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Regulation of Treaty Indian Fishing

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death statute to spell out that parental suffering may be considered and that majority is not a cut-off line for damage recovery would allow more adequate awards. In addition, legislative action removing the dependency requirement is needed. The recent amendment to the child-death statute is a step in the direction of curing multiple ills in the entire wrongful death situation—but only that.

REGULATION OF TREATY INDIAN FISHING

On December 26, 1854, the Treaty of Medicine Creek[1] was concluded between the United States[2] and nine western Washington Indian tribes.[3] The Indians ceded to the United States all rights in a large portion of their tribal lands,[4] but reserved the "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[5] Whatever the representatives of the United States or the Indian chiefs meant by this clause has been lost in antiquity. It is certain that they could not have foreseen the acrimony[6]

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an inference that such recovery is not contemplated by the statute. While the general provision for "fair and just" awards avoids implication from the concurrent specific enumeration of some elements *(see* note 79 *supra),* it might still be suggested that if the legislature intended to contradict a long-standing common law rule it would have done so explicitly. *(See* note 73 *supra.)*

Moreover, it is not certain that the Washington court would reconsider its restrictive construction of what is contemplated by a "fair and just" award. (*See* Penoza v. Northern Pac. R.R., 215 Fed. 200 (W.D. Wash. 1914), discussed note 51, *supra.*)

[1] Treaty with Nisquallys, Dec. 26, 1854, 10 Stat. 1132.

[2] Acting for the United States was Isaac I. Stevens, Governor of Washington Territory.

[3] The Indian tribes signing the treaty were the Nisqually, Puyallup, Steilacoom, Squak sin, S'iltomamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish.

[4] The Indians ceded approximately 2,240,000 acres and reserved reservations comprising 3840 acres. *See* AMERICAN FRIENDS SERVICE COMMITTEE, AN UNCOMMON CONTROVERSY 23 (1967). The Indians received from the government $35,750, or about 1.6 cents per acre.

[5] Treaty with Nisquallys, Dec. 26, 1854, 10 Stat. 1132, art. III.

[6] The Indians' claims to the right to fish free of state regulation have been countered by the demands of commercial and sport fishermen that the Indians' fishing be subjected to state regulation. *See Hearings on S.J. Res. 170 and S.J. Res. 171 Before Subcomm. on Indian Affairs,* 88th Cong., 2d Sess. (1964), especially app., at 211-29. The claims of the Indians have become something of a civil rights cause celebre, with Dick Gregory and Marlon Brando participating in "fish-ins" protesting state regulation of treaty Indian fishing. *See* AMERICAN FRIENDS SERVICE COMMITTEE, AN UNCOMMON CONTROVERSY 109-13 (1967). The latter reference contains an excellent, though not wholly unbiased, account of the entire controversy over state regulation of treaty Indian off-reservation fishing. It concentrates primarily on the Puyallup, Nisqually, and Muckelshoot tribes, and delves deeply into the historical and sociological aspects of the controversy, while placing a lesser emphasis on the legal issues.

or the legal battles[7] that it would cause many years later when the Indians, in circumstances vastly changed from 1854, would invoke it demanding the right to fish free of state regulation. It is equally certain that the Indians could not have conceived that one hundred years later over a million people would populate the Puget Sound Basin,[8] or that fishing would be an important contributor to the economy of those million people.[9] They also could not have conceived that many of the salmon which their descendants now claim the right to catch unrestrictedly would be hatched and released at state hatcheries[10] operated under a state conservation program.

Appellants in the principal case were members of the Puyallup Tribe,[11] one of the signatories to the Treaty of Medicine Creek. Claiming immunity from state conservation regulations, the Indians persisted in fishing at their "usual and accustomed grounds" in violation of state regulations[12] forbidding commercial net fishing in rivers of the state. The Washington State Departments of Game and Fisheries brought a declaratory judgment action[13] to determine whether

[7] The legal controversy over this clause, or ones very similar in other treaties, has enveloped the state courts of Idaho and Washington, the Court of Claims, the Ninth Circuit Court of Appeals, and the United States Supreme Court. *See, e.g.*, State v. Arthur 74 Idaho 251, 261 P.2d 135 (1953); State v. McCoy, 63 Wn. 2d 421, 387 P.2d 942 (1963); Makah Indian Tribe v. United States, 151 Ct. Cl. 701 (1960); Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963); Tulee v. Washington, 315 U.S. 681 (1942).

[8] The population of the Seattle metropolitan area in 1960 was 1,107,213. 1966 WORLD ALMANAC 381.

[9] The average catch value of the Washington state commercial salmon catch for the years 1963-64 was $8,769,000. The average processed value was $15,473,000, and the average retail value was $21,856,000. AMERICAN FRIENDS SERVICE COMMITTEE, AN UNCOMMON CONTROVERSY table 4 (1967). The value of commercial fishing vessels and gear in 1956 was estimated at $31,408,698. WASHINGTON STATE DEP'T OF FISHERIES. FISHERIES, 203 (1960). The value of the salmon sport fishery is not capable of precise measurement. However, in 1963 approximately 1,130,000 salmon were caught by the 1,467,000 salmon fishermen in the state. 73 WASHINGTON STATE DEPARTMENT OF FISHERIES ANN. REP. 43 (1963).

[10] There are two fish hatcheries located on tributaries of the Puyallup River. One hatchery is operated by the Department of Fisheries and the other by the Department of Game. *See* Brief for Respondent at 6, Department of Game v. The Puyallup Tribe, Inc., 70 Wash. Dec. 2d 241, 422 P.2d 754 (1967).

[11] The Puyallups are a tribe of approximately 340 members, according to the testimony given by a member of the tribe at congressional hearings. *Hearings on S.J. Res. 170 and S.J. Res. 171 Before the Subcomm. on Indian Affairs,* 88th Cong., 2d Sess., at 119 (1964). *See also,* AMERICAN FRIENDS SERVICE COMMITTEE, AN UNCOMMON CONTROVERSY 58 (1967).

[12] *See* Brief for Respondent at 4, 5 *supra* note 10. *See generally* Wash. Admin. Code, tit. 220, chs 20-48.

[13] The Indians objected to the state's bringing of a declaratory judgment action instead of proceeding individually against the Indians in criminal actions. The reason for their objection was the differing burden of proof. In both types of actions, however, the issue as to the extent of Indian treaty rights is the same. The court dismissed the objection stating that a multiplicity of arrests was un-

the Indians enjoyed immunity from state fishery regulation. The trial court held that members of the tribe had no treaty rights and therefore no immunity. It permanently enjoined the Indians from fishing in any manner contrary to state law. On appeal, a divided Washington Supreme Court reversed and remanded. *Held:* Treaty Indians do possess treaty off-reservation rights to fish at "usual and accustomed grounds," but such fishing is subject to state fishing laws reasonable and necessary to preserve the fishery. *Department of Game v. The Puyallup Tribe, Inc.*, 70 Wash. Dec. 2d 241, 422 P.2d 754 (1967), *cert. granted*, 36 U.S.L.W. 3255 (U.S. Dec. 19, 1967).

Rejecting the state's contention that the Indian treaty was not viable,[14] a majority of the court[15] stated that a treaty entered into by the federal government could not be repudiated by the state. How-

necessary to determine whether the Indians have immunity from certain state conservation regulations.

[14] The state claimed that because the Indians, at the time of the signing of the treaty, had only aboriginal, and not legal, title to the ceded land, they therefore gave no consideration for the promises of the United States. The Indians, however, in the treaty pledged their dependence on the United States, promised "to be friendly with all citizens thereof," and promised not to make war with other tribes. Treaty with Nisquallys, Dec. 26, 1854, 10 Stat. 1132, art VIII. These promises could easily serve as consideration. Also, as the court in the principal case pointed out, if the treaty were thought desirable by the United States, and entered into by it, it is binding on the state, whether in actuality it was necessary or not.

[15] In addition to the majority's opinion there were two dissenting opinions and one opinion partly concurring and partly dissenting. One dissent expressing the views of three judges, argued that the trial court's injunction was proper because the state's power to regulate fishing applied to Indians equally with other citizens. The argument also stressed that *all* the state's conservation laws and regulations are necessary for fisheries preservation, and that, under the holding of the majority, state laws when necessary apply to treaty Indian fishing. Therefore, the trial court's injunction was consistent with the majority's holding and should have been affirmed. The argument is erroneous. As to legislative enactments, there is no requirement that they be appropriate or necessary, Olson v. Nebraska, 313 U.S. 236 (1941), so long as they do not violate a specific federal constitutional prohibition or a valid federal law. Ferguson v. Skrupa, 372 U.S. 726 (1963). As to state administrative regulations, the State Game commission is empowered to promulgate "reasonable rules and regulations governing the time, place and manner, or prohibiting the taking of... game fish...". WASH. REV. CODE § 77.12.040 (1955). There is no requirement that such regulations be necessary for the preservation of the fisheries.

The holding of the court was that the state law, *as applied to treaty Indian fishing*, must be necessary. A conservation law might be necessary to preserve a fishery against depredations by the general public; but at the same time, it might be wholly unnecessary to apply the law to the fishing of a few treaty Indians in order to preserve a fishery.

One of the dissenters in a separate opinion stated that the treaty was merely designed to prevent discrimination against the Indians and did not reserve them any rights not shared by others.

Finally one judge concurred in the holding that the Indians do possess treaty rights, but stated that, because the rights were granted by the federal government, treaty Indian fishing cannot be regulated by the state to any extent. He also argued that if the Secretary of the Interior issued regulations governing Indian off-reservation fishing rights, as he had indicated that he planned to do, 30 Fed. Reg. 8969 (1965), the state would be preempted from regulating treaty Indian fishing.

ever, the court reasoned that the rights of the treaty Indians[16] did not extend to the right to fish in such a manner as to destroy the fishery because the state has the sovereign power to prevent destruction of a natural resource within its borders. The court concluded that the state may properly impose on the treaty Indians reasonable regulations necessary to the preservation of the fishery.[17]

The court further stated that when treaty rights and conservation laws are in "apparent conflict", a state law is valid if it is necessary to conserve the fishery. This reasoning is unnecessarily complex. Treaties, including Indian treaties, are the supreme law of the land.[18] Conflict between treaty rights and state law must be resolved in favor of the former. The conceptualization of a conflict is unnecessary, however, to the court's resolution of the case. If fishing by treaty Indians is inherently subject to state conservation laws necessary for the preservation of the fishery, as the court held, then such laws do not *conflict* with the Indians' treaty rights.[19] The issue before the court was the extent of the immunity from fisheries regulation enjoyed by a treaty Indian.

The permissible extent of state regulation of treaty Indian off-reservation fishing is not clear. Until 1942, it was considered settled that the Indians had reserved no rights which afforded them immunity from state fishing regulations, but only easements over state and

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[16] This note does not consider issues raised by the question: Who is a treaty Indian?

[17] The court remanded the case so that the trial court's injunction, which had enjoined the Indians from fishing in violation of state laws, could be conformed to the court's holding. The court stated that specific acts should be enjoined on the basis that there has been a violation of a statute or regulation shown to be reasonable and necessary for the preservation of the fishery. One member of the court felt the state had failed to show that it was necessary that treaty Indian fishing be subject to the conservation laws involved. The majority, however, felt the state had clearly shown that continued net fishing by the Indians would destroy the fishery.

[18] *See* Worcester v. Georgia, 6 Pet. 515 (1832); Holden v. Joy, 17 Wall. 211 (1872). In 1871, Congress decreed:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided,* further, that nothing herein contained shall be construed to invalidate or impair the obligations of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

25 U.S.C. 71. Post-1871 agreements with the Indians, unlike the Treaty of Medicine Creek, are not treaties in the constitutional sense.

[19] It is difficult to understand why the court used such a statement. The state in its brief correctly resolved the matter by stating, "Once the quantum of rights granted by a treaty is defined, a state is powerless to further restrict or to amplify the 'right' as constitutionally defined." Brief for Respondent, *supra* note 10, at 62.

The court had ample legal basis for holding that the state has the power to regulate Indian fishing in order to preserve the fishery. *See* note 33 *infra.*

private property to enable them to fish.[20] Then the Supreme Court held in *Tulee v. Washington*[21] that a state could not require treaty Indians fishing at their usual grounds to purchase fishing licenses. State[22] and lower federal courts[23] have interpreted *Tulee* as indicating, contrary to earlier decisions,[24] that Indian off-reservation fishing is not completely subject to state conservation regulations.[25] Disagreement exists as to the scope of the immunity.

Further complicating the controversy are federal regulations recently promulgated by the Secretary of the Interior purporting to govern the exercise of the treaty Indians' off-reservation fishing rights.[26] This note will first determine the proper extent of state regulation of treaty Indian off-reservation fishing and then ascertain the effect of the federal regulations on the state's attempts to govern this fishing.

Four rules have been employed to determine the permissible extent of state regulation. These rules can be characterized as (1) the *absolute* rule, (2) the *indispensable* rule, (3) the *reasonable* rule, and (4) the *necessary* rule. All except the *reasonable* rule have been derived from *Tulee*. The reasonable rule has its origin in the case of *Kennedy v. Becker*.[27] The United States Supreme Court has granted *certiorari* in the principal case.[28] Because it may well base its decision on one of these rules, it is necessary to examine and evaluate them to determine which offers the best resolution of the overriding question as well as this particular controversy.

Derived from the Supremacy Clause,[29] the *absolute* rule prohibits the state from regulating treaty Indian fishing. Those who favor the rule argue that the treaty must be construed as the Indians understood

[20] *See, e.g.*, Kennedy v. Becker, 241 U.S. 556 (1916); State v. Towessnute 89 Wash. 478, 154 P. 805 (1916); *cf.* State v. Wallahee, 143 Wash. 117, 255 P. 94 (1927); United States v. Winans, 198 U.S. 371 (1904).

[21] 315 U.S. 681 (1942).

[22] *See, e.g.*, State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953); State v. Satiacum, 50 Wn. 2d 513, 314 P.2d 400 (1957).

[23] *See, e.g.*, Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169, (9th Cir. 1963); Makah Indian Tribe v. Schoettler, 192 F.2d 224, (9th Cir. 1951).

[24] *See* note 20 *supra*.

[25] The court in *Tulee* stated that the licensing statute was invalid because "it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." The statute did not charge the Indians for exercise of a right to an easement, but for exercise of a right *to fish*. *Tulee* resolved the question of whether the Indians reserved a treaty right to fish, but did not answer the question of the extent of Indian fishing immunity from state regulation.

[26] 32 Fed. Reg. 10434 (1967).

[27] 241 U.S. 556 (1916).

[28] 36 U.S.L.W. 3255 (U.S. Dec. 19, 1967).

[29] *See* Missouri v. Holland, 252 U.S. 416 (1920).

it,[30] assuming that in 1854 the Indians understood the treaty to reserve the absolute right to fish in any manner and at any time.[31] The evidence supporting this interpretation is far from conclusive.[32] It neither proves nor disproves that the Indians in 1854 understood the treaty to reserve to them an absolute right to fish at their usual places.[33]

Such questionable evidence must be balanced against policy arguments in favor of the state's power to preserve the existence of its fisheries.[34] Because spawning salmon are concentrated within a com-

[30] This principle of construction has been accepted by the United States Supreme Court as a correct one. *See* United States v. Winans, 198 U.S. 371, 384 (1904) wherein the Court stated, "We will construe a treaty with the Indians as 'that unlettered people' understood it..." *See also* Seuffert Bros. Co. v. United States, 249 U.S. 194 (1918). *But see* Kennedy v. Becker, 241 U.S. 556 (1916).

[31] *See* State v. Satiacum, 50 Wn. 2d 513, 314 P.2d 400 (1957): *cf.* State v. Arthur 74 Idaho 251, 261 P.2d 135 (1953).

[32] In *State v. Arthur,* the court's only evidence as to the Indian's understanding of the treaty was an account of the proceedings of the council where the treaty was signed. This document, however, proves very little as to the Indians actual understanding. *See* State v. Arthur, 74 Idaho 251, 261 P.2d 135, 140 (1953). In *State v. Satiacum* the court mustered no evidence whatever as to the Indian's understanding complete immunity from state law. *See* State v. Satiacum, 50 Wn. 2d 513, 523, 314 P.2d 400, 410, (1957). The minutes of the council where the Treaty of Medicine Creek was signed also give no indication of what the Indians understood the treaty to reserve to them as regards off-reservation fishing rights. The sole reference to Indian fishing rights in the minutes is as follows:

> It was also thought necessary to allow them (the Indians) to fish at all accustomed places, since this would not in any manner, interfere with the rights of citizens, and was thought necessary for the Indians to obtain a subsistence.

U.S. DEP'T OF INTERIOR, OFFICE OF INDIAN AFFAIRS, FISHING, HUNTING AND RELATED RIGHTS OF CERTAIN INDIAN TRIBES IN WASHINGTON AND OREGON 330 (1942). The minutes give no hint as to whether the Indians regarded their off-reservation fishing rights as absolute, or whether they understood their off-reservation fishing to be subject, to some extent, to state regulation.

[33] The Supreme Court has also indicated that perhaps the Indians' understanding of the treaty is irrelevant in determining the scope of their reserved fishing rights.

> [I]t can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not.

Kennedy v. Becker, 241 U.S. 556, 563 (1915). This case involved the interpretation of a treaty concluded in 1797 between the Seneca Indians and Robert Morris and ratified by the United States. The treaty reserved to the Indians the right to fish on the ceded land. The Court held the Indian fishing to be subject, however, to state conservation laws.

[34] As to the existence of this power *see:* Geer v. Connecticut, 161 U.S. 519 (1896); Corsa v. Tawes, 149 F. Supp. 771 (D. Md.), *aff'd per curiam* 355 U.S. (1957). State v. McCoy, 63 Wn. 2d 421, 387 P.2d 942 (1963); Frach v. Schoettler, 46 Wn. 2d 281, 280 P.2d 1038, *cert. denied* 350 U.S. 838 (1955).

The theory that the state "owns" the fish and wildlife within its borders in trust for its citizens and hence may arbitrarily discriminate against non-citizens has been largely rejected. *See* Toomer v. Witsell, 334 U.S. 385 (1947); Takahashi v. Fish & Game Comm. 334 U.S. 410 (1947). These cases, however, do not deny the state's power to preserve its natural resources. They only require that the power be exercised in a non-discriminatory manner. "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an

paratively small area, even a few treaty Indians, unrestrictedly fishing with modern gill nets or with set drift nets extending the entire width of a river, could effectively decimate a run. A certain number of fish *must* get up the river to the spawning beds in order to perpetuate the species.[35] The *absolute* rule leaves the Indians free to destroy the fishery at will, without evidence that this result was intended by any of the signers of the treaty.[36]

The *indispensable* rule is less restrictive of state regulation than the *absolute* rule. Courts following the *indispensable* rule[37] have held that, for a state regulation to be validly applied to the treaty Indians' fishing, the state must show the regulation is indispensable in the sense that the fishery cannot be preserved by more stringent regulation of non-treaty Indian fishing. Such regulation would include, if necessary, complete curtailment of fishing by those not having treaty rights.[38]

Analytically the *indispensable* rule is unsound. The rule is derived from dictum in *Tulee*:[39]

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important natural resource." Toomer v. Witsell, 334 U.S. 385, 402 (1947).

[35] *See* State v. McCoy, 63 Wn. 2d 421, 387 P.2d 942, 946 (1963).

[36] The *absolute* rule has been adopted by only one court. *See* State v. Arthur 74 Idaho 251, 261 P.2d 135 (1953). The decision in State v. Satiacum, 50 Wn. 2d 513, 314 P.2d 400 (1957) was by an evenly divided court so the rule was not actually adopted. *See* Addendum to the decision, 50 Wn. 2d at 538. The rule has no basis in prior United States Supreme Court cases, and recent dictum indicates that the Court is not favorably inclined toward it. *See* Egan v. Organized Village of Kake, 369 U.S. 60, 75 (1962).

[37] The rule has been adopted by the Ninth Circuit Court of Appeals. *See* Maison v. Confederated Tribe of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963).

In the *Maison* case, the Indians brought a declaratory judgment action seeking to enjoin the Oregon State Game Commission from enforcing regulations prohibiting fishing on tributaries of the Columbia and Snake Rivers during part of the year against treaty Indians fishing at their usual grounds. The Indians contended that this state restriction on their fishing violated their rights guaranteed under a treaty very similar to the Treaty of Medicine Creek.

The court stated that "restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others." There was no necessity of restricting Indian fishing to preserve the resource because the state had not shown that exclusion of sports fishermen from the spawning grounds would not accomplish the same result. Therefore, the regulations were not "indispensable" and could not be applied to treaty Indian fishing.

[38] *See* Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963). The court stated that "the complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians." However, the same analysis could apply to commercial fishing in Puget Sound because commercial fishermen are no less subject to state regulation than sports fishermen. A vital question under the indispensable rule would be the definition of "spawning ground." If "spawning grounds" include all of Puget Sound, because the salmon when they enter the Sound are on their way to spawn, then the rule could preclude all commercial fishing.

[39] Tulee v. Washington, 315 U.S. 681, 685 (1942).

> The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program.

The Court thus stated that before the licensing statute, which was both revenue producing *and* regulatory, can apply to treaty Indian fishing it must be shown to be "indispensable" to the effectiveness of a state conservation program. *Tulee* does not support the proposition that before a purely regulatory statute can apply to Indian fishing the statute must be shown to be indispensable.

The *indispensable* rule is also unsound for reasons of policy. The rule correctly premises that the state has the inherent power to prevent a fishery from being destroyed by treaty Indian fishing,[40] but the rule reduces that power to a nullity. The state does not conserve fisheries for the sake of conservation. The state instead seeks the benefits of intelligent management. These benefits include commercial and recreational fishing, fisheries related industries, and tourism.[41]

Under the *indispensable* rule if a fishery is endangered, all commercial and recreational fishing by non-treaty Indians must be prohibited before treaty Indian fishing can be regulated.[42] By the time the state may validly exercise its power, all the benefits which it seeks to derive from such exercise are lost. The *indispensable* rule thus allows a state power to regulate treaty Indian fishing, but so limits the power as to render it vacuous.[43]

A third rule defining the permissible extent of state regulation of treaty Indian off-reservation fishing is the *reasonable* rule. Under this rule, treaty Indian fishing is subjected to all reasonable state conservation laws. The only requirement of the rule is that the law be

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[40] *See* note *33, supra.*

[41] *See* note 9, *supra.*

[42] The Indians could easily by unregulated fishing endanger the fishery. The state would then have to curtail all non-Indian fishing on the stream and perhaps near its mouth. The Indians could then allow just enough escapement of salmon to perpetuate the run. Since the fishery would not then be endangered the state could not regulate the Indians' fishing, but at the same time could not permit anyone else to fish, because this added fishing would place the fishery in danger.

[43] The state would be in effect preserving the fishery for the benefit of the Indians. Whether the state would consider the exercise of its power of preservation worthwhile in such a situation is questionable. Certainly it might consider relocating the two fish hatcheries now located on the Puyallup if all non-treaty Indians were excluded from fishing the stream. The court in the principle case specifically rejected the *indispensable* rule as a "completely unworkable standard" which "would make the competent exercise of the state's inherent power of preservation an impossibility."

reasonable. Although the rule has not been accepted since *Tulee*, it nevertheless requires examination.

Advocates of the rule admit, as they must after the Supreme Court's decision in *Tulee*[44] that the Indians reserved not only an easement of access to their usual fishing grounds, but also a right to fish on these grounds. However, under the *reasonable* rule, these fishing rights are merely a guarantee of review of state regulations for due process. The treaty clause becomes a redundancy. The essence of the Indians' reserved fishing rights is the degree of immunity which these rights afford from state regulation. To say that Indian fishing is subject to all state conservation laws is to say in effect that the Indians reserved no treaty rights to fish. The *reasonable* rule obliterates any meaningful distinction between the Indians' fishing rights and those of other citizens,[45] although the Supreme Court has stated that the treaty "conferred . . . continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places'."[46]

The fourth rule is the *necessary* rule adopted in the principal case.[47] The rule occupies a middle ground with the *indispensable* rule between extremes of complete regulation and no regulation. It differs, however, from the *indispensable* rule in that the state, in showing a particular law to be necessary, need not prove that more stringent regulation of non-treaty Indian fishing will not preserve the fishery. Close examination of the *necessary* rule reveals that it offers a better resolution of the problem than do the three rules previously discussed.

Under the *necessary* rule, treaty Indian fishing is subject, as it is under the *indispensable* and *reasonable* rules, to the state's inherent power to preserve a fishery. The *necessary* rule, however, allows judicial review of fisheries regulations concerning Indians. The test for review is more severe than legislative reasonableness. The rule requires the state, before regulating treaty Indian fishing, to show

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[44] *See* note 25 *supra*.

[45] The only difference between the two sets of rights, under the *reasonable* rule, is that the treaty Indians do not have to purchase a fishing license to exercise their rights to fish at the "usual and accustomed grounds." Once the non-Indian has purchased a license, then the two sets of rights to fish become equal.

[46] Tulee v. Washington, 315 U.S. 681, 684 (1942).

[47] The rule is derived from a dictum in *Tulee* wherein the Court stated that "the treaty leaves the state free to impose on the Indians all laws of a purely regulatory nature . . . necessary for the conservation of fish." This statement is supportive of the rule. Had the Court wanted to allow the state to impose *all* regulatory conservation laws on the Indians' fishing, the word "necessary" was wholly superflous. Taking the statement at its face value, the Court must have meant that the state may impose on the Indians' fishing only those laws which are indeed necessary for the conservation of fish.

that the regulations are necessary to preserve the particular fishery.[48] This continuing judicial review on the federal question of the necessity of regulation amply protects the Indians' treaty rights to fish from derogation by the state.

The Indian fishing rights, under the *necessary* rule, are not reduced to a meaningless fiction, as they are under the *reasonable* rule. Their fishing is immune from state conservation laws which, as applied to treaty Indian fishing, are not necessary for the preservation of the fishery.[49]

Nor does the *necessary* rule curtail the state in the exercise of its power of preservation, as does the *absolute* rule. The state need only show that the regulation in question is necessary, as regards treaty Indian fishing, for the fishery's continued existence.[50] If the state can show this, it may validly enforce the regulation on treaty Indians.

Because the state need not limit all nontreaty Indian fishing to make a showing of necessity, the state is able to maintain an effective conservation program[51] and to obtain the benefits which it seeks to obtain from the exercise of its power to preserve the fisheries. The *necessary* rule thus allows the Indians the exercise of a meaningful treaty right to fish, and at the same time allows the state effective exercise of its

[48] Because it is through its power of preservation that the state is able to regulate treaty Indian fishing, *see* Kennedy v. Becker, 241 U.S. 556 (1916); State v. McCoy, 63 Wn. 2d 421, 387 P.2d 942 (1963); Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963), the state ought to be required to show the necessity of the exercise of the power. Otherwise, the state, by simply invoking its power, could regulate treaty Indian fishing to whatever extent it wished.

[49] Indians would probably be forbidden under the *necessary* rule from violating state regulations forbidding commercial net fishing in state rivers. Two hundred Indians fishing commercially with modern gill nets could easily catch enough fish to endanger a salmon run. *See* State v. McCoy, 63 Wn. 2d 421, 387 P.2d 942 (1963). However, they would probably be allowed, under the rule, unrestricted subsistence fishing with hook and line, since it is unlikely that treaty Indians, fishing purely for subsistence, would endanger a fishery. *See* Judge Hill's concurrence in *State v. McCoy*: "[R]ights of the Indians to fish by the methods and with the gear in use at the time of the treaty cannot be suspended or abridged." Judge Hill, writing for the majority in the principal case, may incorporate this position in the *necessary* rule.

[50] This is not an impossible burden of proof. In the principal case the state introduced index counts from the Puyallup River, research data of the Department of Fisheries, and testimony of fisheries experts to show the effect of Indian fishing and the necessity of the state regulations. The court held that the state had clearly established that a regulation prohibiting the use of drift and set nets was necessary for the preservation of the fishery. For a case where the state failed to carry the burden of proving necessity see State v. James, 72 Wash. Dec. 2d 738, 435 P.2d 521 (1967).

[51] The Supreme Court in *Tulee* indicated that a state must be allowed to maintain an effective conservation program. A statute which is both revenue producing and regulatory may be applied to treaty Indian fishing if such statute is "indispensable to the effectiveness of a state conservation program."

power to preserve the fisheries. Of the four rules it is the only one which reaches an equitable balance between the Indians' treaty rights to fish and the State's interest in preserving its fisheries.

It is possible, however, that the principal case may not be decided by determination of the permissible extent of state regulation of treaty Indian fishing. It will undoubtedly be argued before the Supreme Court that federal regulations recently promulgated by the Secretary of the Interior which purport to govern the exercise of treaty Indian off-reservation fishing rights have preempted state regulation.[52] It is necessary to ascertain whether these regulations do preempt the state from regulating fishing by the treaty Indians on their "usual and accustomed ground."

The Secretary of the Interior does not have a "general power to make rules governing Indian conduct."[53] He does enjoy, however, a sort of general supervisory power over Indians. But this power is "simply a power to take administrative measures necessary for the execution of responsibilities and authorities otherwise more definitely fixed by statute or treaty."[54] The statutes granting this general supervisory power to take administrative measures "cannot be relied upon as grants of new power unrelated to the statutory responsibilities of the Department."[55] These statutes cannot be relied upon as authoriz-

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[52] Shortly after the principal case had been decided, the Secretary promulgated the regulations. 32 Fed. Reg. 10433 (1967). The regulations were published on July 10, effective either 30 or 60 days thereafter, depending upon the section involved.

[53] Organized Village of Kake v. Egan, 369 U.S. 60, 63 (1962); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 100-03 (1945). UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 54 (1958). In *Organized Village of Kake v. Egan,* the Court held that there was "no statutory authority under which the Secretary of the Interior might permit (the Indians) to operate fish traps contrary to state law." In this case there was no treaty involved, and the Secretary was relying for his power on general statutes which the Court said did not confer "a general power to make rules governing Indian conduct."

In Metlakatla Indian Community v. Egan, 369 U.S. 45, (1962), the Court stated that a statutory provision subjecting the Indians' reservation to regulations of the Secretary of the Interior was "unusual," and that no other "treaties or statutes which have come to our attention contained such a provision."

[54] Use of Allotted Indian Lands, 58 Interior Dec. 103, at 107 (1942).

[55] *Id.* These general statutes can be found at 25 U.S.C. § 2 (1964), 25 U.S.C. § 9 (1964); and 5 U.S.C. § 301 (1964). For an analysis of the powers which they confer on the Secretary, see 58 Interior Dec. at 106-107, 109. "(A)ctions which this Department purported to justify on the basis of 'general supervisory powers' have been repeatedly condemned by the Federal courts as unauthorized and unlawful." 58 Interior Dec., at 109. According to correspondence with George D. Dysart, Assistant Regional Solicitor of the Department of the Interior, the regulations were issued under the above statutory authority. *See* Letter from George D. Dysart to *Washington Law Review,* Feb. 12, 1968, on file in *Washington Law Review* office.

ing the regulations in the instant case because the Treaty of Medicine Creek fixed no power in the Secretary to regulate treaty Indian fishing.[56] Congress has not subsequently conferred that power.[57] The Deparment of Interior itself has specifically disclaimed such authority in the past.[58] Although Congress has the power to authorize the Secretary to promulgate regulations governing the exercise of the Indians' treaty fishing rights, it must be concluded in the absence of such authorization[59] that the regulations are void and can not preempt the state.[60]

The Secretary's power to regulate is derived solely from the treaty,

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[56] Treaty with Nisquallys, Dec. 26, 1854, 10 Stat. 1132, art. III. The treaty is completely silent as to action to be taken by the Secretary or the President as regards the treaty fishing of the Indians. This is in contrast to many other treaties where, when it was thought necessary, power was conferred on the President or the Secretary to make regulations. *See e.g.*, Treaty with Menomonies, Feb. 8, 1831, 7 Stat. 342; Treaty with the Arapahoe and Cheyenne, Feb. 18, 1861, 12 Stat. 1163; Treaty with Poncas, Mar. 12, 1858, 12 Stat. 997.

[57] *See Hearings on S.J. Res. 170 and S.J. Res. 171 Before the Subcomm. on Indian Affairs*, 88th Cong., 2d Sess., at 2 (1964). S.J. Res. 171 would have authorized the Secretary of the Interior to extinguish the Indians' treaty rights by compensation. In the resolution it was stated:

> Whereas Congress could by legislation resolve the issues either (1) by prescribing the kind of regulation that may be imposed on the exercise of these treaty rights... or (2) by providing for... payment of compensation therefore....

From this it might be inferred that the drafters of the resolution considered it necessary for Congress to authorize the Secretary to issue regulations governing the exercise of the Indians' treaty rights. S.J. Res. 170 would have authorized the states to enforce laws of a purely regulatory nature on the Indians' fishing. Neither of the two bills passed, nor have any bills dealing with the problem been since introduced.

[58] In testimony given before the hearings on the Senate Subcommittee on Indian Affairs in 1964, a representative of the Department of the Interior stated that without specific congressional authorization the Secretary would have no authority to regulate the exercise of treaty Indian fishing rights either on or off the reservation. This authority, it was stated, lay with the tribes. The Puyallup Tribe has itself enacted regulations governing the exercise of the Indians' treaty fishing rights. *See Hearings on S.J. Res. 170 and 171, supra* note 56, at 15-16, 120-21.

Obviously the Secretary now believes that he does have authority to issue the regulations without specific congressional authorization. Admittedly, there are in a few cases dicta which might support such a broad scope of authority. *See* United States v. Birdsall, 233 U.S. 223, (1914); United States *ex rel.* West v. Hitchcock, 205 U.S. 80 (1907). "But it will be found that in each case where such language appears there is some specific statutory authorization for departmental action," 58 Interior Dec. at 109, and the general power of the Secretary is invoked only to fill in "gaps of detail." In the treaty in the principal case, there is no authorization "for departmental action," let alone "gaps of detail." The treaty in Articles IV, V, and VI does provide for action by the President in removing the Indians to their reservations, in disbursing funds to the Indians, and in allotting to individual Indians land on the reservation. As to these directives, there may be authorization for the President or the Secretary to fill in "gaps of detail." But in Article III, regarding the Indians' reserved right to fish, the treaty is wholly silent as to any administrative action to be taken. *See* F. COHEN, HANDBOOK OF FEDERAL LAW 103 where it is stated:

> The claim of administrative officers to plenary power to regulate Indian conduct has been rejected in every decided case where such power was not invoked simply to implement the administration of some more specific statutory or treaty provision.

[59] *See* note 57 *supra*. During this period of congressional silence, it was generally believed that without authorization by Congress the secretary would not regulate.

as he has no congressional authority to impair the Indians' rights under the treaty. The regulations themselves state that nothing in them shall be deemed to abrogate or modify the Indians' treaty rights. If the federal regulations are held by the Supreme Court to preempt state regulation, their scope cannot exceed that of valid state regulations. Regardless of who has authority to regulate their fishing, the scope of the Indians' immunity from governmental regulation is defined by the rule which the particular court, state or federal, has previously used in interpreting the treaty. If the adjudication to enforce the federal regulations is brought in state court, the *necessary* rule will be followed. If it is brought in federal court, the *indispensable* rule will be followed. When federal officials enforce federal regulations, it is likely that the adjudication will take place in federal court, where the *indispensable* rule is followed.[61] But adherence to this rule is not warranted by precedent, logic, or policy.[62] Hence, the Court, before it validates the federal regulations ought to examine closely to determine whether the Secretary has exceeded his powers in promulgating them.

As a matter of policy, this conclusion is even more warranted. The conservation of fisheries vitally concerns the state both in its own right and as *parens patriae*. The state, not the federal government, has developed a comprehensive conservation program and the expertise necessary to administer it. Recognizing this, Congress has historically left the regulation of fisheries to the state.[63]

See Hearings on S.J. Res. 170 and 171, supra note 56, at 15-16; *cf.* 58 Interior Dec., at 107-09. A reasonable inference from the accepted interpretation and Congressional inaction is that Congress did not intend such fishing to be so regulated.

[60] The amicus brief of the United States submitted to the United States Supreme Court in the principal case assumes the validity of the regulations without discussion. Brief for United States as Amicus Curiae, The Puyallup Tribe v. Department of Game of the State of Washington, 70 Wash. Dec. 2d 241, 422 P.2d 754 (1967), *cert. granted*, 36 U.S.L.W. 3255 (U.S. Dec. 19, 1967). The regulations at the present time only call for identification of fishing equipment, for the issuance of identification cards to Indians listed on a tribal roll approved by the Secretary, and prescribe the procedure for the promulgation of further regulations. The Secretary has authority to promulgate a tribal roll for the purpose of distributing tribal funds, 25 U.S.C. § 163 (1964), but in the absence of express legislation to the contrary an Indian tribe has authority to determine for tribal purposes its own membership. UNITED STATES DEP'T. OF THE INTERIOR, FEDERAL INDIAN LAW 414 (1958).

[61] *See* Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963).

[62] *See* p. 677, *supra*.

[63] *See* Royce & Hansen, *Food Fishery Policies in the Western United States*, 43 WASH. L. REV. 231, 237 (1967). The federal government's role has been largely that of aiding state development of fisheries through research and subsidy. *See* Anadromous Fish Act of 1965, 16 U.S.C. § 757a (1965), wherein Congress authorized the Secretary of the Interior to enter into cooperative agreements with one or more states for the purpose of conserving and developing anadromous fish re-

A final point mitigating against preemption should be made. Under treaties with Canada and Japan,[64] the United States has the responsibility of carrying out "necessary conservation measures"[65] with regard to salmon originating in rivers of this country.[66] To effectuate this responsibility the federal government has relied upon state fisheries management and regulation. The state's interest, therefore, is the federal interest. Preemption of the state regulations by the Secretary's regulations, and the consequent adherence to the *indispensable* rule, would, by hamstringing the state, seriously prejudice the United States in carrying out its treaty responsibilities in the North Pacific.

In such a situation as this, courts should be wary of holding that federal regulations of doubtful utility promulgated without a clear congressional mandate preempt state regulations. State regulatory interests in fisheries are intense, and the only contrary federal interest is that of protecting Indian rights. Administrative regulations so tenuously grounded as these should not preempt the state.

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sources. *See also* the Commercial Fisheries Research and Development Act, 16 U.S.C. §79 (1964), wherein the Secretary is authorized to cooperate with the States through their state agencies in carrying out projects designed for research and development of commercial fisheries resources. The Act makes federal grants available to the states upon approval of a development plan by the Secretary.

National fisheries policy has been aptly summarized thusly: "National action should be reserved for residual participation where State and local governments are not fully adequate, and for continuing responsibilities which only the National Government can undertake" U.S. DEP'T OF THE INTERIOR, TRIDENT—A LONG RANGE REPORT OF THE BUREAU OF COMMERCIAL FISHERIES 31 (1963).

[64] International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 U.S.T. 380, T.I.A.S. No. 2786; Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fishery of the Fraser River System, May 26, 1930, 50 Stat. 1355, T.S. No. 918.

[65] International Convention for the High Seas Fisheries of the North Pacific Ocean, *supra* note 63, art. V, §2. *See generally,* NORTH PACIFIC FISHERIES SYMPOSIUM, 43 WASH. L. REV. 1-307 (1967)).

[66] These treaties cannot, of course, be regarded as a source of power for the Secretary to regulate the Indians' fishing. They contain no mention of how the United States' responsibility to conserve the fisheries is to be effectuated. Congressional inaction in the face of state implementation should be regarded as approval of such implementation.