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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-2148

TITLE OREGON DEPARTMENT OF FISH AND WILDLIFE, ET AL.,
Petitioners V. KLAMATH INDIAN TRIBE

PLACE Washington, D. C.

DATE February 27, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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OREGON DEPARTMENT OF FISH :

AND WILDLIFE, ET AL., :

Petitioners, :

V. : No. 83-2148

KLAMATH INDIAN TRIBE :

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Washington, D.C.

Wednesday, February 27, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:09 o'clock a.m.

APPEARANCES:

DAVID FROHNMAYER, ESQ., Attorney General of Oregon,
Salem, Oregon; on behalf of the petitioners.

DON BRANTLEY MILLER, ESQ., Boulder, Colorado; on
behalf of the respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next this morning in Oregon Department of Fish and Wildlife against the Klamath Indian Tribe.

Mr. Attorney General, I think you may proceed when you are ready.

ORAL ARGUMENT OF DAVID FROHNMAYER, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. FROHNMAYER: Mr. Chief Justice, and may it please the Court, the state of Oregon appears before this Court on a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

This case presents an opportunity to avoid an unwarranted conflict between important principles of Indian treaty law and the fundamental sovereign powers of states over public lands and their regulatory dominion.

That conflict would threaten important environmental and wildlife management policies of state and federal government.

The question is posed by the unambiguous language of a Congressionally ratified agreement. That agreed ceded reservation lands, and as all parties agree, diminished the physical size of the Klamath Indian Reservation.

1 In these circumstances, can tribal members
2 nonetheless hunt and fish on the ceded land without
3 observing state regulation which applies to all other
4 Oregon citizens on that public land? Language,
5 authority, and logic, we believe, require a negative
6 answer to this question.

7 The Ninth Circuit decision below ignores the
8 fact of Indian reservation diminishment, and the
9 decision below also ignores the explicit treaty language
10 which limits the right in question to the reservation
11 itself.

12 We will argue today for a general rule
13 consistent with the decisions of this Court. That rule
14 would provide that where the reservation boundaries are
15 diminished, and where treaty rights are defined by the
16 reservation area, those rights may only be exercised in
17 the reduced area unless Congress specifies its intention
18 to preserve them.

19 But on the contrary, if treaty hunting and
20 fishing or other rights are not limited by the
21 reservation boundaries, they remain unaffected by the
22 diminishment unless the Congress clearly modifies and
23 expresses its intent to reduce them.

24 QUESTION: Mr. Frohnmayr, do you agree that
25 tribal hunting and fishing rights can exist outside of

1 reservation lands?

2 MR. FROHNMAYER: Yes, very clearly. Yes, very
3 clearly they can.

4 QUESTION: Well, is it possible that the 1864
5 treaty can be read to preserve the tribe's hunting and
6 fishing rights in land that was at that time included in
7 the reservation?

8 MR. FROHNMAYER: I'm sorry. I'm not sure that
9 I follow the second part of your question, Justice
10 O'Connor.

11 QUESTION: Well, can you read that 1864 treaty
12 as creating hunting and fishing rights in whatever land
13 was in the reservation at that time but not that it is
14 forever bound to that land. It could exist separate and
15 apart from it.

16 MR. FROHNMAYER: I don't think so, and this
17 anticipates an argument I would make in a moment, but I
18 will reach it now, and that is that the language of the
19 treaty is very careful to express that the hunting and
20 fishing -- or that the fishing rights are "within its
21 limits," and then when it goes on in the same sentence
22 to confer the gathering rights given to the tribe, those
23 are also expressed as within the limits.

24 So, two different phrases within the same
25 session which creates the rights also explicitly limit

1 those rights to the boundaries of the reservation. And
2 if one looks to the purpose --

3 QUESTION: Do you think the better reading of
4 the treaty language then is to tie it irrevocably to the
5 boundaries of the reservation?

6 MR. FROHNMAYER: Yes, because it is a
7 reservation -- it is the creation of on reservation
8 rights.

9 Now, when Congress at this time wanted to
10 create rights which existed off an Indian reservation,
11 it knew how to do so. This Court in the classic case of
12 Winans is a perfect example where fishing at the usual
13 and accustomed places identifies geographic locations
14 which may be removed from the meets and bounds of a
15 specific reservation.

16 So, a treaty may create off-reservation
17 rights, but these rights in the specific grant by
18 Congress are unequivocally within the limits of the
19 reservation, and that is part of what we think are the
20 undisputed facts here, and let me touch them briefly.

21 In the 1864 treaty, the tribe ceded \$20
22 million -- or 20 million acres of aboriginal lands and
23 received a reservation of some 1.9 million. The
24 language of sale of the aboriginal lands is clear. The
25 tribe ceded all their right, title, and claim.

1 And as I have mentioned in my answer to your
2 question, Justice O'Connor, the treaty provided for
3 exclusive fishing rights in the streams and lakes
4 included in said reservation. The gathering rights were
5 also restricted within its limits.

6 The language was later construed by court
7 decision to include hunting rights, but the treaty
8 provides on its face and by no fair reading for any
9 off-reservation rights.

10 Subsequently it was demonstrated that surveys
11 erroneously had excluded some 621,000 acres from the
12 tribal lands in the reservation, and after Boundary
13 Commission proceedings and a new survey during which
14 time the tribe was represented by independent legal
15 counsel, it was agreed that the boundary dispute would
16 be resolved.

17 The tribes agreed to cede to the United States
18 those disputed 621,000 acres in exchange for
19 approximately \$533,000. A 1969 Indian Claims Commission
20 decision later awarded the Indians \$4 million more for
21 this to compensate for this transaction.

22 QUESTION: Mr. Frohnmayer, is there anything
23 to establish whether that Claims Commission considered
24 the value of the tribal hunting and fishing rights when
25 it made its award?

1 MR. FROHNMAYER: In the Claims Commission,
2 counsel for both parties agreed that they should be
3 compensated at fair market value and at the highest and
4 best use. It was agreed by the parties in those Claims
5 Commissions that the highest and best use was for timber
6 and grazing, and that was the basis of the
7 compensation.

8 The 1906 agreement which ratified the -- the
9 1096 cession Act which ratified the bilateral agreement
10 provided in Article 1, and this language is particularly
11 important, that the Klamath Indians do "hereby cede,
12 surrender, grant, and convey to the United States" all
13 their claim, right, title, and interest in and to the
14 erroneously surveyed lands.

15 In its recitation of consideration, Article 2
16 of that same cession act provided that this was
17 satisfaction "in full of all claims and demands of said
18 Klamath or other Indians arising or growing out of the
19 erroneous survey."

20 No express reservation was made in this 1906
21 Act for any residual hunting, fishing, or gathering
22 rights on the ceded lands or indeed on any
23 off-reservation areas. The federal government
24 immediately placed most of this land in Crater Lake
25 National Park or in national forests.

1 The parties stipulated that the Indians
2 continued to hunt, fish, and trap on the excluded lands
3 without regard to state regulation, but also that they
4 were unaware of any denial by the tribe that the state
5 lacked this regulatory power, at least until proceedings
6 were instituted in the instant case.

7 QUESTION: I am a little curious as to what
8 that stipulation reflects. The state of Oregon didn't
9 try to regulate the Indians in the national forest when
10 they fished, or they thought they were regulating, but
11 the Indians thought they weren't?

12 MR. FROHNMAYER: The latter construction is
13 probably correct, and of course the state was a stranger
14 to the agreement between the United States government
15 and the tribes.

16 The state has its regulatory authority by
17 virtue of the joint agreement with the federal
18 government which ordinarily asks states to manage lands
19 and manage wildlife within the national forests in their
20 boundaries.

21 And, of course, enforcement of game and
22 fishing laws are a discretionary matter with the states,
23 although we need to go somewhat beyond the record to
24 amplify it. In 1906, this was a very sparsely inhabited
25 area in the state of Oregon.

1 QUESTION: Does the record tell us, General
2 Frohnmayer, whether the state required non-Indians to
3 have licenses to hunt and fish during this period?

4 MR. FROHNMAYER: The record is silent on that
5 point, but I am certain from everything I know about the
6 history of enforcement of Oregon game and fish laws that
7 seasonal limits, bag limits, and license requirements
8 would be required uniformly of persons not of the
9 tribe.

10 QUESTION: So really what was happening here,
11 they just weren't enforcing those against the Indians.

12 MR. FROHNMAYER: That is apparently so. The
13 stipulation speaks in terms of the parties being unaware
14 of that extent. The Ninth Circuit below affirmed the
15 summary judgment for the tribe in its action to enjoin
16 state regulation. It found that these rights were not
17 appertinent to the property, and that they survived and
18 were not inconsistent with the cession agreement.

19 We believe that the Ninth Circuit's decision
20 has traveled on an unnecessary collision course with
21 three massive obstacles. The first of them is the stark
22 and clear language of the 1864 treaty, which confines
23 hunting and fishing rights to reservation boundaries.

24 The second is the unambiguous language of the
25 cession agreement, which sold and ceded the land and

1 thereby diminished the reservation boundaries. The
2 third analytical roadblock is the absence of any
3 explicit regrant by Congress of a tribal right to hunt
4 or fish on those ceded lands free of normal state
5 regulation.

6 Let me now expand on those points. The 1864
7 treaty provisions on hunting, fishing, and gathering
8 rights specify the boundaries, and the operative words
9 are "within said reservation" and "within its limits."
10 The treaty does not refer to aboriginal rights. It does
11 not refer to any off-reservation rights.

12 It does not, as some treaties of time time
13 would have, refer to geographically undefined usual and
14 accustomed places of fishing, such as were found in the
15 Antoine --

16 QUESTION: Could I ask, Mr. Attorney General,
17 before the 1864 treaty, the Indians had aboriginal title
18 to a much larger area?

19 MR. FROHNMAYER: That is correct, Justice
20 White.

21 QUESTION: And part of the treaty was ceding
22 all but the reservation?

23 MR. FROHNMAYER: That is correct.

24 QUESTION: And was there any express mention,
25 in ceding the non-reservation lands, was there any

1 mention of ceding fishing rights also?

2 MR. FROHNMAYER: No, the cession --

3 QUESTION: I take it that the Indians before
4 the treaty had fishing rights.

5 MR. FROHNMAYER: Aboriginal fishing rights,
6 yes.

7 QUESTION: Yes, exactly.

8 MR. FROHNMAYER: Yes, throughout the --

9 QUESTION: How did they lose their aboriginal
10 fishing rights in the area that was not included in the
11 reservation?

12 MR. FROHNMAYER: By virtue of the treaty,
13 Justice White.

14 QUESTION: Just by quit claiming their right,
15 title, and interest to all that land except the
16 reservation?

17 MR. FROHNMAYER: Yes. Well, the language --

18 QUESTION: It didn't mention fishing rights,
19 though.

20 MR. FROHNMAYER: It didn't mention any
21 rights. It referred to the rights by geographic area.

22 QUESTION: Yes, all right.

23 MR. FROHNMAYER: Nor has this Court, to my
24 knowledge, in any place when a general cession of land
25 is made to the United States specifically required the

1 separate itemization or valuation --

2 QUESTION: I was just pointing -- that they
3 lost fishing rights by a general cession.

4 MR. FROHNMAYER: That's right, for which they
5 were paid.

6 QUESTION: And you are arguing, I suppose,
7 that when the reservation was diminished, their fishing
8 rights were in the diminished area or in the area that
9 was excluded were lost for the same reason.

10 MR. FROHNMAYER: That is correct. That is the
11 argument, and that is an argument which would follow
12 from my ambiguous language of sale and cession where in
13 the first instance the fishing right is defined by the
14 terms of the treaty as being within the reservation
15 boundaries.

16 QUESTION: But they weren't paid for giving up
17 their fishing rights.

18 MR. FROHNMAYER: Well, they were not paid
19 separately as an itemization, Justice Marshall.

20 QUESTION: I thought you said they were paid
21 for the price of lumber -- timber.

22 MR. FROHNMAYER: They were paid to extinguish
23 the --

24 QUESTION: So they weren't paid for the
25 fishing rights.

1 MR. FROHNMAYER: They were not paid separately
2 for the fishing rights, Justice Marshall, but I think
3 that is a question of -- the compensation issue is two
4 steps removed.

5 QUESTION: I just can't get fishing rights
6 over with lumber.

7 MR. FROHNMAYER: I beg your pardon, sir?

8 QUESTION: I can't get fishing rights over
9 with lumber. If you pay for the lumber, you are not
10 paying for fishing rights.

11 MR. FROHNMAYER: You are paying for the land
12 and all that is appertinent to the land. The highest
13 and best use agreed by the parties, including by the
14 tribe, was that that was fair market value. When a
15 house is sold, separate valuations are not given for the
16 attic or for the foundation.

17 QUESTION: It depends on the state.

18 QUESTION: But you are relying on the cession
19 language when the reservation was diminished.

20 MR. FROHNMAYER: That's correct. We are
21 relying on two things. First is the nature of the
22 treaty right which is created in 1864, which defines it
23 within the territorial confines of the reservation, and
24 then we are relying on the unambiguous language of the
25 cession agreement, which could not be more precisely

1 suited to effective diminishment --

2 QUESTION: And that is true, you say, no
3 matter what happened later before the Indian Claims
4 Commission.

5 MR. FROHNMAYER: I am not sure I follow,
6 Justice --

7 QUESTION: Well, they were paid -- they had
8 another proceeding before the Indian Claims Commission?

9 MR. FROHNMAYER: That's correct.

10 QUESTION: So you say that the Indian Claims
11 Commission proceeding has no bearing on this general
12 cession language.

13 MR. FROHNMAYER: The Indian Claims Commission
14 bears only on the adequacy of the compensation that was
15 given for the cession.

16 QUESTION: Did I understand you to say
17 earlier, Mr. Attorney General, that the additional \$4
18 million awarded by the Indian Claims Commission was
19 measured by lumber and something else?

20 MR. FROHNMAYER: And grazing --

21 QUESTION: Lumber and grazing.

22 MR. FROHNMAYER: -- because that was the
23 highest and best use for the land, as agreed by counsel
24 for both parties, the tribe and the United States. That
25 compensation was for the land area that was taken.

1 QUESTION: You were in the process of
2 developing three points. You had gone over the 1864
3 treaty language. Now, what was the second one?

4 MR. FROHNMAYER: Well, the language of the
5 cession agreement, which is the language which is
6 unambiguous. When Congress wanted to preserve hunting
7 and fishing rights in the ceded areas, it knew how to do
8 so. Page 28, Footnote 5 of our opening brief cites
9 authority to this Court in which it was regarded at the
10 time as the normal practice, that when the Congress of
11 the United States wished the tribes to retain aboriginal
12 hunting or fishing rights or earlier hunting and fishing
13 rights within the area to be ceded, they knew how to do
14 so and they said so, and that was something for which
15 there was bargain and sale.

16 And so what we have is, the very silence of
17 the cession agreement indicates that the language of it,
18 which is precisely suited to effect a diminishment, as
19 this Court found in De Coteau and in Footnote 22 of De
20 Coteau where it cites additional treaties at the time.

21 The contemporaneous practice was perfectly
22 clear to the Congress of the United States, and its
23 intention to see that the reservation boundaries were
24 diminished is, I think, unassailable.

25 Let me return to the question on which I had a

1 colloquy with Justice Marshall a moment ago, because the
2 tribe's position on compensation is anomalous. Bear in
3 mind that the fishing rights at issue here were
4 exclusive fishing rights within the boundaries of the
5 reservation.

6 The tribe has conceded, apparently without
7 much argument, that it lost exclusivity of those fishing
8 rights, and now seeks to say that because it was not
9 compensated for what obviously is the far lesser value,
10 if indeed there is any value at all in being subject to
11 state regulation, that therefore that lack of
12 compensation shows that Congress must not have intended
13 to do what it did in the cession language, and that is
14 to include everything in the sale.

15 We think the tribal argument is inconsistent,
16 necessarily inconsistent by not complaining of the
17 greater deprivation of the asserted right, and at the
18 same time saying that the presence of the lesser
19 deprivation without compensation therefore must mean
20 that Congress must not have intended to include these
21 rights because they were not included in the sale.

22 We think that when the argument is pursued, it
23 falls of its own weight. Tribes retain no beneficial
24 interest, as this Court has found was sufficient in some
25 cases, the Ash Sheep case, for example.

1 QUESTION: May I just interrupt with one
2 thought that is troubling me? Your argument is that on
3 the valuation point, omitting the hunting and fishing
4 isn't significant because the timber and the grazing was
5 the highest and best use for the land, and therefore an
6 appropriate measure of use, and therefore you don't have
7 to worry about other uses.

8 But does that totally meet the argument that
9 the hunting and fishing rights might be not pertinent to
10 the land at all, but a separate bundle of rights that
11 wouldn't necessarily be included within the valuation.
12 That is part of their argument, as I understand it.

13 MR. FROHNMAYER: And I will confess, Justice
14 Stevens, that we are perplexed by that argument, because
15 the question that must be posed to the tribe, it seems
16 to me, is what kind of right is it that is being claimed
17 if it is not a treaty right or if it is not an occupancy
18 right?

19 The treaty gives two conceivable bases on
20 which that right could be urged, the exclusive right to
21 occupy the land or the fact that the treaty confers the
22 right to fish, gather, and hunt within its limits.

23 But when both of those potential theoretical
24 bases are destroyed by a cession agreement with respect
25 to some part of the land, then what theoretical basis is

1 left to assert that these are not --

2 QUESTION: In other words, perhaps, to be sure
3 I understand your point, you are saying that although
4 theoretically they could exist separate and apart from a
5 piece of land, they don't in this case.

6 MR. FROHNMAYER: That's right. In many
7 treaties, or at least in some treaties which have
8 reached this Court, it is clear that the treaty right to
9 hunt and fish can not only not be within the boundaries
10 of the reservation, but it can be on the Columbia River
11 many miles, for example, from the Akima Tribe's
12 reservation, and this Court has held that where those
13 conditions exist, the treaty right is protected and is
14 not appertinent to the -- but here, the only two bases
15 on which we can find for the assertion of hunting and
16 fishing right in the ceded area is either that they come
17 from the right to occupy, which no longer exists, or
18 from the treaty language creating the rights, which says
19 within its limits and within said reservation.

20 But consider, if you will, this anomaly. The
21 western part of the ceded land lies squarely within the
22 boundaries of Crater Lake National Park. Congress has
23 prohibited hunting altogether in national parks, and has
24 required that fishing be done only with hooks, and yet
25 by the reasoning that the tribe now urges on us, either

1 the tribe has a right, because that was ceded land, to
2 hunt and fish free of state regulation, or it does not,
3 because the federal government can bar it.

4 So, not only have they started from an
5 exclusive treaty right within the reservation, the right
6 asserted now becomes one which is nonexclusive,
7 nonuniform, because it apparently does not apply as
8 against the federal government or private landowners,
9 and can be exercised only to prohibit state regulation.

10 It is an anomalous right which is being
11 asserted today, and one which analytically, I think,
12 cannot be justified on the basis of the language and the
13 law that is asserted to have created it. It is for that
14 reason that we believe that the very analysis scheme
15 which the tribe urges today would cause this Court to
16 unravel all tribal cession agreements since the creation
17 of this nation unless the Congressional language in that
18 cession agreement explicitly extinguished hunting and
19 fishing rights on the ceded land.

20 We have yet to find a treaty that does so
21 explicitly, and that presumably is one of the reasons
22 which motivated this Court in the De Coteau decision to
23 stay and to look to how unequivocal the language of
24 bargain and sale is in the cession agreement to
25 determine whether or not it was precisely suited to

1 effect a diminishment.

2 In this case, we believe that it was.

3 QUESTION: Well, if the cession language in
4 the -- was it 1906?

5 MR. FROHNMAYER: Yes, it was, Justice White.

6 QUESTION: If the cession language in the 1906
7 agreement didn't extinguish fishing rights in the land
8 that was ceded, I would suppose that the Indians would
9 still retain the fishing rights in all the land they
10 gave up in 1964.

11 MR. FROHNMAYER: You mean 1864?

12 QUESTION: Yes.

13 MR. FROHNMAYER: Yes, if this is not language
14 of extinction of rights in and to the land, it is
15 difficult to know what language would accomplish that
16 objective unless it is the claim of the tribe that for
17 everything that was of value to the tribe, there must be
18 a specific inventory in the document of bargain and sale
19 to give some valuation to that right or show that it was
20 conveyed.

21 One good example of that, a right which was
22 perhaps not important at the time except that we know
23 that Crater Lake was a sacred place for the Klamath
24 Tribe as it indeed is for anyone who witnesses it, but
25 the western boundary of the claimed land was right on

1 the rim of Crater Lake, of inestimable value now for
2 recreational and aesthetic purposes.

3 There was no specific recitation in the
4 cession agreement in 1906 putting a value on this land
5 separate and apart from fair market value. Is it to be
6 said now, then, that because the cession agreement was
7 silent with respect to particular items of valuation,
8 that the language of bargain and sale of cession,
9 ofgiving up all right, title, claim, and interest is to
10 be regarded as ineffective as against that --

11 QUESTION: Was that the language of the 1906
12 agreement? They grant, bargain, and sell all right,
13 title, and interest, or something to that effect?

14 MR. FROHNMAYER: Let me read it precisely. It
15 appears on Page 3 of our petition for certiorari. The
16 Klamath Indians, and I quote, Justice Rehnquist, "do
17 hereby cede, surrender, grant, and convey to the United
18 States all their claim, right, title, and interest in
19 and to" these excluded areas.

20 QUESTION: And that was very similar to the
21 language in the 1864 treaty?

22 MR. FROHNMAYER: The language in the 1864
23 treaty was that they cede all their right, title, and
24 claim.

25 QUESTION: Yes.

1 MR. FROHNMAYER: Ironically enough, the
2 language in the 1906 agreement is almost identical to
3 the language used in the DeCoteau Tribe agreement, which
4 this Court found was precisely suited to effective
5 diminishment of the boundaries of the reservation.

6 The tribe rests its argument so far as we can
7 tell, other than on a somewhat self-contradictory theory
8 of the origin of these rights, on Article 4 of the
9 cession agreement. We believe that they have
10 misconstrued Article 4.

11 Article 4, by its terms, is a savings clause.
12 It grants no new rights. It is typical of boilerplate
13 language used in tribal agreements of that period. In
14 reading that clause to grant off-reservation hunting and
15 fishing rights would by its terms be inconsistent with
16 the treaty language that establishes those rights within
17 the reservation.

18 Bear in mind the purpose of Article 4 is to
19 kepe the 1864 treaty and the 1906 cession consistent
20 with each other. And yet what an inconsistency that
21 would wreak, because instead of on-reservation exclusive
22 rights to hunt and fish and gather, their reading of
23 Article 4 would create off-reservation, non-exclusive,
24 and non-universal rights, because, for example, of the
25 national parks and because they concede that they can't

1 hunt and fish on private land, at least without the
2 consent of the landowner.

3 The rights that Article 4 was meant to save
4 are plain within the balance of any fair reading of the
5 1864 treaty. That treaty gave allotments in
6 perpetuity. It gave tax exemptions to Indians. It gave
7 family inheritance rights to Indians. It exempted the
8 tribal annuity from individual debts.

9 It protected the Klamath, Modoc, and Yahooskin
10 band of the Snake Indians from forfeiture of their
11 particularly valuable land in case other tribes were put
12 there. That is what a savings clause is intended to
13 give. It doesn't confer new rights.

14 Moreover, the tribe has given us arguments
15 which for four separate reasons we believe should fail.
16 They acknowledge diminishment but give it no legal
17 significance. They ask to rewrite the treaty by utterly
18 ignoring in their briefs the limitations of "within said
19 limits" and "within the reservation" language that is
20 used in the treaty.

21 They would expand the cession act to include a
22 new off-reservation interest, and they, we believe,
23 misread the cases, which clearly augur in favor of the
24 state's position. The first group of their cases
25 reserves off-reservation rights.

1 The second group of their cases are ones in
2 which the cession agreement actually reserves rights on
3 the ceded land, and in the third group of cases that
4 they cite, the cession agreement doesn't diminish the
5 reservation boundaries.

6 I would like to reserve the balance of my
7 time, Mr. Chief Justice.

8 CHIEF JUSTICE BURGER: Mr. Miller.

9 ORAL AGUMENT OF DON BRANTLEY MILLER, ESQ.,

10 ON BEHALF OF THE RESPONDENT

11 MR. MILLER: Mr. Chief Justice, and may it
12 please the Court, the rights at issue here today are
13 basic subsistence rights that continue to this day to
14 play an extremely important role in the day to day lives
15 of the Klamath Tribe and its members.

16 They are treaty rights that have been
17 exercised continuously in the ceded area since before
18 the 1864 treaty to the present time, and they are rights
19 that have a very direct impact on how the Indians live
20 their lives, and affect directly their ability to
21 provide food for themselves and their families.

22 Indeed, the parties here have stipulated that
23 in addition to the Indians' continuous use in this area,
24 these rights were crucial to the survival of the Klamath
25 Indians at the time of the 1906 cession Act, and that

1 they continue to this day to play a highly significant
2 role in the lives of the Klamath Indians.

3 Now, no doubt because of this fundamental
4 importance to the livelihood and existence of the
5 Indians, Congress and this Court have traditionally been
6 highly protective of treaty hunting and fishing rights.
7 This right to hunt and fish free of state regulation has
8 long been regarded as more than a mere jurisdictional
9 prerogative of the Indians. Rather, it has been
10 regarded as an important treaty right for the
11 extinguishment of which just compensation must be paid.

12 Now, in this case and, with all due respect,
13 contrary to Mr. Frohnmayer's assertion, we would assert
14 that there really is no practical reason why the 1906
15 Act should not be construed as preserving the tribe's
16 treaty rights.

17 Because the 1954 Klamath Termination Act
18 preserved these same treaty rights to hunt and fish on
19 lands that were subject to that Act, the Klamath Indians
20 now possess a decreed right to hunt and fish free of
21 state regulation over roughly two-thirds of their 1864
22 treaty reservation, an area of approximately one million
23 acres, and those lands, like the lands at issue here
24 today, were sold, purchased by the federal government,
25 and placed in the national forest.

1 Now, tribal law governs its members' exercise
2 of hunting and fishing rights on those lands. The tribe
3 has cooperative agreements with the state of Oregon, the
4 Forest Service, U.S. Fish and Wildlife Service. It has
5 a wildlife code that establishes seasons and taking
6 limits. It issues ID's to its members, and it employs a
7 wildlife biologist and four tribal enforcement officers.

8 So, whether the tribe retained its treaty
9 rights to hunt and fish on the additional one-third of
10 that 1864 reservation that was ceded in 1906, and which
11 lands are comprised of essentially similar forest lands
12 even today, is probably not of major practical
13 consequence to the state of Oregon, and the record in
14 this case certainly would indicate nothing to the
15 contrary.

16 QUESTION: What is your response, Mr. Miller,
17 to your opponent's contention that it is a kind of
18 peculiar right that has evolved? It is not good on
19 private lands, apparently, yet it is not good against
20 the federal government, and he says it must once have
21 been an exclusive right. How did it become so
22 diminished?

23 MR. MILLER: Well, I think the Court should
24 keep in mind that the situation of the Klamath Indians
25 is peculiar as well. Their reservation has been -- the

1 entire treaty reservation has now been terminated, and
2 they have retained rights, non-exclusive rights on the
3 other two-thirds of the reservation.

4 Now, we certainly admit that when these lands
5 were sold, when all right, title, and interest was
6 ceded, then the exclusive right to hunt and fish on
7 those lands passed with the title to the land, and
8 therefore we assert no interest against the private
9 landowner.

10 Now, this Court has recognized --

11 QUESTION: Has passed to whom?

12 MR. MILLER: Your Honor?

13 QUESTION: The title was given up to the
14 United States, wasn't it?

15 MR. MILLER: That's correct.

16 QUESTION: And it was -- the land became part
17 of national forest mostly, or parks?

18 MR. MILLER: Virtually all of it. The record
19 indicates that about 1 percent of the land had been
20 entered for settlement.

21 QUESTION: Well, normally state hunting and
22 fishing laws apply in national forests and parks, don't
23 they?

24 MR. MILLER: That's entirely correct, Your
25 Honor. Our assertion here is simply that the nature of

1 the right that we assert is really -- has two parts to
2 it, or if -- I mean, you can break it down into two
3 parts. One is the exclusive right to enter on the land
4 and reduce fish and game to possession.

5 The other, and, we would submit, the far more
6 important right in this case, is the right to be free
7 from state regulation, and those have always been
8 considered the perhaps two important elements of Indian
9 hunting and fishing rights. It is a hybrid right. It
10 is not simply a regulatory right. It is not simply a
11 property right.

12 QUESTION: Are there other cases in which
13 other Indian tribes have the right broken down this way,
14 where their right doesn't extend to going on private
15 land, and it is simply a matter of being free from state
16 regulation?

17 MR. MILLER: Well, we are -- I am aware of
18 only one, which was a Blackfeet cession Act in 1891, I
19 believe. In that case, the right in the ceded lands of
20 the tribe was retained as long -- to hunt and fish in
21 the ceded lands as long as they remained public lands,
22 but they specifically held or specifically stated that
23 those rights would be exercised subject to state
24 jurisdiction.

25 So, they did break it down. They recognized

1 they would retain the right to go on as long as they
2 were public lands, but applied state regulation. So
3 Congress knew how to apply state regulations in that
4 area if it wanted to.

5 QUESTION: May I inquire what -- I gather none
6 of the land did go into private ownership in the
7 disputed area here, but had it gone into private
8 ownership -- say they had settled a couple of hundred
9 acres or something -- would you claim the right to hunt
10 and fish on that private land, hunt and fish on it?

11 MR. MILLER: No, Your Honor. Well, we would
12 claim the right to hunt and fish free of state
13 regulation. We would not assert any rights to enter the
14 land over the objection of the landowner.

15 QUESTION: So it is just a right to be free --
16 and earlier you said you had four game wardens of your
17 own, or enforcement personnel within the tribe.

18 MR. MILLER: Yes.

19 QUESTION: Do they have enforcement duties in
20 the area that is involved in this case?

21 MR. MILLER: Well, pending the resolution of
22 this case --

23 QUESTION: Before the case started, did they
24 have such responsibility?

25 MR. MILLER: I can't tell you, Your Honor. I

1 don't know.

2 QUESTION: The record doesn't tell us.

3 MR. MILLER: The record has nothing, and I
4 can't tell you.

5 QUESTION: Let me ask you another question.
6 Supposing you win the case. What would their
7 responsibility be in the area of this case, these four
8 Indian game wardens or whatever the proper title is?
9 Would they have some kind of jurisdiction over what
10 happens in this area?

11 MR. MILLER: They would have jurisdiction over
12 only tribal members hunting and fishing. It would be --
13 and the state of Oregon would have jurisdiction over
14 non-Klamath Tribe members hunting and fishing, and the
15 Klamath Tribe issues tribal identification cards to its
16 members, and --

17 QUESTION: Do they have limits, too, on how
18 much --

19 MR. MILLER: They have limits. They open
20 areas. They close areas.

21 QUESTION: So there would be two sets of rules
22 on the limits that could be taken from this area, one
23 that would apply to the Indians and one that would apply
24 to the non-Indians.

25 MR. MILLER: That's correct.

1 QUESTION: And how to fish. I mean, I suppose
2 there are some regulations on how fish may be taken.

3 MR. MILLER: I assume that there are as well,
4 Your Honor, but that is really not the major bone of
5 contention here. Due to the number of dams on the
6 Klamath River, there were a whole lot of fish back at
7 the time of this agreement, and there aren't -- I mean,
8 there are, I suppose, some trout fishing or something,
9 but it is not a major salmon fishery as it was before.

10 Well, Mr. Frohnmayer has, I believe, correctly
11 pointed out that this case does present the question of
12 whether Congress intended to abrogate treaty hunting and
13 fishing rights in the context of a combination of
14 factors that have not before been considered by the
15 Court.

16 But the lower court decision here certainly
17 doesn't represent a significant departure from the
18 principles that have been announced in the Court's
19 earlier treaty property rights cases and hunting and
20 fishing rights cases.

21 QUESTION: Well, could I ask you, if the
22 cession language in the 1906 agreement didn't extinguish
23 fishing rights in the property that was ceded, why would
24 Indian fishing rights have been extinguished in 1864 in
25 the property that was ceded?

1 MR. MILLER: Your Honor, this Court, I
2 believe, has never required an express or explicit
3 extinguishment of a treaty for hunting and fishing
4 rights.

5 QUESTION: Do you concede that Indian fishing
6 rights on the land that was ceded in 1864 were
7 extinguished?

8 MR. MILLER: Absolutely, and I will tell you
9 why, because there was a clear expression of
10 Congressional intent in that case as opposed to in this
11 case.

12 QUESTION: Well, it didn't mention fishing
13 rights off the reservation.

14 MR. MILLER: No, it did not.

15 QUESTION: And neither did the 1906.

16 MR. MILLER: That's correct.

17 QUESTION: It just said -- I suppose the
18 cession language is even more specific in the 1906
19 agreement.

20 MR. MILLER: They are close to the same, Your
21 Honor. I don't know if one is more specific than the
22 other. But you have to look to the purposes of the two
23 acts. The purpose of the 1864 treaty was specifically
24 to provide an area in which the Indians could continue
25 to be self-sufficient through hunting and fishing, and

1 indeed the record here shows that the Indians
2 specifically bargained for the inclusion of these ceded
3 lands within their reservation because of their value
4 for hunting and fishing, and the --

5 QUESTION: In 1864?

6 MR. MILLER: In 1864, yes. The treaty
7 commissioner had initially proposed to lay out a
8 reservation on the floor of the Klamath Basin and
9 exclude the up slopes and valleys, and the Indians said,
10 no, you can't do that. These lands must be included
11 because they form -- provide us with a major part of our
12 subsistence.

13 And so the government acceded, and they
14 acceded to the Indians' request because they were aware
15 that the Klamath Reservation was simply too high and too
16 cold to support any meaningful agriculture, and the
17 treaty provided for absolutely no support whatsoever of
18 -- I'm sorry. It provided for some support initially in
19 the first few years, but it provided for no long-term
20 support of the Indians by the government.

21 So, the government's intent was to provide an
22 area that would be -- where the Indians could be
23 self-sufficient through hunting and fishing, and the
24 treaty specifically reserves fishing rights, so when the
25 Indians voluntarily agreed to come on that reservation

1 after having bargained for the inclusion of their
2 hunting and fishing grounds, then that probably is a
3 clear enough -- I don't think there's any doubt that
4 that is a clear enough expression of intent of the
5 parties there to constitute an abrogation of those
6 aboriginal rights. But here we are talking about treaty
7 rights.

8 QUESTION: What if there hadn't been that
9 much, Mr. Miller? Suppose that there had just been
10 language saying, we transfer, grant, bargain, sell, and
11 convey all of our right, title, and interest, whatever
12 we may have, in these lands that are now being excluded
13 from the reservation.

14 Do you say that fishing rights wouldn't pass
15 under that sort of cession language? Do you see what I
16 mean?

17 MR. MILLER: Yes, Your Honor, and I think that
18 you would have to again look at the circumstances of the
19 particular act and what the intent of the parties and
20 the understanding of the Indians was at the time.

21 QUESTION: So, if there were just nothing
22 relevant on either side on that, that general language
23 would not be sufficient, I take it.

24 MR. MILLER: I --

25 QUESTION: Let me elaborate a little bit. I

1 think your opponent takes the position that if I as a
2 seller -- or I as a buyer come to you as a seller and
3 say, look, I see you've got an acre of land for sale, I
4 think it is first-rate residential property, and that
5 would be worth \$10,000, an acre of residential property,
6 so I offer to buy that land from you, and you give me a
7 deed to it, a grant deed.

8 You can't come back the next day and say,
9 well, I am starting to farm on this corner of the
10 property, because all you bought from -- all I sold you
11 was the residential value of the property. He is saying
12 that in effect the fact that fishing rights may not have
13 been expressly included doesn't mean that when the
14 Indians say we convey everything they don't convey
15 fishing rights, too.

16 Now, what is your response to his -- as I
17 understand his position?

18 MR. MILLER: Well, briefly, it is that the
19 right that we assert is not a right that is appertinent
20 to the land. It is not in the nature of an easement,
21 and it does not diminish in any respect whatsoever the
22 new landowner's interest in the property. We only
23 maintain that we retain the right to hunt and fish with
24 the permission of the landowner.

25 In the case of the Forest Service lands, if

1 hunting is permitted, then we --

2 QUESTION: So it is basically not a property
3 right at all, but kind of a freedom from state
4 regulation.

5 MR. MILLER: It is a freedom from state
6 regulation that has, because of its unique character as
7 such an important right to the Indians, that has some of
8 the characters of a property right.

9 In other words, it is a compensable right. It
10 is a property right within the sense of the Fifth
11 Amendment. If it is taken away, then compensation must
12 be paid. But it is not an interest in the property that
13 is ceded.

14 This Court has recognized, and I think maybe
15 this could answer some of the concerns in terms of
16 whether this decision is breaking tremendous new ground
17 or not, this Court has held that the right to hunt and
18 fish free of state regulation may survive the language
19 of cession where all right, title, and interest is
20 conveyed.

21 It held that in the Winans case in 1905, and
22 this Court's decision in the Antoine case in 1975 also
23 held that such rights survived the all right, title, and
24 interest cession.

25 QUESTION: Have we held that such rights

1 survive where you have both the conveyance of the entire
2 property interest and also the diminishment of the
3 reservation?

4 MR. MILLER: No, Your Honor. This Court has
5 held that the rights do survive the total
6 disestablishment of the reservation. Well, if I
7 understand -- let me regroup here.

8 Your Honor's question was, may they survive
9 total disestablishment of the reservation and the cede,
10 sell, convey, and relinquish?

11 QUESTION: Well, here you have the two things
12 combined. I don't think you contest the fact that not
13 only was the interest in the real estate, the land
14 conveyed, but also the boundaries of the reservation
15 became smaller as a result of that conveyance.

16 MR. MILLER: That's correct.

17 QUESTION: And often you might have it survive
18 -- say you conveyed land within a reservation. Why, the
19 hunting and fishing rights might well survive within the
20 reservation.

21 MR. MILLER: That's correct.

22 QUESTION: But I am not aware of any cases in
23 which you have the two factors conjoined in which the
24 hunting and fishing rights have survived, both the
25 conveyance of the property and the reduction in the size

1 of the reservation.

2 MR. MILLER: Well, the Winans decision
3 certainly represents such a case. Antoine, the Court's
4 1975 decision in Antoine --

5 QUESTION: Wasn't Winans the construction of a
6 treaty which specifically referred to the hunting and
7 fishing rights?

8 MR. MILLER: That's correct.

9 QUESTION: That was my recollection.

10 MR. MILLER: That's correct. And Antoine was
11 construction of a cession agreement that also contained
12 -- so there is -- there is no case, and I don't want to
13 be evasive, there is no case without some sort of
14 specific preservation.

15 QUESTION: If there were a specific case, you
16 probably wouldn't be here, either one of you.

17 MR. MILLER: I hate to speculate, Your Honor.

18 I would like to point out that the Court has
19 held that such rights, particularly the treaty right to
20 hunt and fish free of state regulation, that particular
21 right, free of state regulation, has survived the total
22 diminishment of reservation status, and that was this
23 Court's holding in the 1968 Menominee decision.

24 We believe that those principles control -- in
25 those cases, control the resolution of this case.

1 QUESTION: Mr. Miller, let me interrupt you
2 once more. Menominee kind of cuts both ways. Aren't
3 there two parts to Menominee? In the first part they
4 had a conveyance somewhat like this, and they said that
5 took the hunting and fishing rights along with it,
6 didn't they?

7 In other words, there was both a conveyance of
8 the land, I thought, without any reference to hunting
9 and fishing rights, which -- I don't remember the exact
10 language, but the Court said, well, that implicitly took
11 with it the hunting and fishing rights.

12 And then there was the second part, on which
13 you rely.

14 MR. MILLER: No, I --

15 QUESTION: They cite this in one of the
16 footnotes in their brief.

17 MR. MILLER: I don't believe so, Your Honor.
18 I may be misunderstanding the question, but my
19 understanding of the Menominee case is that at the time
20 of termination, the termination Acts specifically
21 provided that the reservation, all federal laws would no
22 longer apply to the reservation.

23 Its Indian country status was totally
24 disestablished and diminished. And there was a specific
25 provision in the termination Act that required that all

1 laws of the states would apply to the Indians in the
2 same manner. But it said nothing about hunting and
3 fishing rights.

4 QUESTION: That's right. I'm referring to the
5 language that created the reservation. It created the
6 reservation by conveying the land, in effect, and it
7 said nothing at all about hunting and fishing rights.

8 MR. MILLER: That's correct.

9 QUESTION: But implicitly it was assumed that
10 that must have gone with the --

11 MR. MILLER: That's correct. And I might
12 address that issue at this time. We do not believe that
13 these rights are tied irrevocably to the land, so that
14 they shrink along with the land.

15 These rights were defined by an area of land,
16 as necessarily they must have been, but they were the
17 right, a very separate right to hunt and fish over these
18 areas, and there is no reason why they should be tied
19 irrevocably to the tribe's right to occupy and possess
20 those lands.

21 And indeed the numerous cessions where tribal
22 rights have been retained is reflective of the fact that
23 these rights are not unequivocally tied to possession of
24 the land.

25 I think it is very important for the Court to

1 focus on the unique purposes of this cession Act. They
2 distinguish this cession Act from virtually every other
3 land cession Act, with the exception of the Blackfeet
4 cession Act which I alluded to earlier, in that these
5 lands were not opened for settlement by non-Indians, and
6 the purpose of this Act was to honor treaty obligations
7 in a manner entirely consistent with the treaty, and to
8 benefit the Indians. It sought to promote their
9 self-sufficiency.

10 And when you consider what must have been the
11 Indians' understanding at that time, here they were
12 negotiating an agreement. The government knew full well
13 that these lands were important to them for hunting and
14 fishing purposes.

15 They had specifically bargained for their
16 inclusion earlier. And yet the agreement said nothing
17 whatsoever about hunting and fishing rights, but it did
18 contain an article, Article 4, which provided that all
19 treaty rights that were consistent with the provisions
20 of the cession would be preserved.

21 QUESTION: Could I ask, does the history show
22 why the Indians sold or why the United States bought
23 that land that had been erroneously surveyed as outside
24 the reservation? They hadn't been settled to any
25 extent. Why didn't they just include those lands in the

1 reservation instead of having a cession and payment,
2 things like that?

3 You can make an argument on the other side
4 that if the Indians decided to sell it, they didn't
5 think this area was so important to them, if there
6 weren't any settlements around. Why didn't they just
7 stick to the original boundary of the reservation?

8 MR. MILLER: Well, we don't know, Your Honor,
9 and the record doesn't reflect very much. What it does
10 indicate is that there are some statements by Bureau of
11 Indian Affairs people even back in the 1880s', 15 years
12 before the land was going -- or before the Boundary
13 Commission was even appointed to investigate, there was
14 indication that they simply thought that the easiest way
15 out of this mess was to just have Congress buy it, and
16 everything seemed to proceed down that track.

17 And one of the important things to keep in
18 mind, Your Honor, with regard to the cession agreement
19 is that -- and with regard to your inference that the
20 Indians perhaps didn't think it was important is that
21 this was really -- the agreement that was negotiated in
22 1901 was really not a negotiated agreement across the
23 board. All items weren't on the table.

24 The inspector had told the Indians that he was
25 adopting the Boundary Commission's detailed appraisal of

1 those lands, and that the only negotiations they were
2 going to have regarded what the Indians were going to do
3 with the proceeds.

4 So, there were no negotiations whatsoever with
5 regard to whether the land would be ceded or retained.
6 The tribe had nothing to do with that. Or how much
7 money they would be paid for the land. That was
8 preordained. It was simply --

9 CHIEF JUSTICE BURGER: We will resume there at
10 1:00 o'clock, counsel.

11 (Whereupon, at 12:00 o'clock p.m., the Court
12 was recessed, to reconvene at 12:59 o'clock p.m. of the
13 same day.)
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AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Miller, you may resume.

ORAL ARGUMENT OF DON BRANTLEY MILLER, ESQ.,
ON BEHALF OF THE RESPONDENT - RESUMED

MR. MILLER: Thank you, Mr. Chief Justice, and may it please the Court, I would like to address first a matter that was brought up earlier regarding the question of whether the Indians were paid for the value of this right or whether it was subsumed within the fair market value and highest and best use.

And I would simply point to the Joint Appendix at Page 14, Stipulation Number 19, where the state has stipulated that the Commission did not take the tribe's hunting and fishing rights into consideration in making its assessment.

QUESTION: That may be so, but if you assume that the 1906 agreement ceded all rights, all that happened before the Indian Claim Commission was that they reevaluated whatever was ceded.

MR. MILLER: Well, the key is all rights or --

QUESTION: I agree, but you have to go back to the 1906 agreement.

MR. MILLER: That's correct, Your Honor.

QUESTION: Okay.

1 MR. MILLER: Now, the state has argued that
2 this is an anomalous, very different, almost an oddball
3 right, that this would be the only place where it would
4 exist. The point to be made is that this is a right,
5 the right that we assert today is a right that was
6 subsumed within the larger rights that the Indians
7 before possessed.

8 It is the same identical right that exists
9 today on the other two-thirds of their treaty
10 reservation, and it is a right that exists on numerous
11 other national forest lands throughout the country. It
12 has been recognized time and again by various courts in
13 the country.

14 The thing that is different about this case is
15 not the nature of the right asserted. The thing that is
16 different is the manner in which the right was
17 preserved, and Article 4, which we place great reliance
18 on, means that the rights were only extinguished to the
19 extent necessary to accomplish the purposes of the
20 cession, and the purposes of this cession were not to
21 open reservation lands to settlement, as was the case in
22 virtually every other cession Act.

23 So, the retention of these rights on unfenced,
24 unenclosed forest lands is consistent with the purposes
25 of the cession, and the Indians surely must have

1 understood that. They knew that Article 4 was in that
2 agreement, and they knew that those lands out there were
3 not going to be settled, that they were unenclosed,
4 unfenced forest lands, that there was no population
5 pressure.

6 The exclusive nature of the right was probably
7 unimportant to them at the time. Nobody else used those
8 lands anyway. The important thing at the time was the
9 right to be able to go out and continue to use those
10 lands for their subsistence, and that is the way they
11 would have understood it, we submit.

12 Now, the adoption of the approach for which we
13 have argued would simply mean that in each Indian land
14 cession Act you would have to examine each Act in light
15 of its own legislative history and its surrounding
16 circumstances, and in adopting the rule that we propose,
17 the Court should bear in mind that there really were
18 very few cessions and diminishments that were
19 effectuated for purposes other than opening the lands
20 for settlement, and that is the key to the analysis of
21 this case.

22 This was a unique Act. Its purpose was to
23 settle a boundary dispute, honor treaty obligations.
24 Its purpose was not to benefit non-Indian settlers.

25 Now, as we have suggested in our brief, it

1 might well be in those cases where there was a
2 diminishment as well as a cession of title and the lands
3 were opened for settlement, in those cases, there might
4 well be an extinguishment of the rights. The totality
5 of those circumstances might well rise to the level of
6 clarity that has been required by this Court for an
7 extinguishment of the treaty rights.

8 Thank you.

9 CHIEF JUSTICE BURGER: Do you have anything
10 further, Mr. Attorney General?

11 ORAL ARGUMENT OF DAVID FROHNMAYER, ESQ.,
12 ON BEHALF OF THE PETITIONERS - REBUTTAL

13 MR. FROHNMAYER: Thank you, Mr. Chief Justice.

14 Briefly, six points, which I believe will not
15 require all the time that I have reserved.

16 First, I must respectfully submit that
17 opposing counsel has done in oral argument precisely
18 what he has done in the briefs, and that is to confuse
19 the language of Article 4, which does not speak to
20 purposes of the cession agreement. It talks about
21 provisions of the agreement. Provisions are clear, and
22 speak for themselves, and do not require psychoanalysis
23 of the parties or the Congress which enacted it.

24 The second point is that we have referred in
25 our opening argument to the anomaly created by the

1 special situation of Crater Lake National Park, the
2 largest part of the western cession boundaries.

3 Federal law has since time immemorial, at
4 least since the creation of the park, prohibited hunting
5 altogether on that piece of ceded property, and yet it
6 is anomalous because the right asserted is the right of
7 subsistence to hunt and fish and the allegedly onerous
8 nature of state regulations, which simply have bag
9 limits and season limits.

10 The federal government with respect to its
11 share of those lands in the national park prohibits
12 hunting altogether, and yet no mention of how this is to
13 be reconciled with the theoretical position of the tribe
14 has yet been offered by our opponents.

15 That leads to the point that we have heard no
16 argument about the source of this asserted right. That
17 source can only come from one of four sources:
18 aboriginal right, the treaty right of 1864, the 1906
19 cession agreement, or some other contemporaneous Act of
20 Congress which regranted to the tribe the authority to
21 hunt and fish as it had before on the ceded land, and in
22 fact none of those first three sources is conceivably
23 the source, and therefore we must look to the fourth.

24 Justice Stevens asked our worthy opponents for
25 authority for their proposition, a point, I believe,

1 echoed by Justice White. Indeed, the authority cited is
2 quite contrary. The Blackfoot treaty which was cited as
3 an example, as counsel explained to this Court, where
4 the cession agreement explicitly reserved hunting and
5 fishing rights on the ceded land until such time as they
6 were open to the public.

7 The Winans case is a case where a treaty
8 explicitly reserved off-reservation rights. The Antoine
9 case is a case in which the cession agreement explicitly
10 reserved rights to hunt and fish on the ceded land, and
11 in fact on Page 28, Footnote 5 of our brief, we cite
12 authority to the proposition that when Congress wanted
13 to reserve rights on ceded land, the normal practice was
14 for the Congress of the United States to say so, and it
15 did.

16 Justice Stevens in his colloquy with opposing
17 counsel asked about the opposing interests of the state
18 in the varieties of fish, game, and other wildlife
19 management. Justice Stevens, that is not in the
20 stipulations of the parties, but in the motions to stay
21 the District Court proceedings, the opposing views of
22 counsel and affidavits with respect to the various
23 practices are included in the record, and that may serve
24 to answer your question there if that is a residual
25 issue.

1 The point that the state raises is that the
2 normal practice if something is other than a complete
3 sale and cession and giving up of all rights in a
4 cession agreement is for the Congress to have said so.
5 The Congress knew how to say so.

6 The Congressional language is clear and
7 undeniable, and yet the tribe shrinks in horror at the
8 notion that with respect to land which is admittedly no
9 longer in tribal domain but in the public domain, that
10 the same rules, the same regulation to enhance wildlife
11 and to protect the environment should apply to tribal
12 members as well as to all the members of the public.

13 We believe that the intention of Congress is
14 otherwise, and that the ability of the state to regulate
15 this land with an even hand in the interests of
16 enhancing its wildlife resource ought to be preserved as
17 against the theory which has no true basis in analytical
18 consistency that we can discover.

19 Thank you very much.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.
21 The case is submitted.

22 (Whereupon, at 1:07 o'clock p.m., the case in
23 the above-entitled matter was submitted.)
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-2148 - OREGON DEPARTMENT OF FISH AND WILDLIFE, ET AL., Petitioners v.

KLAMATH INDIAN TRIBE

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Paul A. Richardson

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