

Was Buchanan Buffaloed?

I. CASE HISTORY

A. Trial Court

On July 10, 1995, defendant Donald Buchanan, an enrolled member of the Nooksack Tribe, filed a motion in Yakima County Superior Court to dismiss two counts of taking or possessing big game during the closed season (RCW 77.16.020(1)(E); 77.21.010(1))¹ and one count of hunting while non-tribal license is revoked (RCW 77.21.60(2)). Buchanan asserted that he was lawfully exercising his subsistence hunting rights under the 1855 Point Elliot Treaty.

At an intertribal hunting meeting prior to his court hearing on August 17, 1995, Buchanan apologized to the Yakama Indian Nation for hunting in their traditional hunting grounds without asking permission. Deferring to their primary right to hunt in this territory, Buchanan promised Yakama tribal leaders that he would give the two large bull elk to the Yakama Nation if he prevailed in court and the elk were returned.

Buchanan argued during the motion hearing that the plain language of the Point Elliot Treaty reserved and restricted tribal hunting within the Territory of Washington² only to “open and unclaimed” lands. This could be contrasted with other treaties made with eastern tribes, which had limited the right to hunt to ceded lands.³ This could also be contrasted with the right to fish in the Treaty, which was limited to “usual and accustomed grounds and stations.”⁴

¹ Because Buchanan had a prior conviction for hunting out of season, these charges were filed as felonies.

² Buchanan has taken the position that the right to hunt protected by the Stevens Treaties was only intended to apply to Washington Territory. RP 9-10. Governor Stevens was well known to be the governor of Washington Territory, and his authority to negotiate treaties was limited to that Territory.

³ See Findings of Fact 5, CP 3 at page 3, *infra*, and App. 1.

⁴ The Point Elliot Treaty does not address the question of inter-tribal disputes (i.e. which tribes would have primary rights to hunt in which areas) or how these disputes should be resolved. This can be contrasted with the Treaty With The Sioux (1825), which provided the following restriction:

It is understood by all the tribes, parties hereto, that no tribe shall hunt within the acknowledged limits of any other without their assent, but it being the sole object of this arrangement to perpetuate a peace among them, and amicable relations being now restored, the Chiefs of all the tribes have expressed a determination, cheerfully to allow a

The State argued that treaty-hunting rights were limited to ceded lands, and to “normal and accustomed” hunting grounds. RP 16-18. The State also argued that Buchanan had violated Nooksack tribal regulations,⁵ RP 15-17, and that the State regulations were applicable to treaty hunters because they were reasonable and necessary. RP 48-51.⁶ Although the Court invited the State to present evidence as to whether the land in question was “open and unclaimed,” RP 25, the State’s evidence was very limited⁷, RP 45, and the State did not argue the issue. RP 48-51.

Judge Heather K. Van Nuys dismissed the charges at the conclusion of the hearing, and on Nov. 17, 1995, entered Findings of Fact and Conclusions Of Law Supporting Order And Judgment Of Dismissal (App. 1) including the following:

FINDINGS OF FACT

1. On January 6, 1995, defendant Donald Buchanan, his brother Albert and uncle Randy Ross were stopped by DFW enforcement officers with two recently killed branch-antlered bull elk in their possession on land owned by the Washington Department of Natural Resources (“DNR”), east of the summit of the Cascade range, 4.3 miles up the 1400 road of Oak Creek . . .

3. The Nooksack Indian Tribe, which is a party to the Point Elliot Treaty of 1855 . . . regulates hunting by its members through its Hunting Regulations and Hunting Code . . . At the time of the alleged offense, defendant Buchanan

reciprocal right of hunting on the lands of one another, permission being first asked and obtained, as before provided for.

Treaty With The Sioux (1825)(Article 13).

⁵ The State stipulated that Buchanan was an enrolled member of the Nooksack Indian Tribe, RP 2-3, and conceded that the Nooksack Tribe is a party to the Point Elliot Treaty, United States v. Washington, 459 F. Supp. 1020, 1041 (W.D. Wash. 1978). At the trial level, the State did not challenge Buchanan’s assertion that the Point Elliot Treaty has never been abrogated, CP 11, and is binding on the State of Washington. State v. Miller, 102 Wn.2d 678, 681-82, 689 P.2d 81 (1984); CP 13; see RP 17 (State’s argument to the trial court assumed the applicability of the Treaty). On appeal the State abandoned its argument that Buchanan had violated tribal regulations.

⁶ The State presented the testimony of Department of Fish and Wildlife enforcement officer Robert L. Lamb and Regional Wildlife Biologist Roger McKeel regarding the reasonableness and necessity of applying the spike bull only age restriction to Buchanan.

⁷ Officer Lamb testified that the “general use” of the area where Buchanan was arrested was for “[h]unting and fishing, outdoor recreation in general,” and that at that time of year it would “[n]ot be of any use, little recreation, sight-seeing for elk above the area, snowmobiling.” RP 45.

Defense counsel asked Regional Wildlife Biologist Roger McKeel, “This Oak Creek area where the kill was made, this is open to the public for hunting during the regular season?” He replied, “Yes, it is.” RP 42.

possessed valid tribal tags to hunt branch-antlered bull elk for subsistence purposes in the area in question . . .

4. Article V of the Point Elliot Treaty, which has never been abrogated, reads in part:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands; provided, however, that they shall not take shell fish from any beds stated or cultivated by citizens.

5. Prior to its drafting the Point Elliot Treaty, the United States Government had drafted numerous treaties with Indian Tribes and Nations. In a number of these treaties, including the Potowatomi Treaty 1826 (Article 7), Miami Treaty 1826 (Article 8), Chippewa Treaty 1829 (Article VII), Pawnee Treaty 1833 (Article II), and Ottawa Treaty 1836 (Article Thirteenth), the hunting privileges of the Indians were restricted to the lands ceded by the Indians to the United States. The terms of the Point Elliot Treaty of 1855 restrict the privilege of hunting to “open and unclaimed lands” in the Territory of Washington but do not restrict tribal hunting to ceded lands.

6. The language of the Point Elliot Treaty geographically restricts the right of taking fish to “usual and accustomed grounds and stations,” but does not geographically limit the privilege of hunting to traditional hunting grounds. . .

7. The Oak Creek area is east of the territory ceded to the United States by the Nooksak Indian Tribe under the Point Elliot Treaty. The ceded territory is bordered on the east by the summit of the Cascade range.

8. . . . [The Oak Creek area] is publicly-owned land kept open to the public for hunting, fishing, and recreational purposes. All of the uses to which this land is put are compatible with Indian hunting. For purposes of the Point Elliot Treaty, it must be considered “open and unclaimed.”

9. . . . There was not sufficient evidence that Nooksak hunters or Point Elliot Treaty hunters, hunting for subsistence or ceremonial purposes, can have a significant impact on the elk population in the Oak Creek or Yakima County area

11. . . . [T]he State has failed to sustain its burden of proving that the application of its regulations to Nooksak Indians or to Point Elliot Treaty hunters is necessary for conservation.

CONCLUSIONS OF LAW

1. Washington State is bound by the supremacy clause of the United States Constitution (Art. VI, cl. 2) to respect the terms of the Point Elliot Treaty of 1855, which has never been abrogated by the Federal Government. See Antoine v. Washington, 420 U.S. 194, 204, 43 L. Ed. 2d 129, 95 S.Ct. 944 (1975); State v. Miller, 102 Wn. 2d 678, 681, 689 P.2d 81 (1984).

2. In interpreting Indian treaties, courts are required to construe the treaties liberally in favor of the Indians. Choctaw Nation v. United States, 318 U.S. 423, 431-32, 87 L. Ed. 2d 877, 63 S.Ct. 672 (1943). Ambiguous treaties must be resolved in favor of Indians. Winters v. United States, 207 U.S. 564, 576-77, 52 L. Ed. 340, 28 S. Ct. 207 (1908); Ecology v. Yakima Reservation Irrig. Dist., 121 Wn.2d 257, 277, 850 P.2d 1306 (1993).

3. The Point Elliot Treaty of 1855 restricts the privilege of hunting to “open and unclaimed lands” in the Territory of Washington but does not restrict tribal hunting to ceded lands and does not geographically limit the privilege of hunting to traditional hunting grounds. The language of this treaty must be contrasted with the language of the treaties referred to in this Court’s Finding of Fact 5, which specifically restricted the hunting privileges of the Indians to the ceded lands. Moreover, the treaty’s restriction on the right of taking fish “at usual and accustomed grounds and stations” does not apply to the privilege of hunting. See State v. Chambers, 81 Wn. 2d 929, 935-36, 506 P.2d 311 (1973); United States v. Washington, *supra*, 384 F. Supp at 350-51 (Finding of Fact 4); State v. Tinno, 497 P.2d 1386, 1391, 1393, 1395 (Idaho 1972). In construing this treaty pursuant to the above-stated rules of interpretation, this Court cannot add geographic restrictions that were not included in the language of the treaty.

4. “Open and unclaimed lands” include public lands, such as the DNR land involved in this case, put to uses compatible with an Indian hunting privilege. United States v. Hicks, 587 F. Supp. 1162, 1165 (W.D. Wash. 1984).

5. The State Department of Fisheries and Wildlife can regulate Indian hunting pursuant to the police power if the State can affirmatively demonstrate that at the time the treaty hunting right was asserted by the defendant: (1) the regulations at issue were both reasonable and necessary for conservation; and (2) the regulations’ application to Indians covered by the treaty was necessary to conservation. A “necessary” regulation, within this context, is a regulation required for the perpetuation of a species of game within a certain zone. A regulation is reasonable if it is appropriate to its conservation purpose. State v. Miller, 102 Wn.2d 678, 687-88, 689 P.2d 81 (1984); *see* United States v. Washington, 384 F. Supp. 312, 342, 402-404 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *see also* Antoine v. Washington, *supra*, 420 U.S. at 207; Felix S. Cohen’s Handbook of Federal Indian Law 461 (1982). . . .

7. Defendant was validly exercising his privilege to hunt under the Point Elliot Treaty of 1855, so the charges against him must be dismissed.

CP 2-6.

Because Buchanan prevailed on his motion as a matter of law, and because the Court found no ambiguity in the meaning of the Treaty language, he was not called on to present historical or anthropological evidence regarding the understanding or intent of the parties to the Stevens treaties.⁸

B. Court of Appeals, Division III

On appeal, the Yakima Prosecutor's Office contended that because, under United States v. Winans, 198 U.S. 371, 381, 86 L. Ed. 1089, 25 S. Ct. 662 (1905), "the treaty was not a grant of rights to the Indians, but a grant of rights from them," the Nooksacks reserved the right to hunt and fish within the ceded lands but would "not have rights to hunt and fish outside the ceded area unless those rights were established by aboriginal title." Appellant's Brief at 11.⁹

The Prosecutor's Office attempted to raise several issues that had not been raised to the trial court. Appellants argued that the area where Buchanan was arrested was not

⁸ Buchanan presented no testimony at this hearing, referring only to Treaty minutes entered as evidence before the trial court in State v. Chambers, 81 Wn.2d 929, 506 P.2d 311 (1973). Had Judge Van Nuys decided that the Treaty language was ambiguous, Buchanan would have been able to call witnesses to present historical and anthropological evidence regarding the understanding of the parties to the Treaty at his bench trial.

⁹ In the absence of a treaty or act of Congress, the exclusive right of Indians to occupy, possess and exercise the rights of sovereignty within the borders of certain real property, subject only to the United States, has been referred to by the courts as "aboriginal title" or "Indian title." See generally Cohen, Handbook of Federal Indian Law, 232-37, 486-93 (1982); see also United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 344-45, 62 S. Ct. 248, 86 L. Ed. 260 (1941); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560, 8 L. Ed. 483 (1832). Exclusive occupation is necessary to establish aboriginal title, "which could only be interfered with or determined by the United States." Cohen, supra, at 345.

As distinguished from "aboriginal title," usufructuary rights to hunt, fish, trap and gather are not based on exclusive use, and are independent of any ownership of or title to land. Seufert Bros. Co. v. United States, 249 U.S. 194, 197-99, 63 L. Ed. 555, 39 S. Ct. 203 (1919); Mille Lacs II, supra, 861 F. Supp. at 833-35; Lac Courte Oreilles Band v. Voigt, 700 F.2d 341, 352 (7th Cir. 1983); see Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 765-66, 87 L. Ed. 2d 542, 105 S. Ct. 3420 (1985).

The State's argument is internally inconsistent because the ceded lands of the Point Elliot Treaty comprised the aboriginal lands of a number of tribes. The Nooksacks did not exclusively occupy the ceded lands. There is no evidence that the Nooksack Tribe had even hunted throughout the entire ceded territory.

“open and unclaimed” because it was nearby (1.5 miles from) a winter elk feeding station. Appellant’s Brief at 14-22. Also, relying on the then recently decided case of Crow Tribe v. Repsis, 73 F.3d 982 (10th Cir. 1995), cert denied 116 S. Ct. 1851, 134 L. Ed. 2d 951 (1996), appellants argued that the tribal right to hunt under the Point Elliot Treaty was extinguished when Washington was admitted as a State into the Union, on an “Equal Footing” with the other states of the Union. Appellant’s Brief at 24-34.

On August 5, 1997, the Court of Appeals, Division III, unanimously affirmed the trial court, holding that the Nooksack Tribe’s hunting rights reserved by the Treaty of Point Elliot extend to “open and unclaimed” lands throughout the Washington Territory. State v. Buchanan, 87 Wash. App. 189, 941 P.2d 683 (1997)(App. 2).

Finding no ambiguity in the language of the Treaty, Chief Judge Schulteis explained:

[T]he Point Elliot treaty, by its express terms, does not limit hunting rights to the ceded lands or to traditional hunting grounds. Although fishing is reserved only on “usual and accustomed grounds and stations,” hunting rights extend anywhere in the territory that is “open and unclaimed.”

Id. at 193.

In United States v. Washington, 384 F. Supp. 312, 331 (W.D. Wash. 1974), affd, 520 F.2d 676 (9th Cir. 1975), vacated sub nom. Passenger Fishing Vessel, 443 U.S. 658, 61 L. Ed. 2d 823, 99 S. Ct. 3055, the court construes language similar to that found in the Point Elliot treaty: the right of taking fish, at all usual and accustomed grounds and stations Any interpretation of that language requires a delineation of the traditional fishing grounds. A reservation of the right to hunt all open and unclaimed lands, however, clearly does not limit hunting to such traditional areas

Id. at 193-4.

[T]he Oak Creek Wildlife Area is open to elk hunting periodically, so it passes the threshold test of open and unclaimed land under the treaty.

Id. at 194.

On balance, the State failed to show that it was necessary to apply the licensing restrictions to the Nooksack tribe in order to perpetuate the Oak Creek elk population. Evidence offered on appeal, that a winter feeding station in the area is necessary to protect the elk, was not presented at trial and is not properly before this court. Nelson v. McGoldrick, 127 Wash. 2d 124, 141, 896 P.2d 1258 (1995).

At any rate, this evidence does not establish that the closure to hunting by the Nooksacks is necessary to perpetuate the species.

In its final argument, the State contends the Point Elliot treaty was abrogated by Washington's subsequent admission to the Union. This argument was not presented to the trial court, is not asserted to be of constitutional magnitude, and is not considered on appeal. *Richmond v. Thompson*, 130 Wash. 2d 368, 384, 922 P.2d 1343 (1996). In any event, it is settled that Washington's admission into the Union imposed on the state, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States. . . .

Id. at 195-6.

C. Washington Supreme Court

The Yakima County Prosecutor's Office petitioned for review, relying on State v. McCoy, 63 Wn. 2d 421, 387 P.2d 942 (1963),¹⁰ and argued that when read "within the context of the treaty," the right to hunt was limited to the ceded lands. Petition for Review ("PR") 4-8. Petitioners further argued that the area's use as a winter feed station was incompatible with tribal hunting, so the area was no longer "open and unclaimed," PR 8-12, and that Buchanan had failed to establish aboriginal title. PR 12-15. The petition also raised the "Equal Footing" doctrine. PR 15-18.

The Department of Fish and Wildlife (DFW) filed an amicus brief through the Attorney General's Office in support of the Petition arguing that the treaty preserved only rights that had previously been exercised, and was not a grant of new rights. DFW 8-9. DFW asserted that the hunting right of Tribes should be limited to areas where they held aboriginal title. DFW 9-15. DFW also argued that the Oak Creek Wildlife Area was not "open and unclaimed," DFW 15-17, introducing a draft management plan for the Area as an Appendix although the draft plan had never been adopted or implemented and was not presented to the trial court. DFW 4.

The Petition for Review was granted on April 1, 1998, shortly after two well publicized incidents involving illegal tribal hunting.

An amicus brief was filed by the late Professor Ralph W. Johnson in support of Respondent on the definition of "open and unclaimed" lands. An amicus brief of The

¹⁰ State v. McCoy, *supra*, was overruled *sub silentio* in State v. Miller, *supra*, 102 Wn.2d at 681-82, a preeminent hunting rights case in Washington that was absent from petitioner's brief.

Modern Firearm Hunters of Washington argued for the Court to apply the “Equal Footing Doctrine” of Ward v. Race Horse, 163 U.S. 504, 16 S. Ct. 1076, 41 L. Ed. 244 (1896). DFW filed a supplemental amicus brief, arguing for the first time on appeal that the Court of Appeals’ decision “threatens the state’s right to control and manage its lands.” DFW Sup. Brief at 1, 7 n.5. DFW also suggested a test for determining whether an area has been removed from “open and unclaimed” status by being “closed, controlled, restricted, or otherwise managed in accordance with the exercise of state legislative authority.” DFW Sup. Brief at 16.¹¹ An amicus brief signed by sixteen tribes provided an overview of tribal management and addressed the interpretation of “open and unclaimed” lands.

Shortly before oral argument on Nov. 18, 1998, a brief was lodged with the Court by the Pacific Legal Foundation, which was not allowed to participate as an amicus because of the tardiness of the filing.¹² On Oct. 30, 1998, the Yakima County Prosecutor’s office filed a Motion to Supplement the Record, asserting that the Nooksack Tribe was not a party to the Point Elliot Treaty, and that United States v. Washington, 459 F. Supp. 1020, 1040-41 (W.D. Wash. 1978)(Boldt, J.), which held otherwise, was not binding precedent.¹³

The Buchanan decision was published on June 17, 1999, and on July 7, 1999, Respondent Buchanan filed a timely Motion for Reconsideration that was denied without opinion on Aug. 3, 1999.¹⁴

¹¹ DFW was essentially arguing that because these state lands are managed pursuant to state regulation, they are no longer “open and unclaimed.”

¹² The brief referred to a Comment by student author Bradley I. Nye, Where Do The Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest, 67 Wash. L. Rev. 175 (1992), which was not otherwise cited by any of the parties or amici.

¹³ Thereby reversing the position of the Prosecutor before the trial court, RP 16-18, the Court of Appeals, Appellant Brief at 7, and the Supreme Court. PR at 7. The Buchanan Court rejected this argument, noting that the State was a party to the litigation and was bound by its ruling. 138 Wash. 2d at 197.

¹⁴ The Motion for Reconsideration requested the Supreme Court to remand to the trial court for findings of historical fact on the intent of the parties regarding the geographic scope of the hunting right.

II. THE BUCHANAN DECISION

The Washington Supreme Court, in a 9-0 opinion authored by Justice Guy, set out three issues for decision:

1. What is the geographic scope of the Nooksack Indian Tribe's treaty hunting right?
2. Is the State-owned Oak Creek Wildlife Area "open and unclaimed lands" within the meaning of the Treaty of Point Elliott?
3. Were those provisions of the Treaty of Point Elliott which conflict with the State's right to regulate off-reservation hunting abrogated by Congress when Washington was admitted to the Union upon "equal footing" with the original states?

State v. Buchanan, 138 Wash. 2d 186, 195-96, 978 P.2d 1070 (1999).

A. Geographic Scope

In framing its first inquiry, the Court stated: "The goal of treaty interpretation is the same as the goal of contract interpretation—to determine the intent of the parties."

138 Wash. 2d at 201-02.¹⁵

The Buchanan Court based its determination of the intent of the parties regarding the geographic scope of the hunting right on the "reservation of rights doctrine" and the analysis of a student law review Comment by Bradley I. Nye, titled Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest, 67 Wash. L. Rev. 175 (1992). See Buchanan, 138 Wash. 2d at 202-08.

The Court stated:

A key principle of treaty interpretation is known as the "reservation of rights doctrine." First announced in *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662, a case involving interpretation of a Stevens Treaty made with the Yakama Indians, the reservation of rights doctrine holds that a treaty between the federal government and an Indian tribe is not a grant of rights to the Indians but, rather, a grant from them. In other words, the Indians ceded certain rights

¹⁵ In determining the intent of the parties to the Stevens Treaties, the Washington Court did not acknowledge that the "United States, as the party with presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side." Passenger Fishing Vessel, *supra*, 443 U.S. at 675-6. On the contrary, the Court stated that the tribal negotiators were "sophisticated." Buchanan, 138 Wash. 2d at 201.

possessed by them at the time of making the treaty but reserved whatever rights were not expressly granted to the *United States*. *Winans*, 198 U.S. at 381. See also *Seufert Bros.*, 249 U.S. at 199; *Fishing Vessel*, 443 U.S. at 679-81; *Wilkerson*, *supra*, at 454-55.

Buchanan, 138 Wash. 2d at 202-03(footnote omitted). The Court went on to state:

The reservation of rights doctrine has consistently been applied to the fishing and hunting provisions¹⁶ of the Stevens Treaties. See, e.g., *Fishing Vessel*, 443 U.S. at 679-81; *Seufert Bros.*, 249 U.S. at 196.

The treaty language at issue here is the following:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians . . . together with the privilege of hunting . . . on open and unclaimed lands.

This court has interpreted the words "privilege" and "right," as used in the treaty, to be synonymous. *Miller*, 102 Wash. 2d at 683. The United States Supreme Court has interpreted the treaty language "securing" or "secured" rights to be synonymous with "reserving" rights previously exercised. *Fishing Vessel*, 443 U.S. at 678.

The State argues that the hunting right reserved by the treaty was limited to the right previously exercised that is to the ceded lands or to lands upon which the Nooksack Tribe traditionally hunted. We agree.

Buchanan, 138 Wash. 2d at 203.

The Buchanan Court could point to no language in the Stevens Treaties that limited the hunting right to ceded lands,¹⁷ or to traditional hunting grounds,¹⁸ but the

¹⁶ Although the reservation of rights doctrine has been discussed in analyzing the fishing clause, which restricts tribal fishing to "usual and accustomed grounds and stations," neither the State nor the Buchanan Court cited a single case from any jurisdiction wherein the doctrine was used to restrict hunting in "open and unclaimed lands," which does not refer to previous use.

¹⁷ None of the cases cited by the Buchanan Court--*State v. Arthur*, 74 Idaho 251, 265, 261 P.2d 135 (1953); *State v. Coffee*, 97 Idaho 905, 556 P.2d 1185 (1976); or *State v. Stasso*, 172 Mont. 242, 563 P.2d 562 (1977)-- specifically held that the hunting right in Stevens' Hellgate Treaty was limited to the ceded lands. On the other hand, in *State v. Tinno*, 497 P.2d 1386 (1972), the Idaho Supreme Court interpreted identical language in the hunting clause of the subsequent Fort Bridger Treaty (1868) to allow hunting outside the territory ceded by the Shoshone-Bannock Tribes.

¹⁸ Recognizing the distinction between aboriginal title and aboriginal usufructuary rights, see note 9, supra, the Buchanan Court did not limit tribal hunting to areas of aboriginal title (which requires exclusive use). The Court limited hunting outside the ceded lands only to areas that had been "occupied or used, over an extended period of time." Buchanan, 138 Wash. 2d at 204-05.

Court was able to discover this hidden intent by relying on Nye's student Law Review Comment, stating:

Mr. Nye provides the following analysis:

Treaty clauses reserving Indian rights to hunt on "open and unclaimed lands" . . . do not expressly limit these rights to ceded lands. However, treaties were reservations of aboriginal rights, and both the signatory tribes and the federal treaty negotiators understood that rights of access would be limited to traditional hunting grounds which remained "open and unclaimed" or "unoccupied."

. . . If the principles of treaty construction are strictly followed . . . the right should be limited to the aboriginal hunting grounds of the signatory Indians. This line of demarcation should be based not on the treaty descriptions, but on other evidence which better captures the understanding of the Indians upon entering the treaty. Any line drawn must necessarily be approximate, and the principles of treaty interpretation require that any ambiguous questions be resolved in favor of the Indians. Nye, *supra*, at 190-91 (footnotes omitted).

Buchanan, 138 Wash. 2d at 207.

Without the benefit of any evidence taken by the trial court from which to discern the understanding of the Indians, the Buchanan Court concluded:

The geographic scope of the hunting right cannot be resolved from the language of the treaty alone. We hold that application of the reservation of rights doctrine is the more legally sound approach to interpreting the hunting rights provision of the Treaty of Point Elliott. Under such an analysis, open and unclaimed lands within the aboriginal hunting grounds of the Nooksack Tribe are reserved under the treaty for hunting by tribal members, so long as the lands remain open and unclaimed. The geographic area available for hunting would certainly include the territory ceded to the United States and described in article I of the Treaty of Point Elliott, and may include other areas if those areas are proven to have been actually used for hunting and occupied by the Nooksack Tribe over an extended period of time.

Buchanan, 138 Wash. 2d at 207-08.

B. Open and Unclaimed Lands

In finding that the Oak Creek Wildlife Area was "open and unclaimed," the Buchanan Court set out the following "general statement of the rule."

[P]ublicly-owned lands, which are not obviously occupied and which are put to a use which is compatible with hunting, are "open and unclaimed lands" under the terms of the Stevens Treaties. Treaty hunters have a right to hunt on such lands,

unrestricted by State regulation, unless the regulations are necessary for conservation purposes.

Buchanan, 138 Wash. 2d at 211.¹⁹

The Court rejected arguments made by the Prosecutor's Office and DFW that would allow the State to determine whether or not an area is "open and unclaimed" by regulation.

Our acceptance of this argument would permit the State to avoid its burden of proving that regulations imposed on Indian treaty hunters are necessary for conservation purposes. See *Miller*, 102 Wash. 2d at 688. The State has designated the Oak Creek Wildlife Area for use for hunting, fishing and recreation. Limits on these activities in the Oak Creek Wildlife Area are by State regulation. The regulations must comply with standards developed by this court and the United States Supreme Court, and be necessary for conservation if the regulations are restrictive of treaty rights. The trial court's unchallenged finding in this case is that the State has not met its burden in this regard. n8

n8 Amicus Department of Fish and Wildlife additionally argues that the status of the land changes as regulations of the State change to close, control, restrict or otherwise put land to uses inconsistent with hunting. In essence, the Department argues that the land is open and unclaimed for elk hunting during the State's elk hunting season, but changes its status when State regulation closes the season in that particular area. This argument ignores established law governing when a State, by hunting regulations, can restrict treaty rights. See *Antoine v. Washington*, 420 U.S. 194, 206, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975); *State v. McCormack*, 117 Wash. 2d 141, 143, 812 P.2d 483 (1991).

Buchanan, 138 Wash. 2d at 210-11 and n. 8.

C. Equal Footing Doctrine

Finding that the recent case of Minnesota v. Mille Lacs, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (March 24, 1999), had effectively overruled Ward v. Race Horse, 163 U.S. 504, 16 S. Ct. 1076, 41 L. Ed. 244 (1896), the Buchanan Court rejected the use of the

¹⁹ Because this case involved state-owned lands, the Court was not called on to decide if this rule would also apply to privately-owned lands which are not obviously occupied such as commercial timberlands. In State v. Chambers, *supra*, the purpose of the "open and unclaimed" clause was examined, concluding that it was a commonsense solution for protecting competing rights. The Indians had a right to wander and hunt, while on the other hand, the white settlers had a right to security and privacy in the use of the lands they had acquired and staked out. 81 Wash. 2d at 935. Although the Chambers Court did not propose its own definition for "open and unclaimed" lands, a definition that emerges from the treaty minutes and the reasoning in Chambers is: *those lands that do not have sufficient indicia of settlement or implicate safety issues for settlers or their stock.*

equal footing doctrine²⁰ to find an implied abrogation of Indian treaty rights upon Washington's admission to statehood. Buchanan, 138 Wn. 2d at 211-13.

Citing United States v. Dion, 476 U.S. 734, 738, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986), the Buchanan Court noted that Congress' intention to abrogate Indian treaty rights must be clear and plain. The Court further found that the premises of the Race Horse case had been undermined²¹ and that Washington's enabling act, 25 Stat. 676 (1889) was different from the enabling act of Wyoming that was relied on in Race Horse.

III. WHY BUCHANAN IS WRONG

A. The Buchanan Court Amended the Plain Language of the Treaty Without Historical Findings of Fact Regarding the Intent of the Parties.

By adding geographic limitations to the hunting right of the Stevens Treaties, where none is written, the Buchanan Court overstepped its authority. In Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989), the United States Supreme Court cautioned:

But where the text is clear, as it is here, we have no power to insert an amendment. As Justice Story wrote for the Court more than a century and a half ago:

"[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation

²⁰ The Northwest Ordinance of 1787 authorized the creation of new States in the western Territories on an "equal footing with the original States in all respects whatever." The Equal Footing Doctrine has two components: First, it prohibits the Federal Government from infringing upon fundamental sovereign powers and rights of States when exercising its power to admit new States to the Union. Coyle v. Smith, 221 U.S. 559, 565 (1911); Cincinnati v. Louisville & Nashville RR, 223 U.S. 390 (1912). Second, it provides that States admitted to the Union have sovereign ownership of shorelines and submerged lands unless the Federal Government has plainly provided otherwise. Shively v. Bowlby, 152 U.S. 1, 48 (1894).

²¹ Treaty rights to hunt and fish are no longer considered irreconcilable with a State's sovereignty over its natural resources. Mille Lacs, *supra*, 119 S. Ct. at 1204. Citing Winans and Passenger Fishing Vessel, the Buchanan Court also noted:

In contrast to the language in Race Horse, where the Court discussed the treaty's "grant" of rights to the Indians, the Supreme Court now views the grant as one from the Indians, with a reservation of rights not granted.

applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops -- whatever may be the imperfections or difficulties which it leaves behind." *The Amiable Isabella*, 6 Wheat. 1, 71 (1821).

490 U.S. at 134-5 (footnote omitted).

The Buchanan Court overlooked several of the principles for the interpretation of Indian Treaties²² in reaching its decision.

The goal of treaty interpretation is to determine what the parties meant by the treaty terms. . . It is the intention of the parties . . . that must control any attempt to interpret the treaties. . . . This analysis of the parties' intentions begins with the text of the treaty and the context in which the written words are used. (Citations omitted.)

United States v. Washington, 135 F.3d 618, 630 (9th Cir. 1998).

1. Plain Language

The Point Elliot Treaty does not expressly or impliedly restrict hunting to ceded lands. Nor does the treaty impose upon the treaty tribes the burden of showing that open and unclaimed lands must also reside within traditional hunting grounds. As drafter of the treaty, had the United States Government intended such restrictions, they were obligated to include them in the treaty's language. Under the rule of contract and statutory interpretation, *expressio unius est exclusio alterius* (specific inclusions exclude implication), the restriction to "open and unclaimed" land is exclusive. See State v. Sommerville, 111 Wn.2d 524, 535, 760 P.2d 932 (1988); Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co., 59 Wash. 501, 512-13 (1910). This rule is not a legal technicality, it is a matter of common sense:

Although the *expressio unius* maxim has had widespread legal application, there is nothing peculiarly legal about it. it is a product of 'logic and common sense.' . . . It expresses the learning of common experience that when people say one thing they do not mean something else.

Sutherland on Statutory Construction, § 47.24 at 228 (5th ed. 1992).

²² Interpretation of Indian treaty language is subject both to general rules applicable to statutes, contracts and treaties and to special canons applicable only to such treaties. See Sutherland on Statutory Construction, § 64.03 at 269 (5th ed. 1992); Tulee v. Washington, 315 U.S. 681, 684-85, 62 S. Ct. 862, 86 L. Ed. 1115 (1942).

Numerous treaties, in contrast to the Treaty of Point Elliott, specifically limit hunting and fishing to ceded lands.²³ Moreover, while the Point Elliot Treaty limits fishing to "usual and accustomed grounds," it does not similarly limit hunting. Where the United States can accomplish an objective by clear and direct words, and where it has chosen to do so in similar or closely related circumstances in the past, courts have found the absence of those clear and direct words to suggest a lack of intent to accomplish the same purpose. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631, 90 S. Ct. 1328, 25 L. Ed. 2d 615 (1970); Williams v. Florida, 399 U.S. 78, 97, 90 S.Ct 1893; 26 L. Ed. 2d 446 (1970); Crawford Fitting Company v. J.T. Gibbons, Inc., 482 U.S. 437, 442, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987); United States v. Henderson, 746 F.2d 619, 622 (9th Cir. 1984).

As stated by the Buchanan Court, "[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereigns. *Fishing Vessel*, 443 U.S. at 675". According to the canons of contract construction, "contract language subject to interpretation is construed most strongly against the party who drafted it." Guy Stickney, Inc. v. Underwood, 67 Wn.2d 824, 827, 410 P.2d 7 (1966). When a contract is subject to two reasonable interpretations, the controversy should be resolved to the detriment of the contract's drafters. Joinette v. Local 20, 106 Wn.2d 355, 364, 722 P.2d 83 (1986).

Disregarding the plain language of the Stevens Treaties²⁴, without the help of any testimonial or documentary evidence taken by the trial court, the Buchanan Court determined that the parties to the Treaties intended to restrict hunting outside the ceded territories to "open and unclaimed" lands that had been traditionally hunted. Buchanan, 138 Wash. 2d at 202-08. The Court based this finding of historical fact²⁵ on the legal

²³ See Findings of Fact 5, CP 3, at p. 3 supra and App. 1..

²⁴ "The geographic scope of the hunting right cannot be resolved from the language of the treaty alone." Buchanan, 138 Wash. 2d at 207.

²⁵ Findings of the parties' and the treaty negotiators' intentions in entering Indian Treaties are findings of historical fact. U.S. v. Washington, 135 F.3d 618, 629 (9th Cir. 1998), cert. denied, 119 S. Ct. 1377; Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334, 343 (9th Cir. 1996), cert. denied, 117 S. Ct. 1432 (1997); Cree v. Waterbury, 78 F. 3d 1400, 1404 (9th Cir. 1996).

theories of a student Law Review article that were not supported by extensive historical or anthropological research²⁶ and on the “reservation of rights” doctrine.

2. Historical Context

In order to determine the intent of the parties to the Stevens Treaties regarding the rights to fish and shellfish, the federal district courts have taken exhaustive testimony from anthropologists and historians. See generally *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff’d, 520 F.2d 676 (9th Cir. 1975) cert. denied, 423 U.S. 1086 (1976) (“Boldt decision”); *U.S. v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994) (“Shellfish decision”) (Rafeedie, J.), aff’d in relevant part, 135 F.3d 618 (9th Cir. 1998), cert. denied ____ U.S. ____ (1999).

In *Minnesota v. Mille Lacs*, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999), the United States Supreme Court recently stated:

[A]n examination of the historical record provides insight into how the parties to the Treaty understood the terms of the agreement. This insight is especially helpful to the extent that it sheds light on how the Chippewa signatories to the Treaty understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them. *See Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-676 (1979); *United States v. Winans*, 198 U.S. 371, 380-381 (1905).

119 S. Ct at 1200-1201; 143 L. Ed. 2d 291.²⁷

The Washington Supreme Court denied Respondent Buchanan’s request to remand to the trial court for findings of historical fact regarding the parties’ intent and understanding of the treaty terms.²⁸ Buchanan was thereby precluded from presenting this evidence because he had prevailed in the trial court as a matter of law.

²⁶ The passages relied on by this Court in Nye, *Where Do The Buffalo Roam*, *supra*, 67 Wash. L. Rev. at 177-178, 190-191, depend almost entirely upon interpretations of court cases, and contain no references to anthropological evidence.

²⁷ The Nye law review article underscores the need to ascertain the intent of the parties through, *inter alia*, examination of the documentation of the negotiation. Nye contrasts the virtue of this “pure” approach with the “necessity” approach employed by some courts, which can disregard widely accepted principles of Indian treaty construction and ignore the intent of the treating parties. Nye, *supra*, 67 Wash. L. Rev. at 183, 185-86.

²⁸ *See* Respondent’s Motion for Reconsideration, denied on Aug. 3, 1999.

There is ample evidence to show the Tribes understood that, within the Territory of Washington, there were no geographic limitations on the right to hunt in open and unclaimed lands. In an exhaustive examination of the shellfish proviso of the Stevens Treaties, Federal District Judge Edward Rafeedie notes:

The most striking aspect of the treaty minutes is the paternal pose struck by the United States negotiators, including Governor Stevens himself. For example, Stevens made the following statement to the Tribes during the negotiations:

I think the paper is good and that the Great Father will think so. Are you not my children and also children of the Great Father? What will I not do for my children and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school? Does not a father send his children to school? It gives you mechanics and a Doctor to teach and cure you. Is that not fatherly? This paper secures your fish. Does not a father give food to his children? Besides fish, you can hunt, gather roots and berries. . . .

There is no dispute that the United States negotiators intended to act in good faith towards the Indians; thus, the Court cannot view the paternal tone as a strategic negotiating tactic, or as a form of sharp dealing. And, indeed, there were specific, tangible promises made by the United States to back up its paternal tone.

United States v. Washington, *supra*, 873 F. Supp. at 1435.

Minutes of the negotiations of the various treaties in the Washington Territory repeatedly describe the activities permitted on open and unclaimed land (hunting, gathering roots and berries, and pasturing horses) as limited only to those areas not occupied or settled by non-Indians.²⁹ Thus, Governor Stevens says at the Yakama treaty proceedings that

Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, that he can kill game and can go to Buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers. Page 449.³⁰

²⁹ No other geographic limitations regarding the right to hunt are mentioned in the treaty minutes.

³⁰ Records of the Proceedings of the Commission to Hold Treaties With the Indian Tribes in Washington Territory and the Blackfoot Country. Page numbers are as shown on the typescript copy offered into

In the Point Elliott treaty, the Indians are merely told that they will be able to go “back to the mountains” to get roots and berries. Page 338. At the Point No Point treaty negotiations, one tribal leader, the Duke of York, indicated his understanding of this by saying “I have been told that I could look for food where I pleased, and not in one place only.” Pages 346-47. At the Grays Harbor treaty negotiations, Stevens tells the Indians “they had the privilege of grazing their horses everywhere on open and common lands.” Page 371. Indeed, there is evidence that Stevens affirmatively encouraged the Indians to hunt and at great distances from the native territories:

We do not want you to agree not to get roots and berries, and not to go off to the Buffalo; we want you to have your roots and to get your berries, and to kill your game; we want you if you wish to mount your horses and go to the Buffalo plains.... Page 399.

Finally, the contrast between the geographic scope of the fishing right and the hunting and other rights on open and unclaimed land was expressly stated to the Indians, not only in the article-by-article explanation of the treaty, but also in the other discussions of the treaty minutes. For example, Stevens told the Indians at the Yakama treaty negotiations:

You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. You will be allowed to go on the roads, to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites: all this outside the reservation. Page 420.

3. Purpose of Stevens Treaties for United States

In entering the Stevens Treaties:

The United States’ primary purpose was to extinguish the Indians’ title to the lands in Western Washington, thereby clearing the way for settlement by Europeans. It was hoped that, by moving the Indians onto reservations, the Treaties would minimize the friction and permit amicable relations between the settlers and the Indians. Of course, the United States recognized that to achieve its primary purpose, it would have to pay some price. Further complicating matters, however, was the fact that the United States wanted to execute the Treaties as quickly as possible.

evidence by the State of Washington in U.S. v. Washington, shellfish subproceeding, as Exhibit D-064, admitted on 4-27-94.

The United States was aware that the Indians used and relied on fish, including shellfish, for subsistence, ceremonial and commercial purposes; thus it was clearly necessary to preserve the Indians' fishing rights. In fact, the United States viewed this concession as serving its own interests to some extent: indeed, **the treaty negotiators did not want the Indians to become dependent upon the United States for their subsistence** and a reservation of fishing rights would insure against this possibility.

United States v. Washington, *supra*, 873 F. Supp. at 1436 (emphasis added); see Cohen, Handbook of Federal Indian Law, 446 (1982). For the Nooksacks, who “were essentially mountain Indians, [and] lived by the chase,” hunting was more important to their subsistence than fishing. The Nooksacks “preferred the chase to fishing or exploiting the adjoining bays and streams as most of the so-called "Sound" Indians did.” Duwamish v. United States, 79 Ct. Cl. 530, 605-06 (1934).

Governor Stevens was “a self-conscious historical actor who proceeded cautiously, guided by a vision for the future of the Washington Territory.” United States v. Washington, *supra*, 873 F. Supp. at 1437. He was no doubt aware of the fact that:

As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 280, 75 S. Ct. 313, 99 L. Ed. 314 (1955). Stevens was also, no doubt, aware that when traditional Indian hunting grounds would be claimed and occupied by Europeans, the herds would move and the tribal hunters would have to follow. See *id.*

Limiting the hunting right to “open and unclaimed lands” was a “commonsense resolution” that allowed the United States to relocate the tribes to the reservations, avoid conflicts between tribal hunters and settlers, and enable the tribes to maintain their traditional customs and self-sufficiency. See State v. Chambers, 81 W.2d 929, 935-36, 506 P.2d 311 (1973).

4. Tribal Understanding of Stevens Treaties

The Tribes' purpose in entering the Stevens Treaties was to secure land and livelihood for their members who faced an aggressive wave of European settlement. United States v. Washington, *supra*, 873 F. Supp. at 1437. Securing their right to hunt

was essential to maintaining their sustenance and their customs. State v. Coffee, 97 Idaho 905, 907, 556 P.2d 1185, 1187 (1976).

The Indians had always fished and hunted “to obtain food and furs necessary for their existence and ha[d] been controlled as to the time when and the area where and the amount of catch or kill by the exigencies of the occasion. . .” State v. Arthur, 74 Idaho 251, 264, 261 P.2d 135, 142 (1953). By the time of the Stevens Treaties, the Tribes had already witnessed the encroachment of settlements in their traditional hunting grounds. See U.S. v. Washington, *supra*, 384 F. Supp. at 352, 355 (“Boldt Decision”). The exigencies of the occasion required that they travel to new locations in pursuit of game. The tribes were willing to reserve and confine their right to hunt and gather to “open and unclaimed land” because:

This then left them free to wander at will, to pick roots and berries, pasture their livestock and hunt as they had from the beginning of time. **They were restricted only in those areas staked out by the white man as his own place to settle.**

State v. Chambers, *supra*, 81 W.2d at 935-36 (emphasis added).

B. THE “RESERVED RIGHTS” DOCTRINE DOES NOT LIMIT THE RIGHT TO HUNT TO TRADITIONAL GROUNDS

The Buchanan Court adopted DFW’s argument that under the “reservation of rights” doctrine, the Point Elliot Treaty only reserved rights that the Indians had previously exercised, so the Nooksack hunting right is geographically limited to traditional hunting areas outside the ceded lands. The State of Washington had used variations of this argument unsuccessfully in several prior cases. The argument is flawed in two respects. First, it misconstrues the “reserved rights” language in Passenger Fishing Vessel and its predecessor, United States v. Winans, 198 U.S. 371, 380, 86 L. Ed. 1089, 25 S. Ct. 662 (1905). Second, it attempts to define the “reserved” right too narrowly.

1. The “Reserved Rights” Doctrine Is A Liberal Rule Of Treaty Interpretation

One of the canons of Indian Treaty construction, first stated in the case of United States v. Winans, *supra*, is that in order to “give effect to the treaty,” certain rights inuring to the benefit of the Indians, though not stated in the language of the treaty, may be

inferred. Id. at 381. Because a treaty involves a grant to the United States from the “larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment,” rights which were not explicitly granted to the United States in the terms of the Treaty were reserved to the Indians. Id.

The Winans Court found that, in order to give effect to the purposes of the Treaty, the “right of taking fish,” limited to “usual and accustomed grounds and stations,” included the unwritten but “reserved” right to cross private lands to the river.³¹ Id.

In Winters v. United States, 207 U.S. 564, 28 S. Ct. 207; 52 L. Ed.340 (1908), the Supreme Court applied the Winans “reserved right” doctrine in finding that the right to use the waters of the Milk River for irrigation was impliedly reserved in the agreement establishing the Fort Belknap Reservation. There was no evidence that the Indians had ever used the river for irrigation before the agreement, but the use of the waters were found to be a “reserved right,” necessary to give effect to the agreement. 207 U.S. at 576; Cohen, Handbook of Indian Law, at 578-81.

Neither Winans, Winters, nor Passenger Fishing Vessel held or even suggested that an Indian Treaty can only secure previously-exercised rights.³² The “reserved rights” doctrine is a liberal rule of Indian Treaty, statute, and contract interpretation, not a means for the United States to escape from its sworn obligations. This language should not be misconstrued to suggest that Treaties do not also contain grants of rights from the United States to the Indians. Indeed, the Winans Court itself recognized that:

Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations. . . .or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

198 U.S. at 383-84.

As a second example, in Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S. Ct. 40, 63 L. Ed. 138 (1918), the Court found that by setting aside “the body of

³¹ Cf. Antoine v. Washington, 420 U.S. 194, 207 n.11, 95 S. Ct. 944, L. Ed. 2d 129 (1975); Confederated Salish and Kootenai Tribes v. Vullles, 282 F. Supp. 829, 830-31 (1968), modified, 437 F.2d 177 (1971); Mille Lacs II, supra, 861 F. Supp. at 834-35.

³² The Buchanan Court did not cite a single case from any jurisdiction to support this position.

lands known as Annette Islands” as a reservation for the Metlakahtla Indians, who had recently emigrated from British Columbia, Congress had intended to secure the use of the adjacent fishing grounds for the foreign-born Indians.

That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. . . . The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose -- that of safe-guarding and advancing a dependent Indian people dwelling within the United States.

248 U.S. at 87-88 (citations omitted).

More recently, in Mille Lacs Band v. Minnesota, No. 3-94-1226 (D. Minn. Mar. 29, 1996)(“Mille Lacs III”), aff’d, 124 F.3d 904 (8th Cir. 1997) aff’d 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999), Federal District Judge Michael J. Davis rejected the same “reserved rights” argument that the Buchanan Court adopted. His reasoning is persuasive:

The Landowners and the Counties argue that the Wisconsin Bands do not hold usufructuary rights in the Minnesota portion of the 1837 ceded territory because none of the Wisconsin Bands used and occupied the area at treaty times. The Wisconsin Bands contend that the treaty expressly guarantees all the signatory bands the privilege of hunting, fishing and gathering throughout the ceded territory and that nothing in the treaty suggests that a particular band must prove its historical use of a particular portion of the ceded territory before exercising its rights there.

The Landowners and Counties do not and cannot, point to any language in the 1837 Treaty that limits the usufructuary rights granted to certain areas within the ceded territory. Nor does the case law support the argument.

The power of Congress to establish or recognize rights or reservations for Indian tribes does not derive from the Indians’ aboriginal title to lands, it derives from the Constitution. . . .The Counties’ reliance on *Winans, supra, Seufert Bros. Co. v. United States. . .and United States ex rel Charlie v. McGowan. . .* is misplaced as those cases involved treaties that granted rights for the taking of fish “at all the usual and accustomed grounds and stations.” As this language suggests, the rights granted under [that clause of] these treaties was limited to those areas historically used by the Indians.

In this case, the 1837 treaty only limited the exercise of usufructuary rights to areas within the ceded territories. The treaty does not contain any language restricting the right to hunt, fish or gather within certain areas within the ceded territory.

... Absent clear language limiting the Chippewa to exercise their usufructuary rights only in the areas they occupied, this motion must be denied.

Mille Lacs III, slip op. at 39-41 (Appendix 1)(citations omitted). The Eighth Circuit Court of Appeals affirmed this decision, stating:

All of the cases cited by the Counties in support of its argument include treaty language which supports a limitation on the scope of the right. The 1837 Treaty does not tie usufructuary rights to historic use or occupancy, and thus the Counties' urgings defy the plain language of the Treaty.

124 F.3d at 933.

As recognized in Winans and subsequent Supreme Court cases, the United States had complete authority to reserve Tribal hunting on "open and unclaimed lands" throughout the Territory of Washington, whether or not the Tribes had traditionally hunted in these areas, in order to "perform [its] obligation" to protect the Tribes' subsistence--a "public purpose appropriate to the objects for which the United States h[e]ld the Territory." 198 U.S. at 383-84. The plain language of the Treaties does exactly that.

2. The Stevens Treaties Reserved Part Of The Tribes' Subsistence Right To Hunt

Almost 25 years ago, in United States v. Washington, supra, 384 F. Supp. 312 (W.D. Wash. 1974), Judge Boldt rejected the State's "reserved rights" argument that the Stevens Treaties restricted tribal fishing only to traditional methods and species. 384 F. Supp. at 401-02. He also rejected the argument that reef net fishermen, who had traditionally fished close to shore, did not reserve the right to fish in deeper waters. Id. At 362. Judge Boldt's reasoning can be applied to tribal hunting:

In aboriginal times, Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time. . .

384 F. Supp. at 362.

In the Shellfish litigation, Washington argued once more that the “reserved rights” language from Winans and Passenger Fishing Vessel could be used to restrict tribal rights that had not been “exercised.”

Defendant and the intervenors have argued that the "right of taking fish" must be limited to those species of fish the Tribes actually took prior to the signing of the Stevens Treaties. At that time, however, the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title. See *Lac Court Oreilles Band, Etc. v. Voigt*, 700 F.2d at 352. The fact that some species were not taken before treaty time--either because they were inaccessible or the Indians chose not to take them--does not mean that their right to take such fish was limited. Because the "right of taking fish" must be read as a reservation of the Indians' pre-existing rights, and because the right to take any species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish" without any species limitation.

The effort by the defendants to read a species limitation into the "right of taking fish" must fail in light of the canons of construction favoring Indians. Defendant and the intervenors ask the Court to impose a limit on the "right of taking fish" without pointing to any treaty language in support of that interpretation. This is impermissible under *Winters* and *Choctaw Nation*.

United States v. Washington, *supra*, 873 F. Supp at 1431 (Rafeedie, J.).

On appeal, the Ninth Circuit Court of Appeals affirmed this reasoning.

With all deference to the State, there is no language in the Treaties to support its position: the Treaties make no mention of any species-specific or technology-based restrictions on the Tribes' rights.

United States v. Washington, *supra*, 135 F.3d 618, 630-31(footnotes omitted).³³ The Buchanan Court's conclusion in this case is also unsupported by the language of the Treaties--there is no reference to geographic limitations on the Tribes' right to hunt.

Prior to signing the Stevens Treaties, Indians could fish or hunt anywhere in Washington Territory. The right to fish had not been limited to the tribes' “usual and accustomed grounds and stations,” and the right to hunt had not been limited to “open and unclaimed lands.”

The right to resort to the fishing places in controversy was a part of **larger rights possessed by the Indians, upon the exercise of which there was**

³³ See also Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1246 (E.D. Wash. 1997)(rejecting Washington State's claim that the treaty-reserved right to travel “does not extend to [Yakama] logging trucks, because logging is a modern ‘Euroamerican’ enterprise”).

not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.

Winans, supra, 198 U.S. at 381 (emphasis added).

Neither in Passenger Fishing Vessel nor Winans did the Supreme Court use specific geographic terms to describe “rights previously exercised.” In Passenger Fishing Vessel the Court said that “the Indians had always exercised **the right to meet their subsistence and commercial needs** by taking fish from treaty area waters. . .” 443 U.S. at 678-79 (emphasis added). The rights the Court spoke of were the right of subsistence and the right to earn a livelihood—two of the “larger rights possessed by the Indians.” Winans, supra, 198 U.S. at 381.

The right to meet subsistence and commercial needs had been “exercised” by taking fish. Passenger Fishing Vessel, supra, 443 U.S. at 678-79. The right to meet subsistence needs had also been exercised by taking game. But whether or where the “the privilege of hunting” had previously been exercised has no significance with regard to the understanding of the parties to the Treaty--even if the Treaty were analyzed without regard to the understanding of the Indians, but rather according to the understanding of nineteenth century American lawyers. See generally, Lund, Early American Wildlife Law, 51 N.Y.U. L. Rev. 703 (1976).

Under early American law, hunting on lands that were not fenced, farmed or otherwise developed required only the permission of the sovereign to take the wildlife--and that permission was freely granted. Id. at 712-14.³⁴ The privilege of hunting was not an interest to or in land, and, like the privilege associated with a modern fishing or hunting license, did not depend on the exercise of that privilege. See Mille Lac II, 861 F. Supp. at 833-34.³⁵

³⁴ The state constitutions of Pennsylvania and Vermont recognized a hunter’s right to enter all unenclosed land. PA CONST. § 43 (1776); VT. CONST. § 39 (1777).

³⁵ Land and water rights depend on use and possession. Georgia v. South Carolina, 497 U.S. 376, 393, 110 S. Ct. 2903, 111 L. Ed. 2d 309 (1990); Arizona v. California, 460 U.S. 605, 620, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983); Ballantine, “Title by Adverse Possession,” 32 Harv. L. Rev. 135 (1918). On the other hand, at the time of the Treaties, American law followed a policy of “free taking,” recognizing everyone’s right to take game. Lund, supra at 705-06, 712.

IV. CONCLUSION

Before the Stevens Treaties and the settlement of Washington Territory there were neither landowners to fence off lands from tribal hunting nor sovereigns to grant or withhold permission. Tribal hunters in Washington Territory were free to hunt wherever they wanted, but avoided conflict by staying away from occupied settlements, and asking permission of other tribes with primary hunting rights. Game was plentiful and hunting was a difficult and dangerous endeavor. The United States gave up little by restricting and preserving the right to hunt in Washington Territory within “open and unclaimed” lands, yet the settlers gained a substantial measure of safety.

According to the plain and unambiguous language of the Stevens Treaties, the Indians’ off-reservation right to hunt in Washington Territory was secured and restricted by the United States only within “open and unclaimed lands.” As the sovereign of the Territory and landowner of all open and unclaimed lands therein, there can be no doubt that the United States had the authority to guarantee this right, and the plain language of the Stevens Treaties shows that this was the intent of the parties.

The Buchanan Court’s re-interpretation of the hunting clause of the Stevens Treaties violates the United States Supreme Court’s admonition in U.S. v. Choctaw Nation, 179 U.S. 494, 532-33, 21 S. Ct. 149, 164, 45 L. Ed. 291 (1900), a seminal Indian treaty interpretation case:

But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words . . . We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice.

179 U.S. at 532-33; quoted in U.S. v. Washington, supra, 135 F.3d at 638 (“Shellfish”).

With no evidence to support its conclusion in the language of the treaties, in the treaty minutes, or before the trial court, the Washington Supreme Court incorporated geographic restrictions that are inconsistent with the clear import of the Stevens treaties. Buchanan will be petitioning the United States Supreme Court for certiorari.