Tribal Hunting and Fishing Rights Fail to Survive Cession of Treaty Land: Oregon Department of Fish & Wildlife v. Klamath Indian Tribe

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Tribal Hunting and Fishing Rights Fail to Survive Cession of Treaty Land:  
*Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*  
105 S. Ct. 3420 (1985)

I think the laws that are made are not straight, they are crooked. They leave the Indian out. He has no one to talk for him . . . . I went to see the President. He looks just like any other man. I was not afraid of him. I intended to tell him what my people wanted, but his ear was too small, he could not hear me. I brought all the things in my heart away.

Then I went to see the Commissioner [of Indian Affairs]. He had large ears. He *seemed* to listen to what I had to tell him, but I looked him in the eye. He did not put the things I told him in his heart. My heart got sick, because I had come a long way . . . to see these men, but they would not take the words I gave them.

Wal-aiks-ski-dat, Chief of Klamath Tribe  
Speech at Independence Hall, Philadelphia, March 24, 1875 regarding the Klamath Reservation boundary dispute

INTRODUCTION

Recognizing the unequal bargaining position of the Indian tribes and their trust relationship with the United States government, the United States Supreme Court during the past century has promulgated several rules for interpreting treaties with American Indians.\(^2\) Two rules frequently cited by the Court are that treaties must be construed as the tribes understood them\(^3\) and that ambiguities in treaties must be resolved

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1. A. MEACHAM, WI-NE-MA (THE WOMAN CHIEF.) AND HER PEOPLE 105 (1876).
in favor of the Indians. As a consequence, in the absence of congressional intent to abrogate treaty rights, most rights survive.

In a recent case, *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, the United States Supreme Court cited these well-established rules of treaty interpretation and then proceeded to ignore them. The Court held that the Klamath Indian Tribe's exclusive tribal hunting and fishing rights did not survive a cession of land by treaty from the Klamath Indians to the United States because Congress did not expressly intend to preserve those rights.

I

HISTORY OF THE CASE

In 1864, the Klamath and Modoc Tribes and the Yahooskin Band of the Snake Indians entered into a treaty with the United States Government ceding "all their right, title, and claim" to approximately 20 million acres of aboriginal land in exchange for a 1.9 million-acre reservation in Oregon. The Treaty reserved to the Indian tribes the "exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits."

The United States first surveyed the reservation boundaries in 1871. Government Surveyor Mercer erroneously excluded a large amount of the land because he did not follow the natural boundaries referred to in the treaty where they did not conform to township subdivision surveys. For the next twenty-five years, members of the Tribe complained to the government because they believed land had been erroneously excluded from the reservation. The land was resurveyed by Government


6. These Tribes are now known collectively as the Klamath Indian Tribe.

7. Treaty between the United States of America and the Klamath and Moadoe [sic] Tribes and Yahooskin Band of Snake Indians: Concluded, October 14, 1864; Ratification advised, with Amendments, July 2, 1866; Amendments assented to, December 10, 1869; Proclaimed, February 17, 1870, 16 Stat. 707 (1864) [hereinafter cited as 1864 Treaty].

8. Id. at 708. For a complete historical account of the signing of the 1864 treaty, see Stern, *The Klamath Indians and the Treaty of 1864*, 57 Or. Hist. Q. 229 (1956). Although the exact language of the 1864 Treaty referred only to fishing rights and not hunting rights, the Treaty was generally understood to reserve to the Tribe a right to hunt and trap game within the reservation, as well as to fish and gather. Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir. 1974), cert. denied, 419 U.S. 1019 (1974) (Kimball I). The Ninth Circuit Court of Appeals in *Kimball I* noted that "in light of the highly significant role hunting and trapping played (and continue to play) in the lives of the Klamaths, it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the treaty." Id. (footnote omitted).


10. In the meantime, these excluded lands—including 7080 acres allotted to "proposed
Surveyor Thiel in 1888, but he also wrongly excluded land from the reservation boundaries. In 1896, Congress responded to the continuing Indian complaints by creating the Klamath Indian Boundary Commission to resurvey the reservation area and determine the value of the excluded land. In 1898, the Commission reported that 617,490 acres, approximately one-third of the land originally promised to the Klamath Indians, had been improperly left out of the Reservation by the 1871 survey. The value of this land was estimated to be $533,270. The Commissioner of the United States General Land Office finally accepted a correct survey of the 1864 Treaty boundaries in 1900 (Eliot survey).

Following lengthy negotiations, the United States entered into a cession agreement with the Klamath Indians in 1901 and agreed to pay the value of the erroneously excluded lands. Article I of the 1901 Cession Act stated:

[The Klamath Indians] do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the [1864] treaty . . . and the reservation boundary lines as established by the survey approved in [1888] . . . .

Article IV of the 1901 Cession Act provided that: "It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement." Most of the ceded land was immediately closed to entry and placed in national forests or parks, a status that much of it settlers" with a "balance of 555,129 acres . . . yet unoccupied"—were entered by non-Indian settlers. H.R. Doc. No. 156, 56th Cong., 2d Sess. 10 (1900) (letter from United States Indian Inspector Wm. J. McConnell to Secretary of the Interior (Jan. 2, 1899)).

11. Joint Appendix at 11-12, Klamath Indian Tribe.
12. Act of June 10, 1896, ch. 398, 29 Stat. 321, 342. Tribal members who were signatories to the 1864 Treaty testified to the Commission that they were convinced that the excluded lands were to be included in the reservation. They stated that the Indian agent who had negotiated the treaty was told that the Tribe wanted the land specifically because of its value for hunting, fishing, and gathering. W. Coleman, R. Hammond, I. Applegate, Klamath Boundary Commission Report, reprinted in S. Doc. No. 93, 54th Cong., 2d Sess. 5-19 (1897) [hereinafter cited as Klamath Boundary Commission Report].
13. Klamath Boundary Commission Report, supra note 12, at 11. The amount of the Commission’s award (86 cents per acre) was based on the estimated value of the land for stock grazing and timber harvesting. Id. The Boundary Commission did not take into account the value of the Tribe’s hunting, fishing, and trapping rights in arriving at its valuation of the land. Id. at 5-12; see also Joint Appendix at 12.
16. This agreement was later ratified by Congress in 1906. Act of June 21, 1906, ch. 3504, 34 Stat. 325, 366 (ratifying Agreement of June 17, 1901) [hereinafter cited as 1901 Cession Agreement]. The value of this land was $533,270. See supra note 13 and accompanying text.
17. Id. at 367.
18. Id. at 368.
Early Boundary Surveys of the Klamath Indian Reservation†

† Adapted by permission from STERN, THE KLAMATH TRIBE: A PEOPLE AND THEIR RESERVATION. Copyright 1965 by University of Washington Press.
Congress terminated federal supervision over the Klamath Indian Tribe and Reservation in 1954. The Termination Act, however, did not "abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." In 1969, the Indian Claims Commission awarded the Klamath Tribe $4,162,992.80 for the lands ceded in 1901 because of the unconscionable consideration originally paid. The claim was based on highest and best uses of the land, timbering and grazing, and again there was no valuation of the Tribe's hunting and fishing rights.

Hunting, fishing, trapping, and gathering were "crucial to the survival" of the Klamath Indians in 1864, 1901, and 1906, and these activities continue to "play a highly significant role" in the lives of the Klamath Indians today. Members of the Tribe continued to hunt, fish, and trap on the excluded lands from the time of the cession in 1901 to the commencement of litigation in 1982 without regard to Oregon state law or regulation. In response to the state's attempts over the past years to regulate Indian hunting and fishing on the ceded lands, the Klamath Indians sued the Oregon Department of Fish and Game to enjoin the wardens from interfering with the Indians' asserted hunting and fishing rights.


20. Act of August 13, 1954, ch. 732, 68 Stat. 718 (codified as amended at 25 U.S.C. §§ 564-564x (1983)). The Termination Act required that members of the Klamath Tribe either elect to withdraw from the Tribe and receive monetary compensation for their interest in the tribal property, or remain in the Tribe and participate in a nongovernmental tribal management plan. 25 U.S.C. § 564d(a)(2). A part of the tribal land proportionate to the number of remaining members was transferred to a private trustee to administer under the statutory management plan; the remainder was sold to pay the withdrawn members or taken by the United States. Kimball I, 493 F.2d at 567. Most of the sold land forms part of the Winema National Forest and the Klamath Forest National Wildlife Refuge. Id. at 565.


23. Id. at 525; Joint Appendix at 14.

24. Joint Appendix at 19; see also supra note 8.


26. Both the Oregon State Department of Fish and Wildlife and the Klamath Indians agreed that the State of Oregon has no authority to regulate Indian hunting, fishing, gathering, and trapping on the former reservation lands except for conservation purposes. See Kimball v. Callahan, 590 F.2d 768, 777-78, cert. denied, 444 U.S. 826 (1979) (Kimball II).
A. The District Court Opinion

In an unreported opinion, the United States District Court for Oregon held that under the 1901 Cession Agreement, the Klamath Indians retained the right to hunt and fish on the ceded lands.27 The court rejected the argument made by the State of Oregon that the language of Article I of the 1901 Cession Agreement, in which the Tribe ceded “all their claim, right, title, and interest” in the land, meant that the Tribe relinquished its hunting and fishing rights.28 Instead, the court focused on the language in Article IV of the 1901 Cession Act which provided that the agreement shall not deprive the Tribe of “benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement.”29

The court further noted that the government’s use of the land for a wildlife refuge and national forests was consistent with the Klamath Indians’ claim to hunting and fishing rights.30 In addition, the Court held that “Congress’ failure to compensate the Tribe for loss of hunting, fishing, and trapping rights indicates that Congress did not intend to extinguish those rights.”31

Finally, emphasizing the well-established principles of Indian treaty interpretation that “[c]ession treaties and agreements must be interpreted as the Indians understood them, and doubtful expressions must be resolved in favor of the Indians,”32 the court concluded that because there was no clear congressional intent to extinguish the Tribe’s hunting and fishing rights in the ceded land, those rights were still valid.33

B. The Ninth Circuit Opinion

The United States Court of Appeals for the Ninth Circuit affirmed the district court, holding that the “Tribe and its members retained their rights to hunt, fish and trap on the land.”34 The Ninth Circuit flatly rejected the State’s argument on appeal that the hunting and fishing rights were appurtenant to the land and were therefore granted away by the Indians in the 1901 Agreement. Instead, the court stated that the Treaty rights to hunt, fish, and trap were “not appurtenant to the Tribe’s property interest in the former reservation land itself” but existed “apart

28. Id. at 6.
29. Id.; see also 1901 Cession Agreement, supra note 16, at 368.
30. Klamath Indian Tribe, slip op. at 8.
31. Id. at 7-8.
32. Id.; see also Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943). See generally supra notes 2-3 and accompanying text.
33. Klamath Indian Tribe, slip op. at 7.
34. Klamath Indian Tribe v. Oregon Department of Fish and Wildlife, 729 F.2d 609 (9th Cir. 1984).
from ownership of the land." Because Article IV of the 1901 Cession Agreement secured "any benefits under existing treaties not inconsistent with this Act" to the Klamath Indians, the rights to hunt, fish, and trap, reserved by the 1864 Treaty survived because they were not inconsistent with the 1901 Cession Act and could be "abrogated only by a showing of clear congressional intent." The court held that the 1901 Cession Agreement, the surrounding circumstances, and the legislative history showed no clear congressional intent to abolish such rights. The fact that the Klamath Indians were not compensated for loss of fishing, hunting, and trapping rights in the Cession Agreement was further evidence that Congress did not intend to take away the Klamath Indians' hunting and fishing rights. In addition, the "United States acted as trustee in executing the cession agreement . . . [and an] interpretation of the Act as abrogating hunting and fishing rights would be wholly inconsistent with the government's trustee status."

The Ninth Circuit's holding apparently was at variance with the decision of the Eighth Circuit Court of Appeals in Red Lake Band of Chippewa Indians v. Minnesota. In Red Lake, a band of Chippewa Indians ceded "all our right, title, and interest in and to" two tracts of land to the United States in 1889 and 1904. The Court of Appeals for the Eighth Circuit held that the Tribe had given up its tribal "rights to hunt, fish, trap, and gather wild rice free of the state's regulation of such activities," despite the Band's claim that diminishing the reservation boundaries in the 1889 and 1904 Acts did not abrogate such rights absent explicit reference by Congress. The Supreme Court granted the writ of certiorari requested by the State of Oregon because of a conflict in principle between the circuits. 

II
THE SUPREME COURT DECISION

A. The Majority

In a six-to-two decision, the United States Supreme Court reversed the Ninth Circuit Court of Appeals. Justice Stevens, writing for the

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35. 729 F.2d at 612.
36. 1901 Cession Agreement, supra note 16, at 368.
37. 729 F.2d at 612.
38. Id. at 612-13.
39. Id. at 613.
40. Id. at 612-13.
42. Id. at 1162 n.2.
43. Id. at 1162.
44. 105 S. Ct. 242; see also 105 S. Ct. 3427.
45. 105 S. Ct. 3420. Justice Stevens wrote the majority opinion with Chief Justice Bur-
majority, began by agreeing with the court of appeals that: "Indians may enjoy special hunting and fishing rights that are independent of any ownership of land, and that, as demonstrated in 25 U.S.C. § 564m(b), the 1954 Termination act for the Klamath Tribe, such rights may survive the termination of an Indian reservation." The Court also recognized that the court of appeals was "entirely correct in its view that doubts concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe." The Supreme Court disagreed, however, with the Ninth Circuit’s reading of the 1864 Treaty and its interpretation of 1901 Cession Agreement.

The majority argued that the granting language used in the 1864 Treaty and the granting language used in Article I of the 1901 Cession Agreement were very similar and therefore should have the same effect. The 1864 Treaty, which ceded 20 million acres of land in exchange for the 1.9 million-acre reservation, stated that the Tribe ceded "all their right, title, and claim" to the described aboriginal land. Justice Stevens reasoned: "that general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed in over 20 million acres outside the reservation. Presumptively, the similar language used in the 1901 Cession Agreement should have the same effect."

Justice Stevens next argued that the "language of the 1901 Agreement must be read with these terms of the 1864 treaty in mind." In the 1954 Termination Act, Congress enacted an express provision continuing the Klamath Indians’ hunting and fishing rights on former reservation land. Yet, the 1901 Cession Agreement contained no express provision concerning hunting and fishing rights on the ceded lands. The broad

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46. 105 S. Ct. at 3428 (footnotes omitted).
47. Id.
48. 1864 Treaty, supra note 7, at 707.
49. 105 S. Ct. at 3428 (emphasis added). Justice Stevens relied heavily on the language in Article I of the 1864 Treaty that described the rights intended to be exercised within the limits of the reservation. Id. Article I stated that:

[T]he following described tract, within the country ceded by this treaty, shall . . . be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation. . . . And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes. It is further stipulated and agreed that . . . the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid . . . .

1864 Treaty, supra note 7, at 708 (emphasis added).
50. 105 S. Ct. at 3429.
51. 25 U.S.C. § 564m(b); see Kimball II, 590 F.2d 768.
52. See 1901 Cession Agreement, supra note 16. Justice Stevens also noted that "the
language of the 1901 Cession Agreement\textsuperscript{53} diminished the boundaries of the Reservation\textsuperscript{54} and "[i]n the absence of any language reserving specific rights in the ceded lands, the normal construction of the words used in the 1901 Agreement unquestionably would encompass any special right to use the ceded lands for hunting and fishing."\textsuperscript{55}

Justice Stevens dismissed the language in Article IV of the Cession Agreement, heavily relied upon by the lower courts,\textsuperscript{56} stating that Article IV only preserved the benefits of the 1864 Treaty that the Tribe had within the reservation.\textsuperscript{57} Because the right to hunt and fish was exclusive within the reservation, "that right could not consistently survive off the reservation under the clear provisions of cession and diminution contained on Article I" of the Cession Agreement.\textsuperscript{58} The majority stated that there would be a "glaring inconsistency" between the 1864 Treaty and 1901 Cession Agreement if the Tribe could hunt and fish on the ceded lands located outside the reservation under the 1901 Cession Agreement, while the 1864 Treaty required the Indians to stay within the reservation unless permission was granted to leave.\textsuperscript{59} Finally, although the 1901 Cession Agreement was silent with regard to the Klamath Indians' hunting and fishing rights, Stevens rejected the Tribe's argument that the "singular" purpose of the 1901 agreement was "to benefit the Indians by honoring the United States' Treaty obligations," and extinguishment of hunting and fishing rights would be inconsistent with this purpose.\textsuperscript{60} Stevens maintained that extinguishing the Klamath Indians' historical record provided by a number of congressional documents contains no reference to continuation of any special hunting or fishing rights for members of the Tribe after payment for the excluded lands." 105 S. Ct. at 3424.

\textsuperscript{53} In Article I of the Cession Agreement, the Klamath Indians "do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" that part of the reservation. 1901 Cession Agreement, supra note 16, at 367 (emphasis added).

\textsuperscript{54} 105 S. Ct. at 3429.

\textsuperscript{55} Id.

\textsuperscript{56} See Klamath Indian Tribe, slip op. at 6; 729 F.2d at 612.

\textsuperscript{57} 105 S. Ct. at 3430.

\textsuperscript{58} Id. The 1864 Treaty required the Indians to stay on the reservation "unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes." 1864 Treaty, supra note 7, at 708. In addition:

[No white person shall be permitted to locate or remain upon the reservation, except the Indian Superintendent and agent, employs [sic] of the Indian department, and [U.S. Army] officers . . . [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish . . . in said reservation . . . is hereby secured to the Indians aforesaid . . . ."

Id.

\textsuperscript{59} 105 S. Ct. at 3429. A written pass system for the Klamath Indians was developed soon after the 1864 Treaty. See T. Stern, The Klamath Tribe: A People and Their Reservation 91, 125-26 (1965). The Klamath Indians, however, continued to hunt and fish outside of the reservation after 1901 and there was "no indication of any concern regarding their legal right to do so until commencement of this litigation." 105 S. Ct. at 3430 n.21.

\textsuperscript{60} Brief for Respondents at 28-30 & n.13.
hunting and fishing rights on the ceded land, "if accomplished with the
understanding and assent of the Tribe in return for compensation," was
not inconsistent with the intent to honor the 1864 Treaty. Because the
United States could have returned the land to the Klamath Indians and
did not, this was consistent with an intent not to preserve those rights.

B. The Dissent

Justice Marshall wrote a sharp dissenting opinion in which Justice
Brennan joined. Although Marshall agreed that "the boilerplate lan-
guage of the [Cession] agreement can be read as the Court does," he
objected that the majority's reading was: "not necessary, ignores the
agreement's historical context, and is not faithful to the well-established
principles that Indian treaties are to be interpreted as they were likely
understood by the tribe and that doubts concerning the meaning of a
treaty should be resolved in favor of the tribe." Reviewing in some detail the historical context of the Klamath 1864
Treaty, Justice Marshall concluded that "[a]lthough the borders of the
reservation soon became the subject of some dispute, the purposes of the
Treaty have always been clear." Focusing first on how the Tribe un-
derstood the 1901 Cession Agreement, Marshall concluded that the Tribe
believed they retained their hunting and fishing rights because these
rights were "crucial to the survival of the Klamath Indians" and be-
cause the Tribe had originally requested these lands within the reserva-
tion specifically for their hunting and fishing value. The Tribe's
subsequent behavior, continuing to hunt and fish on the ceded land,
was also consistent with the Klamath's interpretation of the Cession
Agreement.

In addition to concluding that the Treaty reflected the Tribe's un-
derstanding and intention, Justice Marshall argued that Congress' pur-
pose in ratifying the 1864 Treaty was to preserve for the Klamath
Indians hunting and fishing rights on their reservation. The Boundary
Commission not only knew, but emphasized, that the mistakenly ex-
cluded land was ill-suited for agriculture, and that this land represented

61. Id. at 3431.
62. Id.
63. Id. at 3433.
64. Id.
65. Id. at 3436; Joint Appendix at 19; see Kimball I, 493 F.2d at 566.
67. 105 S. Ct. at 3437-38.
68. The Klamath Boundary Commission Report made clear that the principle object of
the 1864 Treaty was to concentrate the Indians in a limited area defined by mountain ridges
(except to the north). KLAMATH BOUNDARY COMMISSION REPORT, supra note 12, at 6-7.
The Commission Report also recognized, however, that hunting and fishing in this area was
crucial to the Tribe's survival:
There is no provision in the treaty, however, for support of the Indians by the Gov-
tribal hunting, fishing, and gathering grounds of considerable importance. The dissent concluded from this evidence that for the United States to prohibit tribal access to ceded lands "would have served no interest that the United States had ever publicly declared, and it would have compromised the Klamath's ability to remain self-sufficient." Instead, the interests of the United States were served by reading the 1864 Treaty only to require the Tribe not to leave the area specified initially as the Reservation. Article IV of the 1901 Cession Agreement, reserving to the Tribe all benefits from prior treaties not inconsistent with the Cession Agreement, was therefore intended by Congress to allow the Klamath Indians to "travel, hunt, and fish on the full area of the original reservation." Congress' subsequent behavior, closing "[v]irtually all the land . . . to entry and plac[ing it] in either national forests or parks," simply did not reflect "an expectation that the Tribe would alter its hunting and fishing patterns as a result of the cession."

Justice Marshall pointed out that the lack of compensation in the Cession Agreement for hunting and fishing was evidence that the parties did not intend to abrogate those rights, especially because the Commission was "well aware" of the importance of this land to the Tribe for hunting and fishing.

The dissent concluded by criticizing the majority for neglecting to follow the canons of Indian Treaty interpretation:

The Court analyzes the case as one involving little more than the plain meaning of boilerplate language. It turns to history only to determine if its perceived "plain meaning" would be an impossible one. Ultimately,

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69. The Boundary Commission interviewed a number of Klamath, including some signatories of the 1864 Treaty, who insisted that the excluded land was supposed to be part of the reservation. Because of the traditional importance of the ceded lands in the Tribe's hunting and gathering, the tribal elders had specifically asked for the inclusion of this land in the 1864 Treaty. The Indians' arguments were supported by clear evidence of their historical use of the area. For example, while inspecting the land, the commissioners found a tribal fishing site with a stone dam constructed and maintained by the Klamath Indians in order to gather large numbers of fish. Id. at 10.

70. 105 S. Ct. at 3437.

71. Id.

72. Id. (emphasis original).

73. Joint Appendix at 13.

74. 105 S. Ct. at 3438.

75. The parties stipulated that hunting and fishing rights were not taken into account when the Tribe was compensated for the ceded land. Joint Appendix at 12; see generally KLAMATH BOUNDARY COMMISSION REPORT, supra note 12.

76. 105 S. Ct. at 3438; supra note 69.
this produces a largely insensitive and conclusory historical inquiry that ignores how events almost certainly appeared to the Tribe.  

III

DISCUSSION

A. Indian Treaty Interpretation Concerns

The majority opinion implicitly announces a new principle of Indian Law: diminishment of reservation boundaries results in extinguishment of treaty hunting and fishing rights on land removed from the reservation, absent a clear manifestation of contrary congressional intent to preserve those rights. This approach rejects the longstanding principle that most treaty rights survive a cession agreement absent a clear manifestation of congressional intent to abrogate treaty rights. As the dissenting opinion notes, this is a "disturbing" development. In Klamath Indian Tribe, the Supreme Court ignores two well-established rules of Indian Treaty interpretation: treaties must be construed as the tribes understood them, and ambiguities in the treaties must be resolved in favor of the Indians. These rules were originally developed because the Indians' unfamiliarity with the government's language and methods of negotiation placed them in an unfair bargaining position. The courts have therefore deferred to Indian interpretations when construing the terms of treaty "bargains" with the United States. Switching the presumption

77. 105 S. Ct. at 3439.
78. See supra note 55 and accompanying text; see also the Eighth Circuit's similar holding in Red Lake Band, supra note 41.
79. 105 S. Ct. at 3439.
80. See supra notes 2-4 and accompanying text.
81.

In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that emparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.


82. Note, supra note 81, at 425. Indeed, Red Lake could have been decided as abrogating the Indians hunting and fishing rights even if deference had been given to the Indians' interpretation. There was strong evidence of congressional intent to abrogate those rights on the ceded lands: Congress opened the lands for settlement immediately, and in subsequent actions since the 1904 Cession, the State of Minnesota has consistently enforced its gaming laws against Band members who hunt and fish in the area ceded in 1889 and 1904. 446 F. Supp. at 138.
effectively switches the burden of proof in questions of interpretation. Because most Indian treaties are old, evidence of intent can be difficult to find. Consequently, proving intent may be almost impossible. In many cases, therefore, the new rule of interpretation may seriously diminish the number and scope of Indian treaty rights.

As the dissenting opinion carefully observed, the historical evidence in Klamath Indian Tribe strongly favored the Indians. Even though the government acknowledged that the hunting grounds on the ceded lands were important to the Indians,83 and that the land was of little agricultural value,84 the Klamath Tribe did not ask for compensation.85 This omission strongly suggests that both the Tribe and the Boundary Commission understood that the 1901 Cession Agreement was not intended to abrogate hunting and fishing rights on the ceded lands.

The subsequent history also supports the Klamath Indians' position. Only one percent of the land outside the erroneous Thiel survey had been settled before the cession in 190186 and most of the ceded land was placed in national parks or forests, not opened for settlement.87 The Klamath Indians also continued to hunt and fish on the ceded land for over fifty years without any interference from state game officials.88

Justice Marshall correctly points out that the majority does not explain why the language of the Cession Agreement must be understood in terms of the structure of the 1864 Treaty.89 The more sensible approach would be that:

83. See supra note 76 and accompanying text. The central importance of these hunting and fishing rights was known to the courts as early as 1956 when the Klamath first sought relief from the interference of State Game officials on the former reservation lands. The district court found that at the time the 1864 Treaty was negotiated, the Tribe
hunted and trapped throughout the area set aside in [the] treaty without restriction. They hunted and ate grizzly bear, brown bear, deer, elk, antelope, beaver, racoon, badger and the Modoc also hunted and ate fox, coyote, wolf, puma, wildcat, skunk, porcupine, rabbit, groundhog and gopher. The Klamath Tribe also hunted coyotes, grey-wolves, foxes, badgers, wildcats, rabbits and various fur-bearing animals which furnished blankets and clothing, and swans, geese, ducks and wading birds, the majority of which were used by the tribes as food in various ways, the skins of swans, geese, and other birds with especially fine down being made into feather blankets, swaddling clothes, etc.

Klamath and Modoc Tribes v. Maison, 139 F. Supp. 634, 636-37 (1956), aff’d in part, rev’d in part, 338 F.2d 620 (9th Cir. 1964) and reaff’d in Kimball I, 493 F.2d at 566 n.4.

84. Klamath Boundary Commission Report, supra note 12, at 11. The Ninth Circuit in United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), aff’g as modified, 478 F. Supp. 336 (D. Or. 1979), cert denied sub. nom. Oregon v. United States, 104 S. Ct. 3536 (1984), found that the dual purpose of the 1864 Treaty was “to convert the Indians to agricultural way of life” and “to guarantee continuity of the Indians’ hunting and gathering lifestyle.” Id. at 1409.

85. See supra note 75 and accompanying text.
86. See supra note 10.
87. See supra note 19 and accompanying text.
89. 105 S. Ct. at 3435.
[A]n inquiry into the 1901 Agreement's meaning would focus, not primarily on the formal structure of the 1864 Treaty—leaving both documents abstracted from their actual purposes and historical contexts—but instead on the problems that arose since 1864 that gave rise to the need for the 1901 Agreement. Certainly, the latter approach is better suited to the goal of determining the purposes of the parties, and especially, to the goal of determining the understandings of the Tribe.\textsuperscript{90}

The argument in the majority opinion that the granting language in the 1864 Treaty and the granting language in the 1901 Cession Agreement were similar and should therefore have the same effect\textsuperscript{91} ignores the sharply different language in Article IV of the 1901 Cession Agreement that "nothing in this agreement shall be construed to deprive the said Klamath . . . of any benefits to which they are entitled to under existing treaties."\textsuperscript{92}

Another troubling aspect of the majority opinion is Justice Stevens' argument that because the Cession Agreement diminished the boundaries of the reservation, to allow the Klamath Indians to hunt and fish outside the reservation would be a "glaring inconsistency" with the 1864 Treaty requirement that the Tribe stay within the reservation absent permission.\textsuperscript{93} If, however, the Tribe had retained hunting and fishing rights in the ceded lands, then the federal government's acknowledgment of these rights can be considered as granting the Klamath permission to leave the original reservation area.

### B. Environmental Concerns

Although the courts did not address the environmental issues related to this case, and focused solely on questions of treaty interpretation,\textsuperscript{94} the increased enforcement by State game officials concerned about significant decreases in the wildlife population in the disputed area helped spark this litigation. The ceded area at issue in this litigation is part of a critical wintering range for mule deer in southern Oregon. At the time of the termination of the Klamath Indian Reservation in 1954, the deer population in this range was at a historical high of 40,000.\textsuperscript{95} The mule deer population remained at high numbers until 1969 when a sharp decrease occurred. This decrease was attributed by the Oregon Department of Fish and Wildlife to three factors: a 1969 ban on the use of toxicants on predators, two consecutive hard winters, and Indian

\textsuperscript{90} Id. at 3436.
\textsuperscript{91} See supra notes 48-49 and accompanying text. This argument was rejected by the lower courts. See supra notes 28-29 and accompanying text; 729 F.2d at 612.
\textsuperscript{92} 1901 Cession Agreement, supra note 16, at 368.
\textsuperscript{93} See supra notes 57-59 and accompanying text.
\textsuperscript{94} Cf Kimball II, 590 F.2d at 776-77.
\textsuperscript{95} Telephone interview with Sande Schmidt, Native American Program, Oregon Legal Services Corp., Counsel for Respondent (May 1, 1986).
hunting practices. Indian hunting practices include using spotlights at night to hunt deer. This practice is not against the tribal game code, but is contrary to Oregon State Law. State Fish and Wildlife wardens have attempted to regulate this practice. Before the decision by the Supreme Court in *Klamath Indian Tribe*, the mule deer population was seventy five to eighty percent below what the Oregon Department of Fish and Wildlife thought the optimal level should be. Since the Supreme Court decision and renewed enforcement of the Oregon game laws, the deer population has increased to 23,000 to 24,000 mule deer wintering in the Fort Rock and Silver Lake area; a number ten percent over the Department of Fish and Wildlife's desired level. If the State of Oregon is correct that Indian hunting practices reduce mule deer populations to undesired levels, then this Court's decision could lead to better management of the deer.

**CONCLUSION**

*Klamath Indian Tribe* could have far-reaching implications for Indian treaty interpretation as other courts follow the Supreme Court's new rule of interpretation when interpreting treaties. Many other valuable treaty rights apart from hunting and fishing rights could be at stake. For example, losing hunting and fishing rights can lead to the loss of reserved water rights guaranteed for minimum stream flows.

The *Klamath Indian Tribe* decision also reveals the tension between...
the longstanding rights of Indians to hunt and fish on public lands and
the growing concern for protection and management of environmental
resources. In the Court, this conflict culminated in the wholesale rejec-
tion of Indian rights. A better result could have been reached if the Kla-
math Indians had negotiated a management agreement with the Oregon
State Department of Fish and Wildlife to preserve the balance of humans
and nature in the Tribe's native region.102

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102. In *Kimball II*, where the Ninth Circuit found that the State has authority to regulate
treaty hunting, fishing, and trapping rights on the former Reservation *only* for conservation
purposes, the court “urge[d] the appropriate State officials . . . to meet with the representa-
tives of the Klamath Indians in an effort to promulgate mutually satisfactory regulations for
the management of the fish and game resources on the ancestral reservation lands.” 590 F.2d
at 777 n.18.