Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study

Richard A. Finnigan

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Indian and Aboriginal Law Commons, and the Natural Resources Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol51/iss1/4

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
INDIAN TREATY ANALYSIS AND OFF-RESERVATION FISHING RIGHTS: A CASE STUDY

In *United States v. Washington,* Judge Boldt held that treaties negotiated in the 1850's by Territorial Governor Isaac Stevens, on behalf of the federal government, reserved to the Indians of western Washington the right to fish off reservation for salmon and steelhead in their "usual and accustomed places." These treaties stated that the right is to be exercised "in common with" non-Indian fishermen. In a critical examination of precedent which clarified much of the prior uncertainty concerning Indian treaty analysis, Judge Boldt interpreted this treaty language to require that the Indians be given an *opportunity to harvest* 50 percent of the salmon and steelhead runs. The Court of Appeals for the Ninth Circuit affirmed Judge Boldt's decision.

1. 384 F. Supp. 312 (W.D. Wash. 1974), aff'd and remanded, 520 F.2d 676 (9th Cir. 1975).
2. The following treaties were involved: Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 (1854); Treaty of Point Elliot, Jan. 22, 1855, 12 Stat. 927 (1859); Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933 (1859); Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939 (1859); Treaty with the Yakimas, June 9, 1855, 12 Stat. 951 (1859); Treaty with the Quinault, *et al.* (Treaty of Olympia), July 1, 1855, Jan. 25, 1856, 12 Stat. 971 (1859). The salient provisions of these treaties are virtually identical.
3. The court defined this area as "that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area, [including] the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the off-shore waters adjacent to those areas." 384 F. Supp. at 328. Involved were the treaty fishing rights of the Hoh, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, Skokomish, Lummi, Quinault, Sauk-Suiattle, Squaxin Island, Stillaguamish, and Upper Skagit River tribes and the Yakima Nation. *Id.* at 327 nn.1 & 2.
4. The decision actually applied to all "anadromous fish," which the court defined as a fish which spawns or is artificially produced in freshwater, reaches mature size while rearing in saltwater and returns to freshwater to reproduce, and which spends any portion of its life cycle in waters within the Western District of Washington.
384 F. Supp. at 405.
5. *See* text accompanying note 13 *infra.*
6. *Id.*
7. 384 F. Supp. at 343. The right was stated as an *opportunity* to harvest, not as an absolute *right* to, 50% of the run. The run was defined in terms of harvestable fish: "The approximate number of anadromous fish which is surplus beyond adequate production escapement and Indian needs as defined in the Decision; that is, the number remaining when the adequate production escapement and Indian needs are subtracted from the run size." *Id.* at 405. Indian needs are defined as those catches occurring on reservations, or for ceremonial or consumption purposes. *See* notes 147–48 and accompanying text *infra.*
In reaching his conclusions, Judge Boldt emphasized the sociological, historical and political background of the treaty signings and the evolution of the controversy, as well as legal precedent. This comment will examine the district court's decision in *Washington* by analyzing the factors involved in and the legal history of Indian treaty interpretation in the context of an offreservation activity, and by focusing upon the mode of analysis employed by Judge Boldt. Initially, a brief review of the historical background of the controversy will be useful in understanding the decision.

**I. NORTHWEST INDIAN TREATY FISHING RIGHTS HISTORY IN A NUTSHELL**

Before the arrival of white men in the Pacific Northwest, salmon were a central element in the culture of the Indians; the fish were a part of their spiritual life, were vital to their physical well-being, and served as a basis of their pre-capitalistic economy. The pre-treaty Indians of western Washington traveled to favored fishing grounds in family units during the spring, summer and autumn runs and returned to traditional tribal grounds to winter. To that end, the following language, or language

---


10. 384 F. Supp. at 35051.

11. Uncommon Controversy, supra note 9, at 19. Negotiations were carried on primarily in Chinook, a 300-word trading jargon. *Id.* at 23. Considering that the average child of two has a vocabulary of nearly 300 words and that the average child of five has a vocabulary of about 5,000 words, the communication of complex concepts was not likely. *See R. Engle, Language Motivating Experiences for Young Children* (1971).

substantially similar, was incorporated in the treaties:13 "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . ." Once the treaties were signed and reservations established, settlers rushed in to stake claims on the ceded land.

During the early reservation years, fish were abundant and the only commercial exploitation of salmon was carried on by the Indians as part of their trading activities. However, as white civilization expanded, pressures increased on the once thriving salmon runs. Industrial pollution, logging operations and dam construction depleted spawning beds and salmon runs. Commercial fishing technology became more efficient and exploitation of the runs increased. The development of the hatchery system and advances in fisheries science and resource management were unable to keep pace with these pressures.14

While this occurred, efforts were directed toward making farmers of the Indians.15 Nonetheless, the Indians remained primarily fishermen.16 Thus, as the salmon resource diminished, conflicts arose. The Indians maintained that a reserved right to fish off reservation was guaranteed by treaty. On the other hand, the state, through its Department of Fisheries and Department of Game, steadfastly adhered to the position that off-reservation fishing was subject to complete state regulation, as was non-Indian fishing.17

These conflicts resulted in a history of state seizures of Indian fishing nets and equipment, or their destruction by sportsmen, culminating in a series of armed confrontations in the 1960's.18 The parties struck militant positions. Against this backdrop, Judge Boldt was asked to apply the dry aesthetics of legal principle. Lacking the guid-

---

14. See UNCOMMON CONTROVERSY, supra note 9, Ch. VI.
15. Id. at 41-42.
16. 384 F. Supp. at 357.
17. See UNCOMMON CONTROVERSY, supra note 9, at 125-37. As a practical matter, the state's position is not surprising. Most of the electorate is non-Indian, and the state benefits economically from both commercial and recreational non-Indian fishing. For instance, according to a study relied upon by the Department of Game, a sportsman generates $60 in the local economy for each steelhead caught. 382 F. Supp. at 399.
18. The controversy resulted in national publicity during this period. Among the more unusual stories was the March 1964 arrest of actor Marlon Brando for illegally fishing in the Puyallup River. See generally UNCOMMON CONTROVERSY, supra note 9, Ch. V.
ance of clear and precise doctrine, Judge Boldt was forced to wind his way through 200 years of judicial uncertainty and misstatement. To facilitate analysis of the historical setting, it is useful to explore the principles involved in Indian treaty interpretation.

II. PRINCIPLES OF INDIAN TREATY INTERPRETATION

A. The Constitutional Significance of Indian Treaties

The basic constitutional principles applicable to all treaties provide the starting point for analysis of Indian treaties. While economic, political and social changes within the United States influence treaty interpretation, Indian treaties remain part of the supreme law of the land under the Constitution.19 As the eminent scholar on Indian law, Felix Cohen, noted: "One who attempts to survey the legal problems raised by Indian treaties must at the outset dispose of the objection that such treaties are somehow of inferior validity or are of purely antiquarian interest."20 Thus, Indian treaties are of the same dignity as treaties with foreign states.

This basic proposition is clearly evidenced in the negotiations of early treaties, which were conducted from the viewpoint of mutual sovereignty.21 For example, many early treaties included mutual assistance pacts and language reserving and granting to each party mutual rights and privileges.22 Further support exists in early congressional use of the ratification process23 and in the opinions of the Supreme Court declaring Indian treaties to have been negotiated between sovereigns.24 Cohen has stated: "[G]enerally speaking, the

19. U.S. CONST. art. VI.
20. F. COHEN, FEDERAL INDIAN LAW 3 (1942) [hereinafter cited as COHEN].
23. See generally id., at 34.
24. See notes 54–62 and accompanying text infra. See also McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), and Oneida Indian Nation v. County
Indian Treaty Fishing Rights

incidents attaching to a treaty with a foreign power have been held applicable to Indian treaties.\textsuperscript{25}

B. Federal Pre-emption and Preclusion

Under our system of federalism, there are certain areas of jurisdiction from which the states are precluded. These areas are vested exclusively in the province of federal jurisdiction under the Constitution. For example, the states do not have the power to enter into treaties with foreign governments.\textsuperscript{26} There are also areas subsumed within the tenth amendment which are exclusively the province of state governments.\textsuperscript{27} There is also a third area, one of overlap.

If jurisdictional power is not exclusively vested in the federal government but is within the range of permissible federal regulation, there is dual jurisdiction. The states may regulate the area until pre-empted

of Oneida, 414 U.S. 661 (1974). Cohen has summarized the significance of judicial recognition of tribal sovereignty as follows:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States . . . but does not by itself affect the internal sovereignty of the tribe . . . . (3) These powers are subject to qualification by treaties and by express legislation by Congress . . . .

\textit{Cohen, supra} note 20, at 123.

25. \textit{Cohen, supra} note 20, at 34. Because it is significant that Article VI governs Indian treaties, these incidents warrant summarization. The \textit{U.S. Const.} art. II, § 2 vests the treaty making power in the President with the advice and consent of the Senate and subjects proposed treaties to ratification by two-thirds of the Senate. To implement the basic proposition that treaties are the supreme law of the land, the Supreme Court has held that states are subject to and must comply with duly negotiated treaties. \textit{See Missouri v. Holland, 252 U.S. 416 (1920). In addition, U.S. Const. art. I, § 10 prohibits states from entering into treaties. See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816). Treaties remain the supreme law of the land until modified by mutual consent or until abrogated by congressional legislation. Therefore, subsequent congressional legislation is controlling. See Chae Chan Ping v. United States, 130 U.S. 581 (1889) (Chinese person denied re-entry to United States despite certificate authorizing re-entry pursuant to United States-Chinese treaty because Congress had subsequently revoked the certificate). See also The James G. Swan, 50 F. 108 (D. Wash. 1892) (Indian treaties are subject to modification by later treaties). It is also important to note that while subsequent federal legislation may abrogate the terms of a treaty, abrogation by implication is not favored. See, e.g., Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); United States v. Payne, 264 U.S. 446, 449 (1924); United States v. Le Yen Tai, 185 U.S. 213, 221 (1902). This may have an important impact on later development of Pacific Northwest Indian treaty fishing rights. See note 158 infra.}


27. \textqt{The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.} \textit{U.S. Const. amend. X.}
by comprehensive federal regulation.\textsuperscript{28} If the federal government does not occupy the area completely, the states may regulate to an extent and in a manner not inconsistent with existing federal regulation.\textsuperscript{29} The importance of these concepts lies in the Supreme Court’s approach which deals with off-reservation Indian treaty rights from a standpoint of federal pre-emption. The appropriateness of this doctrinal development will be discussed below.

C. Indian Treaties: Concepts and Confusion

There are two principles of Indian treaty interpretation which are unquestioned: (1) ambiguities are resolved in favor of the Indian tribes; (2) doubtful clauses are resolved in a nontechnical way as the Indian tribes would have understood the language.\textsuperscript{30} Both principles flow from the proposition that all powers which are lawfully vested in an Indian tribe are \textit{not} delegated powers granted by express acts of Congress, but inherent powers which never have been extinguished.\textsuperscript{31}

\textsuperscript{28} See, e.g., Pennsylvania v. Nelson, 350 U.S. 497 (1956). This case involved the Smith Act and a state statute proscribing sedition. The Court held that the (federal) Smith Act so occupied the field that the state act was superseded. See also Free v. Bland, 369 U.S. 663 (1962) (state law governing validity of survivorship clause of U.S. savings bonds must give way to Treasury regulations); New York Cent. Ry. v. Winfield, 244 U.S. 147 (1917) (Brandeis, J., dissenting) (recovery from railroad by injured employee under state law barred because federal law governing such injuries is comprehensive).

\textsuperscript{29} See, e.g., Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962) (Bankruptcy Act does not preclude state from attaching consequences it wishes to debt which has been discharged); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (local ordinance governing smoke emissions is enforceable against vessels engaged in interstate commerce because ordinance not in conflict with federal navigation regulations); Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942) (state can regulate mass picketing notwithstanding National Labor Relations Act); Maurer v. Hamilton, 309 U.S. 598 (1940) (state statute governing highway safety standards enforceable because ICC had not set such standards).


\textsuperscript{31} COHEN, supra note 20, at 122.
Indian Treaty Fishing Rights

Neither principle, however, is applied in derogation of any treaty conditions or requirements of equity or substantial justice. Beyond these two procedural principles, the interpretation of Indian treaties is a doctrinal jungle.

The legal status of rights reserved under Indian treaties should be resolved according to the principles applicable to all duly negotiated treaties. The unique geographical status of Indian tribes has, however, caused Congress, the courts and the states concern. To resolve this problem, various parties have advanced and employed a number of themes. Because the indiscriminate use of these themes has been a significant cause of the confusion reigning over interpretation of Indian treaties, it is important that they be clearly delineated.

One theme concerns the battle over jurisdiction. The federal government desires to retain jurisdiction over areas committed to it under the Constitution. These areas include power to regulate commerce with the Indian tribes, exclusive control over treaty making, and power to regulate federal property and make war. The states have been particularly hesitant to recognize Indian nations as sovereigns and Indian treaties as the supreme law of the land because they have been anxious to establish control over the people and activities within their territorial limits. Since the states granted plenary power to the federal government, their jurisdictional claims over Indian activities

32. Id. Cohen quotes from Justice Harlan’s opinion in United States v. Choctaw Nation, 179 U.S. 494 (1900): “But in no case has it been adjudged that the courts could by mere interpretation or in deference to its [sic] view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words.” Id. at 532.

33. The usual construction is that treaties reserve rather than grant rights to the Indians. This is a further manifestation of sovereignty. See Johnson, The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error, 47 WASH. L. REV. 207 (1972) [hereinafter cited as Johnson]; Comment, The Indian Battle for Self-Determination, supra note 21. Contra, Comment, Indian Hunting and Fishing Rights, 10 ARIZ. L. REV. 725 (1968).


36. U.S. CONST. art. IV, § 3, cl. 2. This power extends over Indian tribes to the extent they reside, or prior to treaty signing resided, on land in the public domain. See Cohen, supra note 20, at 94.

37. U.S. CONST. Preamble.

38. See note 17 supra.
depend upon either inherent sovereign power or grants of jurisdiction from the federal government. Finally, the Indian tribes maintain a treaty-based jurisdictional claim over reservation affairs, as well as over all reserved rights, whether exercised on or off reservation.

In balancing the competing jurisdictional claims of the three parties, the courts have advanced two major doctrines as the raison d'être for particular determinations of Indian treaty rights: Indian tribal sovereignty and Indian wardship. Indian tribal sovereignty is the

39. This concept is that the power to regulate and control activity within its territorial boundaries inheres in the state. The states have extrapolated their claim of inherent sovereignty as a basis for exercising jurisdiction over Indian tribes in a number of ways. One use of the concept is the combination of discoverer's title (the method of determining European nations' ownership of new land based upon the discoveries of commissioned explorers) and the equal footing doctrine (the theory that all states enter the union on an equal footing with the original thirteen). According to this argument, complete title to a land vested in a European nation by the act of discovery. This title moved among the European nations by conflict or negotiation, and from England to the original states upon the success of the American Revolution. The states then gave to the federal government only those powers contained in the Constitution. Since the states retained title to the land, those activities within state territorial boundaries and not under the umbrella of federal legislation enacted pursuant to the Constitution remained subject to state jurisdiction. Under the equal footing doctrine, all states succeeded to the same elements of title. Thus, the states have claimed a right to regulate off-reservation treaty hunting and fishing rights based upon their inherent sovereign control over wildlife within their borders. See, e.g., State v. McCoy, 63 Wn. 2d 421, 434–39, 387 P.2d 942, 950–53 (1963).

This doctrine is historically, as well as theoretically, inaccurate. First, discoverer's title was merely a method of determining claims to ownership among the European community of nations. It did not purport to reach the title claims of native inhabitants. Scholars as early as 1532 advised that it would be inaccurate to assert title as against native claimants. Scholars as early as 1532 advised that it would be inaccurate to assert title as against native inhabitants based on a claim of discoverer's title. As against native claimants, title must be acquired by treaty or conquest. See Cohen, supra note 20, at 46–47. See also Cohen, The Spanish Origins of Indian Rights in the Law of the United States, 31 GEO. L.J. 1, 17 (1942), and Cohen, Original Indian Title, 32 MINN. L. REV. 28, 43–45 (1940). Additionally, the equal footing doctrine is meant only to preserve to the states those powers which could be exercised by the original thirteen states. Thus, it does not encompass powers to deal with Indian tribes granted to the federal government and enumerated in the Constitution. See notes 34–37 and accompanying text supra.

40. This comment is not concerned with state jurisdiction asserted under authority of federal statute. It is clear that a federal statute can supersede treaty provisions. See note 25 supra. Therefore, state jurisdiction asserted in compliance with such legislation does not present a conflict. See, e.g., State ex rel. Adams v. Superior Court, 57 Wn. 2d 181, 356 P.2d 985 (1960).

41. This claim has been analyzed by some authors in terms of state-Indian or state-federal jurisdictional clashes. See, e.g., Burnett, Indian Hunting, Fishing and Trapping Rights: The Record and Controversy, 7 IDAHO L. REV. 49 (1970) [hereinafter cited as Burnett].

42. For a discussion of Indian tribal sovereignty, see Mickenberg, supra note 21, at 121–23. See also Oliver, The Legal Status of American Tribes, supra note 21; Comment, The Indian Battle for Self-Determination, supra note 21; Comment, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 HARV. L. REV. 1343 (1968).

43. Part of the problem with the wardship doctrine is that courts and Congress
concept that treaties were negotiated between sovereigns and that the rights reserved in the treaties are under the dominion of the tribe.44 The wardship doctrine views the Indian tribes as needing the beneficent protection of the federal government. A great deal of legislation45 is based upon the latter principle and even a few treaties recognize it.46

Courts have tended to define and utilize these two concepts to suit their ends. The result, as will be shown, has been the development of inconsistent precedent and the application of legislation interpretation principles47 to treaties. Because federal legislation lacks the incidents of mutual sovereignty extant in treaty negotiations, the application of these interpretative tools to treaties creates an inherent misconception of treaty purposes. This misconception and the conflicting jurisdictional claims of the parties underlie much of the confused history of Indian treaty rights litigation.

III. THE HISTORICAL DEVELOPMENT OF THE INTERPRETATION OF INDIAN TREATY RIGHTS

A. History of Treaty Negotiation

The colonization era of the United States was characterized by the negotiation of Indian treaties in an atmosphere of mutual military and

have utilized it to mean whatever is convenient to the result desired. See COHEN, supra note 20, at 169–73. For purposes of this comment, wardship means an entity in need of legal, political and social protection; it does not suggest dominance and supplication in an international affairs context. This definition is suggested by Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). See text accompanying notes 57–61 infra.

44. Treaty rights do not belong to individual Indians, but belong to the tribe because it negotiated the treaty. See Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961) (Indian fishing rights held to be tribal property). However, it should also be noted that since the passage of the Citizenship Act of June 2, 1924, ch. 233, 43 Stat. 253 (repealed 1952), all Indians are citizens of the United States and are afforded the full protection of the Constitution.

45. See note 52 infra.

46. See, e.g., Treaty of Aug. 7, 1790, with the Creek Nation, Art. 2, 7 Stat. 35 (1848); Treaty of Aug. 13, 1803, with the Kaskaskias et al., 7 Stat. 78 (1848).

47. When implementing legislative provisions, courts often emphasize the purpose of the legislation. Such emphasis is inappropriate to treaty interpretation because it avoids examination of the treaty provisions in the context of negotiation between mutual sovereigns.

The use of the wardship doctrine as an interpretive tool for legislation dealing with Indians rests upon sounder logic. The necessary examination of congressional intent and the assumption that state jurisdiction is appropriately asserted until precluded are consonant with legislative, but not with treaty, analysis.
political sovereignty. The European nations faced a choice of extinguishing Indian sovereignty by treaty or conquest. The numerical superiority of the Indian tribes dictated treaty negotiations as the practical route.

The mode of dealing with Indians did not change after the American Revolution. The Constitution gave the new federal government plenary power over Indian affairs. It chose to deal with the Indian tribes through treaties far more often than by conquest. Most treaties were written as between sovereigns, although a few treaties contained language compatible with a view of the Indian tribe as a protectorate. At nearly the same time, Congress began to enact protective legislation. A general pattern emerged, recognizing Indian tribal sovereignty on the frontier but, in the proximity of more settled areas, regarding the tribe as a ward in need of federal protection.

48. The decision to acquire land from Indian tribes by treaty as opposed to conquest presupposed that both parties to the treaty were sovereign powers. COHEN, supra note 20, at 47. The concept of sovereignty is also inherent in the reservation system which began in the colonial era. Under this system the Indian tribe traded certain areas of land for the retention of dominion over others. For a description of the origin of the reservation system in Massachusetts see Kawashima, Legal Origins of the Indian Reservations in Colonial Massachusetts, supra note 21. See generally W. WASHBURN, RED MAN'S LAND, WHITE MAN'S LAW (1971).

49. See text accompanying notes 34-37 supra.

50. Felix Cohen summarized the attitude of the period by observing: "From the first days of the organization of the Continental Congress great solicitude for the natives was evidenced. The Congress pledged itself to unusual exertions in securing and preserving the friendship of the Indian nations." COHEN, supra note 20, at 47. See also Mickenberg, supra note 21, and Mundt, Indian Autonomy and Indian Legal Problems, 15 KAN. L. REV. 305 (1967), in which the author stated: "Indian tribes were recognized and dealt with as 'distinct, independent, political communities' qualified to exercise the powers of self government from the earliest years of this country's existence." Id. quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558 (1832).

51. COHEN, supra note 20, at 48. The preamble to the Treaty of Oct. 22, 1784, 7 Stat. 15 (1848), which states that the United States receives the Indians "into their protection," is often regarded as the source of the wardship concept.

52. An early example of protective legislation was the first congressional enactment regulating trade and commerce with the Indians which invalidated sales of land by Indian tribes unless accomplished by treaty. 1 Stat. 137, § 4 (1790). Another example was the employment of teachers for Indian tribes. 3 Stat. 516 (1819). The creation of an office for a commissioner of Indian Affairs, 4 Stat. 564 (1832), and a Department of Indian Affairs, 4 Stat. 735 (1834), also illustrate Congress' prevailing philosophy towards Indians. For a detailed discussion of statutory enactments see COHEN, supra note 20, at 11. See also Oliver, supra note 21; Bean, The Limits of Indian Tribal Sovereignty: The Cornucopia of Inherent Powers, 49 N.D.L. REV 303 (1973); Kelly, Indian Adjustment and the History of Indian Affairs, 10 ARIZ. L. REV. 559 (1968); Mundt, Indian Autonomy and Indian Legal Problems, supra note 50.

53. See Oliver, supra note 21. One commentator described this phenomenon from a sociological perspective:

The attitude of America toward the Indian has long been characterized by the dichotomy between a sentimental attraction to the 'noble savage,' often increasing
Judicial philosophy in the early period of United States-Indian relations laid the groundwork for divergent views of Indian tribal status. Two opinions by Chief Justice Marshall clearly recognized the negotiation of Indian treaties as being based on mutual sovereignty: *Cherokee Nation v. Georgia*\(^5\) and *Worcester v. Georgia*.\(^5\) However, these opinions also served to ground an argument for wardship.

In *Worcester v. Georgia*, Chief Justice Marshall wrote that the Indian tribes are distinct political communities, having territorial boundaries within which their authority is exclusive. He also described the status of the Indian tribes as that of distinct, independent communities subject only to the regulation of federal laws in their interaction with the states.\(^5\) Thus, *Worcester* is a clear statement of tribal sovereignty.

One year earlier, Chief Justice Marshall wrote the opinion of the Court in *Cherokee Nation v. Georgia*. In this case, he also spoke of the legal status of Indian tribes and their treaties: \(^5\)

The numerous treaties made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation . . . . The acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts.

It is significant that it is in this context of federal-tribal interaction that Marshall described Indian tribes as "domestic, dependent nations."\(^5\)

Chief Justice Marshall further wrote that the Indian tribe's relationship to the United States "resembles that of a ward to his guardian."\(^5\) He explained:\(^5\)

---

\(^5\) with distance from the centers of Indian population, and a startling ignorance of and indifference to the actual circumstances of his life.


\(^5\) 30 U.S. (5 Pet.) 1 (1831). This case involved the question whether the Cherokees could invoke original jurisdiction to enjoin execution of certain Georgia laws in the Supreme Court. Jurisdiction was denied because the Cherokee nation did not constitute a state or foreign nation.

\(^5\) 31 U.S. (6 Pet.) 515 (1832). This case involved Georgia's prosecution of a white minister for failure to comply with a statute requiring a license and oath of allegiance from whites residing on reservation. The Court struck down the Georgia statute as conflicting with a valid treaty.

\(^5\) *Id.* at 557.

\(^5\) 30 U.S. (5 Pet.) at 16.

\(^5\) *Id.* at 17–18.

\(^5\) *Id.* (emphasis added).

\(^5\) *Id.*
They look to our government for protection; rely upon its kindness and its power, appeal to it for relief to their wants... They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.

The Chief Justice did not apply the wardship label to individuals, but rather to tribes. Furthermore, he did not say that Indian tribes were wards, but that the relationship resembles that of a ward to his guardian. For Marshall, the description was meant not to govern the relationship of tribe to state, but merely to distinguish an Indian tribe from a foreign nation on a geopolitical level. The unfortunate result of the wardship description has been the subsequent injudicious use of the concept by other courts. It has been applied not to distinguish an Indian tribe from a foreign nation, but as a governing concept of state-Indian relationships in treaty interpretation, ultimately successfully competing for judicial attention with the doctrine of Indian tribal sovereignty.

The stage had been set. Congress assumed the role of legislative protagonist of the wardship doctrine. At the same time, the judiciary misspoke the script of the Marshall opinions. Two lines of cases developed: on-reservation activities of Indian tribes continued to be served by the language of sovereignty, while off reservation, the

61. Cohens, supra note 20, at 170.
62. The balancing of these concepts resulted in what one author labeled “the sovereign wards.” Comment, The Indian: The Forgotten American, supra note 53. The result has also been described as “residual sovereignty.” Comment, The Indian Battle for Self-Determination, supra note 21; Schaub, Indian Industrial Development and the Courts, supra note 21.

Congress ended the treaty making era in 1871 by tacking to an Indian appropriation act a rider which stated: “[N]o 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...” 25 U.S.C. § 71 (1970). The effect was to state that legislation would be the mode of Indian relations. The Act expressly preserved the validity of previously negotiated treaties. Id.
64. See, e.g., Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855) (Indian exercise of control over descent and distribution); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (Indians free from state taxation if living on reservations); The New York
Indian Treaty Fishing Rights

states were given jurisdiction over the exercise of treaty rights. Since Washington involved off-reservation fishing rights, the focus here will be on the latter genre of cases.

B. Development of the Modern Doctrine in the Context of Off-Reservation Rights

Off-reservation Indian activities were quickly subjected by courts to state regulation without consideration of whether the activities were reserved treaty rights. The absence of consideration of elements of tribal sovereignty is exemplified by the Supreme Court's holding in Organized Village of Kake v. Egan. Kake did not involve treaty interpretation. Rather, it dealt with a conflict between off-reservation Indian fishermen and Alaskan game laws. The Court considered the only question to be whether state law had been pre-empted by federal legislation. A state sovereign interest in the conservation of wildlife within its borders was identified. Relying on Williams v. Lee which had, in effect, extended state jurisdiction over non-Indian activities on reservation, Justice Frankfurter, writing for the Court, did not find any act of Congress precluding state action. The effect of this
conclusion was to require explicit congressional language to preempt asserted state jurisdiction based upon state sovereign interest. The Indian tribe was viewed totally as a ward, subject to the state’s jurisdiction. The Court did not consider to what extent tribal sovereignty should have been used to balance Indian tribal rights against state jurisdiction. The Court rejected an argument of exclusive federal jurisdiction by relying on stare decisis: Williams and an earlier case, Draper v. United States, were cited as authority for dual jurisdiction. In addition, Justice Frankfurter referred to precedent in the form of legislation allowing state regulation of Indian activities.

In 1973 in the companion cases, McClanahan v. State Tax Commission of Arizona and Mescalero Apache Tribe v. Jones, the Court announced a new test to resolve state-Indian jurisdictional questions. In McClanahan, the Court wrote:

See also Metlakatla Indian Community v. Egan. 369 U.S. 45 (1962) (federal regulatory power pursuant to statute preempts exercise of state conservation law regarding conservation fishing).

69. 164 U.S. 240 (1896). In Draper, the Court upheld a Montana statute requiring that the on-reservation murder of a non-Indian by another non-Indian came within the exclusive jurisdiction of the state court.

70. The Court concluded: “Draper and Williams indicate that ‘absolute federal jurisdiction’ is not invariably exclusive jurisdiction.” 369 U.S. at 68.

71. 369 U.S. at 72–75. The Court did not analyze the Alaska Statehood Act in terms of jurisdiction or Indian sovereignty, but merely perpetuated the lack of analysis in the Williams holding. The language of the Act was viewed as a disclaimer of proprietary rights and the state viewed as retaining police power over the land on the basis of its own sovereignty. Id. at 68–69. While the result may have been appropriate in Kake which did not involve a treaty right, parallel analysis is inappropriate between treaties and legislation.


73. 411 U.S. 145 (1973). McClanahan involved imposition of a state income tax on activities which occurred on reservation. Mescalero Apache Tribe applied an analytical structure identical to that used in McClanahan (an examination of federal legislation and treaties to ascertain the existence of federal intent to preempt state jurisdiction) to off-reservation activities. Mescalero Apache Tribe relied on Williams and fishing rights cases to find a state interest in asserting jurisdiction to tax off-reservation activities. As there was no explicitly identified treaty right, the case should be read as analogous to Kake, which only involved the interpretation of federal legislation. Unfortunately, as in Williams and McClanahan, the Court did not distinguish between treaty-protected rights and rights protected only by federal statute. See id. at 150–51. All were included in the category of off-reservation activities. As far as the case went, a dual jurisdiction system does appear to be appropriate when dealing with a federal statute in an area of inherent state sovereignty. However, this treatment should not be extended to rights protected by treaty. For another state tax-Indian activity case which failed to make this distinction, see Tonasket v. State, 84 Wn. 2d 164, 525 P.2d 744 (1974). See generally Note, State Taxation of Indians, 49 WASH. L. REV. 197 (1973) and Comment, Indian Taxation: Underlying Policies and Present Problems, 59 CALIF. L. REV. 1261 (1971).

74. 411 U.S. at 172.
The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.

Outside the central core of on-reservation Indian activities, according to *McClanahan*, it is the state sovereign interest which controls, not Indian tribal sovereignty. State jurisdiction is presumed legitimate unless it is shown that a federal intent to preempt the state's regulatory power exists. *McClanahan* itself, and as applied to off-reservation activity in *Mescalero Apache Tribe*, established an analytical mode by which congressional intent as expressed in legislation, including state enabling acts and treaties, is examined. The examination is made against the backdrop of Indian tribal sovereignty which is used to give an historical perspective to congressional intent. Then, only if congressional intent to preempt the "plenary power of the States over residents with their borders" exists is state jurisdiction inappropriate.

*McClanahan* and *Mescalero Apache Tribe* do not squarely meet the issue of Indian tribal sovereignty. Even in its use of the tribal sovereignty concept as an historical backdrop, the Court's perspective was limited. The Court looked only to the "traditional view" of Indian sovereignty, *i.e.*, the view that has developed through the evolution of jurisdiction based upon wardship and that allows state jurisdiction over on- and off-reservation activities. In taking this approach, the Court failed to consider the origins of the competing jurisdictional claims. In addition, the *McClanahan* Court expanded the use of legislative precedent in the interpretation of treaty rights, an unwarranted approach. The Court analyzed treaty rights as though they were merely other federal legislation.

---

75. *Id.*
76. *Id.* at 165.
77. Thus *McClanahan* and *Kake* both erred in their failure to distinguish between state jurisdiction based upon federal enabling legislation and circumstances in which state jurisdiction is asserted over an unabrogated treaty right. *See* Johnson v. Gearlds, 234 U.S. 422 (1914) (a state's police power must give way to an unabrogated Indian treaty).
78. Narrowly construed, the holding of *Mescalero Apache Tribe* may be appropriate in its analysis of legislative precedent. To the extent that it is applied to treaty rights, it is susceptible to the same criticism as *McClanahan*. *See* note 73 supra.
C. The Evolution of State Regulation of Off-Reservation Indian Treaty Fishing

In the area of off-reservation treaty fishing rights, the courts again have asserted, without a great deal of analysis of the status of Indian treaties, that states have jurisdiction to regulate these rights.\(^7\) The first important case affecting the construction of off-reservation treaty fishing rights was *Ward v. Race Horse*.\(^8\) Although this case involved hunting rather than fishing rights, it presented a basis from which states have argued that they are entitled to regulate both off-reservation Indian treaty hunting and fishing activities.\(^9\)

Race Horse had sought a writ of habeas corpus in federal court after his arrest for killing elk in violation of Wyoming game laws. The Supreme Court, in reversing the lower court's grant of the writ, held that the treaty right, by its express language, was only temporary and had expired upon Wyoming's entry into the Union. Therefore, the Court held Race Horse subject to state game laws.\(^10\) Two propositions emerge from an examination of this case: (1) the Court did not construe the treaty language in favor of the Indians\(^11\) and (2), the decision is based upon the expiration of treaty rights rather than upon state power to regulate off-reservation treaty hunting and fishing. *Race Horse* is only dictum, therefore, to the extent it asserted a state power to regulate off-reservation treaty-right activities.\(^12\)

Another important case is *United States v. Winans*.\(^13\) This case involved the right of access over lands owned by whites to the usual and accustomed fishing sites of Yakima Indians. The Supreme Court held that private, rather than public, ownership of the land did not terminate the reserved right of treaty fishing, and that the exercise of this


\(^{80}\) 163 U.S. 504 (1896).

\(^{81}\) See discussion in Johnson, *supra* note 33, at 219-20.

\(^{82}\) 163 U.S. at 540.

\(^{83}\) This violated a basic canon of Indian treaty interpretation. See note 30 and accompanying text *supra*.

\(^{84}\) Another commentator has reached the same conclusion. See Johnson, *supra* note 33, at 220.

\(^{85}\) 198 U.S. 371 (1905).
right entitled the Indians to an easement over the land to their usual and accustomed fishing sites. The Court gratuitously concluded:

[I]t was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed . . . . Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.

In this statement, the Court recognized only in dictum a state right of regulation over off-reservation Indian activities. The question of state jurisdiction to regulate was not even before the Court.

The sovereign power of a state over fish and game within its borders was clearly recognized in Geer v. Connecticut. The Court in Geer reasoned that wildlife is the common property of all citizens of a state. To protect this resource on behalf of its citizenry the state can assert sufficient police power to guarantee conservation. In New York ex rel. Kennedy v. Baker, the state’s sovereign power to regulate in the interest of wildlife conservation was first coupled with the developing trend of judicial approval of state jurisdiction in areas formerly under Indian tribal control. In that case three Senecas were convicted of spear fishing on lands ceded to the state. They claimed a reserved right to fish based upon a sale of land to a private party. The contract of sale, ratified by Congress, did contain a clause guaranteeing a privilege to fish on ceded land. The Court agreed with New York that the sovereignty of the state prevailed:

"It is not to be doubted that the power to preserve fish and game within its borders is

---

86. Id. at 381. The Court noted that to hold otherwise would render the treaty right meaningless and that its construction was probably that intended by the parties at the time of negotiation. Id.
87. Id. at 384.
88. 161 U.S. 519 (1896). For a development of the sovereignty argument, see Burnett, supra note 41, at 57–62. See also note 39 supra.
89. 241 U.S. 556 (1916).
90. See, e.g., United States v. McBratney, 104 U.S. 621 (1881); United States v. Draper, 164 U.S. 240 (1896) (extending state jurisdiction to crimes by non-Indians against non-Indians committed on reservation lands). See also People v. Pable, 23 Colo. 134, 43 P. 636 (1896) (extending state jurisdiction to offenses between Indians committed off reservation). One author has argued that this expansion of state jurisdiction over crime and wildlife gave impetus to state control over off-reservation fishing rights. See Burnett, supra note 41.
91. Contract between Robert Morris and the Seneca nation of Indians, Sept. 15, 1797, 7 Stat. 601 (1848). The agreement provided that the Indians reserved "the privileges of fishing and hunting . . . ." Id. at 602.
92. 241 U.S. at 562 (citations omitted).
inherent in the sovereignty of the state, subject, of course, to any valid exercise of authority under the . . . federal Constitution.” The Court then considered the language of the agreement. Although recognizing that “[i]t has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them,”93 the Court concluded with chilling finality:94

But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing . . . . [T]he 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.

The Winans dictum has been cited as firm authority for the proposition that states have jurisdiction to regulate off-reservation treaty fishing rights.95 Kennedy was readily adopted by state courts96 and stood as the law of the land on fishing rights.

The next case involving off-reservation treaty fishing rights, Tulee v. Washington,97 was decided in 1942. In Tulee, the Washington Supreme Court followed what had been to that time the trend in regulation of off-reservation Indian activities and held that the Yakimas, although fishing under treaty right, had to purchase fishing licenses on the same basis as non-Indians.98 The United States Supreme Court reversed. The treaty included the usual term reserving to the Indians the right to fish in ceded areas at “usual and accustomed” sites. The Court held that although nondiscriminatory on its face, the fee was invalid as an illegal state tax imposing too heavy a burden on the exercise of the federal treaty right.99 However, the Court added, again in

93. Id. at 563.
94. Id.
95. Id. at 564. Kennedy can be distinguished from Winans because the agreement reserved a privilege to fish, not a right. When coupled with the fact that the state of New York existed at the time of negotiation, the Court's view that state jurisdiction was or should have been contemplated becomes reasonable. Absent the existence of a state at the time of negotiation, courts have held that it is not reasonable to expect the Indian signatories to foresee the interposition of an additional layer, a sovereign layer, into the structure of the agreements. See Montana Power Co. v. Rochester, 127 F.2d 189, 192 (9th Cir. 1942); State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1969).
96. See, e.g., People v. Chosa, 252 Mich. 154, 233 N.W. 205 (1930); State v. Meninock, 115 Wash. 528, 197 P. 641 (1921).
97. 315 U.S. 681 (1942).
98. 7 Wn. 2d 124, 109 P.2d 280 (1941).
99. 315 U.S. at 684–85.
dictum: "[T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish . . . ." Tulee concluded by balancing the state’s jurisdictional power with the Indians’ reserved treaty right. The Court held that state regulation was permissible only where “necessary for the conservation of fish.” This limitation was recognized because the state’s jurisdictional power was asserted to rest upon its inherent power under Geer to regulate wildlife within its borders. Thus, the treaty right to fish could be regulated only when it conflicted with the sovereign state power over conservation.

The Tulee Court’s reasoning is unpersuasive for two reasons. First, it assumed from prior decisions that the state had the power, on the basis of its own sovereignty, to regulate off-reservation Indian activities, even when protected by treaty. As has been demonstrated, however, the Court has never explored this issue in searching analysis. Second, the Court once again failed to analyze the nature of the treaty right and asserted that regulation was proper where “necessary” even though the case did not factually present the question. Sovereign negotiation of treaties and the reservation of rights were issues left untreated.

In Makah Indian Tribe v. Schoettler, the Court of Appeals for the Ninth Circuit first faced the issue of when a regulation is “necessary for conservation.” It held that Washington State could not prohibit net fishing by Indians under treaty right without proof that such regulation was necessary to preserve the salmon run on the stream involved where the effect of the prohibition would have been to eliminate the Indian harvest. Thus, the court rejected a construction of “necessary” as being merely appropriate. The court further indicated that the state could regulate the Indian harvest only when it had shown the need to limit it in the interest of conservation and had

100. Id. at 684.
101. Id.
102. One author has argued that such “necessary” regulations are beneficial to Indians and therefore permissible under the treaties. See Comment, State Power and the Indian Treaty Right to Fish, supra note 79. The better argument is to the contrary and focuses upon the statement as dictum. See Johnson, supra note 33; Burnett, supra note 41. The latter author argues that the decision was a compromise of competing sovereign interests in the Indians’ favor.
103. 192 F.2d 224 (9th Cir. 1951).
104. Id. at 226.
proven the regulation necessary to the success of the proposed limitation.\textsuperscript{105}

The first case examining off-reservation treaty rights in a treaty-oriented context was \textit{State v. Arthur}.\textsuperscript{106} The Idaho Supreme Court held, consistent with the principles of treaty construction,\textsuperscript{107} that under the supremacy clause off-reservation treaty hunting rights could not be abrogated except by consent of the Indians or by positive act of the federal government extinguishing their rights.\textsuperscript{108} The court held that a reading of the treaty right, in the sense understood by the Indians at the time of negotiation, would not support state jurisdiction to impose hunting season restrictions on the exercise of that right.\textsuperscript{109}

Four years later, the reasoning of the Idaho court was nearly adopted by Washington in \textit{State v. Satiacum}.\textsuperscript{110} Four members of the Washington Supreme Court held, similarly to \textit{Arthur}, that the state could not impose seasons, in this case on netted steelhead, because of the existence of an unabandoned and unabrogated treaty right.\textsuperscript{111} Four other justices, while agreeing that the conviction for fishing out of season should not stand, followed the \textit{Tulee} precedent and held that charges should be dismissed solely because the state had failed to demonstrate that its regulation was necessary for conservation.\textsuperscript{112}

In the next important decision, \textit{Maison v. Confederated Tribes of Umatilla Indian Reservation},\textsuperscript{113} the Court of Appeals for the Ninth Circuit considered an action for an injunction and a declaratory judgment concerning the effect of Oregon regulatory laws on treaty fishing rights. In affirming the trial court's issuance of an injunction against the enforcement of the state laws, the court wrote:\textsuperscript{114}

\begin{quote}
[In both the \textit{Tulee} and \textit{Makah} cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: \textit{first}, that there is a need to limit the taking of
\end{quote}

\begin{thebibliography}{114}
\bibitem{105} \textit{Id.} This is a narrow reading of \textit{Tulee}, but one which is consistent with the view that the state's jurisdictional power originates only in its sovereign power over conservation of wildlife.
\bibitem{107} \textit{See} notes 19–25 and accompanying text \textit{supra}.
\bibitem{108} 261 P.2d at 142.
\bibitem{109} \textit{Id.} at 143.
\bibitem{110} 50 Wn. 2d 513, 314 P.2d 400 (1957).
\bibitem{111} \textit{Id.} at 529, 314 P.2d at 410.
\bibitem{112} \textit{Id.} at 535, 314 P.2d at 412 (Rosellini, J., concurring in the result).
\bibitem{113} 314 P.2d 169 (9th Cir.). \textit{cert. denied}, 357 U.S. 829 (1963).
\bibitem{114} \textit{Id.} at 172.
\end{thebibliography}
Indian Treaty Fishing Rights

fish, second, that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.

The Maison court ignored treaty interpretation analysis and simply construed "indispensable" to mean that regulation of the Indian treaty right was to be employed only as a last resort.

The Washington Supreme Court had a second opportunity to consider treaty net fishing off reservation and out of season in State v. McCoy. The McCoy court reversed the trial court decision which had applied Arthur and, in language very similar to Kake, held that the inherent sovereign power of the state allowed it to regulate fish and game absent a "clear and unequivocal expression of Congressional will by Congress." As the dissenting opinion noted, however, Kake did not involve a treaty right and therefore was inapplicable to the case before the court. Once again, state power to regulate had been asserted without a proper examination of the treaty involved. The result was a holding that the state possessed power to regulate the harvest of fish and game reserved by treaty, subject only to a limitation that the regulation be "reasonable and necessary" for conservation.

The United States Supreme Court affirmed the general principle of permissible state jurisdiction in Puyallup Tribe v. Department of Game of Washington (Puyallup I). The Washington State Department of Game had sought declaratory and injunctive relief against the Puyallup and Nisqually Indians for fishing off reservation for salmon and steelhead with nets in violation of state regulations. In upholding the granting of such relief, the Court by implication rejected the Maison indispensability test and stated:

The treaty right is in terms of the right to fish "at all usual and accustomed places." But the manner in which the fishing may be done [is] not mentioned in the Treaty. Certainly the right of [non-Indians] may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate

116. See notes 106–09 and accompanying text supra.
117. See notes 66–70 and accompanying text supra.
118. 63 Wn. 2d at 437, 387 P.2d at 952. Also discussed was the equal footing doctrine. See note 39 supra.
119. Id. at 443, 387 P.2d at 955 (Donworth, J., dissenting).
120. 391 U.S. 392 (1968).
121. Id. at 398 (emphasis in original).
exercise of the police power of the State. . . . [T]he manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

So accepted by this time was the notion that a state could regulate the off-reservation treaty activities of Indians that no citation was given by the Court when it acknowledged the state's power. The only apparent limitations on the state were that it not discriminate against the Indians and that it exercise its police power only in the interests of conservation by means of regulations meeting appropriate standards. The Court did not define what constituted appropriate standards.

Three shortcomings are evident in the Court's approach to *Puyallup I*. First, the Court did not undertake to read the treaty in light of the probable understanding of the tribes at the time of negotiations. The Court stated that since "the manner" of fishing was not provided in the treaty, it could be regulated by the state. It must be remembered that the treaties were negotiated predominantly in the Chinook jargon—300 words strong. Complex dialogue was impossible. When the fishing rights were reserved, Indian tribes could not have foreseen that the government would eventually be allowed to impose time restrictions on their fishing or that the use of nets would be prohibited. Second, the argument that a treaty right cannot be qualified by a state, but its exercise may be qualified, is sophistry. Such as argument provides a right in form only, not in practice. This interpretation surely cannot be the construction of the original parties, Indian or non-Indian. Finally, the decision failed to come to grips with the core issue: the treaty right exists as a right reserved between mutual sovereigns. Instead of examining the controversy in terms of treaty analysis, the Court revealed its obvious preconception that states have jurisdiction to regulate off-reservation Indian activities.

Although the *Puyallup I* approach has endured, its holding is no longer viable. In 1969, an Oregon federal district court decided *Sohappy v. Smith*, an action brought by the United States against

---

122. Id. at 399.
123. See note 11 supra. It should also be noted that the treaties were written in English which few Indians could read. See United States v. Washington, 384 F. Supp. 312, 355–56 (W.D. Wash. 1974).
Indian Treaty Fishing Rights

the State of Oregon on behalf of several Indian tribes to enjoin, as a denial of Indian treaty rights, enforcement of that state's fishing regulations. The court construed the Puyallup I decision as requiring more than mere nondiscrimination in the application of state police power.125 Focusing upon the effect of the regulations, Judge Belloni indicated that the only jurisdictional basis upon which the state can regulate the Indian right is conservation.126 The state was denied plenary power to regulate the Indian fishery. In recognizing the competing sovereign interests of the tribe and the state, the court observed:127

Oregon recognizes sports fishermen and commercial fishermen and seems to attempt to make an equitable division between the two. But the state seems to have ignored the rights of the Indians . . . . If Oregon intends to maintain a separate status of commercial and sports fisheries, it is obvious a third must be added, the Indian fishery.

Thus, the Court compelled the state to recognize and accommodate the Indian fishery in its regulatory scheme. In addition, it emphasized that the Indian fishery could not be regulated for the benefit of the other fisheries. As a result, the court placed severe restrictions on what at first glance appeared to be a broad authorization from Puyallup I for state regulation.128

In 1973, Puyallup I, having been remanded because of the breadth of the original state injunction against Indian net fishing, again came

---

125. The state argued that regulation was permissible if Indians and non-Indians merely were treated identically. Id. at 907.
126. Id. at 908.
127. Id. at 910–11. The Court in this case felt that the result simply would be “that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago.” Id. at 911.
128. Shortly thereafter, the Washington Supreme Court affirmed the state’s power under the authority of Puyallup I to prohibit treaty net fishing for steelhead as a valid regulation reasonably necessary for conservation in State v. Moses, 79 Wn. 2d 104, 483 P.2d 832 (1971). The court relied on the concept of inherent state sovereign control and ownership of wildlife within its borders; it made no attempt to analyze the treaty language. Further development occurred in People v. Jondreau, 384 Mich. 539, 185 N.W.2d 375 (1971), which, after the Puyallup I decision, overruled an appellate court’s affirmation of a conviction for illegal possession of trout by an Indian fishing off reservation under a treaty right. The court rejected a rule that would have subjected Indians to the same regulation as non-Indians, and followed State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953), cert. denied, 347 U.S. 937 (1954). See text accompanying notes 106–09 supra. See also Menominee Tribe v. United States, 391 U.S. 404 (1968), in which the Court held, based upon aboriginal title rather than treaty, terminated reservation lands were subject to the exercise of fishing and hunting rights because repeal of such rights by implication is unfavored.
before the Court.\textsuperscript{129} The Washington Supreme Court had upheld the Department of Game's regulations as reasonable and necessary for the conservation of the fish resource.\textsuperscript{130} Perpetuating the language of \textit{Puyallup I} which allowed state regulation of the time and manner of off-reservation treaty fishing, the United States Supreme Court in \textit{Puyallup II} explored the effects of the regulations. In holding that the state could not regulate so as to discriminate against the Indian fishery, the Court wrote:\textsuperscript{131}

The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve the species . . . [T]he Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

Thus, the Court seemed to modify \textit{Puyallup I} by accepting the \textit{Sohappy} analysis of accommodation. But the Court once again avoided a direct examination of treaty rights in the context of Indian tribal sovereignty. The jurisdictional power of the state was merely reasserted. The only limitation on the state was that it could regulate, not in terms of plenary power, but in terms of conservation, after the rights of the Indian fishery had been accommodated.\textsuperscript{132} The importance of this limitation became apparent in the \textit{Washington} decision.

Thus, analysis of the extent of treaty rights was never undertaken by the Court.\textsuperscript{133} Obeisance to \textit{stare decisis} replaced critical examination. The error has been judicial reliance upon precedent.


\textsuperscript{130} 80 Wn. 2d 561, 497 P.2d 171 (1972).

\textsuperscript{131} 414 U.S. at 49. The Court found that the Washington regulations discriminated against Indians because they proscribed all Indian net fishing in derogation of treaty rights. \textit{Id}.


\textsuperscript{133} Recently, the Court reaffirmed its position and again failed to consider adequately the treaty rights involved. In \textit{Antoine} v. \textit{Washington}, 420 U.S. 194 (1975), an Indian was charged with a violation of state law for hunting out of season on ceded land. The agreement ceding the former reservation land contained a clause reserving the right to fish and hunt. The Court held that while the agreement was part of the supreme law of the land, the state may regulate the treaty right if the regulation meets appropriate standards and does not discriminate against Indians as required by \textit{Puyallup I} and \textit{II}. \textit{Id} at 207. The Court concluded: "The 'appropriate standards' requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure . . . \textit{and} that its application to the Indians is
Indian Treaty Fishing Rights

which is no more than dictum and which is founded upon mistaken principles. As a result of this development, there is a core of on-reservation tribal activities controlled by federal law which a state may not infringe. Outside this area, a state may assert its jurisdictional claim if an appropriate basis derived from its sovereign power exists, e.g., conservation of wildlife. If there is such a basis, explicit federal intent to pre-empt must be found before state jurisdiction will be declared inappropriate. The outcome of this judicial treatment is that the origin of the Indian tribal right in an unabrogated treaty has been subordinated. This was the status of the law Judge Boldt was asked to apply to the treaty rights before him.

IV. UNITED STATES V. WASHINGTON

A. Analysis and Evaluation

An analysis of the Washington decision must begin with an outline of the framework in which a remedy was fashioned. Judge Boldt began with the fundamental premise that “[t]he treaty was not a grant of rights to the treating Indians, but a grant of rights from them, and a reservation of those not granted.” For Judge Boldt, both the historical context of reservation of the right to fish and the recognition of mutual sovereignty in the negotiation process were important. He wrote:

The taking of anadromous fish from usual and accustomed places, the right to which was secured to the Treaty Tribes in the Stevens’ treaties, constituted both the means of economic livelihood and the foundation of native culture. . . . [T]he mere passage of time has not eroded, and cannot erode, the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold.

necessary in the interest of conservation.” Id. (emphasis in original, footnotes omitted). Because the state had failed to demonstrate the requisite need for regulation, the Court reversed the conviction and remanded the case to the state court.

134. Antoine v. Washington, 420 U.S. 194 (1975), indicated a weakening of the state sovereign interest concept. The Court indicated that the important question was whether there was a federal right to be protected by the supremacy clause, not whether state sovereignty was to be observed. 420 U.S. at 205. However, the Court confirmed the permissible state regulation of Puyallup I. See note 133 supra.


Given the reserved treaty right, the principles of treaty interpretation were stated in the following terms:\textsuperscript{138}

It is the responsibility of all citizens to see that the terms of the Stevens' treaties are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the councils, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Thus, the court recognized the paramount importance of the treaty right in seeking a solution to the controversy before it.

Judge Boldt directly confronted the issue whether the state possesses the requisite power to regulate off-reservation fishing rights granted by treaty. Recognizing the import of the Indian contention that no power exists, he carefully traced the history of state regulation and concluded that the power to regulate is mistakenly based upon dictum and inadequate analysis.\textsuperscript{139} He added that:\textsuperscript{140}

[I]t is unfortunate, to say the least, that state police power regulation of off reservation fishing should be authorized or invoked on a legal basis never specifically stated or explained. This is particularly true because state regulation of off reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future.

Despite this realization, Judge Boldt felt constrained to follow the mandate of the Supreme Court in the \textit{Puyallup} decisions.\textsuperscript{141}

Having reached these threshold conclusions, the court pointed out that the exercise of the tribal treaty right off reservation is limited

\textsuperscript{138} \textit{Id.} at 406. The court concluded that the admission of Washington into the United States had no effect upon the treaty rights involved in the controversy. Rather. "[s]uch admission imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States." \textit{Id.} at 401.

\textsuperscript{139} \textit{Id.} at 334–39.

\textsuperscript{140} \textit{Id.} at 338–39.

\textsuperscript{141} See notes 120–23 and 129–32 and accompanying text supra. In recognizing the state's authority to regulate off-reservation fishing, Judge Boldt stated:

[Judicial integrity also requires this court to hold that the tribes' contention that the state does not have legal authority to regulate the exercise of their off reservation treaty right fishing must be and hereby is denied by this court. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge, despite academic or personal misgivings, to enforce and apply every principle of law as it is directly stated in a decision of the United States Supreme Court.

384 F. Supp. at 339.
only by the geographical phrase "usual and accustomed" places, the numerical limit imposed by the "in common with" phrase, and conservation purposes.\textsuperscript{142} It is not limited to specific manners or methods of taking fish.\textsuperscript{143} Therefore, the state's police power to regulate off-reservation fishing activities exists only as required for resource preservation and protection of all those entitled to share in the harvest.\textsuperscript{144} To validly regulate off-reservation Indian fishing rights, a regulation must not discriminate against the treaty tribe's reserved right to fish, must be appropriate from a substantive and procedural due process standpoint and must be both reasonable and necessary to preserve and maintain the resource.\textsuperscript{145} The state bears the burden of demonstrating necessity.\textsuperscript{146}

On the basis of these principles the court fashioned a remedy. Operating from an historical perspective, the court first identified certain exclusions from regulation either under the treaty or by the state pursuant to its police power. It found that the taking of fish for consumption and religious purposes had special importance in context of the treaty negotiations, independent from fishing for commercial purposes. Because of this importance, these uses were excluded from regulation by the state.\textsuperscript{147} The court also recognized that on-reservation fishing is an exclusive right based upon the language of the treaty.\textsuperscript{148}

The court then sought to accommodate the state's power over wildlife, as necessary for conservation, with the Indian treaty right to fish off reservation. Judge Boldt considered the limitations upon both sovereign powers. He concluded that for a regulation to be necessary for

\textsuperscript{142} In Conclusion of Law No. 25, 384 F. Supp. at 402, the court held: The exercise of a treaty tribe's right to take anadromous fish is limited only by the geographical extent of the usual and accustomed fishing places, the limits of the harvestable stock, the tribe's fair need for fish, and the opportunity for non-Indians to fish in common with Indians outside reservation boundaries.

\textsuperscript{143} Id. at 401. But see Puyallup II, 414 U.S. 44 (1973).

\textsuperscript{144} Id. at 401-02.

\textsuperscript{145} Id. at 402. The Supreme Court recognized this principle in Antoine v. Washington, 420 U.S. 194 (1975). See note 133 supra.

\textsuperscript{146} Id. The court noted that the Department of Game especially had failed to take into account Indian fishing. Id. at 395.

\textsuperscript{147} Id. at 343. This conclusion was upheld on appeal. 520 F.2d at 690.

\textsuperscript{148} Id. In affirming this conclusion, Judge Choy, writing for the Ninth Circuit, stated: The right to take fish in common with the settlers off the reservation was a right reserved by the Indians in addition to their right to occupy and use reservation land. The settlers obtained no analogous rights on the reservations. Other citizens clearly have no more claim to a share of fish caught on the reservations than they do to a right to reside on those reservations. 520 F.2d at 690.
conservation, its purpose must be to provide an adequate number of escapement fish to spawn and propagate the next run of salmon.\textsuperscript{149} Because numerous state regulations and statutes did not meet this test or because they were discriminatory in their effects, Judge Boldt held that they could not lawfully be applied to restrict Indian treaty fishing rights\textsuperscript{150} and he enjoined their application.\textsuperscript{151}

In examining the treaty-imposed restrictions on fishing rights, Judge Boldt attempted to apply treaty analysis to reach an accommodation of the competing interests. He examined the terms “usual and accustomed” and “in common with” as they had been defined in the mid-nineteenth century and as they would have been understood by the treaty tribes.\textsuperscript{152} In this context, the language “usual and accustomed places” emerged as the source of the off-reservation Indian fishing right and as a limitation on it. That language, as Judge Boldt viewed it, had recognized that the tribes in western Washington travelled to a series of sites to fish for spring, summer and autumn runs, and returned to their villages during the winter.\textsuperscript{153} It had limited the exercise of that right to those areas alone. Judge Boldt sought to delineate the “usual and accustomed” fishing sites in specific geographical terms for each tribe before the court.\textsuperscript{154}

The language “in common with” posed another limitation. The court rejected the argument that Indians had a right to fish only in the

\textsuperscript{149.} The court labeled this concept as “adequate production escapement.” \textsuperscript{384} F. Supp. at 402.

\textsuperscript{150.} \textit{id.} at 403–04.

\textsuperscript{151.} \textit{id.} at 415. These statutes are codified in the following sections of the WASH. REV. CODE (1974): § 75.08.260 (penalty for violation of fisheries code); § 75.12.060 (prohibition against catching salmon with fixed appliances); § 75.12.070 (prohibition against shooting, gaffing, etc. food or shellfish); § 75.12.160 (prohibition against salmon fishing with reef nets outside designated waters); § 77.08.020 (definition of “game fish”); § 77.12.100 (seizure of contraband game and devices); § 77.12.130 (declaration of certain devices as public nuisances); § 77.16.020 (prohibition against hunting, trapping or fishing in the closed season or on game reserves, and prohibition against exceeding bag limits); § 77.16.030 (prohibition against processing fish, birds or game in closed season, or in excess of bag limit); § 77.16.040 (prohibition against trafficking in game); § 77.16.060 (prohibition of explosives, medicated bait, etc. in fishing). The affected regulations codified in WASH. AD. CODE (1974) are: § 220–20–010 (general provisions regarding lawful and unlawful taking of fish for food); § 220–20–015(2) (prohibition against commercial fishing within 3 miles of any river emptying into Puget Sound); § 220–47–020 (salmon preserve areas).

\textsuperscript{152.} 384 F. Supp. at 356.

\textsuperscript{153.} \textit{See} text accompanying note 10 supra. Judge Boldt concluded that usual and accustomed fishing places could be designated only in terms of freshwater systems and marine areas. Thus, watercourse changes would not impair the scope of the treaty rights. 384 F. Supp. at 402.

\textsuperscript{154.} 384 F. Supp. at 359–82.
same manner and to the same extent as non-Indians.\textsuperscript{155} The court concluded that the clause was merely a recognition, in terms of the probable meaning attached to it at the time of the negotiations, that the ability to fish at the off-reservation locations was not exclusively the Indians' and that non-Indians could fish at the same sites.\textsuperscript{156} The source and extent of each right was different, however. The right of non-Indians was properly viewed as a privilege granted by the sovereign state, whereas the right of the Indians was a reserved treaty right.

Because of a long history of conflict over the extent of fishing rights, Judge Boldt felt that a concrete accommodation of the rights of each fishery at the usual and accustomed places was necessary. In attempting to reach a numerical accommodation, he considered the most probable meaning of the language to the parties at the time, supported by contemporary dictionary definitions of "in common with." He concluded:\textsuperscript{157}

\begin{quote}
By dictionary definition and as intended and used in the Indian treaties and in this decision "in common with" means sharing equally the opportunity to take fish at "usual and accustomed grounds and stations"; therefore, non-treaty fishermen shall have the opportunity to take up to 50\% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish . . . .
\end{quote}

Judge Boldt pointed out that a significant portion of each run is harvested in marine areas closely adjacent to and within waters of the State of Washington before it reaches the usual and accustomed Indian fishing sites. Thus, to provide an equal opportunity for all

\begin{itemize}
\item \textsuperscript{155} \textit{Id.} at 356–57. The Court of Appeals for the Ninth Circuit upheld this conclusion. 520 F.2d at 688.
\item \textsuperscript{156} \textit{Id.} at 357.
\item \textsuperscript{157} \textit{Id.} at 343 (emphasis in original, footnote omitted). The court found that the phrase probably had been introduced into the treaties by an advisor of Governor Stevens. It apparently did not exist in Chinook jargon, and the minutes of the treaty negotiations do not reflect any discussion of the clause. \textit{Id.} at 356. The Court of Appeals for the Ninth Circuit employed a co-tenancy analogy in upholding the 50–50 split, pointing to the discretion of a court in equity to apportion rights to protect the interests of all parties. 520 F.2d at 685. The appellate court cited Lemon v. Kurtzman, 411 U.S. 192 (1973) (district court has equity power to order reimbursement of schools for services performed pursuant to invalidated statute), and Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (district court has equity power to fashion remedies to eliminate school segregation), in support of this proposition.
\end{itemize}
parties to share in the resource, not only must fish passing through the usual and accustomed places be counted, but adjustments must be made for those which were harvested before reaching such grounds.\textsuperscript{158}

As a result of the \textit{Washington} decision, the Indian tribes can claim a reserved treaty right, without any state regulation, to as many fish as can be caught on reservation.\textsuperscript{159} In addition, there is a reserved treaty right to take as many anadromous fish as are needed for religious and consumption purposes. Finally, the Indians are entitled to an opportunity to harvest 50 percent of all anadromous fish passing through usual and accustomed off-reservation sites, plus a favorable adjustment for fish caught adjacent to but beyond the state's territorial waters.\textsuperscript{160}

Another important aspect of the \textit{Washington} decision is the requirement that the state recognize the Indian fishery in the formulation of its policies.\textsuperscript{161} To implement this holding, Judge Boldt required the state and Indian tribes to cooperate in the development

\begin{enumerate}
\item\textsuperscript{158} 384 F. Supp. at 344. Judge Boldt labeled this an "equitable adjustment" which was intended to "compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen . . . ." \textit{Id.} The Court of Appeals for the Ninth Circuit limited this adjustment to the catches of Washington citizens, thus placing the loss suffered to foreign fishing harvests on both Indians and non-Indians. 520 F.2d at 693.
\item\textsuperscript{159} Separate from the principle that in treaty negotiations the tribes reserve rights to themselves, is the "reserved rights doctrine." Under this doctrine, the federal government, in creating a reservation on federal land, either expressly or impliedly reserves sufficient resources on that property to satisfy present and future needs. This doctrine has had its widest application in water rights cases. \textit{See, e.g.,} \textit{Winters v. United States.} 207 U.S. 564 (1908); \textit{Arizona v. California,} 373 U.S. 546 (1963). The doctrine was applied in \textit{Washington} to identify and serve as a basis to quantify the treaty right involved. 384 F. Supp. at 343.
\item\textsuperscript{160} An issue of vital importance to the \textit{Washington} decision was the effect of the International Pacific Salmon Fisheries Commission in regulating the harvest of salmon between United States and Canadian fishermen. The Commission is empowered by compact. \textit{Sockeye Salmon Fisheries Agreement with Canada, May 26, 1930, 50 Stat. 1355 (1937), T.S. No. 918.} The tribes contended that while they were bound by the Constitution, and therefore by the compact as a subsequent treaty, it was the duty of the state to harmonize the compact and the treaties and to recognize the tribal fishing rights to the fullest extent possible. Brief for Appellees at 50–57. \textit{United States v. Washington,} 520 F.2d 676 (9th Cir. 1975). The state contended that it could not fulfill its obligation under the compact if it had to prove that regulation of the Indian fishery was necessary for conservation. Brief for Appellants, \textit{Dept. of Fisheries, id. at 21–26.} The Court of Appeals for the Ninth Circuit rejected the argument that the compact pre-empted Indian treaty rights. Following \textit{Menominee Tribe of Indians v. United States,} 391 U.S. 404 (1968), the court pointed out that Indian treaty rights are not abrogated absent explicit statutory language and indicated that it was the duty of the state to adjust the rights of non-Indian citizens to comply with the Indian treaties and the compact. 520 F.2d at 689–90.
\item\textsuperscript{161} 384 F. Supp. at 403.
\end{enumerate}
Indian Treaty Fishing Rights

of general guidelines and principles of tribal fishing regulation and to pool information regarding the runs.162

Because the state can regulate only when reasonable and necessary for conservation, an important concept in Judge Boldt's remedy is tribal self-regulation. Judge Boldt found a clear congressional intent and philosophy to increase tribal self-government.163 To be self-regulatory, and as the term implies, completely free of state regulation in the exercise of its treaty fishing rights, a tribe must have certain qualifications and comply with certain conditions.164 The basic qualifications are a well-organized and efficient internal structure and an ability in fish sciences and management to provide for conservation of the runs. These conditions require cooperation with the state in management of the harvest. Under Washington, once a tribe can demonstrate its ability to provide for conservation of the runs, the only legitimate purpose for state regulation ceases to exist and the tribe can become self-regulatory in the exercise of its treaty fishing rights, subject to the enumerated conditions.165 Even if not qualifying as self-regulatory, the court required each plaintiff tribe to certify its members, to provide identification cards for them and to provide fish catch reports for all tribal fishing.166

A major area of concern untreated in this comment is the myriad administrative problems created by the Washington decision. Undoubtedly there will be substantial changes in the operations of the state agencies concerned. The major problems are logistical.

---

162. Id. at 341.
164. Id. at 340-41. This was one of the most hotly contested issues on appeal. The state argued that this portion of the decision overstepped the bounds of Puyallup II and that not only could the state agencies not function under such a system, but that it would also be disastrous for the salmon runs as well. The Court of Appeals for the Ninth Circuit, however, upheld this portion of the decision stating: "So long as the tribes responsibly insure that the run of each species in each stream is preserved, the legitimate conservation interests of the state are not infringed." 520 F.2d at 686.
165. The court enumerated three conditions which the tribe must accept and abide by to the satisfaction of either the Department of Fisheries or the Department of Game in order to qualify for self-regulation. These conditions require the tribe to provide "full and complete" fishing regulations, to permit monitoring of off-reservation Indian fishing by the state, and to provide fish catch reports regarding both on-reservation and off-reservation catches. 384 F. Supp. at 341. Failure to abide by these conditions suspends self-regulation. Id. at 340.
166. Id. at 341.
Enforcement of new regulations and measurement of 50 percent of each run are difficult tasks, which undoubtedly will be settled as the parties repeatedly return to the district court.\textsuperscript{167}

The remedy formulated in \textit{Washington} has accomplished two results. It has established parameters for the treaty fishing right and it has set the stage for state-Indian cooperation in fisheries resource utilization and management. The fervor of non-Indian reaction to the decision has been extreme.\textsuperscript{168} However, when an analysis of the actual experience with \textit{Washington} becomes available, this reaction may be quieted as the public realizes that the Indians are not decimating the anadromous fish.\textsuperscript{169}

\textbf{B. Analysis of Alternatives}

It is difficult to analyze an opinion in a vacuum. Perhaps the best method with which to determine the efficacy of the Boldt decision is

\textsuperscript{167} The court concluded that it would retain jurisdiction until the controversy is resolved. 384 F. Supp. at 405, 408. This has meant that the court has remained in the middle of disputes arising out of the original decision. For example, in the exercise of its continuing jurisdiction over the controversy, the court considered three Washington State court injunctions against the implementation of regulations promulgated by the Department of Game and the Department of Fisheries. The regulations had been designed, ostensibly, to reduce the non-Indian fishery so that the objectives of the Boldt plan could be achieved. Judge Boldt let stand two of the injunctions. Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, No. 50370 (Thurston County Super. Ct., Jan. 23, 1975) (injunction of regulation reducing from 3 to 2 the sports catch daily bag limit), and Washington Kelper's Ass'n v. Tollefson, No. 50552 (Thurston County Super. Ct., Jan. 23, 1975) (injunction of regulation closing salmon trolling within three mile limit), because the state had failed to demonstrate that these regulations would significantly increase the number of fish available to treaty fishermen. However, Judge Boldt overturned the injunction in Puget Sound Gill Netters Ass'n v. Tollefson, No. 50757 (Thurston County Super. Ct., Oct. 18, 1974). In the latter case, the state did demonstrate to the satisfaction of the court that the reduction of fishing time for gill netters and purse seiners in Puget Sound would be an effective regulation. United States v. Washington. No. 9213, at 8-9 (W.D. Wash., Sept. 12, 1974) (mem.).

The Washington Supreme Court is also becoming involved in this controversy. In Purse Seine Vessel Owners Ass'n v. Moos, No. 52881 (Thurston County Super. Ct., Sept. 9, 1975), Judge Alexander invalidated several Department of Fisheries regulations. The Association immediately petitioned the Washington Supreme Court to stay Judge Alexander's order, but the court denied the stay pending appeal of the decision. \textit{Id.}, No. 43938 (Wash., Sept. 23, 1975).

\textsuperscript{168} Sportsmen and commercial fishermen have been in the forefront of public discontent with the \textit{Washington} decision. Shortly after Judge Boldt's decision was handed down, irate sportsmen hung him in effigy, using a fishing net, outside the federal courthouse in Tacoma. \textit{See} Seattle Times, March 17, 1974, \$ D, at 8, col. 3.

\textsuperscript{169} A United States Fish and Wildlife Service survey shows that the tribal catch was 2.4\% of the total (through August) in 1974 (2.0\% if the sports catch is included in the total) compared with 3.5\% for 1973. United States v. Washington. No. 9213, at 4-5 (W.D. Wash., Sept. 12, 1974) (mem.).
Indian Treaty Fishing Rights

examination of the possible alternatives. In the Washington case, the court had, beyond a decision to do nothing, three alternatives to the approach taken. First, the decision might have been based upon Judge Boldt's recognition that prior judicial statements were erroneously based on dictum and that proper construction of treaty language precluded state regulation, even of off-reservation fishing. As suggested, this, although the preferable alternative, would have been impossible. The public reaction to such a decision would have been overwhelmingly critical. In an area already plagued by racial violence and long-standing prejudice, the result might have been disastrous. In addition, such a decision would have been directly contrary to recent Supreme Court precedent, thereby inviting swift reversal. This alternative merely would have prolonged the litigation process.

A second alternative might have been to proceed by smaller steps. If an order, based upon the exact language of Puyallup II, had been entered, holding the state regulations to be discriminatory or unnecessary for conservation, much of the public anguish could have been avoided. Nevertheless, this alternative also would have prolonged the already protracted adjudication of treaty fishing rights. New regulations would have had to have been drafted and the question presented again. The state's recognition of Indian treaty fishing rights "with all deliberate speed" would not have been adequately facilitated by this approach.

A third alternative was available. Although unusual as a judicial remedy, there could have been, in essence, a purchase of the treaty rights from the tribes. The economic value to the tribes of the seasonal runs could have been calculated in terms of a price per pound of fish predicted to be harvested, perhaps redetermined each year. A total sum representing this value would have been paid to each tribe for its share, to be divided among tribal members by a predetermined method. Of course, on-reservation religious and subsistence fishing could not, and need not, have been eliminated. Other fishing done by the Indians would have been in accordance with state laws applicable to all citizens of the state.

170. See text accompanying notes 131-32 supra. The Court in Puyallup II explicitly declined to articulate a method of apportionment. "What formula should be employed is not for us to propose." 414 U.S., at 48.


172. An ample supply of fish for recreational purposes would have been preserved, as well as the accompanying state revenues and license fees.
There are two reasons militating against such a solution to the Indian fishing problem. First, such a drastic remedy is not necessary. Statistics show that from 1950 to 1968 the Indian catch from all sources remained constant. In fact, the Indians' share of the salmon catch from 1958 to 1967 was only 6 percent of the total in Puget Sound and 6.5 percent for all of Washington State. There is no proof this trend has not continued. If these statistics are sound, it would be, on the one hand, uneconomical to pay for any greater share and, on the other hand, inequitable for the tribes to be paid for 7 percent of runs of which they were entitled to harvest up to 50 percent. Second, this alternative might be unacceptable to the Indians. There would be no pride in "earning a living" by getting a check once a year roughly equivalent to that which would have been gained from the actual work. Moreover, this approach can be viewed as an attempt to assimilate the Indians by removing a traditional source of their livelihood, breaking yet another cultural link with the past. For these reasons, this alternative is probably unworkable.

A final alternative cannot be achieved judicially. Indian treaty fishing rights are subject to modification, including complete abrogation, by Congress. If the courts are an unavailing forum, Congress may be more willing to act upon the complaints of non-Indian fishermen. However, in light of prior unsuccessful attempts to congressionally end Indian treaty fishing rights, this is unlikely.

---

173. Uncommon Controversy, supra note 9, at 123.
174. Id. at 126–27.
175. See note 169 supra.
176. In a study of welfare grant programs among Southwest Indians, only those programs involving work, and not "something for nothing," attracted many takers. See Wolf, Needed: A System of Income Maintenance for Indians, 10 Ariz. L. Rev. 597 (1968).
177. Several unsuccessful attempts were made. See, e.g., H.R.J. Res. 698, 87th Cong., 2d Sess. (1962); H.R.J. Res. 48, 88th Cong., 1st Sess. (1963); S.J. Res. 170, 88th Cong., 2d Sess. (1964). Congress may be more willing to move in the opposite direction by incorporating the treaty fishing provisions into statutes. Depending on the language of particular statutes, the states may be left without jurisdiction to regulate. Congressional recognition of the importance of treaty fishing rights to the tribes is illustrated by 18 U.S.C. § 1162 (1970). 18 U.S.C. § 1162(a) (1970) grants jurisdiction to several states to enforce their criminal laws on reservation lands, but 18 U.S.C. § 1162(b) (1970) limits that jurisdiction by requiring that state enforcement not "deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity . . . with respect to hunting, trapping, or fishing . . . ." Id.
V. CONCLUSION

In retrospect, Judge Boldt's plan in *Washington* appears to provide the best solution at this time to the problem of off-reservation Indian fishing. Broad parameters of the off-reservation treaty fishing right have been established—although a good deal of adjustment and fine tuning are necessary. The court has provided the avenue for this fine tuning through continuing jurisdiction and by spurring state-Indian cooperative interaction. The basis for amicable adjustment has been laid and should advance as the public outcry diminishes. Based upon a thorough exploration of the history, sociology and legal principles of treaty negotiation, a modern definition of the treaty right has also been formulated. Central to this definition is the conclusion that treaty language did not restrict the tribal fishing right to the same prerequisites as non-Indian fishing, but rather granted rights to non-Indians, allowing them to fish at the same sites as Indians. Because they recognize and are based upon historical realities and legal precedent, the principles of *Washington* should endure.

*Richard A. Finnigan*

---

* Member, Washington Bar Ass'n; B.A., 1972, Fairhaven College, Div. of Western Washington State College; J.D., 1975, University of Washington.