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STATE V. STASSO: OFF-RESERVATION HUNTING RIGHTS

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INTRODUCTION

The principal problem surrounding Indian hunting, fishing and trapping rights centers on the relation between the Indian and the states.[1] The conflict is between the states' assertion of regulatory power over the taking of wildlife within its boundaries and the Indians' claim to immunity from any state power to control the taking of fish and game governed by treaties with the United States. The states' claim rests on sovereign police power; the Indians' on constitutional principles. Each has validity. The controversy raised its head in Montana in *State v. Stasso.*[2]

Lasso Stasso, an enrolled member of the Confederated Salish and Kootenai Indian Tribes, was convicted in justice court on a violation of Montana game laws. Stasso shot and killed a deer out of season at a location outside the boundaries of the Flathead Reservation,[3] but "within National Forest Service lands which have never been patented to any private person. . . ."[4] Stasso was hunting on aboriginal tribal lands. Montana adopted the "no regulation" rule when the Montana supreme court held: (1) the provisions of the Hell Gate Treaty guaranteed that an enrolled member of the Tribes had the right to hunt free from Montana game laws on land ceded to the federal government and which were "open and unclaimed"[5] and, (2) National Forest Service lands were "open and unclaimed" lands. This decision, resting on the construction of the Hell Gate Treaty, appears to leave regulation of tribal hunting covered by treaty provisions to the federal government and to the internal control of the tribes.

This note will focus primarily on the conflict between the states' assertion of control over off-reservation hunting and the Indians' claim of immunity from such regulation. It will examine the origin of the issue and explore possible solutions. Finally, it will examine Montana's solution as illuminated in *Stasso.*

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1. Burnett, *Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy*, 7 IDAHO L. REV. 49, 50 (1970).

2. ___ Mont. ___, 563 P.2d 562 (1977).

3. The actual incident took place in Sanders County, Montana near White Pine Creek. Stasso was therefore charged and convicted in the justice court, Thompson Falls, Montana. Additionally, an expert witness testified that the land Stasso killed the deer on was aboriginal tribal land which the Indians ceded to the federal government.

4. ___ Mont. ___, 563 P.2d at 563.

5. *Id.*

ORIGIN OF THE ISSUE

The onslaught of white settlement in the Northwest forced Congress to impose treaties on various tribes.[6] Foremost to tribal leaders was the assurance that their people would be guaranteed the historical means of subsistence—hunting, fishing and gathering. At stake were not only physical necessities but cultural and psychological ones as well. These activities developed attitudes and skills which were highly honored in most Indian societies.[7]

Indians reserved their ancient hunting, fishing and gathering rights in most of the Northwestern treaties. Typical language appears in Article III of the Treaty of Hell Gate.[8] The tribes reserved:

> [t]he exclusive right of taking fish in all the streams running through or bordering said reservation; the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Indians contend that the treaties are solemn expressions of the superior sovereignty and as such, the provisions are immune to state interference. The Indians' claim to immunity from state interference with hunting and fishing provisions rests on the "supremacy clause:"[9]

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all *Treaties* made . . . shall be the *supreme Law* of the Land, and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Indians argue, in short, that the Constitution elevates treaties above state legislation. The states' claim to regulatory power have rested on (1) the general police power of a sovereign and (2) an abrogation of treaty rights through state admission acts.

The general police power of a state prima facie includes the power to regulate its citizens in the taking of all wildlife resources within the state. In the leading decision of *Geer v. Connecticut*,[10] the Supreme Court held the state has initial authority to regulate the

6. In *Choctow Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970), the court stated: "The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's length transaction. Rather, treaties were imposed upon them and they had no choice but to consent."

7. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 196 (1971).

8. Treaty of Hell Gate of July 16, 1855, 12 Stat. 975.

9. U.S. CONST. art. VI, cl. 2.

10. 161 U.S. 519, 533-34 (1896).

taking of wildlife. The Court reasoned that since wildlife is the common property of all citizens and not subject to private ownership, the citizens of the state have power to regulate its exploitation. Thus the rationale for attempted state regulation of Indian hunting, fishing and trapping was established.

The 1896 decision of *Ward v. Race Horse*[11] is the landmark decision in favor of treaty abrogation by an act of admission. The *Race Horse* case stands for the proposition that treaty hunting rights may be terminated upon the admission of statehood. Race Horse, an Indian, was convicted of violating Wyoming game law for killing seven elk on unoccupied lands in Wyoming. Although an 1869 treaty provided that he should have the right to hunt upon the unoccupied lands, the fact that Wyoming was admitted on an "equal footing" with other states superseded and terminated the treaty right. The state argued that because the Enabling Act did not expressly reserve hunting rights to Indians, the Act necessarily repealed or abrogated those treaty rights. The Supreme Court upheld the state's reasoning and concluded that Wyoming, when admitted into the Union, was "endowed with powers and attributes equal in scope to those . . . states already admitted."[12] Therefore, Wyoming's admission gave it the police power of other states, including the authority to regulate Indians in the taking of wildlife within its borders. Race Horse's conviction was upheld. Subsequent decisions in other states expanded the "superseding act doctrine," holding that admission to statehood annulled treaty rights.[13]

Concurrently, however, another body of law was developing which challenged the superseding act argument. In *U.S. v. Winans,*[14] the Supreme Court, without addressing the *Race Horse* decision, ruled that treaty rights secured to the Yakimas could not be extinguished by implication (the usual way that it had been asserted that acts of statehood superseded treaty rights). Therefore, enforceable treaty rights may not be abrogated by the states unless and until Congress expressly delegates the power to do so.[15] In *Winans,* the Yakimas contended their 1855 treaty ensured them the right of taking fish in their "usual and accustomed" places. The state argued that the admission of Washington into statehood repealed the treaty. The Supreme Court thought otherwise, holding

11. 163 U.S. 504 (1896).

12. *Id.* at 514.

13. Kennedy v. Becker, 241 U.S. 556 (1916); State v. Alexis, 89 Wash. 492, 154 P. 810 (1916); State v. Meninock, 252 Mich. 154, 233 N.W. 205 (1930).

14. 198 U.S. 371 (1905).

15. *See generally* Menominee Tribe v. U.S., 391 U.S. 404 (1968); Johnson, *The States versus Indian Off-Reservation Fishing: A United States Supreme Court Error,* 47 WASH. L. REV. 207, 208 (1972).

that statehood did not extinguish fishing rights retained by the Indians in the treaty.

The *Winans* decision had the effect of undermining the *Race Horse* doctrine so that it has become almost completely emasculated. The conflict between the *Race Horse* and *Winans* rationales has been generally resolved in favor of the Indians' position and the *Winans* rationale.

The Idaho supreme court clearly shattered the superseding act argument in *State v. Arthur.*[16] The decision established *complete* Indian immunity from state hunting regulations when federal treaty rights are involved. The court held that a member of the Nez Perce Tribe who shot a deer out of season, on land ceded by an 1855 treaty was not subject to Idaho state game laws. The court determined that the reservation of the Indians' right to hunt on open and unclaimed lands within their aboriginal hunting territory, remains intact regardless of Idaho's admission to statehood. In justifying the holding, the court focused on the "supremacy clause" and the fact that the Idaho Enabling Act did not expressly state any intention to abrogate any of the provisions of the treaty of 1855.[17]

TREATY RULES OF CONSTRUCTION

The prime reason for the Indians' success in maintaining their treaty rights and in repelling attempted state regulation of off-reservation hunting land can be attributed to judicial rules of interpretation. There are three basic canons:[18] (1) ambiguous expressions in treaties must be resolved in favor of the involved Indian parties;[19] (2) treaties must be interpreted as the Indians themselves would have foreseen and understood them;[20] and (3) Indian treaties must be liberally construed in favor of the Indians.[21] These canons applied in conjunction with the purposes of the treaties[22] buttress Indian interpretations of hunting and fishing treaty provisions. It must be

16. 74 Idaho 251, 261 P.2d 135 (1953).

17. *Id.* at 257, 261 P.2d at 141.

18. Wilkinson, *A Summary of the Law of American Indian Treaties,* MANUAL OF INDIAN LAW J-8 (1977).

19. McClanahan v. State Tax Commission, 411 U.S. 164 (1973).

20. Jones v. Meehan, 175 U.S. 1, 11 (1899), quoted in Wilkinson *supra* note 18.

21. Choctaw Nation v. U.S., 318 U.S. 418 (1943).

22. In *Winters v. U.S.,* 207 U.S. 564 (1908), and more recently in *Arizona v. California,* 373 U.S. 546 (1963), the Supreme Court concluded that Indian treaties should be construed in light of their purposes. One clearly recognized purpose of the mid-19th century Northwest treaties was to provide the Indians a continued means of livelihood. Since the reservation lands were not large enough to support the members of a tribe, the treaties guaranteed the right to continue taking fish at "all usual and accustomed places . . .; together with the privilege of hunting . . . upon open and unclaimed land." Art. III of the Treaty of Hell Gate of 1855.

cautioned, however, that each treaty must be examined to determine precisely the rights a particular tribe reserved.

WILDLIFE CONSERVATION

The necessity for wildlife conservation is the states' policy reason for state regulation of hunting and fishing. If the states do not regulate the Indians, the fish and game may be wiped out.[23] Supporters of this argument point out that the treaties are "now so ancient, they can legitimately be ignored."[24] The objection being, wildlife is not as plentiful as it once was, and that to satisfy the commercial, recreational, and foodstuff needs of the population, strict state regulation is a necessity.

The Indians' response is that if Indian hunting and fishing pose any real threat to the fish and game, then *Congress* has the authority to regulate its taking.[25] The mere passage of time should not erode solemn treaty rights.[26] Moreover, internal tribal regulation over the time and manner of taking fish and game will ensure the preservation of the state's wildlife resources. Tribal governments have passed wildlife conservation ordinances[27] which prohibit hunting, fishing or trapping during closed seasons; fix bag limits; and make unlawful the needless waste of any animal, bird or game after killing the same.[28] The tribal court's power to enforce these ordinances applies to members and extends over areas within reservation boundaries, usual and accustomed fishing stations, and all open and unclaimed lands outside the reservation.[29] Indians insist

23. This argument continues to be pursuasive in fishing rights cases such as *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968). In that case the Supreme Court allowed imposition of Washington's regulatory scheme when "necessary for conservation."

24. Johnson, *The States versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 208 n. 4 (1972).

25. A distinguishable but analogous body of law has evolved concerning a state's control over Indian fishing activities. *Puyallup, supra* note 23, and more recently *U.S. v. Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), affirms the right of Washington state to regulate the manner of fishing including the size of the take by Indians, providing the state can prove it is "necessary for the conservation of the fish"; if it does "not discriminate against the Indians"; and if the state meets "appropriate standards". Appropriate standards generally means allocating to the Indians "their fair share," which in this case meant treaty Indians were entitled to an opportunity to catch 50% "of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds." *Id.* at 688. In short, the cases are compromises which assure Indians less than complete immunity from state control.

26. State v. Tinno, 94 Idaho 759, 766, 497 P.2d 1386, 1393 (1972). If treaty rights could be eroded merely because of the passage of time, one could argue for the discarding of the U.S. Constitution or the Louisiana Purchase.

27. *See* the Conservation Ordinance of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana.

28. *See* MANUAL OF INDIAN LAW, Appendix B, G-19 (1977).

29. Settler v. Lameer, 507 F.2d 231, 240 (9th Cir. 1974).

they have always practiced conservation to protect valuable wildlife.

THE STASSO CASE

A. *What Constitutes "Open and Unclaimed" Lands?*

Since treaty hunting provisions are superior to state statutes enacted under general police power, legitimate Indian hunting areas are determined by judicial construction of key phrases within treaties. This is the case with the Indians' right to hunt outside the reservation on "open and unclaimed" lands. In *State v. Coffee,* the Idaho supreme court held lands which are privately owned do not qualify as open and unclaimed.[30] The rationale is that aboriginal title to private land has been extinguished by private ownership. It is clear, however, that National Forest Service lands *are* open and unclaimed.[31] In *Arthur* the court stated, "It [open and unclaimed land] was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership. . . ."[32] *Arthur* involves substantially the same facts as *Stasso,* including identical treaty provisions. Hence, the Montana court was pursuaded by the Idaho court's conclusions[33] and followed *Arthur's* ruling that the Indians may hunt on ceded federal lands (National Forest Service lands) without limitation or restriction.

B. *Abrogation by Admission*

The Montana supreme court soundly rejected the state's main argument that the Montana Territorial Act of May 26, 1864 abrogated reserved treaty rights.[34] The court merely pointed to language of the Act wherein it was specifically stated the Act shall *not* impair existing treaty rights. The Montana court unequivocally rejected the *Race Horse* rationale.[35] Thus, based on sound constitutional principles (e.g., "supremacy clause"), the Hell Gate Treaty hunting

30. 97 Idaho 905, 914, 556 P.2d 1185, 1194 (1976). Note, however, that in *State v. McClure,* 127 Mont. 534, 547, 268 P.2d 629, 635 (1954), it was held that an Indian could hunt while on non-Indian land but within the reservation.

31. State v. Arthur, 74 Idaho at 261, 261 P.2d at 141 (1953); State v. Stasso, ___ Mont. at ___, 563 P.2d at 565 (1977).

32. *Id.*

33. State v. Coffee, 97 Idaho 905, 556 P.2d 1185 (1976); State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1972); State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953).

34. State v. Stasso, ___ Mont. at ___, 563 P.2d at 564 (1977).

35. Other cases repudiating *Race Horse* include: State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953); State v. Satiacum, 50 Wash. 2d 513, 314 P.2d 400 (1957); Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1968).

provision controlled and did not become subservient to state regulation.

QUESTIONABLE RESULT

Stasso, however, was not decided without apprehension. The district court judge wrote: "[w]hile the Court disagrees in principle and seriously questions this result, it must nevertheless adhere to established legal precedent."[36] Although the judge did not say so, the obvious concern is the loss of state wildlife regulation over millions of acres of Montana lands governed by federal treaty rights. Montana's wildlife management program is, no doubt, somewhat weakened by the *Stasso* decision. Inaccurate census taking, overuse of wildlife habitats, and unequal law enforcement represent some potential problems. In spite of the problems incident to the loss of state control over the manner in which a tribe may assert its right to hunt and take game upon open and unclaimed lands, the *Stasso* decision is a sound judicial result. The decision is a product of well established legal principles.

The Idaho supreme court in explaining its position stated in *Arthur:*

> We are not here concerned with the wisdom of the provisions of the treaty under present conditions nor with the advisability of imposing upon the Indians certain regulatory obligations in the interest of conserving wild life; that is for the Federal Government, the affected tribe, and perhaps the State of Idaho to resolve under appropriate negotiations; our concern here is only with reference to protecting the rights of the Indians which they reserved under the Treaty of 1855 to hunt upon open and unclaimed land without limitation, restriction or burden.[37]

THE SAVING GRACES

While it appears Montana is restrained from imposing any state hunting regulations over Indians on open and unclaimed lands, covered by such a treaty provision as Article III of the Hell Gate Treaty, there are realistically three potential limitations which should allay most of the alarm. First, and most important, there is internal tribal regulation. Secondly, Congress can at any time revise and update treaty provisions. Finally, the state still could conceivably intervene. Should any wildlife species become threatened due to poor conservation practices in any area, the state could, by anal-

36. Msla. Dist. Ct. Memorandum No. 777, State v. Stasso, ___ Mont. ___, 563 P.2d 562 (1977).

37. State v. Arthur, 74 Idaho at 263, 261 P.2d at 143 (1953).

ogy, resort to the "necessary for conservation" rationale successfully used in the Indian fishing rights area and impose hunting regulations on the manner of hunting, the size of the take and the like.[38]

CONCLUSION

Montana courts have applied well-established principles of constitutional law by not allowing state interference with off-reservation hunting rights until Congress expressly permits it. The state and its citizens will likely continue to rail at the notion that the state has no regulatory powers over Indian hunting. In that sense, tension will continue to exist, and allegations of reverse discrimination will abound.[39] Tribes can significantly lessen the tension by showing wise management of wildlife resources. Congress could ease the tension by examining the wisdom of treaty provisions made over 100 years ago in light of present conditions.

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38. Antoine v. Washington, 420 U.S. 194, 207 (1974); Tulee v. Washington, 315 U.S. 681 (1942); Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969); Confederated Tribes of Umatilla Indian Reservation v. Madison, 314 F.2d 169 (9th Cir. 1963), *cert. denied*, 327 U.S. 829 (1963) and U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). *See generally* Johnson, *supra* note 15.

39. GETCHES, ROSENFELT, & WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 177 (1977).