AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 20:1 (1996) 87–129

Indian Treaty Rights: Sacred Entitlements or "Temporary Privileges?"

DAVID E. WILKINS

INTRODUCTION

Tribal reserved lands and the (sometimes porous) federal legal protection of those territories and the natural resources contained therein, both within and without reservation boundaries, are critical for the perpetuation of tribal survival. Individually, these natural resource rights—rights to hunt, gather, and fish, and to own and utilize water, timber and minerals—have been studied in depth by various scholars.[1] My intention, however, is much more modest. I will examine a single case, *Ward v. Race Horse*,[2] decided on 25 May 1896, in which the Supreme Court announced a set of powerful and problematic doctrines that constricted Indian treaty rights and also articulated a vision of tribal-state political relations that elevated states' rights to a preeminent role above even federally sanctioned Indian treaty rights.

I believe much of the current debate about states' rights vis-à-vis tribes is rooted in the doctrines laid out in *Ward*. Certain elements of *Ward* were previously thought to have been "implicitly" overruled by the 1905 decision *United States v. Winans*,[3] in which the Court affirmed treaty-defined off-reservation fishing rights. Furthermore, the entire decision has been "much criticized" by other jurists and commentators.[4] However, *Ward*'s key

David E. Wilkins is an assistant professor of political science and American Indian studies at the University of Arizona, Tucson.

holdings, which center on treaty interpretation, the relationship between state law and tribal sovereignty as exercised via treaty rights, and the so-called equal-footing doctrine—which requires that all states newly admitted to the Union after the thirteen original states be admitted with the same rights and sovereignty at the time of admission as the original states—were remarkably resuscitated in a recent Tenth Circuit Court of Appeals decision, *Crow Tribe of Indians and Thomas Ten Bear v. Repsis*,[5] in which the court said *Ward v. Race Horse* "is alive and well."[6]

In addition, the current congressional and judicial tenor is such that reassertions of states' rights, particularly when they conflict with Indian treaty rights, need to be closely examined so as to gauge their constitutional, statutory, or treaty basis. The fact that *Ward* has just been dramatically reaffirmed by a federal court of appeals serves as a vivid reminder that even historically unsound and legally repudiated decisions can be revived unless indigenous groups remain vigilant and poised to defend their treaty rights. As tribes have learned, however, although vigilance regarding their rights is necessary, it has not always been a forceful enough factor to shield those rights from abridgement or diminution.

By the time *Ward* arose in the mid-1890s, issues centering on a tribe's treaty-defined right to hunt and fish both on and sometimes off reservation lands were vitally important to tribal survival. This was because the federal government's reservation/assimilation policy had generally confined Indians on diminished lands and subjected them to educational, religious, and agrarian policies designed to acculturate them.

The issue of whether the tribe had reserved the right to hunt on the reservation or whether it was a reserved off-reservation right is an important one. Indians, it has usually been presumed, have rights to on-reservation hunting, fishing, and gathering because of their inherent sovereignty and may exercise those rights so long as they have not been expressly terminated or ceded in a treaty or by federal statute.[7] A number of treaties also explicitly confirmed for certain tribes the right to take wildlife within reservation boundaries.[8]

Alongside the retention of on-reservation hunting and fishing rights were the tribes' preservation of a number of important off-reservation rights, typically involving the continuing right to hunt, fish, and gather food products in ceded lands. As early as a 1789 treaty with the Wyandot,[9] tribes often reserved the right to

secure wild game on lands they had sold to the United States. This was a way, says Felix S. Cohen, of "softening the shock of land cession."[10] Article 4 of the 1789 Wyandot Treaty, for example, stated, "It is agreed between the said United States and the said nation that the individuals of said nation shall be at liberty to hunt within the territory ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury or annoyance to any of the subjects or citizens of the said United States."[11] Numerous examples exist of such "ceded land" preservations of hunting and fishing rights.[12]

Unlike the exercise of relatively unchallenged on-reservation hunting and fishing rights, the practice of such rights off-reservation, even when treaty-defined, "have been much more disputed over the years" and continue to be the basis of much litigation.[13] This was the primary issue the Supreme Court was called to decipher in the *Ward* decision. The disputed clause in *Ward* was Article 4 of the 1868 Shoshoni-Bannock-United States treaty, which said, "The Indians herein named . . . 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."[14]

In the 1890s, the U.S. government was almost maniacally devoted to what it considered a weighty question: how to expedite the rapid transformation of the Indian tribes from "savagery to civilization." During this decade and well into the first part of the twentieth century, this broad policy and comprehensive cultural goal was met by (1) the continued individualization of tribal lands by allotment; (2) the implementation of Indian education programs that forced Indian children away from their homes; and (3) the extension of some "individualized" Indian civil rights protection.[15]

The federal government's policy of allotment and assimilation was statutorily and judicially entrenched.[16] Nevertheless, tribal nations, especially those as generally accommodative as the Shoshoni-Bannock,[17] remained optimistic that their explicit treaty rights would be protected by the Supreme Court. And even though new states were being formed throughout the West, tribes on the whole had fared well in direct legal battles with states, although states occasionally secured victories when non-Indian parties were involved.[18] The tribes' historically impressive litigative record against states traces its roots directly to the Constitution's Commerce Clause, which vests control of Indian affairs exclu-

sively in the Congress. It is also intimately connected to judicial precedent like *Worcester v. Georgia* (1832),[19] which held that the state of Georgia had no jurisdiction in Indian Country, and to important cases such as *The Kansas Indians* (1866)[20] and *The New York Indians* (1866),[21] which declared that states had no power to tax Indian lands even if the Indians appeared to be "culturally" assimilated. In *The Kansas Indians,* it was held specifically that as long as a tribe governs itself and is recognized by the United States, it retains sovereignty and is exempt from state taxation laws. Tribal rights can be changed only by treaty or voluntary abandonment, said the Court.

Both *Worcester* and *The Kansas Indians,* as well as later cases such as *Jones v. Meehan* (1899),[22] also spelled out in graphic fashion an important legal principle: that the language used in Indian treaties "must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."[23]

Indians residing "off-reservation" were generally understood to be subject to state law. Importantly, state jurisdiction did not hold if the Indian was exercising an explicit off-reservation treaty right that was within "the constitutional scope of exclusive federal authority."[24] Nevertheless, considering the frenetic pace of western settlement and the direction of federal policy that was focused on individualizing Indians lands, funds, and powers, it was unclear how the Supreme Court would decide the issue when the Indians' rights were directly contradicted by state law.

Ward originated in Wyoming. The interested parties were the state, the Shoshoni-Bannock Indians of the Fort Hall Reservation, and the federal government as the trustee[25] for the tribes and their resources. First, however, I will present some historical data preceding the Court's decision.

SHOSHONI-BANNOCK HISTORY

The Shoshoni-Bannock tribes (also known as the Sho-Bans) of the Fort Hall Reservation, located in the southeastern corner of Idaho, are a district part of the great Shoshoni Nation. This sizable nation, prior to sustained contact and treaties with the United States, maintained territorial jurisdiction over some eighty million acres of land from western Wyoming to southern Idaho; from eastern Oregon down to eastern California; and from central Nevada to northern Utah.[26]

The Shoshoni people can be broadly classified into four distinct groups: the Western Shoshoni, hunters and gatherers of the Great Basin (southern Idaho to Death Valley, California, to central and eastern Nevada); the Northern Shoshoni, residing on the Columbia River Plateau (this group merged with the Bannock of Fort Hall); the Eastern (or Wind River) Shoshoni, who inhabited the Wind River Mountains and the high Plains; and the Comanche-Shoshoni. Although the Bannock, a Northern Paiute-speaking people, and the Northern Shoshoni spoke a different language, the other Shoshoni groups shared a common language, though speaking a number of dialects. The Comanche language is of the Uto-Aztecan linguistic group, which includes Shoshoni and other languages as well. Their original territory ranged from the Rocky Mountain region to Mexico's interior.[27]

The vast area controlled by the Shoshoni Nation was not really pierced by Anglo travelers and settlers until the 1840s. Several routes intruded into Shoshoni territory. One of the more favored routes was the Oregon Trail, which emerged from South Pass and crossed Washakie's Eastern Shoshoni country to enter Idaho. The California Trail was another. This road, originating in southeastern Idaho, branched off south of Idaho's Raft River, dipped into northern Utah, and then headed due west through Nevada and into California. The number of Anglo migrants coursing through Shoshoni territory during these early years was fairly small. The one early and important exception was the Mormons, who used the Salt Lake Road, opened in 1848.[28]

The Shoshoni people's relative physical isolation from whites changed forever when gold was discovered in the mountains of California, near present-day Sacramento. This precipitated the famous 1849 Gold Rush. In 1849 alone, some twenty-five thousand fortune seekers traveled the California Trail; in 1850, another forty-four thousand made the trek.[29] This "discovery" had devastating consequences for the indigenous inhabitants in both California and throughout the affected Shoshoni country. The flood of whites pouring into Shoshoni territory denuded the grasslands and led to a dramatic depopulation of the animal herds the tribe depended on for subsistence.

In 1849, federal Indian agents and superintendents made recommendations that the United States negotiate treaties with the various Shoshoni bands as part of an effort to ease the inevitably mounting tension between white settlers moving west and the various tribes, including the Shoshoni, Sioux, Cheyenne, Arapaho,

Crow, and Assiniboine, all of whom were defending their homelands. The federal government hoped, in part, to convince the tribes to agree to peace and wanted to secure permission from the Indians for the construction of roads and military posts in their territories to provide for the safe passage of the whites. In response to an invitation from the government, one of the greatest gatherings of indigenous nations ever assembled took place at Fort Laramie (eastern Wyoming) in September 1851. This impressive assemblage of indigenous peoples and federal officials included a delegation of sixty Shoshoni chiefs and headmen, led by one of their most esteemed leaders, Washakie.

The Shoshoni, however, left the treaty proceedings prematurely and were not signatories of the 1851 treaty. There are conflicting accounts of why they left. Professor Vine Deloria, Jr., asserts that when Washakie and his delegation arrived, the Sioux group balked at their presence because of an earlier battle in which a group of Shoshoni had killed a number of Sioux. A Sioux warrior, Deloria says, even attempted to assassinate Washakie. The federal government, "realizing there was no practical way to make the Sioux and the Shoshone's agree to peace terms . . . decided to make a separate treaty with the Shoshone's at a later time."[30]

Another account suggests that the government's treaty commissioner, Colonel Mitchell, doubted whether his instructions from Washington authorized the inclusion of the Shoshoni Nation. Commissioner of Indian affairs Luke Lea reported the following in his annual report of 1851:

> A delegation of the Shoshones or Snake Indians, a disaffected and mischievous tribe, infesting one of the principle routes of travel to Oregon and California, was conducted by the agent to the grand council recently held at Fort Laramie with the wild tribes of the prairies. These Indians were not considered by the Superintendent as embraced in his instructions, and were, consequently, not parties to the treaty negotiated with the other tribes. The delegation, however, were kindly received, suitable presents were bestowed upon them, and they returned to their people with more friendly feelings toward the government and the whites.[31]

Whichever account is considered the more accurate, the fact remains that the Shoshoni Nation had the requisite political and military standing and was treated as a sovereign entity by the United States.

THE SHOSHONI TREATIES

As whites continued to stream west, their depredations against the Shoshoni and the area's game continued unabated. Such actions understandably outraged the Shoshoni people. Furthermore, stagecoach lines were established and telegraph and overland mail lines were constructed without the consent of the Shoshoni people. By 1861, the commissioner of Indian affairs, William P. Dole, reported that "the Shoshones, or Snakes, and the Flathead, are wealthy and powerful, and can cause their hostility to the remoter settlements and the overland emigration to be severely felt. Hence the pressing necessity of some speedy arrangement with them, which with the Snakes [Shoshoni] it is suggested should be (as a temporary measure) a treaty granting annuities in consideration of a right-of-way across their country."[32]

The subsequent discovery in the early 1860s of gold veins in the Beaver Head, Salmon River, and Boise areas of Idaho, along with the expansion of the American Civil War, exacerbated an already delicate interracial situation. The Civil War compelled the federal government to confront the reality of tribal military power west of the Rocky Mountains. And since gold provided the economic stability the North needed to continue the war, the struggle for control of roads on which to transport this precious material was critical.[33]

On 5 July 1862, Congress enacted a law[34] appropriating twenty thousand dollars for the purpose of negotiating a treaty with the Shoshoni Nation. United States military expeditions, intent on providing safety for their westward-bound citizens, felt the need to maintain the roads for the transport of gold and other supplies and to ensure the passage of mail and other freight items. Although the superintendent of Indian affairs for Utah earlier had recommended that the treaty have as its main objective the extinguishment of the Shoshoni's right of land occupancy, Congress, in authorizing the appointment of the treaty commission, emphatically chose not to terminate Shoshoni land title.

The only specifics sought by the United States in the appropriating legislation were peaceful relations with the Shoshoni and safe passage for American citizens and U.S. mail. The federal government also hoped to learn what the outer boundaries of Shoshoni territory were.

Tragically, in January 1863, several months before the treaty negotiations began, several hundred Northwestern Shoshoni who

had gathered at one of their customary winter encampments at Bear Lake in southeastern Idaho, were viciously attacked by General Connor and his 250 men, fresh from a campaign to crush California Indian resistance to white intrusion. When the Bear Lake massacre concluded, some 224 Shoshoni lay dead. The United States lost fourteen men. The senseless killing of so many Indians left an indelible mark on the Shoshoni people. It was the last time the Northwestern Shoshoni band ever fought against the United States.

Subsequently, between 2 July 1863 and 14 October 1863, the United States negotiated five treaties with the various dispersed bands of the Shoshoni Nation.[35] Although the five treaties are similar in form, it is clear that the Fort Bridger Treaty, the first one negotiated, had special import. This is because Washakie, the principal chief of the Shoshoni Nation, presided over this agreement for his people. He would also be a major player in the second Fort Bridger Treaty of 1868, which will be discussed on the following pages.

The first Fort Bridger Treaty (Fort Bridger #1, 1863) laid out the northern, eastern, and southern boundaries of Shoshoni territory. It left the western boundary ill-defined, since there were no Shoshoni from that area present at the treaty negotiations. The treaty's major emphasis, from the federal perspective, was to secure from the tribe permission allowing white travelers safe passage through Shoshoni lands as well as to allow the construction of stagecoaches, telegraph lines, and projected railroads.[36]

Furthermore, under Article 5, Washakie and his band were promised ten thousand dollars worth of food and supplies annually for twenty years as compensation for the "inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by whites. . . ."[37] Each of the other bands was guaranteed compensation as well.

THE 1868 FORT BRIDGER TREATY (FORT BRIDGER #2)

The years between 1863 and Fort Bridger #2 were especially traumatic for the Shoshoni and Bannock nations. Originally, the ten-thousand-dollar allotment of foodstuffs and supplies was deemed sufficient to enable the Indians to survive the difficult winters until such time as they could be settled on a reservation and learn the skills needed for agricultural pursuits. However, Congress sometimes failed to appropriate the money for the

supplies, and even when it did, "transportation difficulties delayed the distribution of annuities."[38]

Some Shoshoni bands and individuals reacted to their poor and unlawful treatment by attacking the Overland Stage Lines stations, stealing livestock and post provisions. Washakie's group, however, was against any further warfare with the United States, despite enticements from the Crow, the Cheyenne, and even the Sioux. The revered chief impatiently awaited the arrival of his band's treaty annuities.[39] Washakie's band, in fact, was attacked in 1865 by the Sioux and Cheyenne, who were "infuriated by Washakie's loyalty to the white man."[40]

Washakie's willingness to accommodate the federal government and its expanding population fit well with Congress's establishment of the Indian Peace Commission on 20 July 1867.[41] The peace commission was authorized to determine the reasons for the raft of Indian-U.S. wars in the 1860s and was empowered to propose and carry out peace treaties and establish Indian reservations as a systematic way to "civilize" the Indians. Washakie, of course, was one step ahead of the federal policymakers. He had already asked the local agent, Luther Mann, Jr., for a reservation to be set aside in the Wind River Valley for his band.[42] Additionally, the Fort Hall Reservation was established in southeastern Idaho on 14 June 1867 by President Andrew Johnson via presidential executive order on the advice of Acting Secretary of Interior W.T. Otto.[43] It was designed to accommodate the Boise-Bruneau Shoshoni bands, who were led by Chief Tagee.

The details of the Great Treaty Council of 1868, also known as the Fort Bridger Treaty (or Bridger #2), have been amply documented elsewhere,[44] and I will touch on only some of the key points. It is significant in that it was the last treaty council called specifically for the purpose of establishing a reservation—actually two—Wind River and Fort Hall.[45] Thereafter, reservations were established either by presidential executive order or congressional enactment.

The call went out from Fort Bridger the first week of May 1868, summoning all Eastern Shoshoni and Bannock to assemble at the fort on 4 June. The Bannock, led by Tagee, arrived around 15 May. The Eastern Shoshoni, headed by Washakie, drifted in more slowly. General C.C. Auger, one of the federal treaty commissioners, held a series of informal conferences with both chiefs, primarily concerning the set-aside of a well-defined land base in country that was familiar to them. Washakie and his band secured a

portion of the land they had always inhabited, encompassing some 2,774,000 acres.

Tagee, on the other hand, who wanted to retain his 1867 reservation in Idaho near Soda Springs and the Portneuf River, was informed that he and his band would be temporarily housed on Washakie's reservation[46] until the Fort Hall Reservation was confirmed. On 30 July 1869, President Grant, at the behest of Commissioner Parker and Interior Secretary Cox, officially confirmed that the Bannock group, which included some Eastern Shoshoni, could continue to reside on the Fort Hall Reservation. His order noted, "The within recommendation of the Secretary of the Interior is hereby approved, and within the limits of the tract reserved by Executive order of June 14, 1867, for the Indians of southern Idaho will be designated a reservation provided for the Bannocks by the second article of the treaty with said tribe of July 3, 1868."[47] The reservation consisted of some 1.8 million acres in southeastern Idaho.

The treaty was officially announced, read to the two assembled tribes article by article, and then signed by eight Shoshoni chiefs and six Bannock leaders on 3 June 1868. Besides establishing the two reservations, it contained stipulations relating to peace and friendship (Article 1); criminal jurisdiction (Article 1); building construction by the federal government for the tribes (Article 3); an acknowledgment on the part of the Indians that the reservations would be their "permanent home," while they still reserved the "right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . ." (Article 4); clarification of the role and location of the Indian agent (Article 5); and individual land allotments for those Indians willing to engage in agricultural pursuits (Article 6).

Several of the remaining treaty provisions, Articles 7–10, dealt with American "civilization" procedures for the Indians—compulsory school attendance for Indian children, seeds and agricultural implements for novice Indian farmers, Western clothing, and the provision of sufficient doctors, blacksmiths, teachers, and carpenters to meet the tribes' needs. Article 11 declared that no cession of any portion of the reservation would be valid unless agreed to by "at least a majority of all the adult male Indians. . . ."[48] Interestingly, Article 12 established an agricultural contest in which the Indian agent agreed to pay five hundred dollars annually for three years to the ten Indians who "in the judgement of the agent, may grow the most valuable crops for the respective year."[49]

Fort Bridger #2 was proclaimed by the president on 24 February 1869 and was ratified by the Senate two days later.[50] According to Francis P. Prucha, the "standard construction of [Indian] treaties was that ratification was retroactive; a treaty took effect from the date of the signing."[51]

For our purposes, it is Article 4, the hunting provision, which is of central importance. It reserved to the Indians the right to hunt on "unoccupied" federal lands off the reservation as long as peace existed between the whites and the Indians. And this provision applied to both the immediately established Wind River Reservation and the later established Fort Hall Reservation. Article 2 was carefully phrased to assure the Bannock people that, whenever their reservation was created, they would secure "the same rights and privileges" as the Wind River Shoshoni.

Moreover, Article 4 expressly referred to hunting as a "right" and not as a privilege. More importantly, unlike some of the annuities and other benefits the Indians were securing which had specific time lines (i.e., their educational benefits—teachers and construction of school houses—were to last for only twenty years), the hunting right had no time limit. Hunting was a right the Indians were to enjoy "so long as game may be found, and so long as peace" subsisted between the Indians and the whites.

Within a month of the treaty's signing, 28 July 1868, the government enacted a law establishing a temporary government for the territory of Wyoming. This measure, however, contained an important disclaimer provision declaring that Wyoming's territorial government could not interfere with the Indians' treaty-reserved rights "so long as such rights shall remain unextinguished by treaty between the United States and such Indians."[52]

Although the various Shoshoni bands entered into seven ratified agreements[53] with the United States between 1872 and 1904, these were primarily land cession and allotment contracts, and none involved diminution of preexisting Shoshoni-Bannock treaty rights. The one nonratified exception was a drafted agreement entered on 7 November 1873, which had as one of its express purposes a "relinquishment" of the fourth article, the hunting provision, of the Fort Bridger Treaty of 1868. Although it was signed by ten major chiefs, Congress never ratified the agreement, and thus its provisions never went into effect.[54]

As the Shoshoni-Bannock settled into reservation life, they observed the continuing influx of Anglos into and surrounding their reservation and the corresponding diminishment of wild

game herds, especially buffalo. They were greatly distressed by both sets of events—Anglo population growth and animal population decline.

Pocatello, Idaho, for example, grew within a few short years in the 1880s from nothing more than a railroad stop on the Fort Hall Reservation to a bustling town. In 1888, the Sho-Ban were talked into ceding some sixteen hundred acres of their territory for the formal incorporation of Pocatello as a town. Even more dramatically, the white population surge had a noticeable effect on the wildlife that was an essential supplement to the Sho-Ban's otherwise meager reservation provisions. The Indians firmly believed that whites were unnecessarily killing far too many big game animals.[55]

THE TRIBAL-STATE CONTEXT INTENSIFIES

Wyoming became the forty-fourth state on 10 July 1890. With statehood, Wyoming officials and non-Indian residents, basking in their increased political status as entities on an "equal footing" with the other states, began agitating for jurisdiction over Indian resources as well. Their desire was largely supported by the Bureau of Indian Affairs which, on 1 November 1889, had issued a circular to all federal Indian agents urging them to exercise greater control over Indian hunters. The commissioner of Indian affairs, in conformity with federal officials' general perception of Indians, said,

> In view of the settlement of the country and the consequent disappearance of the game, the time has long since gone by when the Indian can live by the chase. They should abandon their idle and nomadic ways and endeavor to cultivate habits of industry and adopt civilized pursuits to secure means for self-support.[56]

The circular did acknowledge that Indian treaty stipulations guaranteeing the tribes their right to hunt outside the reservation still needed to be enforced. However, this so-called privilege could be exercised only "to supply the needs of the Indians" and should not lead, according to the agent, to the "wanton destruction of game."[57]

By 1894 the Department of the Interior was being inundated with complaints from whites—Wyoming's governor, county at-

torneys, and private citizens—that the Bannock and the Shoshoni were "wantonly slaughtering elk and deer." The Indian agent, when asked to report on the situation, stated that this was untrue. He acknowledged that some game had been killed outside the reservation by the Indians, but he noted that they were justified in taking the game, both legally under Article 4 and biologically because they were starving. "Unless," said the agent, Captain Ray, "they receive sufficient food on the reservation, no power can prevent them from killing game or cattle."[58]

Furthermore, Agent Ray reported that the Indians had informed him, as they had for a number of years, that whites were hunting in the same area and were "killing game merely for the pleasure of hunting."[59] For example, Louis Ballou, who lived on Fort Hall in the early 1880s as a special agent, noted that in his travels throughout the region he had once encountered a hunting party of three whites "who the day before admitted having shot over 60 elk in a little basin near our camp, and he [one of the hunters] told with much pride that not a single animal had got away. All the meat these three hunters had taken were two hindquarters, one of which was given to us, and the tongues, these evidently to be shown in Lander [Wyoming] as proof of their skill."[60]

Such reports of sport killing were corroborated by Indian agents in other parts of Idaho, as well as in Montana, Wyoming, Utah, and the Dakotas. State game officials, the secretary of the interior was informed, refused to prosecute whites for violating state game laws because they "did not feel justified in prosecuting white men . . ." as long as "Indians were allowed to hunt."[61]

In an exacerbating move on 20 July 1895, the Wyoming legislature enacted a comprehensive law to regulate the taking of game throughout the state. As written, the law applied even to Indians exercising their treaty-recognized, off-reservation hunting rights. By this time, conditions had deteriorated to the point where more than twenty Shoshoni-Bannock Indians were arrested by a posse of local whites for exercising their hunting rights—rights that the white settlers wanted squelched. After their unjustified arrest, they were robbed of their goods. Fearful that they were going to be hanged, they attempted to escape, and a number were murdered by the twenty-six-member posse, operating loosely under the auspices of Uinta County's constable, William Manning. Initially this tragic episode was euphemistically known as the "Jackson Hole disturbance."[62] As U.S. Indian agent Thomas Teter described it in his 24 July 1895 report,

> The Indians killed by these settlers were practically massacred. . . . One batch, disarmed, were being driven by a body of armed settlers, and in passing over a trail . . . made a break for liberty, whereupon the guards opened fire at once and killed from four to seven Indians, going on the principle that "a good Indian is a dead Indian."[63]

The acting attorney-general, Judson Harmon, believed that the entire episode was a "premeditated and prearranged plan to kill some Indians and thus stir up sufficient trouble to subsequently get U.S. troops into the region and ultimately have the Indians shut out from Jackson Hole. The plan was successfully carried out and the desired results obtained."[64]

As the truth surfaced about the murdered Indians at Jackson Hole, public sentiment shifted in favor of the Shoshoni-Bannock, who had done nothing to deserve the brutality they experienced. Rather than the early reports of an Indian massacre of whites, a more accurate view emerged showing that the Indians had been unmercifully killed by vengeful whites.[65]

By now, even the Indian Affairs office had grudgingly adopted a position supporting the Sho-Ban treaty rights that the United States had originally pledged to protect in 1863 and in 1868. In his 1895 annual report, the commissioner stated that "the laws of the state of Wyoming which prohibit hunting within that state for certain kinds of game during certain months must be construed in the light of the treaty granting rights to these Indians to hunt on the unoccupied lands within the state, so far as they apply to the Shoshone and Bannock Indians." Therefore, urged Browning, "it is not competent for the state to pass any law which would modify, limit, or in any way abridge the right of the Indians to hunt as guaranteed by the treaty."[66] Brown further urged that the government was bound under its treaty with the Shoshoni-Bannock to prosecute those whites who had violated the Indians' treaty-stipulated hunting rights. He requested that the Department of Justice study the matter and make recommendations about how to proceed with punishing the offenders.[67]

On 20 September 1895, the Office of Indian Affairs instructed Province McCormick, inspector for the United States Indian Service, to proceed to Wyoming to meet with the governor and other state officials regarding the hunting dispute. The Indian commissioner's instructions to McCormick are telling and indicate the great importance the United States attached to this case:

> I desire you to confer with the governor of Wyoming with reference to the right of these Indians to hunt off their reservation in the territory in question and ascertain his views upon the subject. . . . In case the governor is unwilling to concede the rights of the Indians to hunt as above indicated, you will propose to him that there shall be a *test case* made and a decision arrived at as to the right of the Indians to hunt on public lands under their treaty, either by having an Indian arrested by the state officials for hunting, and an application brought by the United States attorney for Wyoming or a writ of *habeas corpus* for the release of such prisoner, or in some other way, and that he shall agree that in case it shall be decided that the Indians have a right to hunt, and that the laws of Wyoming are of no effect as against them, then, in that event, he, Governor Richards, shall, by all the means in his power, protect the Indians in such right; and on the other hand, if it shall be decided by the courts that the Indians have no right to hunt, in violation of the state laws, or, in other words, that the state laws operate to abridge or defeat their said treaty rights, then this Department will recommend to Congress that an agreement be made with them for the relinquishment of the rights guaranteed to them by the treaty of 1868, and which they claim and believe are still in full force.[68]

Interestingly, the letter went on to suggest that McCormick not contact the Indians until after he had already concluded his meetings with the governor and his officials. This poignantly shows the disadvantaged position that tribes occupied vis-à-vis the United States and the constituent states, notwithstanding their express treaty relations. The federal government, acting in a typically paternalistic manner, exhibited a clear willingness to litigate the treaty rights of the Shoshoni-Bannock without having first obtained either tribal input or consent on the matter.

McCormick traveled to Wyoming and met with Governor Richards on 29 September. The governor, McCormick later said, refused to concede that the Indians had any treaty rights the state was legally bound to uphold. According to the governor, the Indians' treaty rights had been abrogated by the state's hunting laws. Nevertheless, McCormick reported that Wyoming's chief executive was willing to accept the proposition for a "test case" to let the judiciary decide the matter.[69] McCormick then met with the Shoshoni-Bannock after the detailed state-federal agreement had already been worked out, to explain the government's strategy.

Urging the tribal members to "rely implicitly upon the Department," McCormick received near unanimous consent to proceed.[70] The inspector terminated his report by gratuitously and inaccurately predicting that, in his opinion, the courts would "uphold (as I suppose they will) the treaty rights as guaranteed to these Indians."[71] Nevertheless, he still strongly urged that the government proceed to negotiate with the Indians to have their hunting rights ended because he believed, as the massacre had shown, that "establishing the right of these Indians to hunt on public or unoccupied lands does not protect them in that right."[72]

The legal infrastructure was set. Soon the "test" Indians, including John Race Horse (a Bannock), were arrested. Almost immediately, Gibson Clark, a Justice Department attorney, instituted *habeas corpus* proceedings to seek the Indians' release. The case was tried on 21 November 1895 in the federal district court, located in Cheyenne, Wyoming.[73] Benjamin Fowler, John Ham, and Willis Van Devanter (a future U.S. Supreme Court justice), representing Wyoming, brought the case against Race Horse. Gibson Clark represented Race Horse.

THE DISTRICT COURT'S DECISION

District Judge John H. Riner, after reciting the facts, said that the task before the court was "a delicate one" because the case brought into question not only "the validity of a treaty made by the United States with the Bannock and Shoshone Indians, or, at least, a construction of that treaty, and of the right and privileges claimed under it" . . . "but it also draws into question "the validity of a statute of the state of Wyoming, on the ground of its being repugnant to the constitution, laws, and treaties of the United States."[74]

Judge Riner then moved to a discussion of the actual language of Article 4 and the meaning of the phrase "unoccupied lands of the United States." Although the state argued that the phrase could not sustain Race Horse's right to hunt, since the territory was in the limits of Wyoming's "hunting districts," Riner disagreed and said that "such is not the language of the treaty provision."[75] He said the state was adding words to the treaty and was "giving to it a construction which, as it seems to the court, would not be warranted by its terms and provisions."[76] Riner then cited as support John Marshall's powerful line in *Worcester v. Georgia* (1832) that "the language used in treaties with the Indians

should never be construed to their prejudice. . . ."[77] He also relied on the precedent of *Hauenstein v. Lynham* (1880), in which the Supreme Court held that when a treaty provision has two constructions—restrictive and liberal—the liberal construction "is to be preferred."[78]

In a brisk and erudite opinion affirming Indian treaty rights, Riner ruled that Wyoming's hunting laws were invalid against the treaty-reserved hunting rights of the Shoshoni-Bannock. The decision dealt with three interrelated questions: (1) whether an Indian treaty and the rights and privileges claimed under it were void and continued even after Wyoming's statehood; (2) whether a Wyoming statute that was inconsistent with the federally sanctioned Indian treaty was lawful; and (3) whether Wyoming's admission as a state "upon an equal footing with the original states" abrogated the Indian treaty's provisions.

First, Riner asserted the supremacy of the federal government's treaty power; "a power which is expressly delegated to the United States and prohibited to the States."[79] Therefore, Wyoming's hunting laws, which conflicted with the Shoshoni-Bannock treaty rights, were invalid because Congress's intention to violate it was not clear and unequivocal.[80] Citing *Ware v. Hylton,*[81] Riner vigorously declared that if a ratified treaty is "in conflict with a law of any State, the State law must give way to its superior authority."[82] "This rule," said Riner, "is essential to the existence of the federal government," because without it "the Constitution, laws, and treaties of the United States would be subject to overthrow at anytime at the will of a state."[83]

Riner also refused to accept the state's "equal footing" argument as nullifying treaty rights. While conceding that the act that admitted Wyoming into statehood had not explicitly reserved the tribe's treaty rights, Judge Riner also said, "[N]either does it, in express terms, abrogate the treaty or any of its provisions."[84] Riner relied on the Supreme Court's *The New York Indians,*[85] in which the state of New York had been rebuffed in its attempt to tax Seneca Indian lands because the tax was in direct conflict with an Indian treaty provision exempting Indian lands from taxation. According to Riner, "here we have a treaty provision guarantying [sic] to these [Bannacks] Indians, in consideration of a surrender by them to the government of certain rights, which were recognized by the government as rights, that they should be permitted to hunt upon the public lands of the United States 'so long as game may be found thereon.'"[86]

In conclusion, Judge Riner noted that "the act admitting Wyoming into the Union does not, by necessary implication, repeal or abrogate the treaty, and that the treaty provision remains in force."[87] Thus, since the state law was in direct conflict with an express treaty provision, it could not be "enforced against the Indians, parties to the treaty."[88]

Despite this impressive judicial ruling, the Shoshoni-Bannock soon faced a legislative extinguishment of their hunting rights. Their agent, Thomas Teter, echoing the treaty right termination sentiment expressed earlier by Inspector McCormick, strongly urged that the Bureau of Indian Affairs establish a commission to negotiate with the Indians "for a relinquishment of their treaty rights."[89] The rationale given was that such a relinquishment ostensibly would "prevent a recurrence . . . of the Jackson Hole troubles of the past July."[90]

H.R. 4444 was introduced by Representative Frank Mondell (R-Wyoming) on 4 February 1896. Mondell sought either a complete "surrender" or at least a major "modification" of the tribe's right to hunt "to such an extent that they shall be amenable to state game laws and regulations."[91] The bill was read, its title was amended, and it was subsequently passed in the House. It was not, however, enacted into law. By the time it was introduced, Willis Van Devanter, Wyoming's lead attorney, had already appealed the district court's decision to the Supreme Court.

WARD: A SYNOPSIS

In *Ward v. Race Horse,* argued 11 and 12 March 1896 and decided 25 May 1896, the Supreme Court, in a majority ruling (7–1, Justice Brewer did not participate), reversed Judge Riner's decision. The Court declared the federal district court's judgment "erroneous" and held that Wyoming's laws had superseded the Sho-Ban's treaty-guaranteed rights to hunt on off-reservation and unoccupied lands ceded by the two tribes to the United States.

The primary issue before the Court was whether the Sho-Ban's treaty rights to hunt, free of Wyoming state regulation, on off-reservation lands survived that state's admission to the Union. Justice Edward D. White[92] and the majority held that, first, Indian off-reservation hunting was a "temporary and precarious privilege" and not a treaty-guaranteed perpetual right. Thus, it was logically meant to be restricted as whites slowly settled in the area. Second, the Court held that Indian treaty rights were implicitly

divested when territories became states under the Equal Footing Doctrine.

However, the ensuing analysis will show that the Supreme Court's ruling has several fundamental flaws. First, it represented an "implicit" judicial repudiation of a ratified treaty. A solid constitutional argument can be made that, since the political branches craft and ratify treaties in conjunction with the tribal participants, the rights outlined in these unique bilateral contracts can be changed or modified only with the consent of both parties—by entering into new treaties, by changed circumstances, or by violations or war.[93] And even during those times when some parties have questioned the integrity of Indian treaties or have attempted to read them solely as legalistic documents, the Court has said on a number of occasions that treaties are to be construed as Indians would comprehend them.[94]

Second, the majority disregarded ample judicial precedent which, up to that point, had generally held that treaty language was to be construed in the manner in which Indians understood it. Third, this decision elevated a state law over a tribe's treaty-sanctioned right. And finally, the ruling has several interpretive and factual errors. For example, Justice White incorrectly attributed statehood status to Wyoming in 1868, when this was not actually achieved until 1890.

THE ATTORNEY'S BRIEFS: FOR JOHN RACE HORSE—THE APPELLEE

Race Horse was represented by United States Attorney General Judson Harmon. Harmon argued in his brief that the lower court's ruling that had released Race Horse on a writ of habeas corpus was sound for the following reasons: First, the elk killed by Race Horse were taken on "unoccupied federal lands" which, under the terms of the 1868 treaty, meant that they had been lawfully taken; second, Indian rights under the treaty of 1868 were not subject to regulation or control by Wyoming; finally, the treaty had not been repealed by Wyoming's 1890 admission act.[95]

FOR JOHN H. WARD, SHERIFF OF UINTA COUNTY—THE APPELLANT

Ward's attorneys, Benjamin F. Fowler and Willis Van Devanter, argued in their ninety-four-page brief that the circuit court's

decision was riddled with errors and should be overturned by the high court. The two attorneys launched a multipronged legal attack. First, they argued that Race Horse's killing of the elk had occurred on lands that were, contrary to Race Horse's contention, "occupied" by quite a few white settlers. Many were cattlemen who used the area for grazing local livestock as well as livestock belonging to "citizens of other States. . . ."[96]

Second, they asserted state supremacy over all the property, game, and fish throughout the state. As the preeminent sovereign, Wyoming had exclusive control over all nonreservation property and wildlife.[97] Their answer to the Indians' argument that the treaty right was a contractual arrangement that could not be abrogated by the state's admission was that the treaty had not created a "vested right." "All that was granted," said Fowler and Van Devanter, "was a mere privilege to hunt, and that was not exclusive."[98]

Third, Ward's lawyers argued that, independent of the land ownership issue, the preservation of wildlife was within the province of the state's police power, and the Indians' treaty right was subject to that power. This was crucial because of their assertion, in contradiction to the available evidence, that the Indians, "enjoying and exercising an unlimited and unlimitable right to hunt, would soon be able to exterminate the game."[99]

Fourth, Fowler and Van Devanter relied heavily on the Equal Footing Doctrine and emphasized that, upon admission, Wyoming assumed an equal footing with the original states and was then possessed of all the same authority, power, and attributes possessed by the original states.[100] Finally, they equated Indian treaties and congressional laws and claimed, citing *The Cherokee Tobacco Case*,[101] that treaty provisions are repealed by subsequent inconsistent legislation. More importantly, they claimed that such treaty repeals may be "by implication or it may be expressed."[102]

THE WHITE OPINION

Justice White began the majority decision by denying as "wholly immaterial" the importance of where John Race Horse had killed the elk. This denial immediately signaled his anti-Indian position on the treaty, since that document had explicitly recognized the Shoshoni-Bannock's right to hunt on "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."[103] For White, the "sole question" to be considered was whether the treaty "gave" to the tribes the right to exercise the "hunting privilege," allegedly in violation of Wyoming's laws.

However, since the Sho-Bans had always relied on hunting to sustain themselves, why did White assert that this was a right "given" to the tribes? This hunting right had assumed an even more critical nature since the tribes' agents had evidence that many Indians were malnourished because of the inconsistent and inadequate federal food supplies to the Fort Hall Reservation. These were supplies that had been guaranteed to the Indians as part of their treaty arrangement with the United States.

Moreover, White's postulation of hunting as a *privilege,* a term he would use throughout the case, says much about the tenuous nature of what actually were vested rights that tribes reserved for themselves through their treaty arrangements. The tribes, in fact, had been very careful to reserve the bulk of those rights that had not explicitly been ceded away in the Fort Bridger treaty. In other words, the Sho-Bans surrendered much of their aboriginal territory to the federal government and, in exchange, secured to themselves all those rights specifically mentioned in the treaty—i.e., hunting—and all other rights not granted away. The issue becomes one of interpreting expressed treaty provisions. Were the provisions to be interpreted "as the Indians understood them?" Or was the Supreme Court's interpretation the only one to be considered, even when it conflicted with the Indians' view? In this case the Court had already tipped its hand by calling the right to hunt—a necessity of Indian life at the time—a mere "privilege."

Furthermore, in wording the question this way, Justice White implicitly presumed that a state law was superior to a ratified federal treaty. The federal Constitution's Supremacy Clause, however, contradicts this. That clause, specified in Article 6, clause 2, states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Nevertheless, this would be the premise on which White would construct his ruling. In discrediting the status of treaty-reserved hunting rights, White observed,

> If it [treaty] gave such right, the mere fact that the state had created school districts or election districts . . . could no more efficaciously operate to destroy the right of the Indians to hunt on the lands than could the passage of the game laws. If, on the other hand, the terms of the treaty did not refer to lands within a State, then it is equally clear that, although the lands were not in school and election districts and were not near settlements, the right conferred on the Indians by the treaty would be no avail to justify a violation of State law.[104]

In this quote, White effectively manipulated the facts to give legitimacy to the state's claim where none existed. How, for instance, could the 1868 treaty possibly refer to state lands when Wyoming did not become a state until 1890? Although it was true that Wyoming achieved territorial status in 1868, shortly after the signing of the Fort Bridger Treaty, the act that established territoriality included an explicit provision stating that "nothing in this act shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."[105]

Territories, in broad terms, are those dependencies and possessions over which the United States exercises jurisdiction. Prior to 1873, territories were administered by the Department of State; afterwards the Department of the Interior was given statutory jurisdiction over them. Territories are without the sovereign capability of states, although they could look forward to eventual statehood on terms of equality with the original states, once certain conditions were met.[106] In Wyoming these conditions, one of which included having a population of sixty thousand, were not met until 1890.

White's discussion of Wyoming's actual political status insofar as that status overrides Indian treaty rights is an important misconstruction on his part. This is evident in his early statement of the question before the Court, where he equated the establishment of treaty rights (1868) with Wyoming's existence as a state (1890 in fact; 1868 in White's articulation). This is a crucial error, because the tribes' treaty rights predate Wyoming's territorial status by a month (July 1868) and statehood by more than two decades (July 1890). The Indians' preexisting treaty rights, according to the Constitution's treaty clause, entail the supreme law of the land.

White then returned to an analysis of the language of Article 4 of the treaty, especially the word *unoccupied,* which earlier he had said was "wholly immaterial" to deciding the case. He had to return to this, however, because the language of that provision was explicit, and in order to circumvent such express language he would have to orchestrate the meaning of words carefully. He said,

> It may at once be conceded that the words "unoccupied lands of the United States" if they stand alone, and were detached from the other provisions of the treaty on the same subject, would convey the meaning of lands owned by the United States, and the title to or occupancy of which had not been disposed of. But in interpreting these words in the treaty, they cannot be considered alone, but must be construed with reference to the context in which they are found. Adopting this elementary method, it becomes at once clear that the unoccupied lands contemplated were not all such lands of the United States wherever situated, but were only lands of that character embraced within what the treaty denominates as hunting districts.[107]

White had adroitly changed the tribes' heretofore unqualified right to hunt on any of their former "unoccupied" territory ceded to and still under the control of the United States in the treaty. He thus reduced it to a "privilege" subject to state law via hunting districts that were nonexistent when the treaty was negotiated. White continued and expanded his exercise in obtuse language:

> This view follows as a necessary result from the provision which says that the right to hunt on the unoccupied lands shall only be availed of as long as peace subsists on the borders of the hunting districts. Unless the districts thus referred to be taken as controlling the words "unoccupied lands," then the reference to the hunting districts would become wholly meaningless, and the cardinal rule of interpretation would be violated, which ordains such construction be adopted as gives effect to all the language of the statutes. Nor can this consequence be avoided by saying that the words "hunting districts" simply signified places where game was to be found, this would read out of the treaty the provision as "to peace on the borders" of such districts, which was clearly pointed to the fact that the territory referred to was once beyond the borders of the white settlements.[108]

White was saying that the Indians enjoyed the "privilege" of hunting, but if violence erupted, the privilege could be withdrawn. What he failed to say was that it was local whites who were breaking the peace; yet the tribes were the ones who stood to lose their rights because of white violence. The Court then stepped up its attack and violated one of its most cherished doctrines—the political question rule. These are questions that the courts refuse to take cognizance of on account of their purely "political" character. In other words, the judiciary sometimes refuses to accept certain cases because it perceives that acceptance would constitute an unwarranted encroachment upon the executive or legislative powers.[109]

Hence, on a number of occasions in the field of Indian law, the Supreme Court has refused to exercise its power of judicial review of even highly questionable congressional acts or presidential actions because those branches have been constitutionally empowered—directly via the Indian Commerce Clause and indirectly through the Treaty Clause—to act in Indian affairs, thus freeing their actions from judicial examination because of their alleged political nature. But, as Nell Jessup Newton has eloquently argued,[110] although the Supreme Court regularly applied to Indian affairs such legal doctrines as the political question, which were peculiar to the federal foreign affairs power, despite the so-called domestic-dependent status of tribes and the ending of treaty-making in 1871, the Court, until 1977, continued to apply this doctrine to deny tribes—and in some cases individual Indians—even a forum for their grievances. In that year the doctrine was finally repudiated in *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 84 (1977). Even though this doctrine has been disavowed, the Supreme Court is still exceedingly deferential to the political branches and has yet to overturn "any [federal Indian] statute as being beyond Congress's authority."[111]

White, ignoring this judicial standard, said, "The elucidation of this issue [the distinction between unoccupied land and hunting districts] will be made plain by an appreciation of the situation existing at the time of the adoption of the treaty, of the necessities which brought it into being and of the purposes intended to be by it accomplished."[112] The Court then proceeded to give a description of the events surrounding the 1868 treaty's negotiation and the subsequent years up to and through Wyoming's statehood. White, using his own rather than the Indians' interpretation of treaty proceedings, observed that the Shoshoni-Bannock had

indeed been granted hunting rights but only "so long as the necessities of civilization did not require otherwise" and that such rights were "absolutely" dependent "upon the will of congress."[113]

In constructing his treaty abrogation language, White said that the "privilege" of hunting was available to the Indians "only whilst peace reigned on the borders."[114] With the arguments established, White then reached the gist of his justification for abrogating Indian treaty rights:

> To suppose that the words of the treaty intended to give to the Indians the right to enter into already established states and seek out every portion of unoccupied government land and there exercise the right of hunting, in violation of the municipal law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view. It would also render necessary the assumption that Congress, whilst preparing the way, by the treaty, for new settlements and new States, yet created a provision not only detrimental to their future well being, but also irreconcilably in conflict with the powers of the States already existing.[115]

This quote contains several fallacies and flaws. First, White spoke as if the state existed as a sovereign at the time of the treaty's negotiation. It did not. Second, the Court, in a questionable interpretation of the Treaty and Supremacy clauses of the Constitution, and ignoring prior judicial precedent (e.g., *Worcester v. Georgia* [1832]), urged that treaties were of a diminished stature when placed next to "municipal laws." Third, White noted that the treaty's language, if interpreted to allow the Shoshoni-Bannock the right to hunt off the reservation, would somehow "frustrate" the purpose behind the treaty's negotiation. However, the only thing frustrating about the language of the agreement was White's disputable reading of the otherwise explicit words that affirmed the reserved hunting rights of the Indians. And finally, White created an alleged irreconcilability between a state's admission into the Union and treaty rights, when no such conflict existed.

White then returned to his statements about the relation between the location of Race Horse's killing of the elk and the timing of statehood. He observed,

> It is undoubted that the place in the state of Wyoming, where the game in question was killed, was at the time of the treaty,

> in 1868, embraced within the hunting districts therein referred to. But this fact does not justify the implication that the treaty authorized the continued enjoyment of the right of killing game therein, when the territory ceased to be a part of the hunting districts and came within the authority and jurisdiction of a state. The right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified.[116]

How was it possible for a treaty, much less the treaty commissioners, to contemplate the disappearance of not yet existing conditions? This was a remarkable assertion. The Court then arrived at the apex of this particular set of premises disavowing treaty rights. White said that the federal government had the sole power of determining who could do what on the lands in question. This sense of unrestrained ownership harkens back to the "doctrine of discovery" principle unleashed by the Supreme Court in John Marshall's 1823 ruling, *Johnson v. McIntosh,*[117] which held that the United States was vested with absolute title to "discovered" Indian lands, while the tribal inhabitants' land title was diminished to that of mere occupancy.

According to White's logic, since under the *Johnson* rule the land already belonged to the United States, then the Indians' right to hunt logically "cease[d] the moment the United States parted with the title to its land in the hunting district."[118] Again, this is a problematic historical argument. A reserved Indian treaty right, at this time, was just that, a reserved right, and there was nothing in the language of the treaty or in the treaty's proceedings indicating that the Indians' right to hunt would cease if or when Wyoming went from territorial status to statehood. White then stated his personal views about Indian treaty rights. He said the correct view was of the "temporary and precarious" nature of the right reserved.[119] Continuing, White noted,

> Here the nature of the right created gives rise to such implication of continuance, since by its terms, it shows that the burden [the Indians' hunting rights] imposed on the Territory was essentially perishable and intended to be of a limited duration. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious.[120]

White next brought forth one of the classic treaty interpretation rules—treaties should be liberally construed in favor of the Indian—and swiftly cast it aside. "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 the 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."[121] In the end, White had provided an interpretation of the 1868 treaty provision that had completely clashed with the view of the Indians, the Bureau of Indian Affairs, and the Department of Justice; had read a congressional intent into the treaty that was not discernible from the historical record and that conflicted with the arguments of the federal government's lawyers who had sided with the Sho-Bans; and had elevated states' rights over tribal treaty rights.

WHITE AND "THE EQUAL FOOTING DOCTRINE"

The last section of the preceding quote where White said that Indian treaty rights would not be allowed to be "destructive of the rights of one of the States" capsulized the fragile position of Indian/tribal treaty rights when the justices of the Court were ideologically aligned with the doctrine of dual federalism. Dual federalism,[122] which was operational in the nineteenth century, was a concept based in the belief that the function and responsibilities of the state and federal governments were clearly distinguished and functionally separated from each other.

Additionally, the Tenth Amendment to the Constitution, which expressly states that "the powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people," was yet another source of state power that White and the majority relied on. The relationship between the states and tribes, however, is not constitutionally spelled out. Hence, *contention* has historically been the best word to characterize tribal-state relations. Since the birth of the United States, tribal-state relations have occupied a preeminent if ambiguous role in the transformation of federal Indian policy and law. In fact, Frank Pommersheim, a law professor, contends that "there can be little doubt that tribal-state relations questions are the most significant issues in Indian law

today."[123] Justice White maintained that Article 4 of the treaty (which included the hunting clause) had been repealed because it conflicted with Wyoming's admitting act.[124] In an interpretation wholly at odds with District Judge Riner's more constitutionally sound federal supremacy argument and a recognition of the federal government's moral and political obligation to protect Indian treaty rights, Justice White asserted that the act that admitted Wyoming into the Union "declared that State should have all the powers of the other States of the Union, and made no reservation whatsoever in favor of the Indians."[125] However, the state's enabling act actually said nothing about Indians. The Constitution's Commerce Clause had conferred the power to regulate the nation's Indian affairs on the Congress, not the states.

White quoted liberally from *Escanaba Company v. Chicago* (1882), which discussed the "equal footing theory." In *Escanaba,* the Court held that, on admission, a state "at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing as them. . . ."[126] This is true. However, none of the original states enjoyed unfettered authority over Indian affairs, Indian lands, or Indian treaty rights. Again, the Constitution's Commerce Clause and the president's well-exercised treaty authority saw to that.

Justice White stated that the treaty right had been repealed because of "the conflict between the treaty and the act admitting that State into the Union." "The two facts" said White, "the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as co-existing."[127] This interpretation, however, directly conflicts with an earlier Court opinion, *United States v. Berry,*[128] which also involved a state's (Colorado's) attempt to construe its enabling act in a way to repeal the treaty rights of (the Ute) Indians.

In *Berry,* it was held that "according to a well settled rule of construction, since there is no expressed repeal of any part of the treaty, that instrument and the statute should be construed together, and as far as possible, the provisions of each should be allowed to stand."[129] More importantly, the federal court said that an enabling act could not be so construed because it would deprive the United States "of the power of fulfilling the solemn obligations imposed upon them by said treaty.[130] "The treaty by its terms was to be paramount, and the rights conferred thereby were not to be taken away without the consent of the Indian." And

while conceding that the United States could abrogate or repeal treaty provisions, "it is clear to my mind that such repeal can only be enacted in express terms, or by such language as imparts a clear purpose on the part of Congress to effect that end."[131]

Finally, White capped his opinion by disregarding the considered argument of the government's attorneys that United States constitutional authority precluded state jurisdiction. While paying lip service to the constitutional delegation of federal authority in relation to Indian tribes, White said that "nothing in this case shows that this power has been exerted by Congress."[132] The Shoshoni-Bannock, however, were under the distinct impression, reinforced by the legal support rendered by the government, that their treaty hunting right was not subject to control by any other party, absent tribal consent or a bilateral modification of the preexisting treaty arrangement.

Nevertheless, wedding public faith, state sovereignty, and congressional will together, White concluded by saying that the lower court's decision was "erroneous," and the case was reversed and remanded.

JUSTICE BROWN'S DISSENT

Justice Henry Brown was aware of the destructive precedent being established by the Court's opinion. He said that the majority's ruling was a "distinct repudiation by Congress of the treaty with the Bannocks."[133] The continuing validity of the treaty, and the fact that Wyoming's admission to statehood abrogated the treaty *pro tanto* and left tribes "at the mercy of the state government,"[134] was enough to rankle Brown's sense of justice.

While acknowledging that Congress retained the power to abrogate treaties, Brown stated that such an extinguishment should not occur except and unless the intent was clear and unambiguous.[135] After describing the history of the treaty—coming as it had at the close of a series of deadly skirmishes—Brown noted that the tribes agreed to the terms of the treaty and ceded major sections of their land, reserving all other rights to their remaining territory and specific rights in the ceded territory. The United States, Brown said, solemnly pledged to protect the tribes and their retained rights, including the essential hunting right. What he did not say expressly was that, since the Court was unilaterally nullifying the Indians' right to hunt—a clear abrogation of an explicit contractual right—this, it could be argued,

meant that the two tribes should have their ceded lands returned, since the federal government had failed to fulfill its end of the treaty arrangement.[136] Brown's interpretation of Article 4 was radically different from the majority's and closely conformed to what the federal government was arguing on behalf of the Sho-Bans. He said the Indians retained the right to hunt as long as there was game and peace. More importantly, Brown noted,

> The right to hunt was not one secured to them for sporting purposes, but as a means of subsistence. It is a fact so well known that we may take judicial notice of it, that the Indians have never been an industrial people; . . . and that their chief reliance for food has been upon the chase. The right to hunt only on unoccupied land of the United States was a matter of supreme importance to them, and a result of being deprived of it they can hardly escape becoming a burden upon the public. It is now proposed to take it away from them, not because they have violated a treaty, but because the State of Wyoming desires to preserve its game. Not doubting, for a moment that the preservation of game is a matter of great importance, I regard the preservation of the public faith, even to the helpless Indian, as a matter of much greater importance.[137]

Brown also refused to accept the "equal footing argument." He argued, in line with the Court's earlier decision in *The Kansas Indians,*[138] that Indian treaty rights could not be adversely affected except "by purchase or by a new arrangement [treaty] with the United States."[139] Since neither of these stipulations had been met, there was no lawful basis for the Court to accede to Wyoming's abrogation of the Indian's treaty rights. In closing, Brown gave a more historically realistic appraisal of the words "unoccupied lands of the United States." He said that those lands "refer not only to lands which have not been patented, but also to those which have not been settled upon, fenced, or otherwise appropriated to private ownership. But I am quite unable to see how the admission of a Territory into the Union changes their character of unoccupied to that of occupied lands."[140]

THE AFTERMATH

The Supreme Court's anti-Indian treaty position only added additional tinder to the mushrooming treaty-abrogation move-

ment in the country. The ever-quickening downward spiral of tribal sovereignty's remaining force, and the precarious status of Indian treaty rights, culminated seven years later in *Lone Wolf v. Hitchcock*.[141] *Lone Wolf* is considered by most commentators to be the most extreme expression of judicial acquiescence to United States expansionistic interests, which directly violated the treaty-recognized land rights of tribes.

In *Lone Wolf,* the Supreme Court held that the federal government could force the allotment of Indian lands notwithstanding a treaty provision requiring the consent of three-fourths of all adult males before such an action could occur. The Court, citing the political question rule, in fact refused even to consider many of the Indians' claims of fraud and deception, arguing instead that the political branches had plenary power to do whatever they thought was in the best interest of their Indian "wards."

Lone Wolf is easily the more catastrophic of the two cases, since it diminished tribal lands rather than hunting rights by combining unlimited federal power over Indians and their property with the political question doctrine and unabashed judicial deference to the political branches. *Lone Wolf,* however, clearly built upon the treaty abrogation principles clarified and expanded in *Ward*.

Conversely, two years after *Lone Wolf,* the Supreme Court handed down *United States v. Winans*.[142] The issue in *Winans* was whether the Yakima Nation, by treaty, reserved the right to fish both on and off the reservation. The federal government, representing the Yakima, argued that the tribe's claim was "not merely meritorious and equitable; it is an immemorial right like a ripened prescription."[143] Winan's attorneys, on the other hand, relying heavily on the *Ward* precedent, argued that Indian treaty rights specifying off-reservation activities were nothing more than "temporary and precarious" privileges. And, based on the equal footing doctrine, Washington State had the right to grant exclusive fishing rights to non-Indians in the Yakima's "usual and accustomed" fishing spots located off the reservation.

In an 8–1 ruling supporting Indian treaty rights, the Court held, contrary to *Lone Wolf* and *Ward*, that Indian treaty rights were indeed vitally important, that the language of the treaty was to be interpreted as Indians understood it, that Indians "reserved" all rights not specifically ceded away, and that the "equal footing doctrine" would not be understood as having extinguished pre-existing Indian treaty rights.

Winans has been interpreted in several cases as having "modified by implication" the strict holding of *Ward*, especially as regards the "equal footing doctrine."[144] Most legal commentators also support this understanding.[145] Despite this "implied" modification, judges and justices at both the state and federal court level continue to cite *Ward* as good law.

For example, in a 1955 Wyoming Supreme Court case, *Merrill v. Bishop*,[146] the state high court, seemingly unaware of *Winans'* "implied" modification, said that *Ward* "held that hunting rights reserved to the Indians in a treaty were nullified by the act of admission of Wyoming to the Union on an equal footing with the remainder of the States." And in 1988 the Wyoming Supreme Court in *In Re Rights to Use Water in Big Horn River*,[147] citing *Ward*'s treaty interpretation language, held that "courts should not disturb the words of a treaty to find rights inconsistent with its language."[148]

The United States Supreme Court has on several occasions[149] utilized *Ward*. Justice Rehnquist, for example, cited *Ward* in the 1980 case *Washington v. Confederated Tribes*,[150] a decision upholding the state's imposition of cigarette and sales taxes on on-reservation sales by Indians to nontribal members. Rehnquist used it as precedent for his discussion of the *Mescalero* decision that the tribal "tradition of sovereignty" was not powerful enough to immunize tribal off-reservation activities from state taxation.

More distressingly, in the recent *Ten Bear* case[151] mentioned at the outset of this article, the 10th Circuit Court of Appeals[152] resurrected each of the key holdings of the *Ward* ruling. This case sent a chilling message to advocates of Indian treaty rights. A shocking case, it deserves some attention.

On 14 November 1989, Thomas L. Ten Bear, an enrolled Crow and a resident of Montana, exercising his 1868 treaty right to hunt on unoccupied land, had killed an elk in the Big Horn National Forest in Wyoming. Ten Bear had not secured a nonresident Wyoming hunting license, and he was arrested by an agent of the Wyoming Game and Fish Department, charged under Wyoming state law with having unlawfully killed an elk without having secured a valid state hunting license.

On 25 October 1990, Ten Bear was found guilty in the county court of Sheridan, Wyoming, of illegal hunting. Ten Bear was not at his sentence hearing, and a criminal warrant for his arrest was issued. The Crow tribe then joined in the legal action and filed suit on 6 January 1992 against the state of Wyoming, the state's game

and fish agencies, and their directors. The tribe sought, first, a declaratory judgment that the 1851 Treaty of Fort Laramie[153] and the Treaty with the Crow of 1868[154] contained express provisions that reserved to the tribe and its members an unrestricted right to hunt and fish on all "unoccupied" public lands in Wyoming. Second, the tribe wanted injunctive relief seeking the removal of a six-mile elk fence that had been constructed by the state along the southern border of the Crow Indian Reservation. The fence, the tribe argued, violated the Unlawful Inclosures of Public Lands Act and the tribe's treaty rights.

A month later, on 4 February 1992, the state filed a motion to dismiss on the grounds that the state had immunity from suit under the Eleventh Amendment to the Constitution. The federal district court agreed and granted the state's motion to dismiss with respect to the state and its wildlife agencies; however, it allowed the tribe's action to continue against the individual defendants, the directors of the state's game agencies.

On 25 October 1994, the district court reluctantly[155] ruled in favor of Chuck Repsis and Francis Petera, directors of Wyoming's gaming agencies, and dismissed the tribe's case. The court held that,

> [w]here the United States Supreme Court has already determined the legal issue before this court in Race Horse, where the underlying fact pattern, including the treaty language at issue, precisely matches that present in the instant case, and where Race Horse has not been expressly rejected or overruled, this court must follow the controlling decision.[156]

The Crow tribe, backed by the moral and legal support of several other tribes who filed *amici curiae* briefs in alliance with the Crow,[157] appealed the district court's ruling. The 10th Circuit Court of Appeal, which affirmed the district court's summary judgment in favor of the state, however, was not the least bit "reluctant" to reaffirm *Race Horse.*

A senior circuit judge, James E. Barrett said, "Unlike the district court's apologetic interpretation of and reluctance upon *Ward v. Race Horse*, we view *Race Horse* as compelling, well-reasoned, and persuasive."[158] After reviewing the facts, Barrett then reiterated the tribe's principal arguments: (1) The tribe's unrestricted right to hunt and fish on off-reservation lands ceded in the 1868 treaty was not foreclosed by *Race Horse;* (2) the tribe has standing and can maintain an action against the directors of the state's fish and

wildlife agencies for violations of the Unlawful Inclosures of Public Lands Act; (3) the district court was wrong to rely on *Race Horse*, since that case was factually different from the present case; and (4) the Supreme Court has "overruled, repudiated and disclaimed each of the legal doctrines applied in *Race Horse*."[159]

The appeals court, however, rejected each of the tribe's arguments. Judge Barrett began his opinion, ominously enough, by summarily declaring that the Crow could not claim a fishing right along with a hunting right because "there is nothing in the Treaty [of 1868] with the Crow, regarding fishing rights." Barrett then turned to an analysis of *Ward* and found within that single case all the evidence the court needed to justify its judicial abrogation of the hunting and fishing treaty rights of the Crow tribe.

Barrett, in rapid, brusque, and questionable language that ignored and turned aside the prior and subsequent precedent affirming tribal sovereignty and federal supremacy in such matters, dismantled Indian treaty rights and supported state sovereignty over Indian sovereignty. First, the court held that the facts in *Ward*, even though two different tribes and two different treaties were involved, were virtually indistinguishable from the *Ten Bear* situation.

Second, Barrett agreed that Wyoming's admission to statehood effectively overrode the Crow's hunting rights which, he agreed with *Ward*, were only of a "temporary and precarious nature." Third, the appellate court took great pains to defeat the tribe's solid assertion of federal authority to regulate wildlife by claiming that "absent any conflict between federal and state authority to regulate the taking of game, the State retains the authority, even over federal lands within its borders."[160] Fourth, Barrett even boldly accepted the largely discredited "equal footing" argument on the same specious grounds Justice White had used in *Ward*—that Indian treaty rights were not "continuing and perpetual rights" but were merely temporary. Fifth, Barrett brushed aside the tribe's argument that, subsequent to *Ward*, the Supreme Court had constructed several rules of treaty construction that favor an Indian interpretation of treaty rights. Strangely but correctly, Barrett chided the tribe's lawyers for failing to note that several of these treaty construction principles had actually been developed before *Ward*, dating back to *Worcester v. Georgia* (1832). Then, in a stunning about-face on the issue, Barrett said that although *Ward* recognized this canon of treaty construction, the court had "declined to follow it." And since the Supreme Court had refused to rely on it, the appeals court would not be bound by it either.

The court's final judicial nail in the Crow's treaty coffin centered on the issue of the meaning of the phrase *unoccupied lands* in the treaties. Like White in *Ward*, Judge Barrett affirmed the state's argument that the Big Horn National Forest was somehow "occupied" and therefore was not open to tribal members wanting to exercise their hunting rights. In the senior judge's words, Big Horn was "managed and regulated for the specific purpose of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber."[161] Ironically, in the next line Barrett stated that "these lands were no longer available for *settlement"* (emphasis added).

CONCLUSION

Ward, therefore, poses a viable, ongoing, and now reinvigorated threat to tribal sovereignty and the exercise of treaty rights. State challenges to Indian gaming both on and off the reservation, state challenges to hunting and fishing regulations on and off the reservation, and state challenges to tribal and individual taxation exemptions are increasing with the federal judicial and congressional shift toward states' rights. This is exemplified by the conservative Rehnquist Court and the Republicans' electoral and gubernatorial victories in the 1994 elections.

Additionally, the continuing and still virtually unlimited federal power over indigenous sovereignty (conceptualized by federal law as "domestic-dependent" sovereignty), tribal property (conceived by federal policymakers and administrators as "subject" territory susceptible to confiscation in certain situations and treated as being of an inferior title to that of the United States), and treaty rights (understood as being subject to the Supreme Court's plenary interpretive power) remains largely intact. This effectively leaves tribes without any substantive protection from the very government branches legally and morally charged with protecting and enforcing indigenous rights.

NOTES

1. See, e.g., Lloyd Burton, *American Indian Water Rights and the Limits of Law* (Lawrence: University of Kansas Press, 1991); Ronald N. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspec-*

tive (Eau Claire, WI: Wisconsin Academy of Sciences, Arts and Letters, 1991); and Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development* (Lawrence: University of Kansas Press, 1990).

2. 163 U.S. 504.

3. 198 U.S. 371, 382–84.

4. See, e.g., the interesting discussion in *Crow Tribe of Indians and Thomas Ten Bear v. Repsis* (866 F. Supp. 520, 523 [1994]), in which a federal district court essentially concurred with the criticism of *Ward* as expressed in *State v. Arthur,* (74 Idaho 251 (1953); *Idaho v. Tinno* (94 Idaho 759 [1972]); and *Sohappy v. Smith* (302 F. Supp. 899, 912 [1969]) but still felt compelled to follow *Ward*'s precedent "whether or not this court agrees that the reasoning or holding announced in *Race Horse* is correct," since the decision had never been overruled (p. 524).

5. No. 94-8097 (filed 26 December 1995).

6. Ibid. I will discuss this case in more detail at the conclusion of this article. The *Ten Bear* case is positive and disheartening evidence that the federal courts are continuing their spiral back in time by resurrecting and validating what once were thought to be invalid, discredited, repudiated, and disavowed legal doctrines and policies that threaten to erase or at least seriously restrict Indian treaty rights.

7. Felix S. Cohen, *Handbook of Federal Indian Law* (Charlottesville, VA: Michie, Bobbs-Merrill, 1982), 449–50.

8. See, e.g., Treaty with the Walla Walla, Cayuse, and Umatilla in 1855, 12 St. 945; and Treaty with the Yakima, 1855, 12 St. 951.

9. 7 St. 28.

10. Felix S. Cohen, *Handbook of Federal Indian Law,* reprint ed. (Albuquerque, NM: University of New Mexico Press, 1972), 44.

11. 7 St. 28–29.

12. See, e.g., Treaty with Kaskaskia, Article 6, 1803, 7 St. 78; Treaty with the Sauk and Fox, Article 7, 1804, 7 St. 84; Treaty with the Wyandot, Article 6, 1805, 7 St. 87; Treaty with the Chippewa, Article 4, 1808, 7 St. 112; Treaty with the Miami, Article 8, 1826, 7 St. 300-301; Treaty with the Nisqualli, etc., Article 3, 1854, 10 St. 1132; and Treaty with the Makah, Article 4, 1855, 12 St. 939.

13. Cohen, *Handbook of Federal Indian Law,* 1982 ed., 450.

14. 15 St. 673.

15. Cohen, *Handbook of Federal Indian Law,* 1972 reprint ed., 79.

16. See, e.g., General Allotment Act of 1887, 24 St. 388; and see *United States v. Kagama,*188 U.S. 375 (1886), which upheld the constitutionality of the Major Crimes Act of 1885.

17. Many commentators have noted that the Wind River Shoshoni, led by their noted chief, Washakie, and the Fort Hall Shoshoni-Bannock, were generally more amenable to accommodating intruding and settling whites rather than engaging in constant or near-constant warfare with them. See, e.g., Grace Raymond Hebard, *Washakie* (Cleveland, OH: The Arthur H. Clarke Co., 1930), preface; and Virginia Cole Trenholm and Maurine Carley, *The Shoshoni: Sentinels of the Rockies* (Norman, OK: University of Oklahoma Press, 1964), ix.

18. See the Court's problematic ruling in *United States v. McBratney,* 104 U.S. 621 (1882), wherein the Supreme Court held that the state of Colorado had exclusive jurisdiction over the crime of murder committed by a white against another white. I use the term *problematic* because as Strickland, Wilkinson, et al. argue in their revision of Felix Cohen's *Handbook* in 1982, "the *McBratney* opinion was brief and far from clear. It purported to be based on statutory interpretation, but it is difficult to arrive at the Court's result by any ordinary approach to statutory construction. One possibility is that the Court simply misread the law. Another is that concerns about constitutional limits on federal power influenced the decision" (p.264–65 and accompanying footnotes).

19. 31 U.S. (6 Pet.) 515.

20. 72 U.S. 737.

21. 72 U.S. 761.

22. 175 U.S. 1.

23. 175 U.S. 1, 11.

24. Cohen, *Handbook of Federal Indian Law,* 1972 ed., 119.

25. Theoretically, *trusteeship* is a relationship that limits the property rights of the trustee and makes the trustee the servant of the trust *beneficiary*—in this case, the Bannock tribe. See, especially, Felix S. Cohen's excellent article, "Indian Wardship: The Twilight of a Myth," in *The Legal Conscience: Selected Papers of Felix S. Cohen,* ed. Lucy Cohen (New Haven, CT: Yale University Press, 1960), 328–34. In that article Cohen contrasts the very different *legal* meanings of *trustee-beneficiary* (the actual relationship between tribes and the United States) with the *guardian-wardship* (the perceived relationship between the two).

26. Demitri B. Shimkin and Judith Vander, "Eastern Shoshone" in *Native America in the Twentieth Century: An Encyclopedia,* ed. Mary B. Davis (New York: Garland Publishing, Inc., 1994), 589.

27. Ibid., 589; Robert F. Murphy and Yolanda Murphy "Northern Shoshone and Bannock," in *Handbook of North American Indians,* ed. Warren L. D'Azevedo, vol. 11 "Great Basin" (Washington, DC: Smithsonian Institution, 1986), 284; but see Brigham D. Madsen's *Chief Pocatello: The "White Plume"* (Salt Lake City, UT: Bonneville Books, 1986), 10–14. In a more detailed analysis, Madsen asserts that, more realistically, there are nine different Shoshoni groups according to geographic distribution and subsistence activities. The information on the Comanche was discerned from Lotsee Patterson, "Comanche," in Davis, *Native America in the Twentieth Century: An Encyclopedia,* 128. Special thanks to an anonymous referee for bringing to my attention the Comanche information.

28. Madsen, *Chief Pocatello,* 18.

29. Ibid., 19.

30. Vine Deloria, "The Western Shoshone," *American Indian Journal* 2 (January 1976): 17.

31. United States Commissioner of Indian Affairs Annual Report, 1851, in Wilcomb Washburn, ed., *The American Indian and the United States* (Westport, CT: Greenwood Press, 1976), 58.

32. Ibid., 1861, 78.

33. Deloria, "The Western Shoshone," 17–18.

34. 12 St. 512, 529.
35. Eastern Shoshone Treaty, held at Fort Bridger, Wyoming, 2 July 1863; Northwestern Shoshone Treaty, held at Box Elder, Utah, 30 July 1863; Western Shoshone Treaty, held at Ruby Valley, Nevada, 1 October1863; Shoshone-Goship Treaty, held at Tuilla Valley, Utah, 12 October 1863; and the Mixed Band of Bannacks and Shoshoni's, held at Soda Springs, Idaho, 14 October 1863.
36. 18 St. 685.
37. Ibid., 686.
38. Madsen, *Chief Pocatello*, 65.
39. Trenholm and Carley, *The Shoshonis: Sentinels of the Rockies*, 212–14.
40. Ibid., 214.
41. 15 St. 17.
42. Hebard, *Washakie*, 111.
43. Trenholm and Carley, *The Shoshonis: Sentinels of the Rockies*, 215; see also Clifford E. Trafzer, "Indians of the Plateau, Great Basin, and Rocky Mountains," in *The Native North American Almanac,* ed. Duane Champagne (Detroit: Gale Research, Inc., 1994), 317. For copies of the executive order and accompanying letters, see *Executive Orders Relating to Indian Reservations* (Washington, DC: Government Printing Office, 1912), 73–75.
44. See Trenholm and Carley, *The Shoshonis: Sentinels of the Rockies*, 219–22; and Hebard, *Washakie*, 119–27.
45. Trenholm and Carley, *The Shoshonis: Sentinels of the Rockies*, 219. Although the Fort Hall Reservation had originally been set aside in 1867, a provision in the 1868 treaty also made reference to the need to establish a reservation for the Bannock. As commissioner of Indian affairs Ely S. Parker stated in a 29 July 1869 letter to the secretary of the interior, "By virtue of Executive order dated June 14, 1867 . . . there was set apart a reservation for the Indians in southern Idaho, including the Bannocks. This reserve, it will be observed from the diagram accompanying said Executive order, embraces a portion of the country which the treaty provision above quoted provides the reservation for the Bannocks shall be selected from. It appears from the letter of Agent Powell that the Bannocks are at present upon the reserve set apart by Executive order as above stated, *and that they desire to remain there" (Executive Orders Relating to Indian Reservations,* 1912, 75–76).
46. Ibid., 1964, 220.
47. *Executive Orders,* 1912, 76–77.
48. 15 St. 673.
49. Ibid.
50. 15 St. 673.
51. Francis P. Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley, CA: University of California Press, 1994), 73.
52. 163 U.S. 505, 506.
53. See Prucha, *American Indian Treaties,* Appendix C, 508–16.
54. Madsen, *Chief Pocatello*, 91.
55. Trenholm and Carley, *The Shoshonis: Sentinels of the Rockies*, 274.
56. U.S. Commissioner of Indian Affairs, *Annual Report* (1894), 67.

57. Ibid.
58. Ibid., 1895, 62.
59. Ibid., 1894, 67.
60. Letter from Louis L. Ballou to E.O. Fuller, 14 November 1929, in Trenholm and Carley, *The Shoshonis: Sentinels of the Rockies*, 274.
61. Ibid.
62. *Annual Report*, 1895, 60; and *Annual Report*, 1896, 991.
63. Ibid., 1895, 67.
64. Ibid., 77.
65. Ibid., 70.
66. Ibid., 73.
67. Ibid., 80.
68. Ibid., 1896, 57.
69. Ibid., 58.
70. Ibid., 58–59.
71. Ibid., 58.
72. Ibid.
73. 70 Fed. 598 (1895).
74. 70 Fed. 598, 603 (1895).
75. Ibid.
77. Ibid., 605.
78. Ibid.
79. Ibid., 606.
80. Ibid., 608–609.
81. 3 U.S. 199 (1796).
82. 70 Fed. 598, 606 (895).
83. Ibid.
84. Ibid., 608.
85. 72 U.S. 761 (1867).
86. Ibid., 612.
87. Ibid., 613.
88. Ibid.
89. *Annual Report*, 1896, 60.
90. Ibid.
91. U.S. *Congressional Record* (1896), 1290–91. This bill was not enacted. Nevertheless, I believe its introduction points to collusion between the Bureau of Indian Affairs' officers, motivated by paternalism and assimilationism, and the state's political representatives and administrative officers, motivated by their desire for unquestioned jurisdictional authority over all the land in the state, to curtail the Indians' hunting rights. Additional evidence of this is found in a House report, in which the Committee on Indian Affairs said that the Indians, armed with their district court victory, would "naturally be arrogant and insolent in their intercourse with the settlers." (See House Report 206 [3 January 1896], 1–2.)
92. White had been nominated by President Grover Cleveland and was confirmed in 1894, two years before the *Ward* decision. He was also the author

of the infamous 1903 *Lone Wolf* decision, which will be discussed more at the end of the paper. White became chief justice of the Supreme Court in 1910.

93. See *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867).

94. See, e.g., *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); and *Jones v. Meehan,* 175 U.S. 1 (1899). For a contemporary perspective see Cohen, *Handbook of Federal Indian Law,*1982 ed., 223. The editors/authors cite as two examples *Menominee Tribe v. United States,* 391 U.S. 404 (1968) and *Washington v. Fishing Vessel Association,* 443 U.S. 658 (1979), in which the Supreme Court held that absent an "explicit statement" abrogating a tribe's hunting and fishing rights, such an intention would not be "lightly imputed to the Congress" (391 U.S. 404, 413).

95. Brief and Argument for Appellee, United States Supreme Court *Records & Briefs,* part 5 (1896), reel 446, pp. 1–29.

96. Ibid., 14.

97. Ibid., 26.

98. Ibid., 36.

99. Ibid., 52.

100. Ibid., 71.

101. 78 U.S. 616 (1871). This decision held that an act of Congress could supersede a prior Indian treaty. Utilizing judicial restraint, the Court held that the imposition of a federal tax on a Cherokee Indian smoke shop, despite a preexisting treaty exempting the Indian enterprise from such taxation, was constitutional.

102. Ibid., 80.

103. 163 U.S. 505-05.

104. Ibid., 507.

105. Ibid., 506.

106. Guy B. Hathorn, "Territorial Governments" in *Dictionary of American History,* vol. 7, rev. ed. (New York: Charles Scribner's Sons, 1976), 31–32.

107. *Records & Briefs,* 507–508.

108. Ibid., 508.

109. For example, in *Buster v. Wright,* 135 Fed. 947 (C.C.A. 8, 1905), app. dismissed 203 U.S. 599 (1906), the Court said, "The opinions of the legislative and executive departments of the government . . . while not controlling upon the courts are entitled to great deference and grave consideration" (pp. 954–55).

110. "Federal Power over Indians: Its Sources, Scope, and Limitations," *University of Pennsylvania Law Review* 132 (January 1984): 196.

111. Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven, CT: Yale University Press, 1987), 82.

112. Ibid.

113. Ibid., 509.

114. Ibid.

115. Ibid.

116. Ibid.

117. 21 U.S. 543. But see my article, *"Johnson v. McIntosh* Revisited: Through the Eyes of *Mitchel v. United States," American Indian Law Review* 19:1 (Summer

1994): 159–81, in which I argue that *Mitchel,* handed down in 1835, implicitly overrides the *Johnson* decision. I believe that *Mitchel* needs to be added to the so-called Marshall Trilogy: *Johnson, Cherokee Nation v. Georgia,* 30 U.S. 1 (1831), and *Worcester v. Georgia,* 31 U.S. 515 (1832), because it effectively defangs not only the "discovery" principle but also supports the international political standing of tribes and the international dignity of Indian treaties.

118. Ibid., 510.
119. Ibid.
120. Ibid., 515.
121. Ibid., 516.
122. This concept arose after the Civil War. According to this theory, which was prominent from the 1890s to the later 1930s, the states and national government have separate spheres of authority, and each is considered supreme in its own sphere. The state's sphere is protected by the Tenth Amendment to the Constitution, which says, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

During this era the Supreme Court acted as an "umpire" of the federal system. On the one hand, it used its decisions to block national actions by narrowly viewing the powers of Congress and broadly construing the Tenth Amendment powers of the states. On the other hand, the Court sometimes struck down as abuses of power many state actions, particularly in the social and economic realms. For more analysis of dual federalism and its other variants, see, e.g., Deil Wright, *Understanding Intergovernmental Relations,* 2d ed. (Monterey, CA: Brooks/Cole Publishing Co., 1982), 185; see also Anne M. McCulloch, "Tribal Rights and States' Rights: A Federalism Interpretation of Federal Indian Policy" (Paper delivered at the American Political Science Association's annual meeting, San Francisco, 1990.)

123. Frank Pommersheim, "Tribal-State Relations: Hope for the Future?" *South Dakota Law Review* 36 (1991): 252.
124. 163 U.S. 505, 509 (1896).
125. Ibid., 511.
126. Ibid., 512–13.
127. Ibid., 514.
128. 2 McCrary 58 (1880).
129. Ibid., 66.
130. Ibid., 67.
131. Ibid.
132. 163 U.S. 504, 514.
133. Ibid., 516.
134. Ibid., 517.
135. Ibid.
136. I wish to thank an anonymous reviewer for reminding me of this basic but crucially important argument.
137. 163 U.S. 504, 518.
138. 5 Wall. 787 (1867).

139. 163 U.S. 505, 520.
140. Ibid.
141. 187 U.S. 553 (1903).
142. 198 U.S. 371 (1905).
143. Ibid., 374.
144. See, e.g., *Johnson v. Gearlds,* 234 U.S. 422, 438–40 (1914); *Donnelly v. United States,* 228 U.S. 243, 259–64 (1912); and *Holcomb v. Confederated Tribes of Umatilla Indian Reservation,* 382 F.2d 1013–14, note 3 (1967); and *Settler v. Lameer,* 507 F.2d 231, 239 (1974).
145. See, e.g., Cohen, *Handbook of Federal Indian Law,* 1982 ed., 268, note 73.
146. 287 P.2d 620, 633.
147. 753 P.2d 76.
148. Ibid., 97.
149. See *Organized Village of Kake v. Egan,* 369 U.S. 60, 75 (1961); *Menominee Tribe v. United States,* 391 U.S. 404, 411–12, note 12 (1968); and *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 149 (1972).
150. 447 U.S. 134, 179.
151. *Crow Tribe and Thomas Ten Bear v. Repsis,* No. 94-8097 (10th Cir. Ct, filed 26 December 1995).
152. The tenth circuit includes Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. The thirteen circuit courts, twelve regional and one national, are the intermediate appellate courts of the federal court system. The twelve circuits with regional jurisdiction include the District of Columbia and first through eleventh circuits. These courts have original jurisdiction to review and enforce orders of many federal administrative agencies; they also have original habeas corpus jurisdiction, although it is seldom used, and they have appellate jurisdiction over the review of all final decisions of the U.S. district courts.

Although their jurisdiction is limited geographically, save for the federal circuit, which has national jurisdiction, the circuit courts have, nevertheless, been referred to as "mini-Supreme Courts in the vast majority of cases," since in more than 90 percent of their cases they are the court of last resort. (Consult J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System* [Princeton, NJ: Princeton University Press, 1981], 58–59.) Hence, although *Ten Bear* has limited geographic scope, since courts outside the tenth circuit are not bound by its precedent, there is no way of predicting how "influential" the case may be on other jurists.
153. 11 St. 749.
154. 15 St. 649.
155. See the language used by the court on page 524, where district judge Alan Johnson seems to be almost apologetic in having to follow *Ward.*
156. 866 F. Supp. 520, 524 (D. Wyo. 1994)
157. The following tribes filed "friend of the court" briefs in support of the Crow tribe's treaty-based arguments: Shoshoni-Bannock, Northern Arapahoe, Northern Cheyenne, Oglala Sioux, and the Eastern Shoshoni tribe of the Wind River Reservation.

158. No. 94-8097, 21. (Note: I secured my copy of the *Ten Bear* case from the internet. The page numbers are from the computer-generated copy and will differ from the official version of the case.]
159. Ibid., 6.
160. Ibid., 13.
161. Ibid., 19.