State Centrism, the Equal-Footing Doctrine, and the Historical-Legal Geographies of American Indian Treaty Rights

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Political and legal conflicts between state governments in the United States and American Indian tribes over hunting, fishing, and gathering on former tribal lands have been widespread and common.[1] Examples in the U.S. include historical and contemporary conflicts over hunting and fishing rights in the Rocky Mountain, Great Lakes and Pacific Northwest states. In a Canadian context, one finds similar treaty-rights fishing disputes in Ontario and most recently, the so-called "lobster wars" in Nova Scotia and New Brunswick.[2] In these cases, indigenous people claim a legal, treaty-based right of access to their former lands and natural resources. One question that arises when these conflicts are examined is how have federal and state governments in the U.S. rationalized and legitimized their exclusion of indigenous people from access to natural resources on ceded lands and traditional territories? Scholars have offered either cultural or political-economic explanations for why national and subnational governments have pursued such exclusionary policies toward indigenous peoples. For some, the explanation lies in Euro-American cultural constructions of nature, especially definitions of wilderness as an uninhabited landscape and nature as a source of recreational pleasure. Mark David Spence explores the romantic wilderness ideal and how it was used to exclude American Indians from their traditional hunting and fishing territories in national parks such as Yellowstone and Glacier.[3] Elsewhere, I have examined how cult sportsmanship, a normative model defining the proper cultural practice of recreational hunting and fishing, has been used to rationalize the exclusion of Ojibwe Indians from former hunting, fishing, and gathering territories in what is now the state of Wisconsin.[4] Louis Warren, in his examination of the destruction of the local commons in the 19th-century American West, argues that it was the imperatives and expansion of market capitalism that led to exclusion of American Indians from their former territories and natural resources.[5] Other scholars reveal that indigenous people in other parts of the world have suffered similar loss of access to natural resources

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because of European cultural constructions of nature and the expansion of the market economy. Roderick Neumann, for example, examines the exportation of the national-park ideal to Africa and the impact of the "aesthetic consumption" of nature upon indigenous peoples' access to African national parklands and protected spaces.[6] Studies of colonial forestry in South and Southeast Asia reveal that European ideas of scientific rationality and economic efficiency served as the basis for defining proper forest management and rationalization for the exclusion of indigenous people from customary lands and resources.[7]

My goal in this paper is to expand upon this line of inquiry, bringing attention to the legal and geopolitical landscape that is simultaneously constructed alongside this specific "cultural" and economic landscape. More specifically, I seek to examine the legal and spatial reference system that is both assumed and asserted in instances where American governments—federal and state—and indigenous people are involved in litigation and legal contests over access to ceded territories and natural resources. My aim is to show that federal and state governments and indigenous people construct particular legal-geographical interpretations that are employed to either deny or permit indigenous people continued access to natural resources and territories outside the boundaries of indigenous reservations. State governments, in particular, I will argue, have sought to create an unambiguous political space upon which their authority over natural resources is impervious to legal and moral challenges by native peoples.[8] This state-centric geopolitical narrative, one which constructs state's rights superior to indigenous treaty rights, is supported by an American legal and political tenet known as the "equal-footing doctrine." According to the equal-footing doctrine, new states must be admitted to the U.S. with the same or "equal" powers and territorial sovereignty as the original 13 states. The assumption is that statehood created an unambiguous, homogenous legal and spatial grid over which state political and police powers flow unimpeded from the political center or state capitol affecting all people in the same manner. In contrast, indigenous nations claim that their ceded territories are a shared political space in which tribal treaty fishing, hunting, and gathering rights and states' rights can coexist. Indian tribes say that when they negotiated and signed land cession treaties, their understanding was that they would share the ecological resources of the ceded lands with non-Indian settlers. They would avoid "settled" places, but unsettled lands (and waters) would continue to be available for Indian hunting, fishing, and gathering. Reservation boundaries were understood as impermeable to non-Indian settlement on-reservation, but permeable to Indian access to off-reservation ceded lands and resources.[9]

State-tribal conflicts over the historical, legal, and spatial interpretation and meaning of treaty rights have been fought primarily within the American judicial system, especially the U.S. Supreme Court. Non-Indian judges have had the task of resolving opposing spatial interpretations and visions of state power and American Indian usufructuary rights. In some instances, the Court has agreed with the state-centric geopolitical vision and ruled that statehood alone is sufficient to abrogate Indian treaty rights and prevent tribal access to

off-reservation resources. The majority of the Court's decisions over the last 100 years, however, have resulted in the construction of a legal-geographical compromise whereby Indian treaty rights and access to resources are recognized and these rights may be limited and regulated by the state when necessary for environmental conservation or if access to such resources threatens the biological integrity of the resource. Thus, one can argue, as legal scholars Robert Williams and Sidney Harring do, that the American judicial system has been a "vital instrument of empire," indispensable for colonization and for Euro-American dispossession and marginalization of indigenous people.[10] While the legal arena has functioned as a tool of colonization and domination, court decisions and legal arguments actually reveal more complex and contradictory lines of legal-geographical reasoning. The legal-geographic interpretive work of judges has resulted not only in defeats for indigenous people—their legal, physical, and moral exclusion from natural resources in former territories—but, it has also resulted in legal victories and the recognition and protection of indigenous peoples' access to natural resources in such territories. In order for the judicial system to function and appear as an "impartial" arena, as a site of justice, it must also serve to constrain the power and ambitions of national and subnational governments, and can thus serve to recognize and even protect indigenous peoples' rights to lands and resources. According to E.P. Thompson:

> The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.[11]

Similarly, David Delaney notes that "legal practice has been important to efforts *both* to reinforce relations of domination and to challenge them."[12] Court decisions and their resulting geographies and material effects are not, therefore, necessarily predetermined. Thus, the legal arena constitutes a critical, complex location for the construction of indigenous and nonindigenous geopolitical relations. It is a contradictory site of domination and resistance, colonization and decolonization, and key to understanding the ongoing political construction of indigenous geographies.

Treaties, Land Cessions, and Reserved Usufructuary Rights

Between 1778 and 1868, the U.S. government negotiated and ratified 367 treaties with Indian tribes across what is now the U.S. According to historian Francis Paul Prucha, treaties were the "legal instruments by which the federal government acquired full title to the great public domain" and promoted Indian "civilization" and assimilation.[13] Legal scholar Charles Wilkinson states that during treaty negotiations, the federal government acted as a "surrogate for future states." The federal government's goal was not only to open

up Indian lands for non-Indian settlement and the capitalist exploitation and development of natural resources, but to create an unencumbered political space that would protect the territorial sovereignty of future states. Treaties would "remove the cloud of Indian sovereign control from most of the West so that new states could govern most land within their boundaries free of complications from Indians."[14]

In exchange for their "traditional" homelands, Indian tribes were compelled to accept much smaller, bounded land bases, known as reservations, as well as money, goods, and various services. Many tribes refused to sign a land-cession treaty unless it also preserved their access to hunt, fish, and gather on the lands they were ceding to the federal government. Tribal oral histories, the archival record, and academic studies reveal that tribal leaders and negotiators recognized that continuing access to their natural resource base was essential to both their economic and cultural survival. For example, during the negotiations over the 1837 Ojibwe treaty, Pillager Ojibwe Chief Flat Mouth remarked that:

> My father, your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees and getting a living from the lakes and rivers, as they have done heretofore and of remaining in the country. It is hard to give up the lands. They will remain, and cannot be destroyed—but you may cut down the trees and others will grow up. You know we cannot be deprived of our lakes and rivers. There is some game on the lands yet, and for that reason also, we wish to remain upon them, to get a living.[15]

This request was included in Article 5 of the 1837 treaty, which states:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed [sic] to the Indians, during the pleasure of the President of the United States.[16]

Lac Courte Oreilles Ojibwe Chief Martin, reflecting in 1843 on the Wisconsin Ojibwe land cession treaty of 1842, said he signed the treaty only under the condition that:

> "...we should remain on the land, as long as we are peaceable. We have no objections to the white man's working the mines, and the timber and making farms, but we reserve the Birch Bark and the cedar for canoes, the Rice and the Sugar tree and the privilege of hunting without being disturbed by whites."[17]

Similarly, throughout the American West and Pacific Northwest, tribal negotiators refused to sign treaties unless they felt secure in their continuing right to hunt, fish, and gather on ceded lands.[18] Written accounts of treaty

councils in the West during 1867 and 1868 reveal that Kiowa, Comanche, Cheyenne, Crow, and Arapaho leaders refused to sign treaties unless their tribes retained the right to hunt, fish, and gather on off-reservation ceded lands. Many treaties negotiated during the 1850s and 1860s contain clauses reserving a tribe's right of access to hunt, fish, and gather on ceded territory. The 1854 Treaty of Medicine Creek, negotiated with the Nisqually and other Puget Sound tribes in what is now Washington State, states in Article 3:

> 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: Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.[19]

Article 4 of the 1868 treaty with the Crow, reserved hunting rights on the ceded lands:

> but they shall have the right to hunt on the unoccupied lands of the U.S. so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.[20]

What these examples reveal is that Indian tribes sought to preserve access to their former territories and lands and that they understood their former territories were to be a shared space where neither Indian and non-Indian had exclusive natural resource rights. As Spence notes:

> "The retention of usufruct rights to areas outside the reservation boundaries meant that Indians would continue their customary movements; the only difference between reservation and off-reservation lands was that native leaders had agreed to share the latter with settlers and railroad builders."[21]

Ward v. Race Horse: The Equal-Footing Doctrine and the Supremacy of States' Rights

Indian tribes in the western U.S. and the Great Lakes region who negotiated land cession treaties with federal officials felt secure in their belief that they had a federally protected treaty right to hunt, fish, and gather on off-reservation ceded territories. From the tribes' perspective, the ceded lands were a shared space and as long as they did not interfere with non-Indian settlements, they could hunt, fish, and gather in this space as they had always done. It was not until the last quarter of the 19th century that tribes began to expe-

rience harassment from state officials and local non-Indian settlers when exercising their off-reservation hunting, fishing, and gathering treaty rights. At that time, states promulgated and enforced conservation laws over Indians on ceded lands and the federal government began to exclude Indians from ceded lands now within the boundaries of newly formed national parks. State and federal exclusionary policies were implemented for a variety of interrelated reasons—notions of romantic and uninhabited wilderness; out of a concern for the biological conservation and protection of species; in order to promote settlement, economic development, and tourism; to protect the commercialization of fish by non-Indian interests; and to eliminate competition for grass, water, and wildlife.[22] In addition to these cultural, scientific, and economic forces and ideas, there existed the take-for-granted belief in state-centrism—the assumption that state sovereignty was homologous with its territory and that state government, alone, controlled natural resources within this territory. States employing this exclusive and absolute territorial definition of sovereignty could exclude Indians from off-reservation ceded lands unless tribal members obeyed state conservation rules and regulations.

Ward v. Race Horse is the first U.S. Supreme Court case to define the relationship between state conservation laws, territorial sovereignty, and Indian treaty rights. Race Horse supported the state's construction of its political space, provided ammunition to claims of state's rights superceding Indian treaty rights, and empowered the states to enforce spatially exclusionary conservation laws on Indians exercising off-reservation usufructuary rights.[23] This case involved the Shoshone-Bannock Indians of the Fort Hall Reservation, the federal government, and the state of Wyoming. On June 3, 1868, the Eastern Shoshone and Bannock Indians negotiated a land-cession treaty with federal negotiators establishing two reservations—Fort Hall and Wind River—in southeastern Idaho. The treaty contained provisions related to "peace and friendship," allotments, education, agricultural supplies, and criminal jurisdiction. In Article 4 of the treaty, the tribes reserved:

> the right to hunt on the unoccupied lands of the U.S. 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.[24]

Article 4 reflects the tribe's intention to maintain access to deer, elk, and other "traditional" food sources and their understanding that the ceded lands were to be a shared landscape, accessible to tribal hunters as long as there was "peace" and portions of the territory remained unsettled or "unoccupied lands."

In 1890, Wyoming became a state and soon thereafter complaints were made by ranchers and public officials that tribal members were wasting wildlife during their off-reservation hunts. Indians claimed that it was non-Indian sport hunters who were killing and wasting game. Federal officials supported the tribes' contentions that non-Indians were responsible for wasting game. In 1895, Wyoming passed legislation restricting the hunting of elk and other

game to specific seasons. State officials claimed that state conservation laws applied to everyone within the state's borders and that Indian off-reservation hunting rights had been abrogated. In keeping with the paternalistic attitudes of this time period, federal and state officials met and arranged a test case to decide the matter. The tribe consented to the legal test case and a Bannock tribal leader, Race Horse, was arrested for killing seven elk on off-reservation lands. On November 21, 1895, the case was tried in federal district court.

The arguments of the parties centered upon the question of whether or not the lands where the hunting and killing took place were "unoccupied lands of the United States." If they were unoccupied public lands, then the defendant, Race Horse, a Bannock Indian, claimed he had a federally protected right to hunt free from state regulation, based upon article 4 of the 1868 treaty between the U.S. and the Shoshone-Bannock tribe. Race Horse argued that the killing of the elk took place on unoccupied U.S. lands because ranches or settlements were "more than five miles distant." This argument was consistent with the tribe's understanding that the ceded territory was a shared landscape and that they could continue to hunt and gather on as long as they did not interfere with non-Indian settlers.

The state, on the contrary, argued that the place where Race Horse killed the elk was no longer unoccupied lands of the U.S. and that state conservation laws, not federal reserved treaty rights, were the law of the land. The state claimed the land had been "settled upon," used for homes and "as an open and common grazing ground." Furthermore, the state—in a broad and sweeping state-centric geographical claim—characterized all lands within the boundaries of the state as no longer being part of the public or federal domain. The state asserted that such lands "constituted a part of the state of Wyoming" and had been subdivided into school and election districts "pursuent [sic] to the laws of the state of Wyoming." The state utilized the equal-footing doctrine to support its state-centric geopolitical claim that the state conservation laws could be applied everywhere within the state's boundaries and that they superseded and abrogated the tribe's treaty rights. According to the equal-footing doctrine, when Wyoming was admitted as a state on an "equal footing" with the original 13 states, it possessed the same police powers to regulate the taking of fish and game within its boundaries as those original states. Any limitations upon this state police power by a federal law or federal Indian treaty meant that Wyoming had not been admitted on an equal footing. Because Wyoming was admitted after the treaty was negotiated and ratified, it meant that the treaty necessarily was abrogated because it conflicted with state territorial sovereignty and police powers.

U.S. District Judge John A. Riner noted that the court's task was to ascertain the proper "construction of the treaty" and the validity of state law in the face of the constitution and treaties of the U.S. He set about to determine the meaning of the term unoccupied lands and "hunting districts" in article 4 of the 1868 treaty. Riner made clear that he would follow the so-called canons or rules of Indian treaty construction; a broad rule for interpreting Indian trea-

ties set forth by the U.S. Supreme Court in *Worcester v. Georgia* and other court cases. In *Worcester v. Georgia*, Chief Justice John Marshall stated:

> the language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense...How the words of the treaty were understood by these unlettered people, rather than their critical meaning, should form the rule of construction.[25]

Riner noted that when the treaty was negotiated "there were several white settlers" located in the territory. Applying the canons of treaty construction, he went on to say that "within the meaning and terms of the provisions of the treaty" such lands, containing settlers, would have been considered unoccupied lands. Riner's interpretation was consistent with the tribe's understanding that the treaty secured the tribes access to their former territories and that the fish and game animals on these lands were to be shared between Indian and non-Indian. He concluded that the term "hunting district" as used at the time of the treaty did not mean lands devoid of settlers; the hunting district at the time of the treaty was not "beyond the borders of white settlement." Riner then turned to the question of the supremacy of a federal treaty, relative to a state law and the validity of the state's equal-footing argument. He noted that according to the U.S. constitution, federal treaties, including Indian treaties, were the "supreme laws of the land." The congressional act admitting Wyoming to the Union, he said, did not expressly abrogate the treaty; therefore, the state law was inconsistent and inferior to the federal treaty right. Riner rejected the state's equal-footing argument on the grounds that the continuing existence of the Indian right to hunt on unoccupied U.S. lands was not inconsistent with the act admitting Wyoming into the Union.[26]

Wyoming appealed the district court's decision and the U.S. Supreme Court (the Court) agreed to hear the case. The Court's decision in this case hinged on the legal-geographical interpretive standards utilized by the justices in determining the meaning of the treaty, the potential for political and spatial limitations on the tribes' exercise of their treaty hunting right, and the power of the state to regulate natural resources within its borders. The legal-geographical question facing the judges was whether the treaty created a homogeneous political space in which the state could regulate off-reservation tribal hunting or shared landscape in which tribal hunters could exercise their treaty right free from state regulation. The answer to this question would be determined by the assumed impact of changing non-Indian geographies—settlement and statehood—upon the treaty right.

The Court began its investigation of the geographical meaning of the treaty by determining the temporal nature of the treaty right; was it a permanent right or temporary "privilege"? It concluded that the tribe's treaty hunting rights were a "privilege" granted by Congress and thus they were of a

"temporary and precarious nature." In arriving at this conclusion, the Court transformed the idea that the tribe *reserved* a permanent hunting right into a temporary hunting privilege *granted* by Congress. It reasoned that the "privilege" had to be temporary because they could not imagine that Congress would have intended such right to endure settlement and eventual statehood. Given the state-centrist, ethnocentric, and assimilationist mindset of the late-19th century, it is not surprising that the justices would rule that the "...right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified."[27]

The Court also tackled the state-centric argument that the equal-footing doctrine and statehood abrogated the tribes' hunting rights on the ceded lands. It agreed with the state's claim that the treaty had been "repealed" by the admission of Wyoming to the Union. Statehood and the treaty right were understood as fundamentally "irreconcilable." The justices reasoned that if the treaty right was permanent, then Wyoming "will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all other States of the Union...."[28] The Court found that nothing in the enabling act creating the state showed that Congress intended that Wyoming should have "diminished governmental authority."[29]

In determining that the tribes' hunting right was a temporary "privilege" and that it was implicitly abrogated by statehood, the Court failed to employ the canons of construction and never investigated the Indians' spatial and temporal understanding of the treaty. Instead, the justices' interpretation of the legal-geographical meaning of the treaty focused solely on what it assumed were Congressional and state government understandings. The Court assumed that the treaty anticipated the spatial exclusion of tribal members from their former lands due to the geographical impact of non-Indian settlement and the construction of the state as an abstract political territory within which the state's police powers were absolute. Given this very narrow interpretative framework, the majority of the justices did not even consider Indian spatial and temporal understanding of the ceded lands and natural resources as a shared landscape and that settlement and statehood were compatible with a continuing Indian presence both on and off-reservation.

The Legal-Geographical Legacy of *Race Horse*

Both state and federal officials were quick to read and apply *Race Horse* as a counter argument in their interactions with Indians who continuously claimed that their treaty rights secured them permanent and unregulated access to fish and game on ceded lands outside the borders of their reservations. As legal precedent and affirmation of state-centrism, *Race Horse* was used to bolster and legitimate the spatial claims of state sovereignty over fish and game everywhere within its territory and to justify the application of state conservation laws to Indians while hunting and fishing on ceded lands. For example, in response to claims by the Wisconsin Ojibwe that they had a treaty right to

hunt and fish free from state interference while on off-reservation ceded lands in northern Wisconsin, Second Assistant Commissioner of Indian Affairs C.F. Hanke unequivocally stated that "[T]he question of the right of Indians to hunt in ceded territory was decided in the case of *Ward v. Racehorse*."[30] State officials, such as Wisconsin Attorney General W.H. Mylrea cited the "reasoning of the Supreme Court" to claim that state conservation laws applied to Ojibwe Indians while hunting and fishing off of the reservation. He argued that the Ojibwe Treaty of 1842 had been "abrogated by the acts of Congress creating the sovereign states." Restating the effect of *Race Horse* and the equal-footing doctrine in spatial terms, he stated that the "state was invested with sovereign powers over the territory within it limits" and the "State of Wisconsin being a sovereign one must have exclusive power over its territory."[31]

State judges were quick to adopt *Race Horse* as their legal-geographical interpretive standard in deciding Indian treaty hunting and fishing rights cases. One of the first courts to apply *Race Horse* was the Wisconsin Supreme Court in the case of S*tate v. Morrin* in 1908.[32] Here the specific question was whether state fish and game laws applied to Michael Morrin while he fished in the ceded territory. Morrin, an Ojibwe, claimed that he was immune from state conservation laws because the Ojibwe reserved hunting, fishing, and gathering rights in the land cession treaties of 1842 and 1854. He believed he had a continuing and permanent right of unrestricted access to fish outside the borders of his reservation. A claim that is consistent with the Ojibwe understanding that their uusufructuary rights were permanent rights and that the ceded lands were meant to be a shared landscape. The state, citing Race Horse, said that the admission of Wisconsin into the Union in 1848 on an equal footing with other states abrogated by implication the rights reserved to the Ojibwe in the 1842 treaty. The state also said that the federal government had no right to provide the Ojibwe with such rights in the post-statehood treaty of 1854. The state defended its sovereignty, viewing its space as a homogenous and abstract legal space: "...the state possesses absolute authority to enforce such laws [fish and game laws], police regulations, *everywhere* within its boundaries."[33]

The Wisconsin Supreme Court, adopting *Race Horse* as judicial precedent, failed to examine Ojibwe spatial and temporal understandings of the treaties. It restated the U.S. Supreme Court's application of the equal-footing doctrine to Indian treaty rights and held that Morrin had no treaty right to fish in Lake Superior because "the stipulations in the treaty with the Chippewa Indians respecting their right to hunt and fish within the borders of this state were abrogated by the act of Congress admitting the state into the Union and making no reservation as to such rights."[34] The court affirmed the state's claims about the geopolitical implications of the equal-footing doctrine and legitimized the state's vision of its territory as a homogeneous grid in which state conservation laws applied to everyone, including Indian hunters, fishers, and gatherers, in the ceded territories.[35]

A similar case, *People v. Chosa,* arose in Michigan involving the treaty rights of members of the L'Anse Ojibwe to hunt and fish on ceded lands in the

upper peninsula of Michigan.[36] Tribal members claimed this right under the treaties of 1842 and 1854 between the U.S. and the Ojibwe. The court ruled, in keeping with *Race Horse*, that the rights were temporary and that "they provided no immunity from operation of game laws, as against the state." It went on to say that "it would be foreign to our system of government" to have the federal government restrict the state's police powers to regulate the taking of fish and game. As part of its defense of state sovereignty, the court also rejected a liberal construction of Indian treaties. It claimed:

> While an Indian treaty is to be construed, not by the strict weight of its words but as the Indians probably understood it, and with liberality of intendment in their favor, it will not be unduly extended to restrict the sovereign power of the State in enactment of laws applicable, without discrimination, to all citizens and aliens.[37]

In the Pacific Northwest, state judges made similar types of rulings denying the continuing existence of off-reservation fishing and hunting rights. *Race Horse* was the critical case that shaped judicial acceptance of the equal-footing doctrine and protection of state territorial sovereignty. It also provided support for judicial failure to investigate and consider Indian spatial and temporal understandings of treaties. The 1916 Washington State Supreme Court case, *State v. Towessnute* involved the question of whether the Yakama Indians retained a right to salmon fishing without a state license. Alec Towessnute claimed a treaty right, based on the provisions of the 1859 Yakama Treaty, to fish free of state regulation, "at all usual and accustomed places." The court investigated the intent of the treaty, but not from the perspective of the Yakama:

> "Was it, then, intended that the Yakimas [sic] at ancient places of fishing outside of their reservation were forever to fish as they pleased and when they pleased, ignoring the regulations of the future commonwealth...."[38]

The court said no; when the tribe accepted life on a reservation they gave up their right to harvest fish and game off-reservation free from state regulation. Despite tribal assertions to the contrary, the court constructed its own culturally biased and ethnocentric interpretation of the temporal and spatial limitations of the treaty. According to the court: "The Indian already saw the approaching end of his rovings, already felt it best to get an area that should be his alone."[39] Outside the reservation, the court reasoned, state law necessarily must operate on "both races alike." Echoing *Race Horse* and its state-centric construction of political space, the court said that by allowing the tribe unregulated access to fish and game, Congress would have intruded on the police powers of the state to regulate its fish and game everywhere within its territory. According to the court, Congress would have "designedly crippled the government of a future state in powers salutary and essential."[40] Directly citing *Race Horse*, the court said that police powers of the state within its

borders and on ceded lands were protected by the act of statehood and the equal-footing doctrine:

> we must remember that the supreme federal tribunal has held Congress itself incompetent to cut of this power [police power to regulate fish and game] from a future state.[41]

Eleven years later, in an almost identical decision, the Washington Supreme Court cited both *Race Horse* and *Towessnute* in its denial of the continuing existence of Yakama off-reservation hunting rights on "open and unclaimed land" of the U.S in *State v. Wallahee*.[42]

Despite these adverse rulings, Indians throughout the country continued to press both state and federal officials for recognition of their treaty rights and confirmation of their spatial and temporal understandings of their off-reservation usufructuary treaty rights.[43] Indian correspondence to state and federal officials and judicial pleadings show that Indians understood their treaty rights to be permanent, enduring, and a sacred obligation. For example, in Wisconsin, even after their defeat in *State v. Morrin*, Ojibwe tribal members persisted in their belief that the ceded territory was a shared space, open to tribal harvesting, and that state conservation laws did not apply to them when they were off-reservation.[44] In 1947, Bad River Tribal Council Chair Gus Whitebird wrote to Great Lakes Agency Superintendent J.C. Cavill, stating:

> "When the Indians ceded these lands to the United States they reserved the right to hunt and fish and to safeguard the interests of the future generations. They had implicit faith that the promises held out to them by the representative of the government would be carried out, but it seems that the United States has failed in its duty."[45]

In Michigan, Chippewa and Ottawa tribe member Jacob Walker complained in 1911 to President William H. Taft about the arrest of two tribal members for violation of state game laws. Claiming the tribe had a continuing and permanent treaty right to hunt, fish and gather on ceded lands, he said:

> It is a well established understanding and believe [sic] that the Right of Hunting, fishing and encampment was reserved by the Ottawa and Chippewa Indians and that they are to hunt, fish and camp in their natural and usual way and Indian style, any time and any where.

He went on to defend the treaty right: saying it had "never as yet been abrogated" and that the treaties were the supreme law of the land.[46] First Assistant Secretary of the Interior Frank Pierce replied that tribal members were subject to state laws. Citing *Race Horse*, and in keeping with a state-centric perspective, he said that Indian treaty rights had "became subordinate to and subject to regulation by the laws of the State."[47]

The Winans Doctrine: Reconciliation of Treaty Rights and State Sovereignty

During the first half of the 20th century, American Indians lost many, but not all, of their legal challenges to state regulation of their off-reservation resource rights. Following *Ward v. Race Horse*, states felt empowered by the judicial affirmation of the state-centrism embodied in the equal-footing doctrine. They applied their conservation laws to Indians found hunting, fishing, and gathering off-reservation, despite Indian protests that their treaty hunting and fishing rights were the supreme law of the land and superceded states' rights. Some states sought to expand their territorial and police powers even further, seeking to regulate tribal hunting and fishing on-reservation, although they were rebuked by the courts.

In the second half of the 20th century, however, Indians won a substantial number of their legal challenges to state regulation of their off-reservation harvesting rights. In this section, I examine the changes in judicial legal and spatial reasoning which allowed tribes to successfully assert and defend their rights of access to off-reservation fish, game, and plant resources. These changes center upon the use of the canons of construction or the interpretive standards judges used to determine the meaning and intent of treaties, the meaning and applicability of the equal-footing doctrine, and the compatibility and co-existence of Indian treaty rights with state territorial sovereignty and police powers. Because of their liberal application of the canons of construction, judges took into account American Indian spatial and temporal understandings of treaty rights and they were compelled to consider whether or not state territorial sovereignty over natural resources could be limited by federal treaties and laws. They were more open to the tribes' assertions that their treaty-reserved usufructuary rights were permanent, that they understood the ceded lands and their natural resources were to be *shared,* and that Indians and non-Indians would harvest such resources according to their own rules.

One of the first legal victories for tribes came just nine years after *Race Horse* with the U.S. Supreme Court decision in *United States v. Winans*.[48] This case involved Lineas and Audubon Winans, who were doing business as the Winans Brothers—non-Indians whose use of a fishing wheel resulted in the exclusion of Yakama Indians from fishing at their "usual and accustomed places" along the Columbia River. Suing on behalf of the Yakama, the U.S. supported the tribe's contention that it had a treaty right of access to traditional fishing sites along the river. The treaty right placed an easement on privately owned property located along the river securing tribal fishers permanent rights to cross this property to reach their "usual and accustomed" fishing sites. Tribal fishers, the U.S. argued, should have "free ingress to and egress from the fishing grounds." "Congress," the government argued, "has never divested the Indians of the right." The U.S. claimed that the treaty right could not be diminished by the equal-footing doctrine and the subsequent creation of a state or by the promulgation of state conservation laws regulating the fishery.

The U.S. argued that states rights and powers "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 U.S. under treaty stipulations...."[49]

Winans countered that the treaty rights were temporary in nature and had been "revoked and extinguished" by the purchase of the land from the government. He emphasized the temporary nature of the rights by claiming that they ceased to exist with the admission of the state into the Union. Winans, resorting to a state-centrist argument and utilizing the equal-footing doctrine, argued that when Washington was admitted to the Union it possessed the absolute right to regulate and control the fishery. This included licensing fishing wheels, which, because of their efficiency, could deprive Indian fishers of access to fish. Located within the homogeneous legal space of the state, Indians had no greater right of access to the fish or right to harvest fish than non-Indians.

The Court ruled that the treaty must have promised something more to the Yakama than providing the tribe with the same rights as non-Indians. In order to discover what the treaty promised, the court employed the canons of construction in interpreting Indian treaties: "we will construe a treaty with the Indians as "that unlettered" people understood it...How the treaty in question was understood may be gathered from the circumstances."[50] Unlike *Race Horse*, the Court in this case applied the canons of construction and recognized and articulated the reserved-rights doctrine: "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." The notion of a reserved right meant that treaty rights were not some kind of temporary "privilege" that could be simply and easily undermined and abrogated by settlement, statehood, or the equal-footing doctrine. Thus the *Winans* Court ruled that the Yakama understood that settlement would occur and that resources of the ceded territory would be shared, be held, or used "in common" with non-Indians. But, settlement or "new conditions" would not mean an elimination of the treaty rights. The tribe, according to the Court, understood that it would have to adapt to these changes. "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." The Court said that the treaty anticipated the "contingency of the future ownership of the lands," and it constituted an enduring easement that allowed the tribe the right of crossing the land in order to fish. Despite statehood and changing geographies, the Court ruled that this easement was permanent and not temporary in nature. "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."[51]

The justices' reliance upon the reserved-rights doctrine and their acceptance of the tribe's spatial and temporal understanding of the treaty right—that the tribe would share the fishery with non-Indians and accommodate non-Indian settlement in the ceded territory—led them to reason that state-

hood and the equal-footing doctrine did not abrogate the treaty right. The U.S. had the power and constitutional authority "to create rights which would be binding on the States."[52] The Court was unwilling, however, to leave the state completely powerless to regulate the fishery within its borders. It sought some way to balance the state's exclusive definition of its territorial sovereignty and the tribe's claim of extraterritorial usufructuary rights.

The Court construed the tribe's spatial and temporal understanding of the treaty right, that it was sharing the land and resources with non-Indians, to imply a potential for some undefined future state limitation or regulation of the treaty fishing right. Limitation of the treaty right, however, is not expressly found in the treaty language nor is there any evidence that at the time of the treaty negotiation the tribe understood that its treaty rights could be regulated by the state.

Tulee v. State of Washington, a 1942 U.S. Supreme Court decision, reflects a continuation of the development of the complex judicial reasoning found in Winans. The case centered upon the whether the state could require Yakama Indians to purchase a state fishing license while fishing on off-reservation ceded lands. Sampson Tulee, assuming that the 1855 Yakama treaty created an extraterritorial fishing right and a non-exclusive shared fishery, claimed that he had unrestricted right to fish at "usual and accustomed" places. He asserted that nothing in the treaty gave the state any right to interfere or regulate the tribe's access to or use of the fishery. The state of Washington abandoned the equal-footing doctrine argument and the claim that statehood alone resulted in the abrogation of Indian treaty rights. Instead, the state relied upon *Winan*s to argue that a state's police powers were not limited by the treaty as long as state regulations were *non-discriminatory* toward Indians. The state's strategic use of *Winans* in this instance would result in the same legal-geographical outcome as if it had relied upon *Race Horse* and the equal-footing doctrine; state conservation laws would be applied to Indians and non-Indians equally, everywhere within the state's borders.

The Court applied the canon of constructions, saying:

> "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."[53]

It ruled in favor of Tulee, saying the state could not charge a fishing license fee. But, in keeping with *Winans*, it opened the door for future state regulation:

> "the treaty leaves the state with power to impose on Indians, equally with others such restrictions of a purely regulatory nature concerning the timing and manner of fishing outside the reservation as are necessary for the conservation of fish...."[54]

The *Tulee* Court did not explain its legal reasoning nor did it provide any definition for the "necessary-for-conservation standard." One interpretation of the inclusion of this "standard" is that the Court was trying to accommodate the legal-geographical interests and understandings of both the state and the tribes. The ceded territory and its fishery resources were to be shared and if the fishery was threatened by overexploitation, then the state could step in and regulate the Indian use of the fishery. Why did the Court provide the state with some regulatory powers over Indian treaty fishing as well as ultimate responsibility to protect the existence of the fishery? This might be explained by the Court's assumption that despite the tribes' treaty-rights claims, the tribes would eventually assimilate and be incorporated into the dominant society or because the state, and not the tribes, had the regulatory apparatus in place to conserve the fishery.

In 1953, the Idaho Supreme Court disagreed with the U.S. Supreme Court's attempt to create a legal-geographical compromise in *Winans* and *Tulee*. In *State v. Arthur*, the Idaho Supreme Court (the court) agreed with the Court's ruling on the limited applicability of the equal-footing doctrine to treaty rights, but disagreed with the Supreme Court's ruling that the state had some power to regulate off-reservation Indian hunting and fishing treaty rights.[55] *State v. Arthur* centered upon whether David Arthur, a member of the Nez Perce Tribe, could legally kill a deer out of season on off-reservation ceded lands located within a U.S. National Forest. Idaho, citing *Race Horse*, claimed that the Nez Perce treaty provided tribal members with no immunity from state conservation laws. Following the equal-footing doctrine, the state argued that the tribe's off-reservation treaty rights were abrogated when the state was created because there was no explicit protection of the rights in the state's 1890 enabling act admitting it into the Union. The state also implied that the forest lands were under state jurisdiction and part of the state because they could not be described as "open" and "unclaimed" or even public lands. From Idaho's perspective, statehood created an undifferentiated political space that included federal lands and over which the state could apply its conservation laws indiscriminately.

Arthur took the position that treaties are the supreme law of the land and treaty rights could not be modified by statehood. The treaty protected the tribe's access to the ceded lands for hunting, fishing, and gathering. Since the ceded lands were a shared space, statehood did not somehow create an undifferentiated legal space ruled by the state. Arthur claimed that Article 3 of the 1855 Nez Perce treaty, which states that "...the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land," reserved "unqualifiedly the right to hunt upon open and unclaimed lands...."[56] The state, therefore, had no legal authority to regulate tribal exercise of the treaty right.

The Idaho Supreme Court agreed with Arthur's assertions and ruled not only that the treaty right survived Idaho's admission to the Union, but that there was no legal foundation to allow the state to regulate the tribes exercise

of their hunting rights. First, the court found that admission of the state had no effect on the treaty right because there was no explicit statement in the admission act that abrogated the treaty right. The court said that because treaties were the supreme law of the land, they could not be abrogated without an express act of Congress. The court said that admission of Idaho into the Union "does not operate to repeal the reserved right" because "the repeal of such provisions by implication is not favored."[57] The court went on to criticize the *Race Horse* decision and the U.S. Supreme Court's misuse of the canons of construction of Indian treaties. The court observed that nothing in the historical record of the treaty negotiations and post-statehood agreements between the U.S. and the Nez Perce indicated that the parties to the treaty understood that the rights were temporary and would be terminated by statehood. The court said: "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...."[58]

The court then tackled the question of whether the state could regulate the tribe's exercise of its hunting rights. It said that a state's police powers are subject to constitutional limitations and are not permitted if they conflict with federal laws and federal treaties. The court ruled that any limitation on the exercise of the tribes' right would not be allowed under a "broad, fair and liberal construction of the treaty."[59] It went on to say that "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 them the right to hunt upon open and unclaimed lands is no right at all."[60]

State v. Arthur exists as an anomaly in the post-*Tulee* court decisions at both the state and federal level. The thread of federal judicial reasoning started with *Winans*, which sought to accommodate the tribe's extraterritorial treaty rights with the territorial sovereignty of the state, continued to shape treaty rights litigation in the Pacific Northwest in the 1960s and 1970s and in the Great Lakes in the 1970s and 1980s. The courts found that while a state could not deny Indian access to the resources, it could set certain limits and regulations on the taking of fish and game. For example, in its 1968 *Puyallup I* decision, the U.S. Supreme Court sought to define and justify its earlier rulings that opened up treaty rights to state regulation. The court ruled that because Indian fishing rights were not exclusive, but held in common with non-Indians, and because the time and manner of fishing was not defined by the treaty, then "we see no reason why the right of Indians may not also be regulated by an appropriate exercise of the police power of the state." The court said that any regulation must be "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[61]

While the Court sought a legal balance of the treaty right with state's rights, some states would continue to assert exclusive territorial sovereignty over fish and game and would continue to use the equal-footing doctrine to defend their state-centric geopolitical position on Indian treaty-defined har-

vesting rights. In the Oregon fishing treaty rights case, *Sohappy v. Smith*, the state of Oregon utilized the equal-footing doctrine to claim that statehood had modified the tribe's fishing rights. The state argued that Indians had identical rights as non-Indians and did not have to be dealt with as a separate category within the state's regulatory schema. Following *Winans*, the tribes and the federal government argued that statehood had no effect on the existence of the fishing rights. While accepting the U.S. Supreme Court's ruling that the state had some regulatory role, they argued that the state's regulations must be the least restrictive and that the state may regulate non-Indians before it regulates Indian fishing.

The court, following *Winans*, ruled that the equal-footing doctrine had little merit and that "subsequent statehood" did not "diminish the treaty-secured fishing right." The court then went on to define the extent of state regulation of the fishing right. In keeping with the notion that the ceded lands and resources were shared, but accepting the reality that only the state had a capacity to conserve the resource, the court defined the fishing right as coequal with that of non-Indians and that the state's regulatory role was limited only to protecting the existence of the fishery. The state was equally obliged to protect the tribe's treaty right at the same time that it was involved in "the conservation of fish runs for other users."[62] According to the court: "when it [the state] is regulating the federal right of Indians to take fish at their usual....it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource."[63]

Indian treaty rights were also litigated in the Great Lakes states of Michigan, Wisconsin, and Minnesota from the 1960s and through the 1990s. The equal-footing doctrine and state conservation powers would come under attack in the state of Michigan during the 1971 Michigan Supreme Court case of *People v. Jondreau*. This case centered on the question of whether the Ojibwe retained a right to fish in Keeweenaw Bay of Lake Superior. The tribe contended that the 1854 Ojibwe treaty secured such rights. The court, ruling in favor of the tribe, followed *Winans* and stated that *Race Horse* has "been limited by implication in recent years by U.S. Supreme Court decisions."[64] The court was critical of its earlier decision, *People v. Chosa*, and said that *State v. Arthur* is the "better view."[65] *Chosa*, it said "no longer states applicable law. When *Chosa* was decided in 1930, our Court properly relied on the governing authorities as of that date. However, through the passage of time, the foundations upon which *Chosa* rested are no longer sustained as valid."[66]

The equal-footing doctrine and *Winans* were directly questioned by Federal District Judge George Boldt in his controversial 1974 treaty fishing-rights decision, *United States v. Washington*. Judge Boldt criticized the equal-footing doctrine defense and the argument that a treaty right could be extinguished by implication. Boldt wrote that the admission of the state to the Union "had

no effect upon the treaty rights." Admission, he said, "imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States."[67] What is interesting about this case is the tribe's challenge of *Winans* and subsequent cases which defined the state' police powers over Indian treaty fishing. The tribes sought to reverse the U.S. Supreme Court's compromise decisions, saying that at the time of the treaty negotiations, the tribes never understood that the state could regulate their rights under any circumstances. Judge Boldt agreed with the tribes. In his examination of *Winans* and subsequent decisions he found that "state power to regulate off-reservation treaty fishing was assumed without any explanation or citation of authority." He criticized the U.S. Supreme Court for assuming that states could exercise such power "without discussion of its basis or indication of its source."[68] He concluded that "to the present time there never has been either legal analysis or citation of a non-dictum authority in any decision of the Supreme Court of the Land in support of its decisions holding that state police power may be employed to limit or modify the exercise of rights...."[69] Applying the canons of construction, he agreed with the tribes that they would not have understood that their rights could be regulated and that without Congressional action, the tribes could not be regulated by the state. Boldt, however, was bound to accept and enforce *Winans* and subsequent Supreme Court decisions. He said that the state could regulate only when necessary for conservation. But, the tribes could preempt the state and self-regulate their fishing activities if they met certain conditions. Following Boldt's decision and its affirmation on appeal by the U.S. Supreme Court, the equal-footing doctrine defense would not be used again in fishing- or hunting-rights cases in the Pacific Northwest, the Rocky Mountains, or the Great Lakes until the 1990s.

Repsis: Re-Birth of the Equal-Footing Doctrine?

Tribes and attorneys specializing in Indian law thought that *Race Horse* and the equal-footing doctrine had been so criticized by the courts that they would never be used in treaty hunting- or fishing-rights cases ever again. But, in the 1995 case of *Crow v. Repsis*, the equal-footing doctrine would resurface once again and would be accepted by a federal appeals court. *Crow v. Repsis* centered upon the question of whether or not the Crow tribe had a continuing and permanent right to hunt elk in the Big Horn National Forest without a Wyoming hunting license. Article 4 of the 1868 Crow Treaty is identical to the hunting provision in the Shoshone-Bannock treaty of 1868 which was interpreted by the U.S. Supreme Court in *Ward v. Race Horse*. The state asserted that because the treaties were identical, *Race Horse* was controlling. Using the equal-footing doctrine, it claimed that admission of the state repealed the treaty and that national forest lands are occupied. The tribe contended that "the Supreme Court overruled, repudiated and disclaimed each of the legal doctrines applied to *Race Horse*." This included the court's repudiation of the equal-footing doctrine, the improper use of the

canons of construction, the state's plenary power over fish and game, and the irreconcilability of state's rights and Indian treaty rights.

Despite the many court rulings that adopted the *Winans* reserved-rights doctrine, both the district court and the appellate court ruled in favor of the state. The appellate court not only found that the case was identical to *Race Horse*, but it also agreed with the legal, spatial, and temporal reasoning of *Race Horse*:

> we view *Race Horse* as compelling, well-reasoned and persuasive. Also, contrary to the Tribe's views, there is nothing to indicate that *Race Horse* has been "overruled, repudiated or disclaimed; *Race Horse* is alive and well."[70]

The U.S. Supreme Court denied the tribes' appeal and opened up the door, once again, for future applications of *Race Horse*, and the use of the equal-footing doctrine. Moreover, this decision represented an acknowledgment of the state-centric geographical model and a denial of the tribes' decentered spatial vision of ceded lands as a shared space where state and tribal-use rights coexisted.

Mille Lacs and Repudiation of the Equal-Footing Doctrine

In 1990, the Mille Lacs Band of Ojibwe Indians sought legal recognition of their treaty right to hunt, fish, and gather on off-reservation lands and waters in the state of Minnesota. The band claimed that such rights had been secured to them by the 1837 Ojibwe treaty. In 1983, the U.S. Seventh Circuit Court of Appeals ruled that the Lac Courte Oreilles Ojibwe of Wisconsin continued to enjoy such off-reservation rights under the same 1837 treaty (and an 1842 treaty) despite a presidential removal order and a subsequent treaty in 1854 that established four Ojibwe reservations in Wisconsin. In 1994, a federal district court employed the liberal canons of treaty construction and found that the Mille Lacs tribe's off-reservation treaty hunting, fishing, and gathering rights had never been terminated. In its defense, the state of Minnesota did not employ the equal-footing doctrine or any legal-geographical theory about the impact of settlement or statehood on the tribe's off-reservation treaty rights.

But, following upon the 1995 *Crow v. Repsis* decision, Minnesota added the equal-footing doctrine to its appeal of the district court's ruling. Minnesota now argued that *Race Horse* and *Repsis* were controlling, that the Mille Lacs treaty rights were temporary, and that they had been terminated in 1858 when Minnesota was admitted to the Union. Applying the uncompromising spatial reasoning and vision of *Race Horse*, the state claimed that hunting- and fishing-treaty rights were fundamentally "irreconcilable with its sovereignty."[71] The appellate court, however, disagreed with this state-centric view and application of the equal-footing doctrine. It ruled that the tribe understood its rights were permanent and could not be implicitly terminated by changing

settlement geography, property ownership, or political status (i.e. statehood) of the ceded territory. The court, citing *Winans* and *Tulee* as precedent, reasoned that because of the reserved-rights doctrine, the Mille Lacs' treaty rights were not irreconcilable with state sovereignty. Accordingly, state territorial sovereignty within American federalism is not absolute and is constrained by the federal constitution, treaties and legislation. Unlike the Repsis court, it found that the U.S. Supreme Court had, in fact, reconciled or created a balance between federally defined off-reservation Indian treaty rights and state regulatory authority. The appellate court concluded that "upholding the Band's usufructuary rights does not offend the State's sovereignty."[72]

The U.S. Supreme Court agreed to hear Minnesota's appeal of the lower court's ruling. In its appeal, Minnesota characterized the lower court decisions as an attack on the state's geopolitical identity and a fundamental diminishment of the state's territorial sovereignty. The continuing existence of the Mille Lacs' treaty rights represented a loss of the state's "core sovereign function of safeguarding and regulating the use and taking of the State's game and fish resources" and "prevents Minnesota from exercising full sovereignty over its natural resources...."[73] Attacking the *Winans* doctrine, Minnesota argued that off-reservation Indian treaty rights were "irreconcilable with the State's ability to enforce its laws *uniformly* as to all person within its jurisdiction [author's emphasis]."[74] The state proposed that the lower court had weakened and attacked the basic political and state-centric spatial assumptions of federalism, stating that "Minnesota no longer will have the authority to unilaterally make management decisions...." and that "the federal court will have the ultimate authority to determine how Minnesota's natural resources in the ceded territory will be managed."[75] The state concluded its defense of state-centrism and *Race Horse* by observing that the continuation of special Indian hunting, fishing, and gathering privileges "carves out a significant slice of the State's core sovereign interests, and requires the State to share that area of sovereignty with the Bands under the ultimate supervision of the federal court."[76]

At the same time it attacked the Court's *Winans* decision, Minnesota asserted that the fundamental geopolitical and temporal assumptions and conclusions of *Race Horse* were sound and applicable in the Mille Lacs case. The state latched onto statehood and the equal-footing doctrine as a means of arguing that the tribe's treaty rights were intended to be temporary. Following *Race Horse*, Minnesota claimed that the most significant event in determining the legal status of off-reservation harvesting rights was the creation of a state and the assumption of geopolitical homogeneity within a state's borders. Citing *Repsis* and the Supreme Court's refusal to hear the Crow tribe's appeal of the appellate court's decision, Minnesota argued that the equal-footing doctrine was applicable in this case because the Court had "rejected the argument that *Ward* had become outdated."[77]

In a five-to-four decision, the U.S. Supreme Court ruled that the Mille Lacs' 1837 treaty rights had survived statehood, an 1850 presidential removal order, and subsequent treaties between the Mille Lacs tribe and the U.S. Writ-

ing for the majority, Justice Sandra Day O'Connor was critical of the state's adoption of *Race Horse* and the equal-footing doctrine. She said that the state faced "an uphill battle" in using this line of defense.[78] The Court said that there was no clear evidence that Congress explicitly intended to abrogate the tribe's treaty rights and that the act admitting Minnesota to the Union was silent about the tribe's treaty rights. According to the Court, treaty rights cannot be "extinguished by implication at statehood. Treaty rights are not impliedly terminated upon statehood."[79] Furthermore, it found that the state's use of *Race Horse* was misplaced because of *Winans* and other Court decisions. *Race Horse*, it said, "does not bear the weight the State places on it, however, because it has been qualified by later decisions of this Court" and, in fact "rejected by this Court within nine years of that decision" in *Winan*s.[80]

In criticizing *Race Horse*, the Court restated its support of the legal-geographical compromise position it had reached earlier in *Winans* and subsequent cases:

> "*Race Horse* rested on a false premise....an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State."[81]

According to the majority, "Indian treaty rights can coexist with state management of natural resources."[82] The justices said that the Court has "consistently rejected over the years" the premise that "treaty rights are irreconcilable with state sovereignty."[83] In attacking this premise, the Court criticized Minnesota's state-centrist claims about its territorial sovereignty and police powers over natural resources within its borders. It said that states, in general, do not have absolute sovereignty over wildlife and natural resources within their borders, but that this "authority is shared with the Federal government." On the other hand, the Court restated its unsupported position that Indian tribes did not have an unqualified treaty right of access and use of natural resources on ceded lands. Indian treaty rights "do not guarantee the Indians 'absolute' freedom from state regulation."[84] Returning to *Winans*, *Tulee*, and *Puyallup I*, the court said that Minnesota may impose regulations when necessary for conservation of species. The Court recognized that its position was a political compromise, that it "accommodates both the State's interest in management of its natural resources and the Chippewa's federally guaranteed treaty rights."[85]

Conclusion

In this paper I have traced the historical-legal geographies of American Indian hunting, fishing, and gathering rights as they have been constructed and reconstructed in the U.S. judicial system. From the 1896 *Race Horse* case to the 1999 case involving the Mille Lacs, I have examined the legal landscapes that were constructed by Indians and non-Indians alike in order to allow or deny American Indian access to natural resources on off-reservation

ceded lands. My goal has been to show the differing legal and geographical interpretations that the parties brought to the courtroom and how the judgments fashioned by the courts—their legal-geographical judgments—were based on the specific legal-interpretive standards employed at the time of the decisions. This interpretive context was framed by assumptions about romantic nature and cultural constructions of "wilderness," belief in assimilation and the notion of the vanishing Indian, and the expansion of capitalist economic forces that promoted the exploitation of Indian lands, as well as abstract conceptions of nature and land as exchangeable commodities. Assumptions about the spatiality of treaty rights, states rights, and federalism, as I have argued, also played a critical important role in shaping treaty-rights litigation and judgments.

I also explored the contradictory role of the legal system in supporting the domination and resistance of indigenous peoples. The historical geography I traced in these specific court cases reveals one aspect of the legal face of U.S. colonialism and post-colonialism. One conclusion I want to draw out is that this historical and legal geography is complex and that simple characterizations about the role of law in relations between Euro-Americans and indigenous peoples should be resisted. Yes, law has served colonial powers in their appropriation of native lands and in assimilating native cultures into the Euro-American social, political, and economic order. But, the legal system has offered native peoples *some* protection from the dominant political, cultural, and economic systems. Law is a site where geographies not only are created, imposed, and reinforced, but also challenged, resisted, and transformed.

The effects of the historical geography of treaty rights have resulted in the judicial protection of both Indian hunting, fishing, and gathering treaty rights, and in the police powers of the states. Following *Winans* and ending with the decision over the Mille Lacs, the courts repudiated the equal-footing doctrine and maintained the supremacy of federal treaties over state's claims of absolute police powers to control natural resources. But, the courts have not completely eviscerated states of all territorial sovereignty nor have they proclaimed that tribal members have unqualified usufructuary treaty rights on off-reservation ceded lands. The courts have fashioned a compromise geopolitical environment that protects Indian treaty rights *and* state territorial sovereignty, allowing states some regulatory powers in order to protect the integrity of the resource base.

The courts have empowered Indian tribes in ruling that tribes may preempt the state's regulatory role by establishing their own conservation institutions and regulatory framework. This has resulted in a partial decentering of wildlife conservation in states with treaty tribes. Tribes in the Pacific Northwest and around the Great Lakes have successfully accomplished this task through the formation of tribal-based conservation codes and agencies and through the formation of sophisticated intertribal conservation institutions such as the Northwest Indian Fisheries Commission and the Great Lakes Indian Fish and Wildlife Commission. With improved institutional capacities,

tribes and intertribal organizations have sought to further decenter state conservation regulation and management by participating as equals in state conservation decision making; tribes have sought resource co-management. States have resisted these pressures and demands to share natural-resource management decision-making powers. Similar to their opposition to the continuing existence of off-reservation treaty rights, some states view tribal requests for co-management as an attack on their political identities, an attempt to erode their constitutionally defined territorial sovereignties, and their ability to protect and manage natural resources within their borders. The result today is that while tribes have access to their off-reservation, treaty-reserved natural resources and increased institutional capacity to participate in the management of these resources, states remain paramount in this arena. This persists because of the states' institutional capacities, financial resources, and the court's reluctance to go beyond the legal-geographical compromise it fashioned in *Winans* and to fundamentally challenge the power structure of dual federalism or recognize ceded areas as a shared regulatory space.

Notes

1. In this article I use the terms native, indigenous, and American Indian to refer to the original communities of what is now the United States. Indigenous peoples within the U.S. find themselves in conflict with the federal or the national government and subnational governments or states. In this paper I will distinguish between the two political scales by referring to the subnational governments as "states" and using central, national, and federal to refer to the national scale of political authority within American Federalism.
2. See Fay Cohen, *Treaties on Trial: The Continuing Controversy Over Northwest Indian Fishing Rights* (Seattle: University of Washington Press, 1986); Robert Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery* (Lexington: University Press of Kentucky, 1990); Robert Sullivan, *A Whale Hunt* (New York: Scribner, 2000); and Rick Whaley and Walter Bressette, *Walleye Warriors*: *Effective Alliance Against Racism and for the Earth* (Philadelphia: New Society Press, 1994). A good source for information on the "Lobster Wars" in New Brunswick and Nova Scotia may be found at www.rism.org/isg/dlb/bc/index.htm.
3. Mark David Spence, *Dispossessing the Wilderness*: *Indian Removal and the Making of the National Parks* (New York: Oxford University Press, 1999). Also see Bruce Willems-Braun, "Buried Epistemologies: The Politics of Nature in (Post)colonial British Columbia," *Annals of the Association of American Geographers* 87:1 (1997): 3-31.
4. Steven Silvern, "Nature, Territory and Identity in the Wisconsin Treaty Rights Controversy," *Ecumene* 2 (1995): 265-82.
5. Louis Warren, *The Hunters Game: Poachers and Conservationists in Twentieth Century America* (New Haven: Yale University Press, 1997).
6. Roderick Neumann, *Imposing Wilderness: Struggles Over Livelihood and Nature Preservation in Africa* (Berkeley: University of California Press, 1998).
7. For examples, see Ramachandra Guha, *The Unquiet Woods: Ecological Change and Peasant Resistance in the Himalaya* (Berkeley: University of California Press, 1990) and Raymond Bryant, *The Political Ecology of Forestry in Burma, 1824-1994* (Honolulu: University of Hawaii Press, 1997).
8. For a general discussion of governmental dispositions toward spatial homogeneity or a desire to "eliminate contradictions of marginalized peoples and nations," see Gerard O'Tuathail, *Critical Geopolitics: The Politics of Writing Global Space* (Minneapolis: University of Minnesota Press, 1996). Also see Henri Lefebvre's discussion of the state and abstract space in *The Production of Space* (Oxford, Blackwell Publishers, 1991): 278-82. He writes, "Each state claims to produce a space wherein something is accomplished—a space, even, where something is brought to perfection: namely, a unified and hence homogeneous society."
9. William Cronon notes that Indian conceptions of land tenure were very different from English colo-

nists. Indians in New England, he says, thought that their "sale" of land to English colonists was only an agreement to share the ecological bounty found on the land. Land sales, he says "had more to do with sharing possession than alienating it." See William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983): 67. Similarly, David Harvey, reflecting upon the difference between Indian and European time-space frameworks, writes that "The value system of the colonizers was set in a matrix of socially constructed spacetime which was radically at odds with that of the Indian community." *Justice, Nature & the Geography of Difference* (Cambridge: Blackwell Publishers, Inc. 1996): 223.

10. Robert A. Williams Jr. *The American Indian in Western Legal Thought: The Discourse of Conquest* (New York: Oxford University Press, 1990): 6; Sidney Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994). In a different context, but with similar political-economic effect, E.P. Thompson notes that the law is "employed, directly and instrumentally, in the imposition of class power." *Whigs and Hunters: The Origin of the Black Act,* (New York: Pantheon Books, 1975): 262.
11. Emphasis in the original, Thompson, *Whigs and Hunters*, 263.
12. David Delaney, *Race, Place and the Law, 1836-1948*, (Austin: University of Texas Press, 1998): 28.
13. Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly (Berkeley: University of California Press, 1994): 226.
14. Charles Wilkinson, *American Indians, Time, and the Law*. (New Haven: Yale University Press, 1987): 101.
15. Quoted in Charles Cleland, "Preliminary Report of the Ethnohistorical Basis of the Hunting, Fishing, and Gatheirng Rights of the Mille Lacs Chippewa," in James M. McClurken, comp., *Fish in the Lakes, Wild Rice, and Game in Abundance* (East Lansing: Michigan State University Press, 2000): 31.
16. 7 Stat., 536. Charles J. Kappler, comp., *Indian Affairs: Laws and Treaties.* Vol. 2 (Washington: Government Printing Office, 1904): 492.
17. Quoted in Cleland, "Preliminary Report," 39.
18. Spence, *Dispossessing the Wilderness.*
19. 10 Stat., 432. Kappler, *Indian Affairs*, 662.
20. 15 Stat., 649. Kappler, *Indian Affairs*, 1009.
21. Spence, *Dispossessing the Wilderness*, 32.
22. See Richard L. Clow, "Colorado Game Laws and the Dispossession of the Inherent Hunting Right of the White River and Uncompahgre Utes," in Richard L. Clow and Imre Sutton, eds., *Trusteeship in Change: Toward Tribal Autonomy in Resource Management* (Boulder: University Press of Colorado, 2001).
23. States also appropriated *Race Horse* in their attempts to restrict and regulate Indian harvesting activities on the reservations. For a discussion of state-tribal geopolitics on reservations, see Steven E. Silvern, "Reclaiming the Reservation: The Geopolitics of Wisconsin Anishinaabe Resource Rights," *American Indian Culture and Research Journal* 24 (2000): 131-53.
24. 15 Stat.,673. Kappler, *Indian Affairs*, 1021.
25. *Worcester v. Georgia,* 31 U.S. (6 Peters) 515, 582 (1832).
26. *In Re Race Horse* 70 Fed. 599 (1895).
27. *Ward v. Race Horse,* 163 U.S. 509 (1896).
28. *Ward v Race Horse*, 504, 514.
29. *Ward v Race Horse*, 504, 515.
30. C.F. Hanke to William Obern, 28 February 1911, Bureau of Indian Affairs, Central Classified Files: 85146-09-052 to 94846-14-053, La Pointe Agency. RG 75 National Archives.
31. W.H. Mylrea to G.H. Mc Cloud, 26 June 1896, Wisconsin Department of Justice Closed Case Files, Series 644, Box 2, Folder 5(36). State Historical Society of Wisconsin.
32. *State v. Morrin,* 136 Wis. 552 (1908).
33. Plaintiff, State of Wisconsin Brief, Vol 902, Wisconsin Supreme Court Cases and Briefs, 11. My emphasis.
34. *State v. Morrin*, 556.
35. Wisconsin would continuously try to include reservations within its territorial vision, applying state conservation laws to Indians while hunting on the reservations. The federal courts rebuffed the state in *In Re Blackbird* 109 Fed. 139 (1901), treating the reservations as extraterritorial enclaves within state territories. See Silvern, "Reclaiming the Reservation."
36. *People v. Chosa*, 252 Mich.154 (1930).
37. *People v. Chosa*, 157.
38. *State v. Towessnute,* 154 Pac. 807 (1916).

39. *State v. Towessnute*, 808.
40. *State v. Towessnute*, 808.
41. *State v. Towessnute*, 809.
42. *State v. Wallahee*, 255 Pac. 94 (1927).
43. See Clow, "Colorado Game Laws" for a discussion of the Ute Indian belief that they continued to have the right to hunt off of the reservation.
44. Bad River Tribal Members to Attorney General Wickersham, 14 February 1911, Bureau of Indian Affairs, Central Classified Files: 85146-09052 to 94846-14-053, La Pointe Agency, RG 75, National Archives. Also Antoine Dennis to John Collier, 28 October 1936, Bureau of Indian Affairs Central Classified Files, 1907-1939, File No. 29040. RG 75, National Archives.
45. Gus Whitebird to J.C. Cavill, 20 May 1947, Bureau of Indian Affairs Central Classified Files, 1907-1939, File No. 68624, Great Lakes Agency, RG 75, National Archives.
46. Jacob Walker to William Taft, 28 March 1911, Bureau of Indian Affairs, Central Classified Files: 85146-09-052 to 94846-14-053, La Pointe Agency, RG 75, National Archives.
47. Frank Pierce to J.H. Fowler, 19 April 1911, Bureau of Indian Affairs, Central Classified Files: 85146-09-052 to 94846-14-053, La Pointe Agency. RG 75, National Archives.
48. *United States v. Winans,* 198 U.S. 371 (1905).
49. *United States v. Winans,* 374.
50. *United States v. Winans*, 380-81.
51. *United States v. Winans*, 381-82.
52. *United States v. Winans,* 383.
53. *Tulee v. State of Washington,* 315 U.S. 684-85 (1942).
54. *Tulee v. State of Washington*, 684.
55. *State v. Arthur,* 74 Idaho 251 (1953).
56. *State v. Arthur*, 253.
57. *State v. Arthur*, 257.
58. *State v. Arthur*, 258.
59. *State v. Arthur*, 265.
60. *State v. Arthur*, 265.
61. *Puyallup Tribe v. Department of Game of Washington, et al.,* 391 U.S. 398 (1968).
62. *Richard Sohappy et al., v. Mckee A. Smith et al,* 302 F. Supp. 911 (1969).
63. *Richard Sohappy et al., v. Mckee A. Smith et al*, 908.
64. *People v. Jondreau,* 384 Mich. 546 (1971).
65. *People v. Jondreau*, 548.
66. *People v. Jondreau*, 547.
67. *United States v. Washington,* 384 F.Supp. 401 (1974).
68. *United States v. Washington*, 336.
69. *United States v. Washington*, 338.
70. *Crow Tribe v. Repsis,* 73 F.3d 994 (10th Cir. 1995).
71. *Mille Lacs Band of Chippewa Indians v. Minnesota,* 124 F.3d 927 (8th Cir. 1997).
72. *Mille Lacs Band of Chippewa Indians v. Minnesota,* 928.
73. State of Minnesota, *Brief for the Petitioners*, 1997 U.S. Briefs, 6 August 1998, 12.
74. State of Minnesota, *Brief for the Petitioners*, 37.
75. State of Minnesota, *Brief for the Petitioners*, 37, 39.
76. State of Minnesota, *Brief for the Petitioners*, 39.
77. State of Minnesota, *Brief for the Petitioners*, 33.
78. *Minnesota et al., v. Mille Lacs Band of Chippewa Indians et al., 526 U.S. 202 (1999).*
79. *Minnesota et al., v. Mille Lacs Band of Chippewa Indians et al.*, 207.
80. *Minnesota et al., v. Mille Lacs Band of Chippewa Indians et al.*, 203.
81. *Minnesota et al., v. Mille Lacs Band of Chippewa Indians et al.*, 204.
82. *Minnesota et al., v. Mille Lacs Band of Chippewa Indians et al.*, 204.
83. *Minnesota et al., v. Mille Lacs Band of Chippewa Indians et al.*, 205.
84. *Minnesota et al., v. Mille Lacs Band of Chippewa Indians et al.*, 204.
85. *Minnesota et al., v. Mille Lacs Band of Chippewa Indians et al.*, 205.