IN THE

Supreme Court

OF THE

STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Appellant,

vs.

ALEC TOWESSNUTE,
Respondent.

No._____

APPEAL FROM THE SUPERIOR COURT OF BENTON COUNTY.

HONORABLE BERT LINN, Judge.

Brief of Respondent

FRANCIS A. GARRECHT,
United States Attorney.
Office and Postoffice Adress:
Federal Building, Spokane, Washington.

SHAW & BORDEN CO. 155157

HISTORICAL RESUME OF THE TREATY.

The Treaty with the Yakimas of 1855 (June 9, 1855, ratified March 8, 1859, proclaimed April 15, 1859; 12 Stats. 951), in the caption describes the Indians as a *nation*. By Article I they "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, and bounded and described as follows," the boundaries and description being then set forth.

Article II *reserved* a described tract of land, which is the Yakima Indians' Reservation. The last paragraph of that article provided that the tribes should settle on the reservation within one year after ratification, and further prescribed a course of conduct to be followed in the meantime by both whites and Indians and made provision whereby Indians would be recompensed for improvements that it might be necessary for them to abandon.

Article III provided that if necessary for public convenience roads may be run through the

reservation, and on the other hand, the right-of-way, with free access to the nearest public highway, was reserved to the Indians, with the right in common with citizens, to travel upon all public highways. That article then expressed the particular provision now before the court, as follows:

> 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.

Article IV, "In consideration of the above *cession,*" provided for payments of money by the United States; Articles V and VI require other expenditures by the government.

Article X "reserved and set apart from the lands ceded by the treaty" for the use of the Indians of the Wenatshapano fishery. This specially reserved fishery was ceded to the United States by an agreement concluded January 8, 1894, and approved by Congress by the Act

of August 15, 1894 (28 Stats. 320). The Indians received $20,000 for this fishery, and the language of the agreement is that "said Indians hereby cede and relinquish to the United States all their right, title, interest, claim and demand of whatsoever name or nature of, in and to all their right of fishery as set forth in Article X of said treaty aforesaid," etc; and the United States paid that sum "in consideration of the foregoing cession and relinquishment."

This treaty rested from 1855 to 1859 without ratification; it is probable as indicated in the reports of those intervening years that the Senate thought the treaties were too liberal. At all events, there was manifestly some objection. On the other hand, many Indians were opposed to the treaty. The Chief of the Yakimas was irreconcible and practically went into exile, although unavailing endeavors were made down to 1860 to induce him to go on the reservation and help hold his people together.

The failure to ratify the treaty, of course, increased the discontent. There were two or three serious outbreaks among the Yakimas, and the

party which had always been opposed to the treaty was enabled to say that the Government did not intend what it promised; was not carrying it out, and would not, and that although it professed to extinguish the Indian title and give adequate compensation to them for surrendering their claims, nevertheless, the United States would not ratify the treaty, but was permitting white settlers to come in and take up the lands in utter disregard of the Indians' rights.

Finally the treaty was ratified, and, therefore, whatever the bargain means, the United States, as well as the Indians, assented to it conclusively.

Thus, it is evident that this was not a mere treaty of peace and amity with the Indians, or of "friendship, limits and accommodations," providing for annuities in goods and money, but was in fact and law a treaty of cession of lands by accurate description, and on consideration duly expressed. There can be no doubt that the proceeding of the convention were embodied in *this contract* of mutual advantage and convenience, and that on the whole the United States received at least as much as it gave.

By the treaty the United States received a definite cession of lands and wiped out the Indian title and claim and reserved or granted to the Indians, under the guarantee of the national responsibility and honor, equally definite things, among them a reservation by metes and bounds, an exclusive right of fishing in the reservation streams, a separate, exclusive reserved fishery which was afterwards sold to the United States, and a common right of fishing at all usual and accustomed places, with the attached privileges.

There is no reason whatever why the common right of fishery is not as real a right and as susceptible of determination as any other of the reserved rights. The only question is, what does it mean legally, and what effect had subsequent legislation upon these *guaranteed rights*.

POINTS AND AUTHORITIES:

General Principles:

Under our institutions, sovereignty resides in the people to be exercised as they have provided by the Constitution.

The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but by the people of the United States, and it was adopted as their voluntary act, and by so doing they acquiesced in the restriction on their rights which it created.

In many ways it operates directly on the states, restraining and annulling their sovereignty in some of the highest branches of their prerogatives.

> The Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes.
>
> *Const. United States,* Art. I, Sec. 8.

A treaty is in its nature primarily a contract:

In its essence a treaty is a contract, differing from an ordinary contract only in being an

agreement between tribes and nations instead of private parties.

> 38 *Cyc.*, 964;
> *Diamond Rings v. U. S.*, 183 U. S., 182;
> *Whitney v. Robertson*, 124 U. S., 190, at 194;
> *Edge v. Robertson*, 112 U. S., 580;
> *Foster v. Neilson*, 2 Pet. (U. S.), 253;
> *Com. v. Hawes*, 26 Am. Rep., 242.

As such contract, the treaty depends for its observance and performance upon the honor and integrity of the nations which are parties to it.

> *Edge v. Robertson, supra.*

The Treaty between the United States and the Yakima nation was a contract for consideration duly expressed.

> 12 *Stats.*, 951.
>
> No law impairing the obligations of contracts shall be passed.
> *Const. State of Wash.*, Art. I, Sec. 23.
>
> No existing rights * * *, *contracts* or claims shall be affected by a change in the form of government.
>
> *Ibid*, Art. XXVII, Sec. 1.

The Supremacy of the Treaty:

It is expressly declared in the Federal Constitution that all treaties made, or which shall be made, under the authority of the United States together with the Constitution itself, and the laws made in pursuance thereof, shall be the supreme law of the land.

> 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,* anything in the Constitution or laws of any state to the contrary notwithstanding.
>
> *Const. U. S.,* Art. II, Sec. 2.
>
> No state shall enter into any treaty * * * (or) pass any * * * law impairing the obligation of contracts.
>
> *Const. U. S.,* Art. I, Sec. 10.
>
> The federal constitution is a part of the constitution of every state and is to be so regarded in determining the validity of legislative acts.
>
> 6 *R. C. L.,* p. 21, Sec. 8.

Inferiority of State Laws and Constitution:

A state statute, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Federal Constitution.

Gibbons vs. Ogden, 9 Wheat., 1;
Northern Securities Co. vs. U. S., 193 U. S., 197.

Mondon vs. New York, etc., 223 U. S., 1.

No act of a state legislature which is repugnant to the Constitution of the United States can be of any validity.

Worcester v. Georgia, 6 Pet., 515;
Chae Chan Ping vs. U. S., 130 U. S., 581;
Homestead cases, 12 Am. Rep., 507.

No public policy of a state can be allowed to override the positive guarantee of the Constitution.

6 *R. C. L.,* p. 37;
Hill v. Woodward, 100 Miss., 879;
57 *So.,* 294, *Ann. Cas.,* 1914, A. 390; 39 L. R. A. (N. S.), 538.

Conflict between Treaty and Statute:

Treaties and acts of Congress are placed upon the same footing, and it is possible for Congress, by statute, to repeal a prior treaty.

Thomas v. Gay, 169 U. S., 264.

It will not be presumed, however, that Congress intended to violate the provisions of a treaty and the general rule applies that *repeals by implication are never favored.*

38 *Cyc.,* 976;
Ward vs. Race Horse, 163 U. S., 504.

The courts have decided that the Enabling Act did not by implication repeal the Yakima Treaty.

U. S. vs. Winans, 198 U. S., 371;
Superior Court Benton County;
Superior Court Whatcom County.

Where the provisions of a state statute and a treaty conflict, the latter will control and the application of the statute as to the subject matter covered by the treaty will be held in abeyance during the existence of the treaty.

In re Stixrud, 58 Wash., 339.

Construction of Treaties:

Treaties in their effect upon personal rights are in the nature of legislative acts and binding upon the courts.

Courts can only construe the treaty and cannot in any way alter, add to, or amend it, or annul or disregard any of its provisions unless they *violate the Constitution,* nor can they dispense with any of its conditions or requirements upon any notion of equity, *general convenience or substantial justice.*

8 *Cyc.,* 969.

The language used in treaties with the Indians should never be construed to their prejudice.

How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

Worcester v. Georgia, 6 Pet., 515;
U. S. v. Taylor, 3 Wash. Tr., p. 96;
Jones v. Meehan, 175 U. S., 11.

The Police Power of the State is subordinate to the Constitution:

The police powers of a state do not extend to the passage of laws which violate fundamental rights secured by the Federal Constitution.

8 *Cyc.*, 865;
Kansas City Gas Co. v. Kansas City, 198 Fed. 500;
Eubanks v. City, 226 U. S., 137.

The United States has power to create rights appropriate to the object for which its holds territory while preparing the way for future states to be carved therefrom and admitted to the Union; securing the right of the Indian to fish is appropriate to such object, and after its admissions to the Union the State cannot disregard the right so secured on the ground of its equal footing with the original states.

U. S. vs. Winans, 198 U. S., 371, which reversed 73 Fed., 72;
Winters vs. U. S., 207 U. S., 564;
Dick vs. U. S., 208 U. S., 340;
U. S. vs. Sandoval, 231 U. S., 28, which reversed 198 Fed., 539, wherein *Ward vs.*

Race Horse was cited as authority.
Johnson v. Geralds, 234 U. S., 422, which reversed 183 Fed., 611, wherein *Ward vs. Race Horse* is cited as authority.
Conrad vs. U. S., 161 Fed., 829.

ARGUMENT.

In the annals of the past we sometimes read of shameful violations of the rights of the Indians. Although these dishonorable practices sought justification, at the time, under the guise of advancing civilization, neverthelss, history has preserved record of them only upon its dark pages of dishonor and of shame, among disgraceful acts which have merited and received the execration of posterity.

Unmindful of this record, the officials of this State, in the name of its police power and under the formality of legislation, are urging this Court to permit rights and privileges guaranteed to a confiding and dependent people to be sacrificed. And they are here demanding that a judgment of the Superior Court upholding sacred treaty obligations, solemnly entered into between the government and Indian tribes, be now set aside.

In general, the nature of Indian rights, as repeatedly expressed by the Courts, was as follows:

The United States, as sovereign and owner, had complete dominion and title, or the exclusive right to ultimately acquire title. The Indians, as domestic, dependent nations, had possession and the right of use and occupancy. As observed by appellant's brief (p. 12), this right was "as sacred as that of the United States to the fee simple title."

Certainly this perpetual right of use and occupancy was as valuable as the naked title to the fee. It is idle then to assert that the Indians had no rights to grant or to retain. At the time of the treaty the Government conceded to the Indians the unlimited and unrestricted right of taking fish, and the Government had the undoubted right under the Constitution to bind itself and its successors to recognize the right.

In the original Act respecting Washington Territory (March 2, 1853; 10 Stat. 172), this prerogative of Government is expressly recognized in the proviso:

> PROVIDED, That nothing in this Act contained shall be construed to effect the authority of the Government of the United States to make any regulation respecting the Indians of said Territory, 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 been passed.

It is incumbent, therefore, on the United States, in law and ethics, regardless of their underlying rights of discovery, to extinguish the Indian title by agreement of cession and on terms of bargain and sale.

The United States is also bound, on the highest compulsions and sanctions which regulate human conduct, to deal with the Indians on the most liberal doctrines of construction and the most generous rules of duty and obligation to inferiors known to our national principles and in international law.

Many, apt and authoritative have been the expressions used to define the nation's proper attitude toward Indian affairs.

About the time of the discovery of this Northwest Country, Thomas Jefferson, then Secretary of State, wrote the following to Secretary of War, General Knox:

> I am of the opinion that Government should firmly maintain this ground: that the Indians have a right to the occupation of their lands, *independent of the State* within whose chartered lines they happen to be; that until they cede them by treaty or other transaction equivalent to a treaty, no act of a State can give a right to such lands; that neither under the present Constitution, nor the ancient confederation, had any State or person a right to treat with the Indians; without the consent of the general government.

The relation between the United States and the Indian tribes, being those of a superior towards an inferior who is under its care and control, *its acts touching them and its promises to them, in the execution of its own policy and in the furtherance of its own interests,* are to be interpreted as justice and reason demand in cases where power is exerted by the strong over those to whom they owe care and protection.

> These Indian tribes *are* the wards of the nation. They are communities dependent on the United States. Dependent for their political rights.

From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and these agreements wherein it has been promised: *"There arises the duty of protection, and with it the power.* This has always been recognized by the Executive and by Congress, and by the Court, whenever the question has arisen."

> The parties are not on an equal footing, and that inequality is to be made good 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., 28;
> *U. S. v. Kagama,* 118 U. S., 383;
> *N. P. Ry. Co. v. U. S.,* 227 U. S., 366;
> *U. S. v. Winans,* 198 U. S., 372;
> *Jones v. Meehan,* 175 U. S., 11.

It is not deemed pertinent to engage in controversy as to what title to wild game and fish may have been vested in the sovereign by the laws of England or France, or any foreign

power, since this nation does not deraign title to the lands and streams in question through any other government. The United States always claimed all this territory now embraced in the State of Washington by right of discovery, which was based upon the voyage of Gray up the Columbia River in 1792, and the explorations in 1805 and 1806 of Lewis and Clark under the direction of that great statesman, President Jefferson.

Neither is it regarded of any great importance in this discussion where the title to fish *ferae naturae* and out of possession may be. The cases cited in appellant's brief do not hold that ownership of the fish in the waters of a state belong absolutely to it. On the contrary, even the majority opinion in *Geer v. Connecticut,* 161 U. S., 519, seems to adhere to the time honored doctrine that animals *ferae naturae,* are the property of no one, either individual or sovereign, but belong to those things which the jurisconsults called *res communes.*

> "This community was not a positive community of interest like that which exists between several persons who have the owner-

> ship of a thing in which each has his particular portion. It was a community, which those who have written on this subject, have called a negative community, which resulted from the fact that those things which were common to all belonged no more to one than to the others, and hence no one could prevent another from taking of those common things that portion which he judged necessary in order to subserve his work."

But these opinions are authority for the proposition that "From the earliest traditions the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power," and for the purposes of this case let it be granted that it is an attribute of government *to control* the taking of game and fish which passed to the states, and remains in them as a part of the "police power," insofar as its exercise may not be *incompatible with, or restrained by, the Federal Constitution.*

THE STATE POLICE POWER.

Now, there is nothing particularly sacred about this police power of a state, as appellant's brief would mislead us to believe. These powers are nowhere described or defined in the Constitution of the United States. They are included in the powers remaining after those granted to the Federal Government have been carved out of the total sovereignty.

> It is expressly declared in the Federal Constitution that all treaties made, or which shall be made, under the authority of the United States, together with the Constitution itself and the laws made in pursance thereof, shall be the supreme law of the land.
> 6 *R. C. L.*, 39.

It follows that if a treaty is within the scope of the treaty making power, it is the supreme law of the land, whether it conflicts with a state police power or not.

In defining the extent of the treaty making power, the Supreme Court of the United States in *Geogroy v. Riggs,* 133 U. S., p. 266, said:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. * * * The treaty power, as expressed in the Constitution, *is in terms unlimited except by those restraints which are found in that instrument* against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or that of one of the states, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe,* 114 U. S., 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware v. Hylton,* 3 Dall., 199; *Chirac v. Chirac,* 2 Wheat., 259; *Hauenstein v. Lynham,* 100 U. S., 483; 8 *Opinions Attorneys Gen.,* 417; *The People v. Gerke,* 5 California, 381.

While it is true that the police power, not having been delegated to the federal government, was left with the individual states and belongs to them by virtue of their general sovereignty

and has no limitation or restriction, *except such as are found in the Constitution.*

> *The States must, nevertheless, recognize this limitation, the federal power being paramount within the scope of its enumerated powers.*
> 8 *Cyc.*, 865.

That these fishing rights were within the scope of the treaty will not be questioned.

That the Indians intended the right of taking fish "at all usual and accustomed places" reserved by them to be unrestricted as theretofore, except as to place and exclusiveness, has been the interpretation placed upon it.

In *Seufert vs. Olney,* 193 Fed., p. 200, in passing upon the same article of the treaty with the Yakima Indians, the Court said:

> In *United States v. Taylor,* 3 Wash. T., 88, 13 Pac., 333, involving a fishery in the same locality, it was held that the treaty reserved to the confederated tribes and bands of Indians the right to enjoy their ancient fisheries as they had done theretofore. This was in all probability the Indians' understanding of the reservation. They had already ceded away a continent; they were

> tenacious of their old customs and traditions; they lived in the past rather than the present; and it is far more likely that they intended to reserve something they already understood, something they already enjoyed, rather than to bargain for something that they did not understand, and for which they did not care.

In the case at bar, Judge Linn, of the Superior Court of Benton County, said:

> I think that at the time the treaty was made, what was in the mind of the parties was that on the reservation the Indian should have the *exclusive* right to fish; but that when off the reservation, at these usual and accustomed fishing places, his right to fish was one to be enjoyed, not in common with the citizens of the territory in the sense of being restrained and regulated by future legislation, but in the sense that the right of the Indian *off* the reservation should not be exclusive; that is, that the white man might also have the right to fish at the same places. And so I feel that the Indian took into consideration the right to fish as he had *theretofore* enjoyed it, rather than to agree to be bound by *new* rules and new methods of which he knew nothing. That is, I do not think that the Indian contemplated that he could fish, *provided he did so only on*

> *and after a certain date;* or that he could fish, *provided he did not get within one mile of a dam;* or that he could fish, *provided he did not use anything but hook and line,* even though such new rules and methods would be best for both Indians and the whites.
>
> Believing that these Indians reserved the right to fish under the treaty and that they did not acquire their right to fish from the state, I believe that they have the right to fish without regulation or restraint upon the part of the state.

Honorable Carroll B. Graves, formerly Judge of the Superior Court of the State of Washington, now one of the leading members of the bar of the State, before the Joint Congressional Commission (Senate Document No. 337, 63d Congress, 2d Session) anent this treaty, made the following statement (page 88):

> Now, it is a matter of tradition among the Indians—you cannot get any of those who were present at the treaty, but it is a matter of tradition among the Indians—that Commissioner Stevens said to them that as long as the sun shone, as long as the mountain stood, as long as the rivers ran, these lands were to be for their use and benefit. They were to be allowed the use of the

> streams; they were to be allowed to take fish from the streams.

And, again, on page 92, in answer to a question of Senator Townsend, he is quoted:

> We will be obliged to construe the treaty as the United States Supreme Court has. But this would be true: That the Indians at that time depended largely upon fish—hunting, and fish taken from the river and streams. Now, under the present terms of the treaty the fish in these streams were controlled by the United States Government and by State officials. At certain seasons of the year the white man may not take fish out of the Yakima River; he may not spear salmon when salmon are running, or when the fish hatcheries are at work; but under the grant of these provisions the Indians may go at all times upon the Yakima River and catch fish, and they do. The purpose was to exempt them from any restrictions that the State Government or the Territorial Government might place upon them and not restrict them in their rights to the appurtenant waters to the lands.

WARD VS. RACE HORSE NO AUTHORITY FOR UNLIMITED STATE POLICE POWER.

There is nothing to overthrow these decisions in the case of *Ward v. Race Horse,* 163 U. S., 504, which is relied upon as authority for reversal of the case at bar.

This decision was based upon the determination by the Court that the rights of the Indians under the Bannock treaty were precarious and uncertain, and by its very wording determinable by the Government without the consent of the tribe and that the Act of Congress admitting Wyoming by implication cut off the claimed right.

Considerable effort is put forth to point out similarities between the two cases, but the differences are overlooked and disregarded.

The *Ward v. Race Horse* case was rested on the ground that the treaty was repealed by implication and turned upon the interpretation of the wording of the Bannock treaty of 1869, and the language of that treaty was given a construc-

tion which we submit cannot be applied to the Yakima treaty.

As pointed out by the Court (*Ward v. Race Horse,* 163 U. S., 507). the sole question which that case presented was "whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privileges, therein referred to, within the limits of the State of Wyoming in violation of its laws."

The text of the Article of the treaty under discussion was as follows:

> 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.*
>
> When in 1868 the treaty was framed the progress of the white settlements westward had hardly, except in a very scattered way, reached the confines of the place selected for the Indian reservation. Whilst this was true, the march of advancing civilization foreshadowed the fact that the wilderness, which lay on all sides of the point selected for the reservation, was destined to be occupied and settled by the white man, hence interferring with the hitherto untrammelled right

of occupancy of the Indian. For this reason, to protect his rights and to preserve for him a home where his tribal relations might be enjoyed under the shelter of the authority of the United States, the reservation was created. Whilst confining him to the reservation, and in order to give him the privilege of hunting in the designated districts, *so long as the necessities of civilization did not require otherwise,* the provision in question was doubtless adopted, care being, however, taken to make the whole enjoyment in this regard dependent absolutely upon the will of Congress. * * * *The right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified.* Indeed, it made the right depend on whether the land in the hunting districts was unoccupied public land of the United States. This, as we have said, left the whole question subject entirely to the will of the United States, since *it provided, in effect, that the right to hunt should cease the moment the United States parted with the title to its land* in the hunting districts. No restraint was imposed by the treaty on the power of the United States to sell, although such sale, under the settled policy of the government, was a result naturally to come from the advance of the white settlements in the hunting districts to which the treaty referred. And this view of the *temporary* and *precarious* nature of the *right reserved,* in the hunt-

> ing districts, is manifest by the Act of Congress creating the Yellowstone Park Reservation, for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty, and is a clear indication of the sense of Congress on the subject. Act of March 1, 1872, c., 24, 17 Stat. 32; act of May 7, 1894, c., 72, 28 Stat. 73. The construction which would affix to the language of the treaty any other meaning than that which we have above indicated would necessarily imply that Congress had violated the faith of the Government and defrauded the Indians by proceeding immediately to forbid hunting in a large portion of the Territory, where it is now asserted there was a contract right to kill game, created by the treaty in favor of the Indians.

Continuing, the Court says:

> Of course the settled rule undoubtedly is that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. *Cope v. Cope,* 137 U. S., 682, and authorities there cited.

At another place, the Court observes:

> "Indeed, it may be further, for the sake of argument, conceded that where there are rights created by Congress, during the existence of a territory, *which are of such a nature*

> *as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will as a matter of construction, be upheld, although the enabling act does not expressly so direct.* Here the nature of the right created gives rise to no such implication of continuance, since, by its terms it shows that the burden imposed on the Territory *was essentially perishable* and intended to be of limited duration."

To justify the position taken in face of the correct statements of law above quoted, the learned and able writer of the majority opinion exhausted every ingenuity of argument and all the energy of persuasive eloquence to carry the conviction that the right conveyed by the Bannock treaty, *being temporary and precarious and never intended to be perpetual,* and in no sense founded on contract, was by implication cut off by the act admitting Wyoming into the Union.

That the Court would not have abrogated a treaty obligation where the language, as in the case at bar, clearly implied continuing and perpetual right is manifest from the concluding paragraph:

> Doubtless the rule that *treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from.* But that salutary rule should not be made an instrument for violating the public faith by *distorting* the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress and also destructive of the rights of one of the States.

Even in the *Ward v. Race Horse* case, where it must be conceded that there was some basis for argument that Congress in the admission of Wyoming, by necessary implication, discontinued the determinable right of the Bannock Indians, there still was a vigorous dissenting opinion, the reasoning of which applied to the perpetual rights retained by the Yakima Indians, under the treaty is unanswerable.

The brief of the State disregards the guarded manner, we might almost say the hesitation, with which the Supreme Court abrogated the Bannock treaty. The Race Horse case was never intended, as a careful reading cannot but make plain, as an authority for the sweeping position of the

officials of the State that its police power is supreme.

Appellant boldly cites the case of *United States v. Winans,* 198 U. S., 371, as an authority directly in its favor. Nevertheless, the brief very truly and candidly admits (p. 28): "There was no question there involved of the power of the state to regulate the exercise of that right (What right is referred to?—"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"); neither does it appear that the Indians there sought to exercise the right in violation of state law.

If it should be conceded that the language of the next paragraph referred to the taking of fish and its regulation under the police power of the state, even then, it being clear that neither of the questions were involved in the Winans case, the opinion as to the issue here would be *obiter dicta.*

How can this Court be assured that the paragraph referred to and quoted in appellant's brief—

> 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.

applied only to the right of taking fish, when the right the Court had just been discussing was—"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."

Rather than give to this inadvertent expression the meaning that counsel contend for, we think it more correct, more just and surely more in keeping with the true intent of the treaty to follow the construction given it by Judge Rudkin, who once adorned this bench, and who is universally recognized as among the very ablest Federal judges of the nation, and who, in *Seufert v. Olney,* 193 Fed., p. 200, after reviewing the Winans case, said on the very point here in question:

> In my opinion, therefore, the true construction of the treaty is this: The Indians are granted certain fishing rights and privileges in their ancient and accustomed places, which they are entitled to enjoy under and by vir-

> tue of the treaty, and of which they cannot be deprived *by state laws or state regulations.*

In the very morning of our judicial history (1832), when the State of Georgia set up her sovereignty against an Indian treaty, the Supreme Court of the United States in limiting the legislative power of that State in matters of Indian affairs, said:

> A State claims the right of sovereignty commensurate with her territory, as the United States claim it, in their proper sphere, to the extent of the federal limits. * * *
>
> But it would violate the solemn contracts with the Indians without cause, to deprive them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.
>
> * * *
>
> Has not the power been as expressly conferred on the federal government to regulate intercourse with the Indians, and is it not as exclusively given as any of the powers above enumerated? There being no exception to the exercises of this power, it must operate on all communities of Indians exercising the right of self government; and consequently include those who reside within the limits of a State, as well as others. Such

> has been the universal construction of this power by the federal government, and of every state government, until the question was raised by the State of Georgia.
>
> * * *
>
> The laws and treaties which impose duties and obligations on the general government should be abrogated by the powers competent to do so. So long as these laws and treaties exist, *having been formed within the sphere of the federal powers,* they must be respected and enforced. * * *
>
> *Worcester v. Georgia,* 6 Pet., 515.

Passing on the Yakima treaty, the Supreme Court of the United States in *U. S. v. Winans, supra,* sanctions the same construction in the following language:

> 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. * * * 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.
>
> * * *
>
> 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."

There are no words more pertinent to conclude this branch of the discussion than those of Judge Rudkin, which so well bear repetition:

> In my opinion, therefore, the true construction of the treaty is this: The Indians are granted certain fishing rights and privileges in their ancient and accustomed places, which they are entitled to enjoy under and by virtue of the treaty, and of which they cannot be deprived by state laws or state regulations.

CONCLUSION.

The Indians' claim is not merely meritorious, but is an impregnable right founded on the Constitution.

This immemorial and historical right was recognized and assumed by treaty, and thereby the United States was enabled to extinguish on behalf of white settlers the Indian title to a large portion of this state.

The Treaty, as has been pointed out, is not vague, loose and uncertain, but speaks of explicit grants and particular reservations. It speaks in terms of cession, grant and conveyance of a definite Indian title to lands, and the specific items of consideration, because of which the grant was made, are set forth as in any private *contract* of sale or conveyance.

Here is not an equity which the United States alone might meet and respond to, but a plain condition, easement, servitude, *obligation of contract which no state law may impair. An existing right* which the Constitution of the State of Wash-

ington guaranteed should not be "affected by a change in the form of government."

We are asking this Court, as we did the Superior Court of Benton County, to recognize the righteousness, and justness, and legality of the Indian claim of exemption from prosecution under the stipulations of his treaty.

The Indian, as is his right in any court, demands the scrupulous construction and fulfillment of the Government's *contract with* him.

The obligation upon the judiciary to sustain his rights rests upon the highest standards of national honor, and no Court, State of Federal, will hesitate to hold in abeyance, and as to the Indians of the Yakima nation suspend an act of the legislature repugnant to the supreme obligation of a treaty for the faithful performance of which the faith of the Government is directly pledged.

It is respectfully submitted that the decision of the lower court should be affirmed.

FRANCIS A. GARRECHT,
United States Attorney,
for Respondent.