Verdugo Potrero and counted 87 head on Oak Flats (Government land). Dr. Willoughby's grazing permit for 80 head on Oak Flats covered this period and it was assumed that the cattle belonged to him. The permit to graze on Oak Flats terminated on June 30, 1953.

On August 26, 1953, the forest ranger discovered that a small herd of 52 cattle with a strange brand was being moved from Verdugo

Potrero to Oak Flats. When questioned, one of the herders, Jim Runkle, son of Frank J. Runkle, said he was taking the cattle to Dr. Willoughby's lands at Oak Flats. When the ranger told Mr. Runkle that Dr. Willoughby owned no land in Oak Flats, and that the permit for the use of that land had expired on June 30, 1953, Mr. Runkle was genuinely astonished. He stated that neither he nor his father nor Mr. Barclay knew that any Government lands were in the area and that they believed that all the lands belonged to Dr. Willoughby. Mr. Runkle informed the ranger about the contacts with Dr. Willoughby and his representatives and concerning the lease and movements of cattle.

Since the unauthorized grazing was a livestock trespass, under Secretary's Regulation T–13 (36 CFR 261.14), it was necessary that the value of forage be computed at the commercial rate prevailing in the locality. The commercial rate for the area in which the trespass occurred was $2.00 per animal month and the damages sustained by the United States were computed at the sum of $1008.

Messrs. Barclay and Runkle claim that when they were shown the grazing lands by Dr. Willoughby's representatives they were given the impression that the entire area belonged to Dr. Willoughby and that only the Lucas Canyon was Government land. However, Dr. Willoughby claims that Messrs. Barclay and Runkle were shown the boundaries between the Government and private lands. He also claims that they were informed that the Government lands would not be included in the lease, that they were to graze only on the Willoughby lands, and that they would have to obtain a permit to graze on Government lands.

In the event Dr. Willoughby did misrepresent that the lease to Messrs. Barclay and Runkle would include grazing rights on the Government lands, such action constituted a breach of the terms of the temporary permit issued by the Forest Service to Dr. Willoughby. Under such circumstances, it is believed that he could be held liable for the damages sustained by the United States. On the other hand, if Messrs. Barclay and Runkle merely received from Dr. Willoughby's representatives the erroneous impression that the grazing rights on Oak Flats (Government lands) would be included in the lease, and if Dr. Willoughby is able to prove that he is innocent of any misrepresentation in the matter, Messrs. Barclay and Runkle would be liable for the damages suffered by the Government, irrespective of the fact that they were innocent trespassers.

On February 3, 1954, the Forest Supervisor made written demand on Messrs. Barclay and Runkle for the sum of $1008, representing the damages sustained by the United States. It appears that on February 18, 1954, Mr. Barclay called on the Forest Supervisor and stated that he felt that his actions were entirely innocent and that he should not be required to pay the penalty rate of $2.00 per head. He indicated his willingness to settle at the regular fee of 70¢ per cow month, but intimated that he would prefer to be sued rather than pay an exhorbitant rate. This offer was not accepted by the Forest Service and on April 22, 1954, Mr. Barclay stated that he was unwilling to pay more than the amount indicated, unless compelled to do so by order of court.

On July 9, 1954, the Acting Attorney in Charge at San Francisco, California, made written demand on Messrs. Barclay and Runkle for the sum of $1008. He informed them that the matter could not be

settled at the rate of 70¢ per animal month, the rate at which the Forest Service leases lands for grazing, on account of the regulation which requires that damages for livestock trespasses be computed at commercial rates. By letter of the same date, the Acting Attorney in Charge sent Dr. Willoughby a copy of the letter addressed to Messrs. Barclay and Runkle and informed him that unless payment in the amount of $1008 was made he intended to refer the matter to the Department of Justice with the recommendation that suit be filed against him and Messrs. Barclay and Runkle.

In a letter dated July 19, 1954, to the Acting Attorney in Charge, Mr. Barclay reiterated his assertion that he and Mr. Runkle acted in good faith under the belief that Dr. Willoughby had the right to lease the lands to them, and that if there was a trespass it was wilfully induced by Dr. Willoughby. Mr. Barclay suggested that the Government seek recovery from Dr. Willoughby alone and that he and Mr. Runkle not be joined as defendants. By letter dated July 21, 1954, the Attorney in Charge informed Mr. Barclay if it becomes necessary to litigate it would be recommended that he and Mr. Runkle, as well as Dr. Willoughby, be named as defendants.

It appears that both the Forest Service and this office have exhausted all possibilities of effecting an amicable settlement of this case. It is, therefore, necessary that legal action be taken for the protection of the interests of the United States. You will note that in the memorandum dated July 28, 1954, from the Attorney in Charge, to the Regional Forester, it is stated that on July 22, 1954, Mr. Barclay asked the Attorney in Charge to request the United States Attorney to communicate with him before a complaint is filed. It is recommended that this information be furnished to the United States Attorney.

The file contains a number of references to a trespass by the Todd Dairy Ranch. This was an entirely different trespass on the national forest and was settled by payment of the damages to the United States. It is, therefore, not necessary that any consideration or action be given to that matter.

The funds collected from Messrs. Barclay and Runkle or Dr. Willoughby should be covered into the Treasury of the United States to the credit of account: "Forest Reserve Fund, Symbol No. 125008.052."

Mr. Jesse R. Farr, Attorney in Charge, Office of the Solicitor, U.S.D.A., Room 216, Federal Office Bldg., Civic Center, San Francisco, California, is familiar with the facts of this case and will be pleased to assist the United States Attorney in the preparation and presentation of appropriate proceedings.

Sincerely yours,

/s/ E. F. Mynatt,
Associate Solicitor.

By direction of the Secretary
Enclosures
HHam: EAG
10–20–54
19892—Not in Reply
CC: Forest Service (4)
Mr. Farr, Attorney in Charge
Mr. Ham

HMW/sf
Date: January 24, 1958

To: Attorney General, Lands Division
Attention: Robert E. Mulroney, Chief, Trial Section

From: Laughlin E. Waters, United States Attorney, So. Dist. of Calif.
Herbert M. Weiser, Assistant United States Attorney (Lands)

Subject: *United States* v. *Willoughby, et al.*,
Civil No. 18,490–PH
Your Reference: REM: MSW 90–1–12–288

Please be advised that the above-referenced matter went to trial before the Honorable Peirson M. Hall, sitting without a jury, on January 23, 1958, and was concluded the same day. The matter had been set for pretrial conference on January 20, 1958, at which time Judge Hall set the matter for trial on the above date, with the warning that if the parties were not ready for trial on that date it would be dismissed for lack of prosecution.

The Court rendered judgment in favor of the United States against the defendants, Cyril D. Willoughby, Eric Barclay and Frank J. Runkle, jointly and severally, in the amount of $352.80 plus costs. This amount was computed on the basis of a charge of $.70 per animal month, which is the rate charged by the Forest Service when a permit is issued for cattle grazing. The complaint had originally asked for $2.00 per animal month, asserting that to be the commercial rate prevailing in the locality. However, the only charges for grazing other than those the Government charges in this locality were the rates charged in connection with this trespass and a previous one which has already been settled. The Court therefore found that there were no commercial rates prevailing in this locality other than those rates charged by the Forest Service. To that extent the Court ruled against the Government's contentions. However, it is the opinion of the trial attorney that the conclusion was a just one and that there was a lack of proof as to any prevailing commercial rate in this locality.

The Government presented two witnesses, Ranger Joseph Munhall of the Cleveland National Forest, where the trespass occurred, and Mr. James Runkle, son of one of the defendants, who testified as to the circumstances surrounding the leasing of property. Defendant Willoughby presented two witnesses, Mr. H. E. De Armond and defendant Willoughby himself. The defendants Barclay and Runkle presented James Runkle again, this time on their behalf, and the defendant Eric Barclay. The testimony of De Armond and Willoughby was contradictory to that presented by the Government's witnesses, but inconsistencies in their testimony discredited the witnesses and substantiated the Government's testimony.

Other than the short time between the pretrial conference and the date set for trial, there appear to be no unusual or controversial aspects to this action and no apparent grounds for appeal or reversal of the decision. Please note that this office had recommended settlement of this matter in the amount of $500.00 as offered by the defendants Barclay and Runkle, which offer of compromise was rejected by the Department of Agriculture in a letter addressed to you

dated June 23, 1955. The defendants Barclay and Runkle also made an offer to settle on the basis of $.70 per animal per month at a different time, which also was rejected.

Pursuant to request of the Court and upon stipulation of all the parties, the requirement as to findings of fact and conclusions of law under Rule 52A was waived. I realize that this may be deemed contrary to the requirements of the United States Attorneys' Manual, but the evidence presented and the findings of the court seemed to leave no doubt as to the lack of error concerning the failure on the part of the Court to recognize any existing commercial rates. With the small amount involved and the apparent lack of error, I deemed it advisable to comply with the Court's request for a waiver. A formal judgment is being prepared and will be filed, which will contain substantially the details required under Rule 52A, although not in the proper form.

U.S. GOVERNMENT PRINTING OFFICE:1964