In the

Supreme Court of the United States

Alexander J. Antoine and
Irene F. Antoine, his wife,

Appellants,

v. No. 73-717

The State Of Washington,

Respondent.

Washington, D. C.
December 16, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER J. ANTOINE and IRENE F. ANTOINE, his wife, Appellants,	:	
v.	:	No. 73-717
THE STATE OF WASHINGTON, Respondent.	:	

Washington, D. C.

Monday, December 16, 1974

The above-entitled matter came on for argument at 10:05 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MASON D. MORISSET, ESQ., Ziontz, Pirtle, Morisset & Ernstoff, 3101 Seattle-First National Bank Building, Seattle, Washington 98154, for the Appellants.

JOSEPH LAWRENCE CONIFF, JR., Assistant Attorney General for the State of Washington, Temple of Justice, Olympia, Washington 98504, for the Appellee.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 73-717, Antoine against the State of Washington.

Mr. Morisset, you may proceed whenever you are ready.

ORAL ARGUMENT OF MASON D. MORISSET ON

BEHALF OF THE APPELLANTS

MR. MORISSET: Mr. Chief Justice, and may it please the Court: Antoine v. State of Washington is here on appeal from the Supreme Court of the State of Washington and involves the hunting rights of the Confederated Tribes of the Colville Indian Reservation on hand which was sold by them to the United States Government in 1891, having been, prior to that time, a part of their reservation as set aside by the President in 1872.

The facts are fairly simple. Mr. Antoine and his wife Irene shot a deer in the fall of 1971 on this land during a time in which hunting was closed by the laws of the State of Washington. The Colville Confederated Tribes and Mr. Antoine are of the opinion that their rights to hunt on that land were guaranteed by the 1891 sales agreement as ratified by the Congress and that the State of Washington has no right to stop them from hunting there whatsoever, or in the alternative, if some right is found, the State can do so only upon a prior showing of necessity for conservation.

Let me trace the chronology briefly of what happened on what we call the "old north half" of the Colville Reservation. This was the aboriginal home of various tribes and bands which now make up the Confederated Colville Tribes. There was no treaty signed with these groups and bands but finally in 1872 the President set aside approximately 3 million acres of land as a reservation. This is the 1872 Executive Order. Thereafter the State of Washington, or what was then the Territory of Washington, was admitted to the Union in 1889.

In 1891 the Congress formed a commission to go and, in the words of the Act, meet and treat with the Indians to buy and purchase whatever land they might wish to sell. An agreement was reached to sell the north half of the reservation, approximately 1.5 million acres, running up to the Canadian border and between the Okanagan and Columbia Rivers.

That agreement was not immediately ratified by the Congress. Rather, in 1892, the Congress passed an Act which unilaterally took the land back. Subsequently, the Indians agitated and lobbied for the ratification of their agreement and the payment of the money. This was ultimately accomplished in 1906 by an appropriation Act whereby the Congress, to carry into effect the agreement, authorized the payment of money and thereafter in subsequent appropriation Acts actually authorized the payment in $300,000 increments of the

money.

Now, 1872, then, finds the vesting of hunting and fishing rights in this land in question by the Federal Government, was an Indian reservation with all the rights that go along with that, the right to exclude non-Indians from that land, the right to fish and hunt without control by the territorial or State government and the many other rights which this Court knows attend a reservation status.

In 1891, the Indians agreed to surrender and relinquish all rights and title to the land, but they reserved many rights. They reserved, for example, allotments in this area, and to this day many members of the tribe still live on their allotment on this sold land. They reserved the right to the use of the water and water courses attendant to those allotments, and they reserved in section 6 of the agreement that the right to fish and hunt shall not be taken away or in any wise abridged.

QUESTION: These lands, Mr. Morisset, are they subject to taxation?

MR. MORISSET: The allotted lands are not, your Honor, they are trust land held by the United States.

QUESTION: The State of Washington makes no point about it, they are just tax free, property taxes.

MR. MORISSET: That's correct. That's correct.

This incident, however, did not occur on trust land, your Honor. I want to make that clear. It did not occur on

trust land.

QUESTION: It occurred on what kind of land?

MR. MORISSET: As far as we know, this is fee simple land held probably by an individual. None of the maps that I have seen, and it was not submitted at trial, indicate who exactly owns the land. It is open, not posted or fenced, as far as we know, is not State land as far as I know, is not Federal forest land.

QUESTION: This the land on which it occurred is subject to State taxation?

MR. MORISSET: It probably is if it's held by an individual in fee. I think we can assume that it is.

QUESTION: I take it your answer to my question about taxability is based on the trust land aspect rather than on the agreement which provided for tax exemption.

MR. MORISSET: That's partly correct, your Honor, but the agreement, by setting up the allotment, would be the document from which that non-taxability flows. It was the agreement that said the Indians may reserve some allotted land on that north half. But it is the status of the land itself rather than the agreement that leads to the non-taxability, that's true.

QUESTION: Focusing on the land where this hunting occurred, are other people, other than members of this tribe, permitted to hunt there?

MR. MORISSET: Non-Indians who are citizens of the State would certainly be allowed to hunt there, yes. It is not a closed area per se, it's not posted or fenced off or posted as no hunting.

QUESTION: There is no question about the State's right to require licenses or any other restriction with respect to others than members of this tribe.

MR. MORISSET: That is correct, your Honor, there is no question about that.

QUESTION: Mr. Morisset, during my brief tenure on the Court I have heard the term "allotted lands" used in a number of arguments involving Indian cases. I have tried to read and find out what they meant. I really don't know what that terms means. Can you define it?

MR. MORISSET: Certainly, your Honor.

The United States generally holds land as a fee simple owner for Indian tribes. Now, that is the status of most reservations, the United States is the owner, it has the fee that's held in trust for the Indian tribes. Now, that land can be allotted to an individual. An individual receives a patent allotment, it's like a deed. You give it to him, the individual Indian has a right of usage of the land, he has a right to devise it by will, and in the state of intestacy it would pass to his heirs under special Federal statute. But the Indian does not have a right to mortgage or alienate that

land without the permission of the Secretary of the Interior, because the Secretary, as the Government's agent, is the owner. He has the fee.

QUESTION: And the record title then is in the United States.

MR. MORISSET: United States Government. A regular title report would show fee in the United States of America in trust for, and then either the tribe as a whole or an individual in it. That's the way the record would read.

QUESTION: If it is an individual Indian, then that means it's allotted land.

MR. MORISSET: That's correct.

QUESTION: Otherwise it's an ordinary part of a reservation.

MR. MORISSET: It would be non-allotted land. Right. Non-allotted trust land.

QUESTION: Is there some cut-off date in the statute, or wasn't there, or has it been indefinitely extended?

MR. MORISSET: There is a variety of allotment statutes. The general allotment Act had a cut-off date which has been constantly and consistently continued by Congress.

QUESTION: Cut off in the sense that the trust would end at some time.

MR. MORISSET: That's right. It was originally 25 years. It's been continued, I believe, in 25-year increments,

possibly more. There are now several allotment Acts, and I --

QUESTION: Is this land under the general allotment Act?

MR. MORISSET: This was under a special allotment Act which flowed from the 1892 Act of Congress and 1891 agreement.

QUESTION: Mr. Morisset, while we have you interrupted, let me ask you another question or two.

Mrs. Antoine was also convicted.

MR. MORISSET: That's correct.

QUESTION: And she is a full-blooded Indian?

MR. MORISSET: She is Okanogan, yes.

QUESTION: But not an enrolled member of --

MR. MORISSET: Not enrolled in this country, no.

QUESTION: Do you raise any question about her conviction, as such, at all?

MR. MORISSET: I have not raised any question because the facts which don't appear in the record, because they were not deemed to be material, I believe, are that she could be no more than an aider and abetter, and my position would be, as a matter of criminal law, Mr. Antoine committed no crime and she couldn't very well have aided and abetted him in such a non-act.

QUESTION: There may be something in the record, as distinguished from the printed appendix, but I look at the

findings on page 12 of the appendix, findings entered by Judge Ennis, the only place in those findings that I find a reference to Irene Antoine is in the title. All the way down through the rest of it, the reference is only to Alexander Antoine. So I ask what the situation is as to Irene.

Maybe I should ask the State this.

MR. MORISSET: I don't want to hedge the question, but I suppose you could, your Honor. My position is that she can't have aided and abetted her husband if he did nothing wrong. There is nothing wrong for her --

QUESTION: I find no findings or conclusions that in effect --

MR. MORISSET: That's correct, there are none.

QUESTION: -- find her guilty.

MR. MORISSET: There are no more findings on the record other than are printed in the appendix as to her, as to Mrs. Antoine.

QUESTION: But you are making no point of this.

MR. MORISSET: No. Why?

QUESTION: Specifically, finding 4 refers to Defendant, Alexander Antoine,and conclusion of law 2 and 3 speak of defendant in the singular. I should think you might well make a point of it. This, of course, is my point throughout, I find no reference whatsoever to Irene. And I'm curious as to why you don't read this as a point of deficiency

in the judgment of conviction.

MR. MORISSET: Well, I think it is a deficiency, but I think the more central and more important point is that Alex Antoine committed no crime and when his conviction falls, Mrs. Antoine will, of necessity fall. She could not have done anything other than be along --

QUESTION: But if you lose that, she is stuck if you don't raise the secondary point.

MR. MORISSET: That's correct.

QUESTION: Well, in your questions presented on page 4 of the jurisdictional statement, you certainly didn't raise any question like that, did you? And that's all that is before the Court.

MR. MORISSET: That's correct, your Honor.

QUESTION: In any event, my question shall be regarded as also asked of State counsel, and perhaps he can explain it.

QUESTION: Before you leave the question of these allotted lands that Mr. Justice Rehnquist was puzzled about, when the land is allotted, will you clarify for me, is that allotted the way conveyance of farm land, a piece of farm land, is allotted by Meachenbaum's description or other specific description?

MR. MORISSET: That's a difficult fact question because it differs from reservation to reservation. But in

most cases the Bureau of Indian Affairs, or in the early years the War Department, carried out some kind of survey, and many of these reservation lands have special Government plats that only exist in the archives,because I have tried to dig them up, and they will be allotted by a lot number and they will have an allotment number 141, and you have to go to an original Government plat to find what that means, and sometimes that will be a map or will be meets and bounds on some occasions. It differs greatly.

Now, I was, I believe, discussing the 1891 agreement and noting that the Indians had to lobby for some time before the agreement was carried into effect, approximately 15 years. In 1906 the Congress did ratify the agreement, appropriate the money to carry it into effect, and the money was gradually paid out over the years.

Now, the effecting agreement gives to appellants that their hunting and fishing rights are guaranteed by supreme Federal law. The State seems to argue that this agreement is not supreme Federal law and the State court in Washington seemed to hold that. I find no support for that in any of the learning and teachings of this Court. Certainly Congress has plenary power over Indian tribes and has exercised that power through the years. Certainly at the time that the promise was made, this was Federal land. In fact, the whole area was a territory, the whole area was Federal land, and the

particular area in question, the north half of the reservation, was even more Federal than the whole territory, if that's possible, because it was an Indian reservation, and the Federal Government had full authority and control over that land as trustee for the Indians. So the two owners of the land, the Government as the fee owner, and the Indians as the beneficial owner, agreed as to how it would be sold and what the terms would be. And the Federal Government promised that hunting and fishing rights would continue.

Now, the Federal Government has done this before in other cases that have come before this Court. Dick v. U.S., for example, involved the sale of land by a tribe of their reservation back to the Government, and the Government agreed in the document that Federal liquor laws would continue to apply, notwithstanding incorporation of those areas into the State thereafter. And this Court held that, of course, the Federal Government could do that. It could take land back from the Indians and apply conditions to it.

Our position, then, is that the Indians and the Federal Government agreed as to what the terms would be of ceding the land back to the United States Government and that the State of Washington had to take whatever power or jurisdiction or authority they have over that land, subject to outstanding Federal promises, just the same as when they became a State in 1889 most of the land at that time was tied

up in some sort of Federal ownership.

Now, getting to the words of the agreement itself as ratified by the Congress, it is our position that the words "shall not be taken away or any wise be abridged," mean that the State has no authority whatsoever to regulate Indians hunting and fishing on that north half. They took, or became a State subject to the outstanding promise of the Federal Government, and it is for the Federal Government and the Indians to decide how hunting and fishing rights will be exercised.

We believe that this case is unlike the Puyallup litigation that this Court has had to struggle with, as has the State courts in Washington, for many years now. Unlike it because the words of the agreement read as an absolute promise. They are much stronger than the Stevens treaties. This Court has had to struggle with the Stevens treaties which promise the right to hunt and fish in common with other citizens of the territory. And that's all the treaties say. In this situation, the Federal agreement, the supreme law of the land, says the right to hunt and fish in common with other citizens of the United States shall not be taken away or in any wise abridged. And we feel it is an abridgement, an impairment and abrogation of those rights if the State is allowed any jurisdiction or authority whatsoever to regulate Indian hunting and fishing.

We believe that a holding would be consistent with this Court's teaching as to the need for Indian tribes to govern themselves. This Court has held that hunting and fishing rights are a tribal right to be exercised by individual Indians, and we believe that the Colville Confederated Tribes can and will regulate this tribal right.

QUESTION: I gather you have to be a member of the tribe, an enrolled member.

MR. MORISSET: That's correct.

QUESTION: I notice as to the wife, as you discussed with Mr. Justice Blackmun earlier, you have a footnote in your jurisdictional statement that she is an Indian but not an enrolled member of the tribe.

MR. MORISSET: That's correct.

QUESTION: How does that place her position as to the defense?

MR. MORISSET: Our position on that would be the same as it has been in fishing litigation in the State of Washington, that spouses and immediate families should be allowed to participate at least as helpers in the right.

QUESTION: They have the benefit of the reservation, then, would they?

MR. MORISSET: Yes, of the reservational rights.

It really makes no practical sense to say that an Indian has a hunting right which it can go slap his wife in

jail if she accompanies him, or if he catches a fish and takes it home to feed his wife and children --

QUESTION: If she were on her own? Suppose she was hunting on her own?

MR. MORISSET: I still think the spouse should be allowed to exercise the right. It is not practical in the sense of Indian rights to not allow the immediate family, the spouse and children, to participate --

QUESTION: What has the law been where the reservation applies?

MR. MORISSET: There has been no holding by this Court --

QUESTION: How about the Washington courts?

MR. MORISSET: The only holding that I know of is the holding of Judge Bolt? in U.S. v. Washington in which he held that -- I don't know if he held it in the original decision or subsequently -- that the spouses should be allowed to participate in the treaty right, in that case.

Our position here is basically the same, the spouse should definitely be allowed to participate. That is purely a policy argument. It makes sense in terms of how Indian tribes operate, how Indian families operate, how they go together to get their food, and so on. No particular strict reason in the law why that should be, but there is a reason in equity.

Now, why don't we want any State power here? We feel that State regulation of Indian hunting and fishing rights is and always has been a complicated procedure of allocating the resource to user groups, a complicated procedure involving political pressure, a complicated procedure involving many competing groups in which the Indian interests get kind of left to the bottom of the heap. We further feel that it is an impairment of tribal government. This is a tribal right guaranteed by Federal law, but the tribe doesn't have anything to say about it. It can't take care of the resource, it can't allocate the resource to its members, it can't have any kind of lottery system or permit system to allow the deer in this case to go to the most useful place, because the State is controlling them.

QUESTION: But it's not on tribal land, is it?

MR. MORISSET: No, but it's a tribal right, it's a tribal right, as is all off-reservation, usual and accustomed, hunting and fishing rights. It's a tribal resource, it seems to me, your Honor, just as important as the land that's on the reservation. This is a resource. It is a right, property right, if you want to call it that, of the tribe, something they should be allowed to control for their members.

And Judge Bolt in U.S. v. Washington has so held that the Indian tribes can regulate that right and the Ninth Circuit has just recently held about two weeks ago that the

Indian tribes should have the right to regulate hunting and fishing, not on the reservation, but in areas that are usual and accustomed places, and we agree with those decisions and think they make good sense. They allow the tribes to take care of their own, to take care of what rights are theirs under Federal law.

QUESTION: I take it non-Indians could hunt in this same area consistent with the treaty, couldn't they?

MR. MORISSET: Subject to State law, yes.

QUESTION: This isn't a treaty, though.

MR. MORISSET: No, this is not --

QUESTION: It was not a treaty after 1871. This was a sale.

MR. MORISSET: Act of Congress.

QUESTION: Well, the Act of Congress simply appropriated money.

MR. MORISSET: And ratified the agreement of 1891.

QUESTION: In haec verba?

MR. MORISSET: Yes.

QUESTION: Indian terms.

QUESTION: Now, this is the first time you have made reference to ratification, and you are relying on that?

MR. MORISSET: Yes. Well, --

QUESTION: Before you made reference only to the appropriations.

MR. MORISSET: I thought I said in my opening remarks that it was ratified in 1906 by the Appropriation Act, I believe I made that statement.

I want to make it clear, however, that these rights, these hunting and fishing rights, attached when the reservation was established, and it has been the teaching of this Court that such rights do not fly away or disappear by implication, by some strange metaphysical happening in an Act of Congress. And the only Act of Congress or only action of Congress which refers to the rights at all is the 1891 agreement, and that agreement, of course, preserves the rights,it does not take them away. The 1892 Act makes no mention of the rights whatsoever. I believe it's the teaching of this Court in Menominee, for example, that if no mention is made of hunting and fishing rights, which are vested in the tribe, then they are not impaired or abrogated or taken away. And that's good teaching, and I would hope that we can stand by that.

So our position, to summarize, is that the promise was absolute in its terms, does not give the State any power or control whatsoever.

In the alternative, arguendo, if there is any State power following a Puyallup kind of reasoning that the State has some authority to regulate, as necessary for conservation -- I want to make it clear we don't accept that in this case -- nevertheless, they have made no case for conservation. They

have done none of the steps that the trial courts, which have had to try to implement your decisions in Puyallup have come up with, such as looking into the regulation ahead of time, considering the Indian needs as a special need and making special provision for that. The State has done nothing of that kind in this case and, I think it would be clear that this particular regulation which Alex Antoine is considered to have violated was not done as necessary for conservation, as that term has come to mean in terms of Indian rights, but was done as a total State political allocation regulation.

I wish to reserve the rest of my time, Mr. Chief Justice, for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Morisset.

Mr. Coniff.

ORAL ARGUMENT OF JOSEPH LAWRENCE CONIFF, JR.

ON BEHALF OF THE APPELLEE

MR. CONIFF: Mr. Chief Justice, and Members of the Court: I wish to first advise the Court that I am appearing here today on behalf of the prosecuting attorney of Ferry County; inasmuch as Mr. Morisset and I tried the case, I was appointed as a special deputy prosecuting attorney to handle the matter.

There was a question raised by Justice Blackmun, I believe, regarding the status of Mrs. Irene Antoine, and I think it should be pointed out to the Court that at the trial

of the case, as was reflected in the statement of facts, page 5, that only Mr. Alexander Antoine was present at the trial. Now, the findings, the argument and the findings referred to by Justice Blackmun would therefore indicate that Mrs. Antoine is not a party to the case. I cannot comment upon the reason why she has been added in this appeal, inasmuch as the appellants have done so.

QUESTION: Perhaps because she was referred to in the judgment that followed the findings of fact and conclusions of law.

MR. CONIFF: Yes, I presume so. I did not prepare the judgment. You will note the prosecuting attorney prepared the judgment, and I was simply sent a copy. I was unaware until the court had signed the order --

QUESTION: Well, Mr. Coniff, if he could not be prosecuted, could she, not an enrolled member of the tribe?

MR. CONIFF: In my opinion, a non-enrolled member of an Indian tribe in this particular case, a Canadian Indian, is fully amenable to State law in exactly the same way as any other non-member or non-Indian.

QUESTION: So that a reversal here, if there were one, would not mean that she would be -- no. An affirment here would not mean necessarily that she couldn't be prosecuted.

MR. CONIFF: I believe that would logically follow,

assuming her status is as is stated in the United States memorandum as amicus curaie, that is, a non-enrolled member.

QUESTION: Well, that is stated, too, in her jurisdictional statement.

MR. CONIFF: That she is a non-enrolled member.

QUESTION: Was a charge filed against her?

MR. CONIFF: The original charges were filed against both Mr. and Mrs. Antoine.

QUESTION: What did it allege about her?

MR. CONIFF: That she was aiding and abetting -- there were originally two charges filed, one was dismissed.

QUESTION: So really they would have to prosecute her -- file another charge if they wanted to prosecute her because she is charged just as an aider and abetter.

MR. CONIFF: Yes, inasmuch as these matters are misdemeanors under the laws of the State of Washington, the statute limitations would have run. So as a matter of reality --

QUESTION: If he is found -- if he wins here, she is out of trouble.

MR. CONIFF: She is out of trouble as far as I can see because of the statute of limitations in any event.

QUESTION: But if he doesn't win here, what happens to her?

MR. CONIFF: If he does not win here, as far as I

can see, she was not present in the judgment entered in the lower court, could be reopened, I believe, on that ground. However, again, I would reiterate that I did not prepare or enter the judgment which is found in the appendix.

QUESTION: So I take it from your remarks that you are doubtful on the part of the State as to the integrity of this judgment against her.

MR. CONIFF: As to Mrs. Antoine, yes.

QUESTION: This judgment anyway.

MR. CONIFF: Yes, because the statement of facts does reflect that she was not present at the trial.

QUESTION: This record would suggest at least the possibility that that's a jurisdictional matter and that whether it was raised or not the Court could take notice of the absence of jurisdiction over her, could they not?

MR. CONIFF: Yes, I would submit that would be the case, Mr. Chief Justice.

QUESTION: ... a matter of State law?

MR. CONIFF: With regard to my response to --

QUESTION: ... Mrs. Antoine.

MR. CONIFF: With regard to the statute of limitations?

QUESTION: Yes. Also, with regard to the effect of the judgment on her and with respect to whether she would have to be reprosecuted as an aider and abetter.

MR. CONIFF: Yes. First of all, I would question

the jurisdiction of the trial court in the first instance to render any sort of a judgment and sentence upon an individual who is not present. The appropriate remedy would be, under those circumstances, I believe, to issue a bench warrant in the event the person did not appear at the trial, unless her attorney might have waived her presence, as is reflected apparently by stipulation of Mr. Morisset and the local prosecuting attorney, Mr. Granville Egan.

Again, I am somewhat handicapped on these detail questions with regard to the entry of the judgment sentence inasmuch as I was not present at that time and did not draft them.

QUESTION: But in any event, I take it you share in my concern, anyway, about the integrity of the judgment against her and almost concede that so far as she is concerned, a reversal is indicated.

MR. CONIFF: Inasmuch as the court in the first instance might well lack jurisdiction because of her failure to appear in the case.

QUESTION: You are also here, are you not, to defend the judgment that has been entered by the Supreme Court of Washington which affirmed the judgment conviction against her?

MR. CONIFF: Yes.

QUESTION: You can leave it to the other side

presumably to attack the judgment.

MR. CONIFF: Yes. I would presume that would be true. However, I was of the impression that Mr. Justice Blackmun wanted to have whatever information -- my comments and whatever information was available from the record directed to his attention, and it was for that reason that I shifted gears, so to speak, and attempted to address myself to that problem.

QUESTION: Was this point argued to the Supreme Court of Washington?

MR. CONIFF: The status of Mrs. Antoine? No, it was not.

QUESTION: So they didn't pass on it, did they?

MR. CONIFF: No, they did not, your Honor.

QUESTION: This is unbelievable. There's a conviction in absentia approved by the court, approved by the Supreme Court, and brought here and nobody raised a point about it.

MR. CONIFF: The appellants did not raise the question and it was not argued by appellants, and I believe counsel for appellants has so indicated. I am simply trying to be candid with the Court and advise the Court of the exact record that is before it.

I would point out in further response to the question, Justice Marshall, that in the single appendix printed by appellants, page 16, wherein the findings are set forth, it is recited that each defendant personally, their attorney,

Mason D. Morisset, and the Assistant Attorney General and the Prosecuting Attorney all have stipulated, and so forth, that the sentence of the district court, the lower court, below the superior court, was reasonable, and so forth. I am not sure that adds or subtracts to her absence at the trial.

I would like to emphasize to the Court, as has been referred to by Mr. Morisset, that the status of the lands upon which the arrest occurred was that of nonallotted lands, they were not Indian lands, they were in non-Indian ownership. They are fully subject to State taxation. And even if the owner of those lands would engage in the activity of hunting, he would be required to possess a State hunting license. So as I understand --

QUESTION: The question isn't unlicensed hunting, it's hunting out of season, isn't it?

MR. CONIFF: Yes, that is correct. And the owner of the land would likewise have to comply with that hunting season regulation, which was promulgated by the Game Commission of the State of Washington pursuant to statutory delegation by the legislature.

The first point that I believe should be briefly discussed involves the 1871 statute prohibiting the execution of further treaties. And in light of this statute, I believe that the Court must examine very carefully the legal consequences which might arguably flow from the 1891 agreement with the

tribes and bands of Colville Indian Reservation. I would first point out to the Court that, as was pointed out by the court below, a plausible interpretation of the exact language before the Court in articles 1, 5, and 6 of the 1891 agreement is that article 6 was intended to secure to the Indian allottees in the northern half the rights to go upon the Indian reservation and hunt in common with the Indians on the diminished or south half of the reservation. This is further borne out by the exact language used by the Commissioners who represented the United States in entering into these negotiations in article 1, whereby the Indians "do hereby surrender and relinquish to the United States all their right, titles, claim, and interest in and to and over the following described tract of land."

Secondly, as pointed out in the briefs filed by the United States as amicus curiae and in the statutes pointed out by the appellants in their brief, there is no showing in this record that the Commissioners of the United States had any authority to enter into a treaty or even that that was what they intended to accomplish. Rather, the statute authorizing the Commissioners to enter into these negotiations indicate that their purpose was to acquire the land so that it might be open for public settlement.

This matter was further brought to the attention of Congress, as pointed out in the memorandums, which ultimately

culminated in the 1892 statute which is found at 27 Stat. 62 and following. It is the State's position that the 1892 statute confers jurisdiction upon the State and that it expressly purports to do so.

In this connection, I would further point out to the Court that the legislative history surrounding the enactment of the 1892 statute clearly demonstrates that Congress had before it the precise question of whether or not to ratify the 1891 agreement. In fact, the House of Representatives did so. The Senate did not concur, and the matter finally culminated in the exact language of the 1892 statute which, because the critical nature of the State's position and the reliance upon this statute, I would like to just very briefly read the precise language employed by Congress, remembering that the proposed inclusion of a reservation of fishing and hunting rights, the House version was rejected by the Senate in favor of this language which finally did pass Congress.

The statute provides that the northern half be and is hereby vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians and the same shall be open to settlement and entry by proclamation of the President of the United States and shall be disposed of under the general laws applicable to the

disposition of public lands in the State of Washington.

QUESTION: Where in the briefs or record is that passage you are reading from.

MR. CONIFF: I am reading from page 12 of the brief of appellee, the blue brief.

QUESTION: Thank you.

QUESTION: Mr. Coniff, as I understand it, the agreement of 1891, and then legislation in 1892 which almost rejected the agreement, or implicitly so. At least one House of Congress thought that the land hadn't been the Indians' to sell. And then a 15-year lobbying effort by the Indians culminating in the legislation of 1906, is that it?

MR. CONIFF: That is my understanding of it.

QUESTION: 1891 agreement, 1892 legislation which was inconsistent with the agreement, and then a 1906 law which was consistent with the agreement and purported to ratify it. Is that it?

MR. CONIFF: A caveat purported to ratify, which leads to the next leg of my argument.

It is that even if we assume that the 1871 statute is to be given no effect, which, of course, we do not agree with that --

QUESTION: That is the 1871 statute that said no more treaties with the Indians.

MR. CONIFF: Prohibited further -- they said no more

treaties. And if we assume for purposes of argument that the Commissioners who executed the treaty, purported to execute the treaty, the question is whether or not under the Constitution of the United States, Article II, section 2, clause 2, which requires ratification by two-thirds of the Senators present, whether or not in fact there was a ratification legally and constitutionally of the 1891 agreement.

QUESTION: Well, an agreement need not be a treaty. The Government can make an agreement with you; it's not a treaty, it's vis-a-vis your land, and in that agreement for the purchase of your land, it can give you certain remaining rights in it, like the right to hunt or fish, even though it will now belong to the Government. That's not a treaty. That's just a purchase.

MR. CONIFF: It could be -- I think we must be careful to distinguish between the question of dealing with the police powers of the State, the State of Washington being admitted into the Union in 1889, presumably coming into the Union on an equal footing with sister States, and to distinguish between the rights of government or reserved police power, if you will, the right to regulate the hunting activities over the land in question, and the right in the nature of an easement, the right to go upon other's land and hunt does not deal with the subject matter of the right of the State to govern or the right of the State to apply the laws in question to the

Indians in the extinguished northern half.

QUESTION: I suppose your position would be that if the Government (inaudible) State had allowed homesteading of certain lands that it owns and ultimately passed it into private hands through a patent, that the Federal Government couldn't accompany that patent by a guarantee to the homesteaders that they would never be subject to the police powers of the State of Washington.

MR. CONIFF: That is correct, Mr. Justice Rehnquist, that is my position.

I would further, in support, while we are on this subject generally of ratification, Mr. Justice Stewart, I would like to further respond to your query by pointing out that the precise language employed by Congress in the 1906 Appropriation Act itself states that its purpose was to authorize payment to the Indians in order to carry into effect the agreement of 1891. And the exact language employed by Congress, I would submit, would support the conclusion that it demonstrates Congressional intention simply to pay for the lands acquired. I would further submit that the language cited by the Federal Government in their amicus brief, the comments of Justice Fullerton, former Chief Justice of the Supreme Court of the State of Washington, who was one of the Commissioners who dealt with the Colville Indians, dealt solely with the question of obtaining compensation from Congress for the payment for the

taking, if you will, or the opening of the northern half lands.

It is our position that the subsequent 1906 and following Appropriation Acts which are set forth in our memorandum, our brief, do not purport to ratify in a constitutional sense of ratification the 1891 agreement. It is our position that similar to the position, interestly, taken by the Department of the Interior when these matters were called to Congress' attention in 1906, that the Indians simply had -- that the Indians did have a possessory right to the northern half and that they should be compensated for it. The reason, apparently, that Congress was dragging its feet was that they weren't sure as to whether the Indians even had a possessory interest in the northern half of the reservation due to the fact it was created pursuant to an executive order and not pursuant to treaty.

QUESTION: That had divided the two Houses of Congress, I think, in 1892.

MR. CONIFF: Yes. The reading of the legislative history in that regard, it seemed to me, could lead to that conclusion.

I would further point out that the 1892 statute which ceded jurisdiction clearly in our view to the State of Washington has never been modified or repealed. And in this connection, I would point out that the Constitution of the United States, Article I, section 8, clause 16, provides that

the jurisdiction of a State once acquired can only be retroceded with the consent of the State legislature. And there is no showing in this record, and in fact the legislature has not purported to retrocede to the Federal Government jurisdiction over the northern half. In fact, what appellants seem to be arguing is that the State should be deprived of the jurisdiction which it acquired in 1892 by implication from an agreement executed for the purchase of the land from the Indian tribes in 1891. We would submit that a State should not be deprived of its jurisdiction to enforce its laws upon all citizens equally upon the land in question, i.e., the former northern half, upon such a showing. The prior decisions of this Court appear to be quite uniform in articulating this rationale.

I would further point out that the suggestion which is made in both the Federal Government's amicus brief and in the brief of appellants, that Public Law 280 somehow comes into play in this case,is spurious --

QUESTION: What comes into play?

MR. CONIFF: Public Law 280, which is the State's assumption of jurisdiction over Indian reservations as was enacted by Congress in 1953 and became effective in August 1953.

Our position simply is that Public Law 280 does not apply because the northern half was not an Indian reservation, quote unquote, as of the date of the enactment. Therefore, by its terms it does not apply to the northern, the extinguished

northern, half of the Colville Indian Reservation. And therefore, the Menominee decision of this Court, the companion case to Puyallup I, simply does not apply. Menominee, of course, dealt with the express termination of a treaty tribe, and, of course, the situation is dramatically different here where, in other words, the Indian country concept -- in this opinion written by Justice Douglas, the Indian country concept was clearly set forth, that the lands must occupy their unique status as Indian country, an Indian reservation, in order at the time of the enactment of Public Law 380 in order for its terms to be applicable. And the Court in a unanimous opinion was very careful to make that distinction.

I would like to further point out that in subsequent congressional treatment of the northern half, the extinguished northern half, of the Colville Indian Reservation, has uniformly dealt with it as if it were extinguished. The precise congressional statutes are set forth in our memorandum. This subsequent congressional treatment is reflected in several opinions of this Court. I specifically refer the Court to United States v. Pelican, which is found at 232 U.S. and I'm reading at page 446, a very short sentence, which I believe is on this point:

"In dealing with the question of the Northern Half, the evident purpose of Congress was to carve out of the portion of the reservation restored to the public domain the lands to

be allotted and reserved as stated and to make the restoration effective only as to the residue. The vacation and restoration which the statute accomplished, section 1, was thus", and so forth,"made subject to the reservation and allotments of land in severalty."

Now, as I've mentioned, the stipulated facts, the facts that were stipulated by Mr. Morisset and I at the original trial of this matter in Republic, Washington, indicate that the offense occurred on non-allotted, non-Indian land. So that we are not dealing with an allotment remaining in the Northern Half in this case.

QUESTION: The provision of the Federal Constitution you referred to which you said limited the right of Congress to impair any right of the State after 1889.

MR. CONIFF: With regard to the jurisdictional argument, it was article I, section 8, clause 16, and I submitted to the Court that the decisions of this Court construing this constitutional provision make it clear that once the jurisdiction of a State vests or is acquired, that it can only be retroceded to the United States with the express consent of the State legislature. The cases referred to are James v. Dravis Construction Company and Fort Leavenworth Railway v. Lowe, which are cited in the brief of appellants.

There are two other decisions of this Court subsequent to the Pelican decision which expressly recognized the diminishment

if you will, and the extinguishment of the Northern Half and the diminishment of the size of the Colville Indian Reservation to its present size, which is approximately one-half of its original size. As the Court is aware the original boundaries extended to the 49th parallel and bounded with the nation of Canada. This is, by the way, reflected by State's Exhibit No. 1, a copy of which is in the record and is available for the Court's inspection. State's Exhibit No. 1 likewise, by a red X, locates the precise location of the offense as being on non-Indian, non-allotted land again and not within the boundaries of a national forest.

QUESTION: Privately owned by a non-Indian presumably. Is that right?

MR. CONIFF: Yes, it is. Privately owned, non-allotted, non-Indian land, and the map, State's Exhibit No. 1, indicates that the locus delicti is not within the boundaries of a national forest.

Now, I've gone a little further than that, as the Court is aware, in terms of the motion to strike and further reply brief to this new issue which was interjected three or four weeks ago when I received a copy of the Federal Government's brief as amicus. I could respond just very briefly to their argument. Their position appears to be that to the extent that the extinguished northern half is a national forest, the Indians at least have this much room, or this much

at least free from any State jurisdiction or State authority to apply the hunting laws in question. And I would submit that this position is erroneous for several reasons.

First of all, as I have previously indicated, the locus delicti is not within national forest boundaries.

Secondly, the establishment of local forests occurred after the acceptance of jurisdiction by the State. As pointed out the Colville National Forest was established by Presidential proclamation in 1907. And, further, the statutes by which the national forests of the United States are established, as set forth in page 3 of the orange reply brief, indicate that the jurisdiction, both civil and criminal, over persons within such national forests shall not be affected or changed by reason of the existence of such reservation, and so on. It says the State wherein any such national forest is situated shall not,by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens of the State, which is presently codified in 16 U.S.C. 480 and has been construed definitively by this Court in Wilson v. Cook , as set forth in the brief.

The Federal Government likewise appears to argue, as do the appellants, that somehow the Indians were nearby a national forest and were somehow acting pursuant to some sort of Federal statutory authority enjoyed by representatives

of the Department of the Interior or the National Forest Service. The case authority cited for this proposition, in our view, does not apply to the case at bar. We do not have a situation present in this case as was presented to this Court in Hunt v.United States wherein Federal officials were killing deer contrary to State law where there was a showing that the deer were in fact doing damage to publicly owned lands, in that case a national park.

QUESTION: Your reference to Article I, section 8, you say clause 16 ?

MR. CONIFF: Yes.

QUESTION: That's the one on organizing, arming, and discipling the militia?

MR. CONIFF: No. I'm sorry, I have the wrong -- oh, it's at the end of that clause.

QUESTION: Authority/training the militia according to the discipline prescribed by the Congress?

MR. CONIFF: Clause 17 ,your Honor, I'm sorry.

QUESTION: You mean, the last,purchased by the consent of the legislature of the State in which the same shall be, relating to forts, magazines, arsenals, and so forth?

MR. CONIFF: Yes, that is the clause. I don't know how my notes got the wrong clause. It's Article I, section 8, clause 17 as construed by the Court in the cases I have indicated.

QUESTION: If they aren't numbered, it makes it a little difficult sometimes.

MR. CONIFF: Yes, I understand. I'm very sorry for that. Thank you for calling it to my attention.

So in sum the facts of this indicate clearly that the Indians were not acting here as agents of the Federal Government, nor that their activities in killing the deer out of season were necessary for the protection of Government property lying right or within or in this case without the boundaries of a national forest. I believe that's a spurious issue which was interjected at a very, very late date in this proceeding by the amicus brief of the United States.

QUESTION: That's injected in footnote 7 of their brief. It's in a rather cryptic form, I gather.

MR. CONIFF: Yes, it is, your Honor.

QUESTION: I didn't really understand it to be making the argument.

MR. CONIFF: Finally, just to summarize, I would like to further point out that this Court subsequent to the Pelican decision in Seymour v. Superintendent has expressly recognized the legal effect of the 1892 statute I referred to with the following language. I'm reading from 368 U.S. at page 354. "In 1892 the size of this reservation was diminished when Congress passed an Act providing that, subject to reservations and allotments made to individual Colville Indians, about one-

half of the original Colville Reservation, since commonly referred to as the North Half, should be vacated and restored to the public domain."

The Court goes on to observe this Act did not, however, purport to affect the status of the remaining part of the reservation since known as the South Half.

Finally, in this same vein, I'd like to refer to the Mattz v. Arnett decision which was written by Justice Blackmun on October 10, 1972, read very briefly from page 412 U.S. at page 504, footnote 22. Here the Court unanimously was reaching a conclusion that the Hoopa and Urark Indians of California, that their reservations in the corridor along the river between the two had never been expressly dealt with or terminated by Congress. And in reaching this conclusion, the Court contrasted, made the point that where Congress desired to specifically extinguish or to terminate an Indian reservation, it clearly was capable of doing so with express language. And in support of that proposition, the Court states unanimously that Congress has used clear language of express termination when that result is desired. See, for example, 27 Stat. 63 (1892), the 1892 statute adopted just two weeks after the 1892 with which this case is concerned, providing that the North Half of the Colville Indian Reservation, "the same being a portion of the Colville Indian Reservation be and is hereby vacated and restored to the public domain," and citing with

approval the Seymour v. Superintendent decision.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Coniff.

MR. CONIFF: Thank you.

MR. CHIEF JUSTICE BURGER: May I make a suggestion? And this is no criticism of you personally. The State's brief apparently is printed by the State printer.

MR. CONIFF: Yes.

MR. CHIEF JUSTICE BURGER: And if you've looked at the index -- don't do it now -- but the index page references, I think without exception, are all wrong. So that the index, as far as I am concerned, the tables of authority, is useless. And I suggest you call this to the State printer's attention.

MR. CONIFF: I apologize on behalf of -- for the inconvenience caused the Court by that error.

MR. CHIEF JUSTICE BURGER: Mr. Morisset, do you have anything further?

REBUTTAL ARGUMENT OF MASON D. MORISSET

ON BEHALF OF THE APPELLANTS

MR. MORISSET: Just briefly.

QUESTION: Mr. Morisset, before you get started, is it agreed that this offense occurred on privately owned land?

MR. MORISSET: We are not sure if it is privately owned, but it certainly is not State land nor Federal land nor

an Indian allotment of any kind.

QUESTION: Right.

MR. MORISSET: That probably leaves only privately owned land.

QUESTION: But if it were privately owned, your position would be the same.

MR. MORISSET: That's correct.

QUESTION: Now, there is a statement in the Supreme Court of Washington's opinion to the effect that if privately owned land had been fenced, then there would have been no question of the right of that private owner to forbid Indians from hunting on it. Is that the law of Washington and the United States? Do you agree with that?

MR. MORISSET: I think that's dicta in the State court's opinion, and I disagree completely. This Court held in Winans that when a Federal law of some kind guaranteed hunting and fishing rights to Indians, they at least in that case had a right of entry across a patented piece of property, a fee piece of property, to get to their usual and accustomed place.

QUESTION: Well, that was fishing, that was to get to the stream. The stream didn't belong to the private owner. But here the land on which the deer was shot and killed did belong to the private owner, it was on his land, and certainly -- is it your submission that the State of Washington can't

even enforce its ordinary trespass laws against Indians?

MR. MORISSET: Well, that's a different case, of course.

QUESTION: Well, that is this case, isn't it?

MR. MORISSET: Well, it could be this case. That would be the next case, I am sure. And my answer would be that it could not if the facts were somewhat similar to Winans. That is, an Indian was not disturbing the peace, was not endangering a farmer's crop or his wife and children or his cows, was simply trying to get across the land or was in an open field --

QUESTION: We are not crossing the land to get to somewhere else. He is hunting a deer on this land and killing it on the land and he is shooting off a gun in the land and therefore presumably at least hypothetically, he may be endangering other people.

MR. MORISSET: That's possible. I think there are two answers to that. One, I don't think that the Confederated Tribes will exercise this right in that way. I think that we have to, of course, be concerned with the outer reaches of any behavior. But I don't think as a practical matter the Indians are going to exercise a right to endanger others.

Secondly, if it should come to that, I think there is a point at which the Indian is not engaged in hunting as it was contemplated by the agreement, and as is contemplated today

by hunting statutes. A person, a white man, can be hunting, have a license, be within State law, but if he goes too far and runs into some other police power law, he can still be found guilty of that. And I think the same principle would apply here.

QUESTION: Going too far? What kind of crime is that? What specifically?

MR. MORISSET: No, of departing from hunting and engaging in some activity which endangers the public peace.

Let me give a simple example. I think that an Indian would be bound not to shoot across a public highway in the exercise of his hunting rights, because the State there is not trying to stop him from hunting per se, is not allocating the resource as it is trying to do here, it's trying to preserve the public peace. And if he insists on shooting across a public highway, that really isn't hunting as it was guaranteed by this agreement. It's something else. And I don't think that any responsible Indian tribe would try to defend that kind of behavior.

QUESTION: Most States that I am familiar with, Mr. Morisett, allow posting, that is a private landowner can say, even though you've got a hunting license, even though it's hunting season, you can't hunt on the land that I privately own. Now, would you say that this private landowner, if that is in fact where this took place, can't say that to a

Colville tribe?

MR. MORISSET: I think if the facts were similar --

QUESTION: Yes or no.

MR. MORISSET: I can't answer it yes or no, because it's a difficult fact law question, as it was in Winans. If that barred every member of the tribe from getting to an aboriginal and usual and accustomed hunting place, if there were no way to get up the valley other than to cross that farmer's land, I would say that farmer does not have that right. He took the fee patent subject to the rights of the Indians to cross his land.

QUESTION: He doesn't have a right on his way to shoot a deer. Am I right?

QUESTION: He shoots the deer on this land, not to be passed over it.

MR. MORISSET: I understand that. He would have a right to pass over certainly, and I think he would have a right to shoot the deer if he did not endanger that person's property or life.

QUESTION: Even though it was posted.

MR. MORISSET: Yes. Yes. There is nothing in the agreement or in the Federal law that says that the patents will be issued not subject to this agreement.

QUESTION: Suppose it was fenced and posted, the private land, you could still climb over the fence and shoot

a deer.

MR. MORISSET: Nothing in the agreement says that this will apply only to unclaimed or unposted lands. It says all usual and accustomed places.

QUESTION: It took place on the Forest Service lands?

MR. MORISSET: Pardon me?

QUESTION: Was this in the Colville National Forest?

MR. MORISSET: It was not on forest land, Mr. Justice Douglas, as far as we know, no. It does not appear that way in the maps.

QUESTION: Is there anything in the record that shows what the deer population in this area is?

MR. MORISSET: No, there is nothing. My own personal knowledge is that it varies greatly from year to year. Some years it's down, some years it's up.

QUESTION: (Inaudible)

MR. MORISSET: And the Indians themselves are concerned, of course, about the resource.

QUESTION: Has there been a case before involving this kind of language in anything other than a treaty? The other cases all involve treaties. Now, it's common ground, I gather, that this, whatever it is, is not a treaty.

MR. MORISSET: That's correct, your Honor.

QUESTION: Now, has there been a case in this Court before involving --

MR. MORISSET: To my knowledge, there is no case involving an Act of Congress as to this particular point, this particular kind of right. I may be incorrect in that, I'm not really sure.

QUESTION: It's not this particular kind of right. The same language, or similar language, might purportedly create the same right in a treaty, but this is not a treaty.

MR. MORISSET: That's correct.

QUESTION: And my question is has any previous case in this Court dealt with some such language in a --

MR. MORISSET: Act of Congress.

QUESTION: Or in a purchase and sale agreement.

MR. MORISSET: Not that I am aware of, although there have been other purchases and sales subsequent to 1871, and those purchases and sales have reserved rights and there may be similar cases. But I don't know them.

I see my time is up.

QUESTION: What you are saying is that an Indian in the category of Mr. Antoine has a greater right to hunt in this area than a non-Indian citizen of the State of Washington with a license.

MR. MORISSET: Absolutely.

QUESTION: He derives that right because it in fact existed before the Government ever issued a patent on that land to anyone.

MR. MORISSET: That's correct. Exactly right.

QUESTION: Well, that alone you are not relying on. You have to rely on the language, don't you,of the 1889 --

MR. MORISSET: I am relying on the reservation of the right in 1872 and the fact it has never been taken away, has never been mentioned except in the 1891 agreement, and there it is reserved, not taken away.

QUESTION: Aren't you relying on the language of the 1891 agreement?

MR. MORISSET: Yes, but I want to make it clear the right does not fall completely if we completely take away the 1891 agreement, because it pre-existed that agreement. It was simply reserved by that agreement.

QUESTION: If there hadn't been any such language and if there had been simply the 1906 legislation, would you have the same case?

MR. MORISSET: The 1906 legislation refers only to the 1891 agreement.

QUESTION: Right. And if there had been no such language in the agreement, would you have the same case or any kind of a case at all?

MR. MORISSET: We would certainly --

QUESTION: All the 1906 legislation did was to authorize installments of $300,000 each.

MR. MORISSET: 1906 authorized the appropriation. The

1907 Act authorized $300,000 apiece.

Assume there is no 1891 agreement at all, we still have the problem that the rights were vested in the tribe by the establishment of a reservation, and we find nowhere that the rights have been taken away. So my position --

QUESTION: When they sold the land, didn't they sell everything that went with it in the absence of the language on which you rely?

MR. MORISSET: Well, that goes more to the disestablishment question, and this Court has held that in many cases where tribes have been terminated, reservations have been terminated, that the hunting and fishing rights continues unless the Congress explicitly says, "We take that away." And I, of course, agree with those rulings of the Court. I think they are valid.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:11 a.m., the argument in the above-entitled matter was concluded.]