TRIBAL RIGHTS AND THEIR EFFECT ON OUR CONCEPT OF PROPERTY RIGHTS IN THE NORTHWEST

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Indian tribal rights are intimately connected with Pacific Northwest habitat issues. Tribal rights affect not only Indians within their reservations. They also affect property outside of reservations held by others. Because of the supremacy of Indian Treaties under the United States Constitution, these rights may be superior to rights based on state or common law.

As of 1990 there were 26 Indian reservations within the State of Washington. U.S. Dept. of Commerce, 1990 Census of Population-Washington, Publication #1990, COH--9, p. 132. These reservations comprise approximately 3,200,000 acres. Of this total, about 2.5 million are held in fee title by the United States government as trustee for the benefit and use of tribes and individual Indians. The remaining 700,000 acres are owned outright in fee by individuals, mostly non-Indians. The strategic location of

many of these reservations near urban centers and on watercourses and the value of the land itself, including the timber, minerals and other natural resources located thereon, make Indian Tribal rights of major concern for habitat management.

1. HISTORICAL PERSPECTIVE

Indian Tribal rights can best be understood in historical perspective. Indians have acquired or retained certain rights in at least six ways: (1) by aboriginal possession of land; (2) by action of governments which antedate the United States, (*e.g.*, a grant from Great Britain, Spain, etc.); (3) by treaty with the United States; (4) by an act of Congress; (5) by executive actions; or (6) by purchase.

The Supreme Court best summed up the origins of retained tribal rights in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). There, the Court noted:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign -- first the discovering European nations and later the original states in the United States -- a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title recognized to be only a right of the occupancy, was extinguished only by the United States.

Oneida, at 667.

Oneida thus recognizes two important concepts: first, that "original" Indian occupancy of land constituted a recognizable and protectable title and, second, that such title could only be extinguished by the sovereign.

The policy of extinguishing Indian title only at the behest of the sovereign was one of the first policies set by the United States Congress after adoption of the United States Constitution. In 1790, the Congress passed the first of many Indian Trade and Intercourse Acts. The first Trade and Intercourse Act declared that no sale of land made by any Indian or Indian tribe would be valid unless "made and duly executed at some public treaty, held under the authority of the United States." Act of July 22, 1790, Chapter 33, Section 4, 1 Stat. 137. This first Act and other subsequent Trade and Intercourse Acts are now codified at 25 U.S.C. ' 177 and are of continuing force

and effect. Thus, the stage was set for the development of a large body of law dealing with Indian Treaties, including their scope and enforcement.

A third important concept in understanding Indian Tribal rights and the duty of the United States to enforce them is the concept of trust responsibility. This concept evolved judicially. It first appeared in Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

In *Cherokee Nation*, the tribe filed an original action in the Supreme Court to enjoin enforcement of state laws. The Court refused original jurisdiction, finding that the tribe was not a state of the United States nor a foreign state, and thus not entitled to bring suit directly before the Court. The Court concluded rather that tribes were "domestic dependent nations" and that their relationship to the United States resembled "that of a ward to his guardian." *Cherokee Nation*, at 17.

It is from this holding that the trust responsibility doctrine has developed. That doctrine has been articulated as follows:

> Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government. Even more broadly, federal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility. As a result, the trust relationship is one of the primary cornerstones of Indian law.

Felix S. Cohen's Handbook of Federal Indian Law, page 220 (R. Strickland ed., 2d ed. Michie 1982).

These three concepts, the viability of original Indian title based on aboriginal possession, the restraint against alienation of that title except by proper action of the federal sovereign (most commonly through a treaty), and the requirement that the federal sovereign act within a trust relationship duty with respect to Indian rights, have led to a large body of law concerning Indian Tribal rights.

2. THE PRIMACY OF FEDERAL LAW - THE SUPREMACY CLAUSE.

Indian Tribal rights are primarily governed by federal law. There are virtually no Washington State statutes dealing directly with Indian Tribal title or property rights. There are few property rights cases in the state courts other than in the area of fishing and hunting rights. Even in that area, state courts have often been overruled by the federal courts or had their decisions substantially modified. This fact has its roots in

the United States Constitution. The Supremacy Clause makes treaties with Indian tribes part of the Supreme Law of the land, thereby essentially preempting state law. In addition, the Indian Commerce Clause, U.S. Const. art I, ' 8, cl. 3, recognizes the supremacy of federal actions governing Indian affairs. The trust relationship also dictates that the federal law will generally govern Indian rights. Further, the fact that the United States government owns fee title to most Indian real property also dictates the preeminence of federal law in the area.

3. INDIAN TREATY RIGHTS WHICH IMPLICATE HABITAT AND PROPERTY

a. Fishing and Hunting Rights Within Indian Country.

Indians generally possess exclusive rights to hunt and fish on reserved land and waters within their reservations. It is a federal crime to fish, hunt or trap on Indian property without permission of appropriate tribal authorities. 18 U.S.C. ' 1165.
As an incident of the power of self-government, tribes retain authority to regulate hunting and fishing of their members on reservation lands. In some cases, the tribal government may also possess the authority to control hunting and fishing of non-members on non-Indian-owned lands if non-member conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe. *Montana v. United States*, 450 U.S. 544 (1981). *See also, New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

b. Fishing Rights At "Usual and Accustomed" Fishing Locations.

One of the most important Indian Treaty rights is the right to fish at all traditional hunting and fishing locations. State law concepts do not defeat the rights of Indians whose tribes were parties to treaties with the United States. *United States v. Winans*, 198 U.S. 371 (1905).

In *Winans*, non-Indian upland owners constructed a fish wheel in the waters of the Columbia River pursuant to state license. That wheel had the effect of barring the Indians from their traditional fishing area. The Court ruled that the fact that the defendants had fee patents to the land in question issued by the government did not defeat the Indians' treaty fishing rights and that the treaties fixed "in the land such easements as enable the (treaty) right to be exercised." *Winans*, at 384.

In the well-known fishing rights litigation commonly known as the "Boldt decision" after the U.S. District Judge issuing the initial decision, the court held that usual and accustomed fishing places of the tribes signing treaties with the United States government in the 1850s were fishing locations where the tribes reserved, and their members currently had the right to take fish. *U.S. v. Washington*, 384 F. Supp. 312 at 332 (1974), *aff'd sub nom. Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

The United States Supreme Court ultimately affirmed that the tribes were entitled to up to fifty per cent of the available fish. *Id*. *see also*, *State v. Antoine*, 420 U.S. 194 (1975) (construing similar language referring to the hunting rights of the Colville Tribe in Okanagan and Stevens counties).

c. Treaty Rights for Shellfish Harvesting.

In continuing litigation in *U.S. v. Washington*, the courts have affirmed that the treaty right to fish includes the right to harvest shellfish imbedded in the state's tidelands and bedlands. *U.S. v. Washington*, 157 F.3d 630 (9th Cir. 1998), *cert denied*119 S. Ct. 1376 (April 5, 1999). The court has held that usual and accustomed places for shellfish harvesting are the same as those for salmon and include " . . . all bed lands and tidelands under or adjacent to these areas." *U.S. v. Washington*, 873 F. Supp. 1422, 1431 (W.D. Wash. 1994).

The treaty right to harvest shellfish within usual and accustomed grounds and stations exists whether or not the underlying bed lands or tidelands are in private ownership.

The right does not extend, however, to shellfish beds which are deemed to be "staked or cultivated" as those terms were used at treaty times. *Id.* pp. 1431 *et seq.* What constitutes a "staked or cultivated" bed is beyond the scope of this article.

In a later implementation order, the court limited access across privately owned uplands ". . . unless the tribal members can demonstrate the absence of reasonable access by boat, public road, or public right-of-way" to shellfish harvesting areas. Memorandum Opinion and Order Granting In Part and Denying In Part Plaintiff's Motion to Alter or Amend The Judgment, *United States v. Washington*, Cause No. 9213, Subproceeding 89-3, Docket No. 15490 (W.D. Wash. Dec. 19, 1995). *See also*, Order Denying Private Landowners' Motion for Reconsideration, Docket No. 16918 (W.D. Wash. Feb. 7, 2000).

d. Access to "Open and Unclaimed" Lands for Hunting.

Tribal hunting rights is on "open and unclaimed lands" have also been affirmed. (Note: The *Antoine* case cited above, dealt with reserved rights at "usual and accustomed locations.") In *State v. Chambers*, 81 Wn.2d 929 (1973), the State Supreme Court held that access to hunt contrary to state law was not preserved where the land on which the Indian was hunting was fenced and there was an unoccupied house nearby. However, the court noted that private ownership must be readily apparent from observation to defeat the reserved right.

Presumably "open" land, even if "claimed", may still be subject to Indian rights. The issue may turn, however, on whether property transactions, subsequent to the treaty or agreement originally reserving the right, were intended to abrogate the reserved right.

In one case, the U.S. District Court denied a motion to dismiss a criminal proceeding for violation of federal statutes barring hunting in the Olympic National Park. The court held that federal legislation creating the park terminated the "open and unclaimed" nature of the land, and that subsequent legislation prohibiting all hunting in the park terminated the "Indian Hunting Privilege." *U.S. v. Hicks*, 587 F. Supp. 1162 (W.D. Wash. 1984). The issue, however, is generally not considered settled.

The State Supreme Court has held that the "open and unclaimed" land language of the Point Elliott Treaty applied only to land within a tribe's "ceded" areas under the treaties or other "traditional" areas. *State v. Buchanan*, 138 Wn.2d 186 (1999), *cert denied* __ S. Ct. __, 68 USLW 3327 (Feb. 22, 2000).

4. TRIBAL WATER RIGHTS WHICH IMPLICATE HABITAT ISSUES.

a. The "Winters Doctrine".

Indian reserved water rights are federal water rights and "are not dependent upon state law or state procedures." *Cappaert v. United States*, 426 U.S. 128 (1976). Indian water rights have two bases. The first is what is known as the "*Winters* doctrine," emanating from *Winters v. United States*, 207 U.S. 564 (1908). The second bases is Treaty Rights.

The *Winters* doctrine was reaffirmed in *Arizona v. California*, 373 U.S. 546 (1963), and was best summed up by the Court in *Cappaert* as follows:

> This Court has long held that when the federal government withdraws its land from the public domain and reserves it for federal purposes, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, art. I, ' 8, which permits federal regulation of navigable streams, and the Property Clause, art. IV, ' 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.

. . .

> In determining whether there is a federally-reserved water right implicit in a federal reservation of public land, the issue is whether the government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created.

Id. at 138-39.

Colville v. Walton, 647 F.2d 42 (9th Cir.), *cert denied*, 454 U.S. 1092, (1981), (9th Cir. No. 83-4285, Jan. 21, 1985), illustrates the application of the *Winters* doctrine in a specific setting. A number of rulings were made.

The case holds that:

- the United States reserved sufficient water at the time the reservation was created to allow irrigation of all practicably irrigable acreage on the reservation.

- a ratable share of the water reserved for irrigation passed to Indian allottees.

- ratable share could in turn be conveyed to a non-Indian purchaser (*e.g.*, Walton). However, the non-Indian purchaser's share was subject to loss if not put to use, that is, the non-Indian purchaser must exercise "reasonable diligence" in applying water beneficially to his land.

- in addition to water for irrigation, sufficient water was reserved to allow establishment of fisheries and to facilitate natural spawning of fisheries. The quantity of water unrelated to irrigation was not affected by the allotment of the reservation and the passage of title out of Indian hands.

- although the non-Indian's use was subject to defeasance for non-use, the Indian allottee's share was not subject to such reduction.

- the reserved tribal right for sufficient water to support fisheries emanated from the purposes for which the reservation was created and not from actual use or appropriation. Thus, failure of the tribe to use the water for fisheries until a much later date in history did not defeat the tribe's right nor reduce its priority.

- where there was insufficient water to meet all of the needs (non-Indian agricultural, Indian allottee agrarian and tribal fisheries), each party should bear a proportionate share of any adjustment required by the shortage, since all parties had a priority date as of the date of creation of the reservation.

b. Off-Reservation Water Rights Base on Treaty.

In addition to the reservation of water rights on reservations, off-reservation waters are also subject to Indian reserved rights where a right to hunt and fish beyond reservation boundaries has been reserved at usual and accustomed fishing places. *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

In *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985), competing interests for water from the Columbia River for agrarian purposes were found to be subordinate to water sufficient to protect the fisheries supply of the Yakama Indian Nation. That water right, however, was based on a treaty preserving fishing and hunting rights rather than on *Winters* doctrine concepts dealing with the creation of the reservation.

5. THE TREATY RIGHT TO HABITAT PROTECTION.

A clear ramification of the fishing rights litigation is the reserved right to have the environment protected.

In the initial complaints filed in massive treaty rights case of *United States v. Washington*, the United States government and tribal governments alleged that an "environmental" right to have fisheries habitat protected from adverse state action also existed by implication from the reserved right to harvest fish. This issue was bifurcated for trial and became known as "Phase II" of the litigation. Phase II was assigned to the Honorable William Orrick, U.S. District Judge, N.D. Calif.

In dealing with this issue, Judge Orrick held:

> Implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation.
>
> . . .
>
> The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken.

U.S. v. Washington, 506 F. Supp. 187 at 203 (1980).

The court went on to state:

> . . . There can be no doubt that one of the paramount purposes of the treaties in question was to preserve to the tribes the right to continue fishing as an economic and cultural way of life. It is equally beyond doubt that the existence of an environmentally acceptable habitat is essential to the survival of the fish, without which the expressly, or -- reserved right to take fish would be meaningless and valueless. Thus, it is necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause.

U.S. v. Washington, at 205.

The district court's decision was appealed to the Ninth Circuit and substantially upheld with some modification on November 3, 1982. However, the opinion was later withdrawn by order and opinion of an *en banc* panel which declared the appeal premature under the applicable federal rules.

On April 29, 1985, the same *en banc* panel, upon a request for rehearing filed by the State of Washington, issued a second *en banc* opinion vacating the original opinion of the district court as inappropriate for a declaratory judgment action. In ordering the district court decision vacated, the Ninth Circuit stated that the district court ruling was "contrary to the exercise of sound judicial discretion" in that the declaratory judgment procedure had been incorrectly used to announce legal rules "imprecise in definition and uncertain in dimension." (9th Cir. Cause No. 81-3111, April 29, 1985, slip op., page 9.)

The court went on to note that the State of Washington was bound by the treaties and that if the State acted "for the primary purpose or object of effecting or regulating the fish supply or catch in noncompliance with the treaty as interpreted by past decisions, it will be subject to immediate correction and remedial action by the courts." *U.S. v. Washington*, at 10.

The court returned the case to the district court for further proceedings based on specific factual situations. It was ultimately dismissed without prejudice on motion of the tribes. *U.S. v. Washington*, Case No. 9213, Docket No. 13291 (W.D. Wash. June 22, 1993)

The essence of the original Phase II decision has, however, already been followed in specific cases by the Ninth Circuit.

In *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), the court held that the treaty between the United States government and the Klamath Indians included an implied water right to as much water on reservation lands as was needed to protect fishing rights. Although *Adair* dealt with water on old reservation lands, the case is analogous to the off-reservation fishing rights reserved by Washington State tribes since the Klamath reservation had been terminated and reserved fishing rights were thus, by definition, "off-reservation", that is, no longer on Indian land.

In *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), the court ruled in favor of protection of fishery habitat in a case involving ". . . the collision of two interests: the Yakama Nation's interest in preservation of their fishing rights, and the Eastern Washington farmers' interest in preservation of water needed for crops in dry spring and summer." *Kittitas*, slip op. at 2. In *Kittitas*, a court-appointed water master had asked the district court for guidance when it became clear that diverting water for agricultural purposes would leave important salmon egg nests in spawning areas exposed, thus destroying those nests. The Ninth Circuit upheld the district court's directive to the water master to release more water to protect fish. It rejected the argument that the court had no jurisdiction to protect treaty fishing rights.

> No such limitation appears. The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation. . . . The court properly assumed jurisdiction to interpret the decree in light of the Nation's treaty fishing right.

Kittitas, 763 F.2d 1032, 1034

Although both *Kittitas* and *Adair* specifically involve water rights necessary to sustain the fishing right, they both stand for the proposition that the treaty right to fish includes an implied right to have the fishery resource protected.[(1)]

The issue of habitat protection has been raised in the specific context of design, construction and maintenance of culverts in the state. The massive litigation in *United States v. Washington* continues. In 2000, the tribes and United States files a new sub-proceeding in the case alleging that the state had improperly designed, built and maintained culverts under state roadways, logging and access roads, etc., in such a way as to impermissibly harm salmon habitat.[(2)] In a ruling on preliminary motions in the case, the court rejected arguments that the case should be dismissed because the so-called "habitat" right arose by implication rather than specific wording in the treaty.[(3)] The case is scheduled to be tried on the merits in June of 2003.

6. TRIBAL RIGHTS TO RIVER BEDS, LAKE BEDS AND TIDELANDS HABITAT.

Indian rights in riverbeds, lakebeds and tidelands within or adjacent to reservations may also give rise to habitat protection rights. Tribal rights to such areas depend upon the particular circumstances of the tribe or reservation.

The main inquiries involve the questions of intent and the original purposes of the reservation. For example, a tribe may own the bed of a navigable river within its reservation where the government intended to reserve such to the tribe in the original establishment of the reservation. That intent may be implied from the surrounding facts. In *Puyallup Indian Tribe v. Tacoma*, 717 F.2d 1251 (1983) *cert. denied*, 104 Sup. Ct. 1324, *reh'g denied*, 104 Sup. Ct. 2162, the Ninth Circuit held that the Puyallup Tribe was the beneficial owner of a tract of property which had constituted the bed of the Puyallup River at the time the reservation was set aside by the federal government. Following an avulsive change in the watercourse, the tribe had claimed the old bed on the grounds that the bed had been set aside for the tribe due to its importance for fishing purposes.

In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court held that an 1891 statute establishing the Annette Island Reserve in Alaska for the Metlakatla Indians included adjacent waters and submerged land. There, the Court relied on the purpose of the reservation to sustain the Indians by fishing in the waters adjacent to the islands and on the canons of construction favoring Indians.

On the other hand, in *Montana v. United States*, 101 Sup. Ct. 1245 (1981), the Court found that the bed and banks of the Bighorn River, a navigable stream flowing through the Crow Reservation, had not been included in the original reservation and the tribe did not hold beneficial title. The Court found that there was no indication of intent to confer beneficial ownership nor any basis to infer such an intent from the other purposes of the reservation, since the Crow Tribe historically had not relied on fishing or other uses of the river for their subsistence or economic support.

In *State v. Edwards*, 188 Wash. 467 (1936), the court held that the reservation of the Swinomish Reservation included tidelands to the low water mark where it was clear that such was the intent and understanding in setting aside the reservation. *See also, United States v. Romaine*, 255 F. 253 (9th Cir. 1919)(re: tidelands on the Lummi Reservation); *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946)(re: riverbed on the Quileute Reservation).

In *Skokomish v. France*, 320 F.2d 205 (9th Cir. 1963), however, it was held that the tribe did not have a claim of title to a strip of tidelands adjoining the reservation where there was no intention to grant, give or convey to them such title.

Notwithstanding ownership of the real property, however, still retain access rights to tidelands for the purpose of treaty-guaranteed shellfish harvesting. *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998).

7. TRIBAL RIGHTS IN SHORELINES.

Management of shorelines is of particular interest in the State of Washington due to the large amount of shorelines and their economic, developmental and ecological importance. The State Shorelines Protection Act (RCW 90.58) essentially authorized shorelines master plans and bars development unless such development is consistent with the Act. RCW 90.58.140.

When a shoreline or adjacent tideland is within Indian country, the state may simply lack jurisdiction to regulate activities therein or authorize development. The issue turns on the application of jurisdiction principles and the specific legal history and situation of the particular reservation in question.

Where shorelines are not within or adjacent to an Indian reservation, the state still may be required to regulate in accordance with Indian tribal rights.

The State Shorelines Act provides that nothing in the Act shall be construed to authorize activities in violation of reserved treaty rights. RCW 90.58.350.

Since treaty rights include reserved fishing rights, including the right to access to fishing places and environmental protection, the state is barred from authorizing actions under the Shorelines Act which would violate these rights.

8. TREATY RIGHTS AND OTHER FEDERAL LAWS.

There is a dearth of law involving the question of whether other federal law might override an Indian Treaty right in the area of habitat protection.[(4)] It is sometimes argued that a party's obligation to honor Indian Treaty rights is met by compliance with other federal laws such as the Endangered Species Act. 16 U.S.C. " 1531-1544. However, for such laws to negate Tribal Treaty rights would be require abandonment on many well know legal canons such as the rule against abrogation of Indian Treaties by implication.[(5)]

9. TRIBAL GOVERNMENTAL REGULATORY POWERS, INCLUDING HEALTH REGULATION, ZONING AND LAND USE REGULATION, WITHIN INDIAN COUNTRY.

In certain circumstances, the owner of fee property (as well as owners of trust land) within the boundaries of an Indian reservation may be subject to the police power of

the tribal government, including health, zoning and land use regulation. In other circumstances, the state may have authority. The question of regulation of land use involves not only the nature of the land but the nature of the activity, whether or not preemptive federal or tribal law applies, and the race of the individual whose behavior is sought to be regulated.

The full nature and scope of the tribe's authority involves complex questions of jurisdiction, far beyond the scope of this chapter. Moreover, the issue of the tribe's authority is often tied to the question of whether or not the state has authority.

For general purposes, however, it should be noted that the tribal government may have, at the very least, concurrent jurisdiction to regulate land use.

The question of tribal jurisdiction over real property held in fee by non-Indians generally involves examining whether there is a tribal interest sufficient to justify tribal regulation.

In *Montana v. United States*, 101 S. Ct. 1245 (1981), the Court held that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 1258.

As to possible regulatory authority over non-Indians on fee lands within the reservation, the Court held:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe.

Id. at 1258.

The most recent United States Supreme Court pronouncement on the specific zoning issue is *Brendale v. Confederate Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). At issue in the *Brendale* case were incompatible zoning schemes adopted within the Yakama Indian Reservation, one by the Yakama Tribe and one by Yakima County. (The Yakama Tribe has reverted to the historical spelling of its name without the letter "i". Yakima County still adheres to the newer spelling with an "i".) The main issue involved which governmental authority had the power to zone fee property within the reservation. The court noted that the reservation could be divided into two parts. First, there was a "closed area" in which 97% of the land was held in trust by the United States government for the benefit of the Tribe or individual tribal members. Non-members were excluded from much of that area. Only 3% of that area

was owned in fee. The second part of the reservation was considered the "open area." In that area nearly 50% of the area was owned in fee, three incorporated towns lay within the area, the population was primarily non-Indian and land within the area was primarily used for grazing, agricultural, residential and commercial development.

There were several opinions rendered and no clear majority on a number of issues. However, all opinions recognized the continued authority of the Tribe to zone trust land wherever found. Six justices concurred in the result that the Tribe lacked regulatory authority over fee lands within the "open area", although for different reasons. A majority of five agreed that the Tribe possessed regulatory authority over fee lands within the closed area.

Tribal governmental authority to zone land owned by non-Indians has been sustained where there is no competing claim of zoning authority from another government. *Shoshone v. Knight v. Shoshone,* 670 F.2d 900 (10th Cir. 1982).

In *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), the court upheld a tribal business license on non-Indians doing business on lots they owned, noting: ". . . jurisdiction to govern the inhabitants of a country is not conditioned or limited by title to the land which they occupy in it . . . ." *Buster,* at 951.

In *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 459 U.S. 967 (1982), the Ninth Circuit held that the tribe retained inherent sovereign power to impose its building, health and safety regulations on a non-Indian business. In *Cardin*, the non-Indians owned a tract which had been held in fee simple by non-Indians since 1928 on which was located a grocery and general store.

Citing the United States Supreme Court's decision in *Montana v. U.S.*, the Ninth Circuit noted that a tribe may retain inherent power to exercise civil authority on fee lands within its reservation when conduct on that land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Cardin*, at 366.

In upholding the tribe's regulatory jurisdiction, the court noted that the non-Indian owner had entered into a consensual relationship with the tribe through commercial dealing and that the conduct of business in a hazardous fashion was threatening or having a direct effect on the health and welfare of the tribe.

Following *Cardin*, the U.S. District Court for the Western District of Washington has upheld tribal authority to impose zoning regulations on the activities of a non-member on the non-member's fee title lands within the reservation. *Sechrist v. Quinault*, W.D. Wash. Cause No. C76-823M, May 7, 1982 (unreported).

Tribal regulation of non-Indian owned fee lands on a reservation has recently been upheld in certain circumstances. In *Bugenig v. Hoopa Valley Tribe*, 2001 WL 1083725 (9th Cir. 2001), the court held, *en banc*, that the tribal action in establishing a one-half mile buffer zone around the White Deerskin dance ground, for protection of the site as culturally significant, was proper. After the Hoopa Valley Tribal Council passed a timber harvesting plan which provided for a "no-cut" timber buffer, the plaintiff (Bugenig) purchased her property, which was located in the buffer zone. The court noted that there is a general presumption against tribal jurisdiction over fee land owned by non-Indians within a reservation. *Bugenig* at 7 (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001)). In finding and upholding the Tribe's authority to regulate the land use, the court found that Congress had ratified the Hoopa Tribe's constitution in legislation dealing with a settlement of various claims to Indian land and the reservation. Article III of the tribal constitution recognized jurisdiction over all lands within the confines of the reservation boundary. In the settlement act, Congress had noted that the tribe's governing documents were "hereby ratified and confirmed." *Bugenig, supra* at 10, 25 U.S.C. ' 1300i-7.

There are other exceptions to the general presumption that tribes do not have the power to regulate the use of fee lands owned by non-Indians within a reservation. A tribe does retain inherent sovereignty, for example, to regulate through taxation, licensing or other means the activities of non-members, who enter consensual relationships with the tribe or its members. *Bugenig, supra* at 7, citing *Montana v. United States*, 450 U.S. 544, 565-66 (1981). A tribe also has the authority to exercise "civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe." *Id*.

Where a tribe does have authority to regulate non-Indian property rights on fee land within a reservation, are there limits to that authority? The answer is presumably yes. Although state constitutional terms do not generally apply to tribes within their reservations, to the extent that property rights takings concepts are based on the United States Constitution, then such limitations may also constrain tribal governmental action. Thus, such cases as *Manufactured Housing Communities v. State*, might be instructive as to the kinds of rights which might be protected. *Manufactured Housing Communities v. State of Washington*, 143 Wn.2d 347 (2000). In *Manufactured Housing*, the state supreme court interpreted the state constitution. Noting that the state constitution was more restrictive concerning takings concepts than the United States Constitution, the court held that the state statute which required a mobile home park owner to grant the residents there the right of first refusal to purchase the park if it was placed for sale, was a violation of the

state constitution. Since this is a state constitution-based case, it is generally not applicable to Indian tribes.

Note, however, that while state constitutional due process requirements do not directly apply to tribes and while it is not necessarily true that all United States Constitution-based claims apply, nevertheless tribes are prohibited from taking private property for public use without just compensation and from denying a person of their property without due process of law. *See* Indian Civil Rights Act, 25 U.S.C. ' 1302. The Indian Civil Rights Act also protects non-Indians who may be subject to a tribal government's jurisdiction. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Thus, cases construing the United States Constitution as to when a regulatory action constitutes a taking are likely to be applicable to tribal governments. Thus, such cases as *Palazzolo v. Rhode Island* are instructive. *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). In *Palazzolo*, the United States Supreme Court considered the Rhode Island Coastal Resources Management Council's actions in denying an application to fill 18 acres of coastal wetlands. In *Palazzolo*, the court affirmed a Rhode Island Supreme Court ruling that the landowner failed to establish a depravation of economic value since "it is undisputed that the parcel retains significant worth for construction of a residence." *Palazzolo* at 2465. The court, however, did rule that the Rhode Island's court ruling that the landowner had essentially waived his right to protest the land use regulation in question since he had purchased or become owner after the regulation was passed was incorrect. The court held:

> . . . A regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principal of the state's law by mere virtue of the passage of title.

Palazzolo at 2464. The court also held that it was not necessary for the landowner to submit applications for every possible use in order to have a "ripe" controversy. *Palazzolo supra* at 2460.

10. CONCLUSION

Because of the Supremacy Clause and the preeminence of Treaty Rights in the American scheme of law, it is not hard to envision Indian Treaty rights as "trumping" other property rights not based on the Treaties. Certainly, most state law-based rights, be they property rights or otherwise, will be overridden by the requirement that Indian Treaties be honored. The Federal Government, bound by the meaning of the Treaties and the concepts of trust responsibility will also be hard pressed to justify actions which destroy or harm habitat necessary for fish. On the other hand, tribal governments will undoubtedly be bound by legal concepts based on the United States Constitution.

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1. The underpinnings of the Phase II "environmental right" have been questioned, however, in litigation asking for monetary damages for destruction of fish runs. In *Nez Perce v. Idaho Power*, 847 F. Supp. 791 (D. Idaho 1994), the tribe asked for damages for fish destroyed by the operation of the three dams on the Snake River. Noting that the case was one for monetary damages, rather than injunctive relief, the court denied relief and found no common law cause of action for such damage. *Id.*

2. *See*, *United States, et al., v. Washington, et al.*, Cause No. 9213: 01-1, W.D. Washington (Seattle).

3. The court also rejected numerous other affirmative defenses of the State of Washington, such as the 10th Amendment, equal footing, non-self-executing treaties, etc. *See* Order of September 5, 2001, attached hereto.

4. As noted earlier, in litigation asking for monetary damages for destruction of fish runs, the tribe asked for damages for fish destroyed by the operation of the three dams on the Snake River which had been authorized by the Federal Power Act. 16 U.S.C. " 791-828. Noting that the case was one for monetary damages for lost fishing opportunity, rather than injunctive relief, the court denied damages and found no common law cause of action for such damage. *Nez Perce v. Idaho Power*, 847 F. Supp. 791 (D. Idaho 1994). The case, however, did not directly involve a request to protect habitat through injunctive or other equitable relief.

5. In *United States, et al, v. Washington, et al.*, Cause No. 9213, Subproceeding 01-1; the district court rejected the argument that State of Washington compliance with the ESA constituted compliance with any Indian Treaty habitat right that might exist. *See* Order of Sept. 5, 2001, attached hereto.