American Indian Law Review

Volume 31 | Number 1

1-1-2006

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RECOGNIZING THE FULL SCOPE OF THE RIGHT TO TAKE FISH UNDER THE STEVENS TREATIES: THE HISTORY OF FISHING RIGHTS LITIGATION IN THE PACIFIC NORTHWEST

*Vincent Mulier**

I. Introduction

In 1854 and 1855, the United States executed nine treaties with twenty-three tribes and confederations of tribes and bands indigenous to the Columbia Basin and northwestern Washington.[1] Under the treaties, which are identical in all essential elements, the tribal groups ceded approximately sixty-four million acres of land to the United States.[2] As consideration for these cessions, the tribes reserved to themselves small reservations within their traditional territories, the exclusive right of taking fish in the streams and rivers flowing through or bordering these reservations, and the right of taking fish "in common with" non-Indians at off-reservation "usual and accustomed" fishing sites.[3] The tribes also reserved rights to erect buildings for curing fish at these off-reservation sites, and to hunt, gather foods, and pasture stock on unclaimed lands.[4]

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1. Treaty with the Walla Walla, Cayuse, Etc., June 9, 1855, 12 Stat. 945; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Yakima, June 9, 1855, 12 Stat. 951; Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957; Treaty with the Makah, Jan. 31, 1855, 12 Stat. 939; Treaty with the Nisqualli, Puyallup, Etc., Dec. 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; Treaty with the S'Klallam, Jan. 26, 1855, 12 Stat. 933; Treaty with the Quinaielt, Etc., Jul. 1, 1855, 12 Stat. 971. The lead negotiators for the United States were Washington Territorial Governor Isaac Stevens and Washington Territorial Superintendent of Indian Affairs Joel Palmer. The treaties are known collectively as the Stevens Treaties.

2. Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 426 (1998).

3. *See* Treaty with the Walla Walla, Cayuse, Etc., art. 1, 12 Stat. 945; Treaty with the Tribes of Middle Oregon, art. 1, 12 Stat. 963; Treaty with the Yakima, art. 3, 12 Stat. 951; Treaty with the Nez Perces, art. 3, 12 Stat. 957; Treaty with the Nisqualli, Puyallup, Etc., art. 3, 10 Stat. 1132; Treaty with the Makah, art. 4, 12 Stat. 939.

4. Treaty with the Walla Walla, Cayuse, Etc., art. 1, 12 Stat. 945; Treaty with the Tribes

From the tribes' standpoint, the clauses reserving the tribes' rights to take fish at customary off-reservation fishing sites are the most valuable provisions in the treaties.[5] They are also the most heavily litigated treaty clauses in the entire record of treaties between the United States and indigenous peoples, having been litigated seven times before the United States Supreme Court[6] and countless times before lower courts. The fishing clauses provide that "[t]he right of taking fish, at all usual and accustomed stations, is further secured to said Indians, in common with all citizens of the Territory . . . ."[7]

This article traces the history of Northwest fishing rights litigation, and argues that the fishing clauses impliedly reserve three essential fishery rights to the tribes: 1) a right of access by tribe members to customary off-reservation fishing sites; 2) a right to up to fifty percent of harvestable fish[8] that pass or are destined to pass these fishing sites; and 3) a right to healthy spawning, rearing, and migratory habitats for fish runs that spawn upstream of tribal fishing sites.

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of Middle Oregon, art. 1, 12 Stat. 963; Treaty with the Yakima, art. 3, 12 Stat. 951; Treaty with the Nez Perces, art. 3, 12 Stat. 957; Treaty with the Nisqualli, Puyallup, Etc., art. 3, 10 Stat. 1132; Treaty with the Makah, art. 4, 12 Stat. 939.

5. COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, WY-KAN-USH-MI WA-KISH-WIT: THE COLUMBIA RIVER ANADROMOUS FISH RESTORATION PLAN OF THE NEZ PERCE, UMATILLA, WARM SPRINGS, AND YAKAMA TRIBES 2 (1995), *available at* http://www.critfc.org/oldsite/text/TRP_leg.htm; O. Yale Lewis III, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281, 289 (2002-2003).

6. United States v. Winans, 198 U.S. 371 (1905); Seufert Bros. v. United States, 249 U.S. 194 (1919); Tulee v. Washington, 315 U.S. 681 (1942); Puyallup Tribe v. Wash. Dep't of Game (*Puyallup I*), 391 U.S. 392 (1968); Wash. Dep't of Game v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44 (1973); Puyallup Tribe v. Wash. Dep't of Game (*Puyallup III*), 433 U.S. 165 (1977); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

7. Treaty with the Yakima, art. 3, 12 Stat. 951; Treaty with the Nez Perces, art. 3, 12 Stat. 957; Treaty with the Nisqualli, Puyallup, Etc., art. 3, 10 Stat. 1132. Some of the treaties provide that the tribes will share off-reservation fishing rights "in common with citizens of the Territory;" others provide that the tribes will share off-reservation fishing rights "in common with citizens of the United States". *See, e.g.*, Treaty with the Walla Walla, Cayuse, Etc., art. 1, 12 Stat. 945; Treaty with the Tribes of Middle Oregon, art. 1, 12 Stat. 963; Treaty with the Makah, art. 4, 12 Stat. 939.

8. The number of harvestable fish in a fish run is the total number in the run minus the number needed for escapement to ensure propagation of the next generation. Sohappy v. Smith, 302 F. Supp. 899, 910 (D. Or. 1969) ("In establishing the escapement goal for a particular run the Fish Commission and its biological staff consider the losses which will occur above the escapement goal point from all causes, including natural causes, losses at dams and the sports catch on the upstream and tributaries in Oregon, Washington, and Idaho. All the estimated numbers of fish in a given run in excess of the escapement goal are regarded by the Fish Commission as harvestable.").

These rights correlate with three essential responsibilities assumed by the United States through the treaties, and by Washington and Oregon as successors to United States treaty obligations: 1) a responsibility to safeguard tribe members' access to customary off-reservation fishing sites; 2) a responsibility to ensure that fifty percent of harvestable fish destined each fishing season to pass through tribal fishing sites will actually reach those sites and be available for tribal harvest; and 3) a responsibility to protect, and, where necessary, to *restore*, the spawning, rearing, and migratory habitats of fish runs returning to tribal fishing grounds.

These rights and responsibilities are incorporated within the fishing clauses by implication. There is no evidence that either tribal or United States negotiators considered the possibility at treaty time that the region's anadromous fisheries might collapse, and it is doubtful that any of the parties sought by means of the treaties to guard against such an occurrence. Because of the abundance of salmon, sturgeon, and lamprey that migrated annually through the region's rivers and streams, and because at treaty time technologies for exploiting the resource did not yet exist, treaty parties probably never imagined that the region's fisheries could be destroyed by human acts. Of each of the three reciprocal rights and responsibilities implicit in the treaties, it would be safe to assume that only the first — the right of access to customary fishing sites and the responsibility of assuring that access — could have been considered in jeopardy when the treaties were negotiated and signed. If the treaties are interpreted as safeguarding only those rights realistically seen as threatened at treaty time, then the fishing clauses would probably have to be read as reserving to the tribes nothing more than bare rights of access to their fishing sites.

However, the fishing clauses cannot reasonably be so narrowly construed. The clauses were intended to protect much more than just tribe members' rights to attempt to catch fish — to "go fishing" — at customary fishing sites. Applying standard canons of treaty construction, the fishing clauses should be interpreted as safeguarding a broad constellation of fishery-related tribal interests and values. This constellation, or web, of fishery-related interests and values includes an interest in an equitable share of each season's harvest as well as an interest in healthy spawning, rearing, and migratory habitats for fish runs passing through tribal fishing grounds. Although the parties could not have foreseen the destruction of the region's fisheries by dams, logging, development, pollution, and other human acts, the tribes clearly expected, and the United States clearly promised, that the treaties would protect the fishery *as a whole* from human-caused destruction, not merely certain discreet aspects of it. All parties would have expected that in the event of harm to treaty fisheries

through government-sponsored or government-authorized actions, the United States and successor state governments would have an obligation to remedy that harm.

This article follows, in chronological order, the courts' painstaking efforts to reconstruct and apply the meaning of the fishing clauses with respect to the tribes' asserted rights of access, allocation, and fisheries habitat conservation and restoration. Part II examines the three cases — *United States v. Taylor*,[9] *United States v. Winans*,[10] and *Seufert Brothers Co. v. United States*[11] — that affirmed the tribes' rights to cross over and use lands encompassing their customary fishing sites. Part III discusses two landmark rulings — *Sohappy v. Smith*[12] and *United States v. Washington*[13] — that established the tribes' rights to a fair allocation of harvestable treaty-area salmon. Part IV covers a series of cases dealing with the power of federal courts to enforce the allocation orders handed down in *Sohappy v. Smith*[14] and *United States v. Washington*.[15] The cases in Part IV confirm that federal district courts have authority to supervise treaty-area fisheries management for the purpose of enforcing treaty-reserved rights. Part V discusses the issue that was litigated in *Phase II* of *United States v. Washington* but was never resolved: whether the right to take fish incorporates a right to have fishery habitats protected from human-caused environmental degradation.

II. Access to Customary Fishing Sites: Taylor,[16] Winans,[17] and Seufert[18]

Litigation over the meaning of the fishing clauses originated in a case brought in 1884 in the Territory of Washington, involving several members of the Yakama nation and a non-Indian property owner named Frank Taylor.[19] Taylor, whose property abutted the Columbia River, had built a fence around his land which prevented Yakama fishers from reaching one of their customary fishing sites.[20] The fishers brought suit in the District Court of the Fourth

9. 13 P. 333 (Wash. 1887).
10. 198 U.S. 371 (1905).
11. 249 U.S. 194 (1919).
12. 302 F. Supp. 899 (D. Or. 1969).
13. 384 F. Supp. 312 (W.D. Wash. 1974).
14. 302 F. Supp. 899 (D. Or. 1969).
15. 384 F. Supp. 312 (W.D. Wash. 1974).
16. United States v. Taylor, 13 P. 333 (Wash. 1887).
17. United States v. Winans, 198 U.S. 371 (1905).
18. Seufert Bros. Co. v. United States, 249 U.S. 194 (1919).
19. *Taylor*, 13 P. at 334.
20. *Id.*

Judicial District of the Territory of Washington, seeking an injunction to have the fence removed.[21] After losing in the lower court, the fishers appealed to the Supreme Court of the Territory of Washington. Surprisingly, the court ruled in their favor.[22]

As framed by the court, the issue was whether the fishers' treaty rights of access to their fishing sites were superior to Taylor's right, as fee simple owner, to exclude them from his land.[23] Taylor argued that the treaty was a grant of limited rights to the Yakama, and that these rights could not be construed as including a broad right of access to customary fishing sites, because *any* place might in the future become a customary fishing site and this would imply, *reductio ad absurdum*, that the treaty could eventually impose a servitude along the entire river.[24] Taylor contended further that even if the treaty was liberally interpreted as having once given treaty fishers the right to cross over lands ceded by the tribes to the United States, this right no longer applied to the land in question because this land had passed into private hands through acts of Congress taken subsequent to the execution of the treaty.[25] Yakama treaty rights were no longer valid against his land, Taylor argued, because they were superceded by the homestead and pre-emption acts that authorized conveyance of that land by the federal government.[26]

The court rejected each of Taylor's arguments. Applying standard canons of treaty construction, it held first that the treaty with the Yakama effected a *reservation* of rights *by* the Yakama Nation and its members, not a *granting* of rights *to* them by the United States:

> The appellants contend that this clause was a reservation . . . of certain rights therein specified, while the appellee insists that it should be construed as a specific grant of rights by the United States. We think the contention of the appellants must prevail, as it seems to us that the Indians, in making the treaty, would have been more likely to have intended to grant only such rights as they were to part with, rather than to have conveyed all, with the understanding that certain were to be at once reconveyed to them.[27]

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21. *Id.* at 333-34.
22. *Id.* at 336.
23. *Id.* at 334.
24. *Id.* at 335.
25. *Id.* at 335-36.
26. *Id.*
27. *Id.* at 335.

Rejecting Taylor's other contentions, the Court held that the fishing clause reserved to the Yakama a right of access, not to the entire riverfront, but to "certain ancient fisheries which had for generations been used as such," and that the tribe's right to use these fisheries survived conveyance of ceded lands from the federal government to private parties.[28] On this last point, the Court concluded that laws such as the Homestead Act "only authorize the extinguishment of the title which the government holds at the time of the appropriation; and, if the land selected by the settler has at such time any servitude or easement impressed upon it [the settler] takes subject thereto."[29]

From the standpoint of non-Indian property owners along waterways containing treaty Indian fishing sites in Washington Territory, the outcome of *United States v. Taylor* must have been startling. One implication of the court's holding is that lands abutting customary Indian fishing sites in territories ceded by tribes through treaties were suddenly found subject to an easement which had not been recognized before. It did not matter to the court that ownership of these lands had been transferred into private hands before the easement had been recognized.

Despite the *Taylor* ruling, the tribes' right of access to customary fishing sites was routinely denied by landowners and state officials in subsequent decades. When Washington was granted statehood in 1889, Frank Taylor's son, who had inherited his father's property, erected a new fence and argued that the new Circuit Court for the District of Washington was not a successor court; therefore, the court did not have authority to punish him for violating the territorial court's injunction.[30] O. D. Taylor lost the argument,[31] but other owners of property abutting traditional fishing sites continued to assert a right to bar treaty fishers from crossing or using their lands.

Within twelve years, the Yakama found themselves back in court to request another injunction, in *United States v. Winans*.[32] Salmon barons, Lineas and Audubon Winans, owned land along the Washington side of the Columbia River, where they operated several fish wheels under license from the state at sites traditionally used by Yakama fishers.[33] The fish wheels monopolized the river channel and prevented Yakama fishers from using their customary fishing

28. *Id.*

29. *Id.* at 336.

30. United States v. Taylor, 44 F. 2, 3 (C.C.S.D. Wash. 1890).

31. *Id.* at 4. The new circuit court held that it was a proper successor and was required to adopt all rulings and orders of the Territorial Court.

32. 198 U.S. 371 (1905).

33. *Id.* at 379.

sites.[34] Joined by the United States as trustee for the Yakama tribe, Yakama fishers filed suit to enjoin the Winanses' fish wheel operation.[35] The circuit court refused to grant the injunction.[36] Overruling the precedent set in *Taylor*, it held that the treaty with the Yakama did not require private property owners to give access and use rights to Yakama fishers. The court accepted the property owners' argument that the treaty gave tribe members only as much right of access as that possessed by non-Indian members of the general public.

> The Indians are at the present time on an equal footing with the citizens of the United States who have not acquired exclusive proprietary rights, and this it seems to me is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States.[37]

The Yakama appealed to the United States Supreme Court. The Winanses repeated the argument they had made to the circuit court, contending that under the key words of the fishing clause — "in common with the citizens of the Territory" — the Yakama reserved no more rights to the fishery than those held by non-Indian fishers.[38] When the lands were part of the public domain, they argued, the Yakama had a right of access to fishing sites in common with other citizens.[39] Conveyance of the lands to private parties, however, extinguished these rights just as completely as it extinguished *non*-Indian access rights; private ownership entailed the right to exclude Indians and non-Indians alike, irrespective of the treaty.[40] Under the reading suggested by the Winanses and accepted by the circuit court, if the Yakama wanted to continue fishing they would have to do so at public sites or with a property owner's permission; whatever rights they might have secured through the treaty were trumped by the "perfect, absolute title" that riverfront landowners acquired through federal patents.[41]

The Winanses also had an alternative theory. Even if the treaty reserved to the Yakama certain rights of access and use that survived the transfer of riverfront lands to private ownership, they argued these rights were

34. *Id.* at 380.
35. *Id.* at 377.
36. *Id.* at 379.
37. *Id.* at 380.
38. *Id.* at 379.
39. *Id.*
40. *Id.*
41. *Id.*

"subordinate to the powers acquired by the state upon its admission to the Union."[42] Since statehood was granted on an equal footing with the original states, upon admission to the Union, Washington acquired authority over lands within its boundaries equal to that held by other states over lands within *their* boundaries, subject only to congressional power over interstate commerce.[43] The Winanses argued that under the submerged lands doctrine, the state's authority over lands below the high water mark of navigable waters within its boundaries included the power to dispose of treaty access rights, and that the state's grant of a license for the Winanses' fish wheels was a legitimate exercise of this power.[44]

Writing for the Court, Justice McKenna rejected each of these arguments.[45] He noted first that under the argument accepted by the lower court, the Yakama acquired no more rights through their treaty than were already held by other inhabitants of the region — "no rights but such as they would have had without the treaty."[46] To Justice McKenna this was a perverse reading of the treaty. Such a bargain would have been "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more."[47] It was absurd to think that the Yakama intended to reserve nothing more than what they would have possessed as common inhabitants of the region. Under Justice McKenna's analysis, the lower court had turned the fishing clause on its head by reading it as a *grant* of rights, as though tribe members had no rights at treaty time and the government had magnanimously bestowed upon them whatever rights they now held.[48] But the tribe *did* have rights at treaty time, including rights to occupy and use the lands, game, and fish within its traditional territories.[49] Upon signing the treaty, the Yakama relinquished most of these rights; however, they expressly reserved a right to continue fishing at customary off-reservation sites. Because tribe members could not exercise this right without entering onto and temporarily occupying

42. *Id.* at 382.
43. *Id.* at 382-83.
44. *Id.*
45. *Id.* at 383-84.
46. *Id.* at 380.
47. *Id.*
48. *See id.* at 380-81.
49. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823) ("[Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion . . .").

these sites, the court concluded, rights to such entry and occupancy were impliedly provided for in the treaty.[50]

Concessions made by the tribes, Justice McKenna reasoned, could only have been understood as a relinquishment of certain rights to the United States — rights of ownership and sovereignty over tribal territories — and a *reservation* of rights not thus granted.[51] The right to continue fishing at customary sites was among the rights reserved by the Yakama.[52] As the parties recognized, however, this right had to be accommodating to new conditions presented by the arrival of hundreds (and eventually millions) of American settlers in the tribe's ceded territories. As Justice McKenna explained, the fishing clause was meant to accommodate the tribe's fishing-based economies and cultures to the new circumstances unfolding around the Yakama people.[53] The Court concluded that the clause could only be understood as reserving to tribe members a right to use customary off-reservation fishing sites in much the same manner they had always enjoyed.[54]

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated .... And the form of the instrument and its language was adapted to that purpose. Reservations [of fishing rights] were not of particular parcels of land, and could not be expressed in deeds . . . [but] were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein . . . . The contingency of the future ownership of lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,--the right of crossing it to the river,--the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty.[55]

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50. *Winans*, 198 U.S. at 381.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

The Court spent little time on the claim that in the absence of congressional action, only the state had authority to grant, dispose of, and regulate rights to submerged lands within its boundaries. Citing its holding in *Shively v. Bowlby*, which upheld the power of Congress to grant or reserve land rights for purposes appropriate to the objects for which the United States held the territory,[56] the Court concluded that extinguishing Indian title, and making concessions to the tribes, was clearly appropriate to achieve the objectives of the United States for the territory in 1855. The government wanted to open Yakama lands to American settlement. To do so it had to extinguish aboriginal title, and to extinguish aboriginal title it had to make concessions to the Yakama. Therefore, reserving to the tribe a right to fish at customary sites was a legitimate and binding exercise of federal power, which the State of Washington could not override through its licensing process.[57]

In *Seufert Brothers Co. v. United States*,[58] another case involving fish wheels, the Court considered whether one tribe's access rights extended to places in the ceded territory of a different tribe. Ten years after *Winans*, Yakama fishers found their access to sites along the south bank of the Columbia River obstructed by Seufert Brothers' fish wheels.[59] The tribe sought another injunction and Seufert answered by asserting that Yakama fishing rights did not extend to the south side of the river because the tribe's ceded territories were to the north of the river.[60]

The lower court had found that sites on both sides of the river had long been used in common by the Yakama and other Columbia River tribes. Relying on these findings, the Supreme Court held that the Yakama were entitled to cross over and temporarily use any sites which they were accustomed to using at treaty time, including sites outside their ceded territories. "To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of the treaty . . . and would substitute for the natural meaning of the expression . . . the artificial meaning which might be given to it by the law and by lawyers."[61]

Thus, after *Winans*, the basic right of treaty tribe members to use and occupy riverfront lands at traditional fishing sites was safe from challenge. *Winans* is the Court's definitive statement of the right of access reserved to the tribes

56. *Id.* at 383-84 (citing Shively v. Bowlby, 152 U.S. 1 (1892)).
57. *Id.* at 384.
58. 249 U.S. 194 (1919).
59. *See id.* at 195-96.
60. *Id.* at 198.
61. *Id.* at 199.

through the Stevens Treaties. Under the rule established in *Winans*, treaty tribe members may occupy lands abutting their accustomed fishing sites to the extent necessary to exercise their rights of taking and curing fish: they may cross over them, camp on them during fishing seasons, and build temporary smokehouses on them.[62] *Seufert* extended the geographic scope of these rights by establishing that a tribe's "usual and accustomed" fishing sites are not confined within the boundaries of its ceded territories, but include all places which its members regularly used at treaty time.[63] Perhaps most importantly, *Winans* and *Seufert* established that property owners may be enjoined from obstructing or otherwise interfering with the tribes' rights to enter and use their traditional fishing sites.

III. Harvest Allocation Rights: Sohappy v. Smith[64] *and United States v. Washington*[65]

Legal questions about harvest allocation rights under the Stevens Treaties were initially raised during litigation over state restrictions on Indian fishing. Long after the Supreme Court resolved the access rights issue in *Winans* and *Seufert*, treaty fishing rights were still being suppressed through state fishing regulations in Oregon and Washington. The Supreme Court partially addressed the question of state authority to regulate treaty fishing in *Tulee v. Washington*.[66] In *Tulee*, the Court held that fishing license fees could not be applied to tribe members because they impaired the exercise of treaty-reserved fishing rights, and because the purposes for which they were imposed could be achieved through other means.[67]

Although claims of a treaty-reserved right to a guaranteed share of the harvest were always implicit in the tribes' objections to state regulation of their fisheries,[68] the issue of harvest allocation did not begin to surface until *Puyallup I*.[69] The principal issue in the *Puyallup* cases was whether, and to what extent, the state was empowered to restrict the exercise of treaty fishing rights.[70] After

62. *See generally Winans*, 198 U.S. at 383-84.
63. *Seufert*, 249 U.S. at 199.
64. 302 F. Supp. 899 (D. Or. 1969).
65. 384 F. Supp. 312 (W.D. Wash. 1974).
66. 315 U.S. 682 (1942).
67. *Id.* at 685.
68. *See, e.g., id.*; Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392 (1968); Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44 (1973).
69. 391 U.S. 392.
70. *Id.* at 393; *Puyallup II*, 414 U.S. at 48.

the Court held, in *Puyallup I*, that the states could restrict fishing by Puyallup tribe members only if the restrictions were necessary to conserve the fishery and did not discriminate against Indian fishers,[71] the Washington Department of Fisheries altered its regulations to allow Indian net fishing for non-steelhead salmonids in the Puyallup River.[72] However, the Washington Department of Game, which had jurisdiction over the steelhead fishery, maintained a total statewide ban on net fishing for steelhead.[73] The Tribe then brought a new challenge in state court, arguing that the restriction on steelhead net fishing was discriminatory because treaty fishers used *only* nets and the ban, therefore, had the effect of allocating the entire Puyallup River steelhead catch to non-treaty fishers.[74] The Tribe also argued that the regulation was not necessary to conserve the steelhead fishery because conservation needs could be met by placing appropriate restrictions on non-treaty fishing.[75] The Tribe's challenge was rejected in Washington's courts and ended up before the Supreme Court again in *Puyallup II*.[76]

State regulations burdened treaty access rights through license fees[77] and restrictions on gear, season, and location;[78] they also burdened treaty allocation rights by enabling non-treaty fishers to take the lion's share of available fish. In *Puyallup II* the Court suggested that the tribes had a right to a portion of the harvest as well as a right to freedom from discriminatory state regulation.[79] From the Tribe's perspective it was obvious that the right to catch fish free of state regulation was seamlessly linked with the right to a share of the harvest. The ban on steelhead net fishing violated treaty rights directly, by eliminating the treaty steelhead fishery, as well as indirectly, by allocating all harvestable steelhead to non-treaty fishers.[80]

Writing for a unanimous Court in *Puyallup II*, Justice William O. Douglas recognized that the effects, and perhaps the motives, of Washington's

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71. *Puyallup I*, 391 U.S. at 398.

72. *Puyallup II*, 414 U.S. at 46.

73. *Id.* Non-steelhead salmonids were considered commercial fish and were thus under the jurisdiction of the Department of Fisheries. Steelhead were considered game fish and were therefore under the jurisdiction of the Department of Game.

74. *See id.* at 46-47.

75. *See id.* at 49.

76. *See generally Puyallup II*, 414 U.S. 44.

77. *See* Tulee v. Washington, 315 U.S. 681 (1942).

78. *See* Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392 (1968); *Puyallup II*, 414 U.S. 44.

79. *Puyallup II*, 414 U.S. at 48.

80. *Id.*

"conservation" measures were as much economic and allocative as they were biological.[81] The Court suggested that some sort of fair apportionment of harvestable fish between Indian and non-Indian fishers was necessary to fulfill the government's treaty obligations.

> There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed . . . . If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then *that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing* so far as that particular species is concerned . . . . The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.[82]

When *Puyallup II* was decided, the District Court for the District of Oregon had already issued a landmark ruling on the harvest allocation issue. In the summer of 1968, Richard Sohappy and his uncle David Sohappy, Yakama tribe members, staged a "fish-in" and were arrested for fishing with a gill net on the Oregon side of the Columbia River in violation of Oregon fishing regulations.[83] Joined by twelve other Yakama fishers, the Sohappys brought suit against state fish and game officials, seeking a declaratory judgment defining their treaty right of taking fish and the scope of the state's power to regulate their fisheries.[84] Shortly after the Sohappys filed suit, the United States, as trustee for the Columbia Basin's four treaty tribes, also filed suit against the state, asking the court to define the tribes' fishing rights and the extent to which Oregon could restrict them.[85] The two cases were consolidated and decided in July 1969.[86] *Sohappy v. Smith* was the first case in which a court directly addressed the implications of the Stevens Treaties for disputes over the apportionment of treaty-area fisheries.

In *Sohappy*, the tribes and the United States argued that before the state could lawfully regulate treaty fishing it was obligated by the treaties to

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81. *See generally id.*

82. *Id.* at 48-49 (emphasis added).

83. FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 78 (1986). Fish-ins were used by treaty fishers throughout the Northwest to initiate legal challenges to state restrictions on the exercise of treaty fishing rights. *Id.*

84. Sohappy v. Smith, 302 F. Supp. 899, 903-04 (D. Or. 1969).

85. *Id.*

86. *Id.*

> regulate the taking of fish [so] that the treaty tribes and their members will be accorded an opportunity to take, at their usual and accustomed fishing places, by reasonable means feasible to them, *a fair and equitable share of all fish which it permits to be taken from any given run.*[87]

The tribes and the United States also contended that, to meet conservation objectives, the state "may lawfully restrict or prohibit non-Indian fishing . . . without imposing similar restrictions on treaty Indians," and that the state could not regulate treaty fishing at customary tribal sites unless it first established that its regulations were "the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes."[88] The state argued that the fishing clauses gave treaty fishers only the same rights as possessed by all other citizens, except for those established in *Winans* and *Tulee*.[89] The state argued further that it was entitled to impose any restrictions it deemed necessary on treaty fishing, even to the point of banning fishing completely along the entire reach of the tribes' customary fishing grounds, so long as the restrictions were imposed for conservation purposes and the restrictions were applied equally to non-treaty fishers fishing at the same sites.[90]

It is important to understand the scope of the tribes' principal claim in *Sohappy* and the dramatic contrast between the tribes' position and that of the state. All of the usual and accustomed fishing places used by Columbia Basin treaty tribes are located along the middle reaches of the Columbia and its tributaries, above Bonneville Dam and other mainstem dams.[91] Prior to implementation of the court's decision in *Sohappy*, harvest as well as hatchery production of Columbia Basin salmonids were managed almost exclusively for the benefit of lower river non-Indian commercial fishers, who operated exclusively below Bonneville and the other dams.[92] Some resources were devoted to maintaining upriver steelhead runs for non-Indian sports fishers, but the rights and interests of treaty Indian fishers were ignored.[93] By 1969, dams and other forms of development on the mainstem Columbia and lower Snake

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87. *Id.* at 907 (emphasis added).

88. *Id.*

89. *Id.* ("rights of access over private lands and exemption from the payment of license fees").

90. *Id.*

91. *See* COHEN, *supra* note 83, at 118. Bonneville Dam is the lowermost of the mainstem Columbia's thirteen dams. *Id.* at 121, fig. 8.2.

92. *See id.* at 40-44. "Losers in the competition were the Indians . . . ." *Id.* at 40.

93. *See id.* at 5, 45-46.

Rivers decimated middle and upper river salmon runs.[94] Hatcheries had been built in an effort to mitigate these losses, but these hatcheries had all been sited in the lower river, below the dams and their lethal effects but also below the usual and accustomed fishing sites of the Basin's treaty tribes.[95] Throughout the 1960s, nearly all the Basin's harvestable salmon were taken in the lower river by non-treaty commercial fishers.[96] As a consequence of the dams and of other forms of development in mid- to upper-Basin, the practical effect of statutes and regulations that failed to differentiate between treaty and non-treaty fishing was to allocate almost the entire fishery to non-treaty fishers.

In *Sohappy*, the tribes and the United States asked the court to declare that these statutes and regulations were in violation of the tribes' treaty-reserved rights to take fish.[97] The tribes asked the court to require Oregon to revise its regulatory system to ensure that a "fair and equitable share" of the Basin's harvestable fish would pass upriver and be available for tribal harvest.[98] They argued that the state, as successor to federal treaty obligations, had a responsibility to prevent the tribes' rightful share of treaty-area fish from being monopolized by lower-river non-treaty fishers, and to ensure that a fair share of the Basin's fish would actually reach the places where the tribes could harvest them.[99]

In an opinion written by Judge Robert Belloni, the court affirmed the tribes' position on every major point in contention.[100] Judge Belloni began by noting that, under the state's interpretation, the fishing clauses give treaty fishers "only the same rights as given to all other citizens."[101] He followed this with the mordant observation that "[s]uch a reading would not seem unreasonable if all history, anthropology, biology, prior case law and the intention of the parties to the treaty were to be ignored."[102] After pointing out that the United States

94. *Id.* at 118-19.

95. *Id.*

96. *See id.* at 70, 120-21.

97. Sohappy v. Smith, 302 F. Supp. 899, 904 (1969).

98. *Id.* at 907.

99. *Id.* In addition to calling for a "fair and equitable share" of the Basin's harvestable fish, the tribes insisted that they be permitted to capture these fish "by reasonable means feasible to them." *Id.* The tribes wanted to be allowed to use gill nets, a much more efficient method of capturing salmon. Before implementation of Judge Belloni's decision, gill nets were banned throughout the river. *See* Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 46 (1973).

100. *Sohappy*, 302 F. Supp. 899.

101. *Id.* at 904-05.

102. *Id.* at 905.

and the tribes were in essential agreement as to the meaning of the fishing clauses, and that, among the parties, only Oregon disagreed, Judge Belloni looked briefly at the context in which the treaties were negotiated.[103] He reiterated one of the basic canons of treaty construction: "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council . . . ."[104] Tribal leaders, he suggested, would not have signed the treaties without a promise from the United States that their people would be entitled to continue taking fish at traditional fishing sites.[105]

The court identified the key issue in *Sohappy* as a question of "the limitation on the state's power to regulate the exercise of the Indians' federal treaty right."[106] Drawing from *Puyallup I*, decided two years earlier, Judge Belloni articulated a three-part test for determining when a state regulation of treaty fishing is permissible under the Stevens Treaties: "the regulation must be necessary for the conservation of the fish . . . must not discriminate against the Indians . . ." and "must meet 'appropriate standards.'"[107] The three parts of this test are intrinsically interconnected and difficult to separate in practice.

First, a regulation is inconsistent with the rights of treaty fishers if it is not necessary to conserve the fishery. The burden of proving necessity is on the state.[108] "[T]he state must show that there is a need to limit the taking of fish and that the particular regulation sought to be imposed upon the exercise of the treaty right is necessary to the accomplishment of the needed limitation."[109]

Second, however, not every regulation that might be "necessary" to conserve the fishery will pass scrutiny with the court.[110] A conservation measure affecting treaty fishing at customary upriver sites may be necessary, for instance, only because the state concentrated its hatchery facilities in the lower river, did not take appropriate measures to restrict non-treaty fishing, or promised a disproportionate share of upriver fish to sports fishers. Under the court's interpretation of the *Puyallup I* test, the "necessity" of a particular conservation measure has to be assessed jointly with whether the measure is

103. *Id.*

104. *Id.* (quoting Tulee v. Washington, 315 U.S. 681, 684 (1942)).

105. *Id.* at 906.

106. *Id.* at 906-07.

107. *Id.* at 907 (quoting Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392, 397-99 (1968)).

108. *Id.* at 907-08.

109. *Id.* at 908.

110. *See generally id.* at 910-11.

discriminatory.[111] A measure that limits treaty fishing will not be found "necessary" in the sense required to justify restrictions on the exercise of treaty rights unless the burdens it imposes on treaty fishers are shared equally by non-treaty fishers and the benefits it bestows on non-treaty fishers are shared equally by treaty fishers.

Judge Belloni noted that, as a practical matter, state regulations and policies on harvest and hatchery production were driven not only by conservation concerns but also by concerns over how the resource would be allocated among various interest groups.[112] "The regulations of [Oregon's fish and game] agencies, as well as their extensive propagation efforts, are designed not just to preserve the fish but to perpetuate and enhance the supply for their respective user interests."[113] Finding that fisheries management throughout the Basin was being driven by apportionment decisions that failed to consider the rights of treaty fishers, the court held that Oregon's existing regulatory scheme was inconsistent with the state's duties as successor to federal treaty obligations.[114]

> Oregon recognizes sports fishermen and commercial fishermen and seems to make an equitable division between the two. But the state seems to have ignored the rights of the Indians who acquired a treaty right to fish at their historic off-reservation fishing stations. If Oregon intends to maintain a separate status of commercial and sports fisheries, it is obvious a third must be added, the Indian fishery. *The treaty Indians, having an absolute right to that fishery, are entitled to a fair share of the fish produced by the Columbia River system.*[115]

Thus, the court affirmed the argument, advanced by the plaintiffs, that to be nondiscriminatory the state's regulations must accord treaty fishers an opportunity to catch fish at their customary upriver sites equal to the opportunity other fishers are given to catch fish.[116]

The court declined to decide the issue of what constitutes an "appropriate standard" for regulating treaty fishing, the third part of the *Puyallup* test.

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111. *Id.*
112. *Id.* at 910.
113. *Id.* at 909.
114. *Id.* at 911.
115. *Id.* at 910-11 (emphasis added).
116. *Id.* at 911.

Resolution of this issue was left to state regulators.[117] In determining what constitutes an "appropriate" regulation, however, the court cautioned that

> the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portion of the stream where the historic Indian places are mostly located . . . . *[P]rotection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users.*[118]

Three months after filing its findings of fact and conclusions of law, the court issued a final decree granting the tribes' petition in full. Judge Belloni ordered the state to deal with treaty fishing as a separate and distinct fishery, subject to regulation only if the state establishes through hearings that regulation is "reasonable and necessary for the conservation of the fish resource."[119] To be necessary, a regulation "must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish."[120] The court also ordered the state to

> regulate [the fishery so] that, except for unforeseeable circumstances beyond its control, the treaty tribes and their members will be accorded an opportunity to attempt to take, at their usual and accustomed fishing places, by reasonable means feasible to them, *a fair and equitable share of all fish which it permits to be taken from any given run.*[121]

Anticipating further disputes between the tribes and the state, the court retained continuing jurisdiction over the case.[122] Its ruling was not appealed.

The next stage of fishing clause jurisprudence was played out in the District Court for the Western District of Washington. Eleven months after the final decree in *Sohappy*, the United States filed suit on its own behalf and as trustee for seven western Washington Indian tribes, seeking a declaratory judgment on the tribes' fishing rights within the treaty case area, and an injunction to enforce those rights.[123] The seven plaintiff tribes were joined by seven intervenor

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117. *Id.*

118. *Id.* (emphasis added).

119. Judgment at 2, Sohappy v. Smith, 302 F. Supp. 899 (1969) (No. 68-409).

120. *Id.*

121. *Id.* at 2-3 (emphasis added).

122. *Id.* at 4 (holding that the court still retains jurisdiction to oversee management of the Columbia salmon fishery).

123. United States v. Washington (*Phase I*), 384 F. Supp. 312, 327-28 (W.D. Wash. 1974).

plaintiff tribes.[124] The United States and the tribes asserted that the state lacked authority to regulate treaty fishing, that the fishing clauses in their treaties[125] entitled the tribes to a specific allocation of harvestable salmon and steelhead trout in the case area, that hatchery-origin fish must be included in the allocable fish population, and that the tribes' right of taking fish incorporates an implied right to have treaty fishery habitats protected from environmental degradation.[126] By agreement of the parties, the latter two claims were separated from the allocation claim and litigated in a subsequent trial.[127]

Pretrial and trial proceedings in *Phase I* of *United States v. Washington* lasted more than three years. Plaintiffs and defendants presented exhaustive evidence on the history, culture, traditional territories and fishing practices of the fourteen tribes, the history of the tribes' treaty negotiations with the United States, the biological needs of salmon fisheries in the case area, the terms, conditions, and policy objectives of post-treaty tribal and state fishing regulations in the case area, the meaning and historical context of the key phrases of the fishing clauses, and relevant case law.[128] *Phase I* was tried and decided in a political climate of extreme antagonism directed at Indian fishers by non-Indian fishers and state fish and game officers.[129]

Named as plaintiffs in the original complaint were the Hoh Tribe, Makah Tribe, Muckleshoot Tribe, Nisqually Tribe, Puyallup Tribe, Quileute Tribe, and the Skokomish Tribe. *Id.* at 423 n.1. The "case area" consists of all watersheds within or bordering either the tribes' ceded territories and reservations lands. It includes the U.S. portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and adjacent offshore waters. *Id.* at 327-28.

124. *Id.* at 423 n.2 (the Lummi Tribe, Quinault Tribe, Sauk-Suiattl Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit River Tribe, and the Yakama Nation).

125. *Id.* at 328. The fishing clauses in treaties between the United States and the tribes of western Washington are substantially identical to the ones contained in treaties between the United States and the tribes of the Columbia Basin. Some of the treaties with the tribes of western Washington use the phrase "usual and accustomed *grounds* and stations" instead of "usual and accustomed places" or "usual and accustomed stations;" and unlike the Columbia Basin treaties, none of the treaties with the plaintiff tribes explicitly reserves to the tribes the *exclusive* right of taking fish in streams running through or bordering their reservations (excepting the treaty with the Yakama, whose traditional fishing stations included sites in both the *Phase I* and the *Sohappy v. Smith* case areas). These phraseological differences were found by the court to be insignificant. *Id.* at 423 n.12.

126. United States v. Washington (*Phase II*), 506 F. Supp. 187, 190 (W. D. Wash. 1980).

127. *Id.* at 191. The hatchery fish issue and the fisheries habitat issue were litigated in *Phase II* of the case, discussed *infra* Part V.

128. United States v. Washington (*Phase I*), 384 F. Supp. 312, 334-39, 350-99, 406-08 (W.D. Wash. 1974).

129. COHEN, *supra* note 83, at 67-70. The conflict over Indian fishing rights in northwest

Judge George Boldt introduced his opinion by stating that the court's ultimate objective was "to determine every issue of fact and law presented and, at long last, thereby finally settle, either in this decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do."[130] His ninety-three page ruling provides detailed demographic and historical information about each of the plaintiff tribes, including a description of each tribe's customary fishing grounds, an account of each tribe's treaty relationship with the federal government, and a description of each tribe's political organization and procedures for regulating treaty fishing.[131]

On the question of the state's authority to regulate treaty fisheries, the court reluctantly followed the rule announced in *Puyallup I* and held that the state could impose conservation-related restrictions on tribal fishing.[132] The court

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Washington had been brewing since the early 1950s. Tribe members were constantly harassed, threatened, and assaulted by non-Indian fishers. Indian fishers were repeatedly arrested for violating state fishing regulations. State officers routinely confiscated their gear as evidence. Their nets were cut, their boats were sunk, and they were shot at by vigilantes. *Id.*

130. *Phase I*, 384 F. Supp. at 330.

131. *Id.* at 359-82.

132. *Id.* at 338-39. Judge Boldt expressed deep misgivings about this holding and pointed out:

> there has never been either legal analysis or citation of a non-dictum authority in any decision of the Supreme Court of the Land in support of its decisions [in *Puyallup I* and *Puyallup II*] holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties . . . . It also appears that the United States Supreme Court has exercised a prerogative specifically reserved by and to Congress in the treaties. Congress has never exercised its prerogative to either limit or abolish Indian treaty right fishing . . . . Since Congress has the power to qualify or revoke any treaty or any provision thereof, unquestionable federal authority is available to provide federal regulation, or to authorize state regulation, for the protection of fishery resources against any threatened or actual harm that might arise from off reservation treaty right fishing by tribal members limited *only* by tribal regulation. In these circumstances it 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.

Id. at 338-39 (emphasis added) (citing Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), for the rule that Congress may unilaterally qualify or revoke treaties or treaty provisions); *see also* Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972). After expressing his doubts, Judge Boldt conceded that "judicial integrity" and the Supreme Court's rulings in *Puyallup I* and *Puyallup II* required him to reject the tribes' contention that the state did not have authority to regulate treaty fishing. *Phase I*, 384 F. Supp. at 339.

insisted, however, that the state would not be allowed to use conservation necessity to rationalize inequitable restrictions.[133] To explain this point, Judge Boldt inserted lengthy quotations from *Sohappy*, including Judge Belloni's summation of the state's obligation to balance the needs of conservation with the need to protect the treaty fishery.[134] "In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy (at least) coequal with the conservation of fish runs for other users."[135]

The Oregon court had held that Columbia Basin tribes are entitled to a "fair share" of harvestable fish destined to pass their customary fishing sites.[136] Relying on *Arizona v. California* and a dictionary definition of the phrase "in common with," Judge Boldt decided that a "fair share" meant that treaty fishers had a right to take *up to fifty percent* of harvestable fish in treaty-area rivers, streams, and coastal waters.[137] The question was whether the tribes' express reservation of "the right to take fish . . . in common with citizens of the Territory" contained an implied reservation of the right to a specific share of harvestable fish.[138] In *Arizona*, the Supreme Court ruled that certain Indian treaties which expressly reserved lands for occupancy of the treaty tribes had impliedly reserved enough water to fulfill the tribes' irrigation needs, even though no provision for water rights was included in the treaty.[139] Impliedly reserved irrigation water rights "could only be limited in amount to the total reasonably required by the needs of the treaty tribe as determined from time to time indefinitely in the future."[140] Drawing by analogy from the *Arizona* holding, Judge Boldt reasoned that by expressly reserving the right of taking fish at their usual and accustomed places, the tribes impliedly reserved the right to an allocation of fish reasonably sufficient to meet their needs, limited by the further requirement that this right be exercised "in common with" non-treaty fishers.[141]

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133. *Phase I*, 384 F. Supp. at 346.

134. *Id.* at 345.

135. *Id.* at 346 (quoting Sohappy v. Smith, 302 F. Supp. 899, 911 (1969)).

136. *Sohappy*, 302 F. Supp. at 911.

137. *Phase I*, 384 F. Supp. at 343.

138. *Id.* at 343-44.

139. Arizona v. California, 373 U.S. 546, 600 (1963) (applying Winters v. United States, 207 U.S. 564 (1908)).

140. *Phase I*, 384 F. Supp. at 342-43 (citing *Arizona*, 373 U.S. 546).

141. *Id.* at 343.

Though the ruling in *Phase I* is complex and extremely detailed, Judge Boldt's reasoning is fairly straightforward. Using standard canons of treaty construction, he begins by trying to construe the fishing clauses as the tribes themselves probably construed them at treaty time.[142] Following Justice McKenna's artful formulation in *Winans*, he recognizes at the outset that treaty rights were *reserved by the tribes*, not granted by the United States; they were "part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment."[143] To grasp the meaning of the fishing clauses as understood by tribal negotiators in 1855, the court had to determine which rights the tribes meant to retain from the plenum they possessed prior to execution of the treaties, and which rights they agreed to reduce or give up.[144]

Under Judge Boldt's reconstruction of the treaty negotiations, the tribes clearly meant to reserve exclusive rights to take fish from rivers and streams within the small homelands they retained for their exclusive use and occupation.[145] Because the tribes reserved exclusive on-reservation fishing rights, the court decided that fish caught on reservations should not be included in the sum of harvestable fish to be divided between treaty and non-treaty fishers.[146] The court further distinguished between tribal ceremonial and subsistence fishing, on one hand, and tribal commercial fishing, on the other.[147] Because evidence at trial showed that at treaty time "the opportunity to take fish for personal subsistence and religious ceremonies was the single matter of utmost concern to all treaty tribes," Judge Boldt reasoned that fish taken to fulfill ceremonial and subsistence needs should not be included in the sum of harvestable fish to be divided between treaty and non-treaty fishers.[148]

The court thus began by reducing the *non-treaty* allocation of fish within the treaty area to a share of all harvestable fish not destined for on-reservation harvest, tribal subsistence harvest, or tribal ceremonial harvest.[149] The *treaty* allocation, in turn, would be determined by adding 1) the number of fish taken on reservations; 2) the number of fish expected to be taken by tribe members for subsistence and ceremonial purposes; and 3) the number of remaining

142. *Id.* at 330-31 (citing Jones v. Meehan, 175 U.S. 1 (1899)).

143. *Id.* at 331 (quoting United States v. Winans, 198 U.S. 371, 381 (1905)).

144. *Id.*

145. *Id.* at 332, 423 n.12.

146. *Id.* at 343. Although exclusive on-reservation fishing rights were expressly reserved in only one plaintiff tribe's treaty, the court held that each of the other tribes also reserved, through implication, an exclusive right of taking fish on their reservations. *Id.* at 332 n.12.

147. *Id.* at 343 (footnote omitted).

148. *Id.*

149. *Id.*

harvestable fish, reduced by the number allocated to non-treaty fishers in accordance with the "in common with" language of the treaties.[150]

Through the fishing clauses, the tribes reserved rights to take fish at usual and accustomed off-reservation grounds and stations.[151] Unlike their on-reservation rights, however, the tribes' off-reservation rights were reserved expressly on condition that off-reservation fishing would be done "in common with" non-treaty fishers.[152] In Judge Boldt's analysis, this limitation carried two crucial implications for the tribes' post-treaty allocation of harvestable fish. In pre-treaty times, the tribes were entitled to take as many fish as needed or wanted, limited only by intra-tribal and inter-tribal regulations.[153] Upon execution of the treaties, however, and upon the courts' cumulative interpretation of the treaties, tribal harvests became subject to two additional *extra-tribal* limitations. The number of any species of fish that could be taken by treaty tribes was now reduced by 1) "[t]he number of fish required for spawning escapement and any other requirements established to be reasonable and necessary for conservation," and 2) "[t]he number of harvestable fish non-treaty fishermen may take at the tribes' 'usual and accustomed [off-reservation] grounds and stations' while fishing 'in common with' treaty right fishermen."[154]

Although the conservation necessity doctrine was announced in *Puyallup I* and has tenuous roots in dicta found in *Winans* and *Tulee*,[155] by the time *Phase I* was decided it was settled that states were empowered to restrict treaty harvests to ensure perpetuation of each run. In interpreting the fishing clauses, however, Judge Boldt was concerned less with the question of whether Washington was empowered to regulate the fishery than with the question of how, if at all, treaty and non-treaty fishing practices were limited by the words

150. *Id.*

151. *Id.*

152. *Id.*

153. Traditional intra-tribal and inter-tribal fishing regulations clearly placed utmost importance on conservation of the resource. Modern tribal regulations also include very strong conservation measures. I stress this point to emphasize the absurdity of the state's contention, at trial, that without state regulation of treaty fishing the resource would become endangered. The court noted that "neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish." *Id.* at 338 n.26.

154. *Id.* at 343.

155. Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392, 398-99 (1968). For the classic exposition of how the conservation necessity doctrine came to be created by accident, out of nothing, see Johnson, *supra* note 132.

of the treaties themselves.[156] Judge Boldt clearly believed that the tribes were entitled to regulate their own fisheries, free of state interference, and should eventually be fully and exclusively responsible for doing so.[157] Under his reading of the fishing clauses, moreover, each party to the treaties, the United States and the tribes alike, has a duty to conserve the fishery for the sake of the other.[158] By reserving no more than the right to fish "in common with" non-Indians at off-reservation sites, the tribes assumed a treaty responsibility to refrain from preventing non-Indian users from taking their rightful present or future shares of the resource.

The fishing clauses themselves, in other words, affirmed a tribal duty to refrain from overfishing or otherwise monopolizing the resource.[159] In Judge Boldt's analysis, if the tribes had reserved an *exclusive* right to fish at off-reservation sites, as they did at on-reservation sites, treaty fishers would have no treaty-based obligation to conserve the fishery (though of course they would still have obligations based on tribal law).[160] They did not do this, however, and under the court's interpretation the treaty requirement of sharing off-reservation fisheries *in common with* non-Indians bars the tribes from fishing off-reservation in such a way as to threaten a fish run with extinction.[161] The implied terms of the treaties themselves, with no added state or federal regulation, prohibit the tribes from "pursu[ing] the last living steelhead until it enters their nets."[162]

The phrase "in common with" also guided the court's determination of the number of harvestable fish that non-treaty fishers are entitled to take from treaty-area fisheries. The treaties, of course, did not specify how the resource should be divided in the event of scarcity. All the parties seem to have assumed that there would always be more than enough salmon to provide for the needs

156. *See generally Phase I*, 384 F. Supp. at 346.
157. *Id.* at 340-41.
158. *Id.* at 341.
159. *Id.* at 343.
160. *Id.*
161. *Id.*
162. *Id.* at 338. As Justice Douglas memorably stated in *Puyallup II*, "The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*) 414 U.S. 44, 49 (1973). He was correct about the Indians rights under the treaties, but not for the reasons he cited. Treaty fishers are prohibited from exhausting a fish run not in virtue of Douglas's legal fiction that a state government may regulate fishing rights without congressional authorization, but because their treaties obligate them to conserve the fishery for the sake of "in common with" non-treaty fishers.

of treaty fishers and non-treaty fishers alike.[163] Since the treaties used the phrase "in common with" but did not specify in percentages or numbers of fish how the harvest was to be divided, the court relied on a dictionary to answer the question:

> 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 . . . .[164]

By interpreting "in common with" to mean "sharing equally," and "sharing equally" to mean a fifty-fifty division of the resource, Judge Boldt significantly sharpened the "fair share" principle that Judge Belloni had employed five years earlier to define the tribes' allocation rights. At the same time, Judge Boldt realized that "precise mathematical equality" would be impossible to achieve due to the far-flung nature of the fishery and the impracticability of determining with any precision how many fish are destined to pass tribal fishing sites in any given year.[165]

The court ordered the state to "take all appropriate steps within [its] actual abilities to assure as nearly as possible an equal sharing" of fish destined to pass the tribes' usual and accustomed fishing grounds.[166] The court also recognized that equal sharing of the resource would require an equitable division of harvestable fish intercepted outside the state's jurisdiction but *destined* for treaty-area waters.[167] A substantial but indeterminate portion of each run originating in and returning to treaty-area waters is harvested by non-treaty fishers in marine areas off the coasts of Alaska, British Columbia, Washington

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163. The prospect of a collapse of Northwest fisheries did not become foreseeable until industrial exploitation of the resource became feasible. Industrial exploitation of the resource did not become feasible until the invention of canning technology and the rise of large-scale commercial fish canneries. The first salmon cannery on the Columbia was built in 1866. The first cannery on Puget Sound was built in 1877. JIM LICHATOWICH, SALMON WITHOUT RIVERS 84-90 (1999).

164. *Phase I*, 384 F. Supp. at 343 (emphasis added).

165. *Id.*

166. *Id.* at 344.

167. *Id.*

and Oregon.[168] Judge Boldt decided that because these fish were being intercepted before they could be counted, the treaty allocation could not be based solely on the number of harvestable fish that actually reached tribal fishing grounds.[169] To compensate the tribes for fish caught by non-treaty fishers beyond the state's jurisdiction, the court ordered the state to periodically make equitable upward adjustments in the tribes' allocation.[170]

The court also clarified that the state's obligation to assure equal sharing of subject fisheries extended to its role in advising the Pacific Salmon Fisheries Commission.[171] The Commission is responsible for setting fishing restrictions under the Pacific Salmon Treaty between the United States and Canada by controlling the "time, places and manner of harvest."[172] Under the terms of that treaty, Washington may provide input into the development of offshore salmon harvest programs.[173] The court's order required Washington to consider its tribal treaty obligations in providing that input.[174]

The political upshot of Judge Boldt's ruling in *Phase I* of *United States v. Washington* was a forced shift in the basic objectives of fisheries management in western Washington. Reinforcing and clarifying Judge Belloni's ruling in *Sohappy*, the court held that the state could regulate treaty fishing only to the extent necessary to conserve particular stocks of fish[175] and that the tribes were entitled to up to fifty percent of harvestable fish destined to pass their fishing grounds[176] (excluding fish caught on reservations[177] or for ceremonial or subsistence purposes[178]) and periodic equitable adjustments to compensate for heavy off-shore fishing by foreign and domestic ships.[179]

Judge Boldt defined conservation necessity as narrowly as possible: a state regulation affecting treaty fishing would be unlawful unless it was both "reasonable and necessary to prevent demonstrable harm to the actual conservation of fish."[180] To be *necessary*, the regulation must be "essential to

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 342.
176. *Id.* at 343.
177. *Id.* at 332.
178. *Id.* at 343.
179. *Id.* at 344.
180. *Id.* at 342.

conservation;" if alternative means are available, "the state cannot lawfully restrict the exercise of off reservation treaty right fishing, *even if the only alternatives are restriction of fishing by non-treaty fishermen.*"[181]

The court retained continuing jurisdiction over the parties and subject matter of the case to ensure compliance with its orders.[182]

IV. Federal Court Authority Over Treaty-Area Fisheries Management: Gillnetters[183] and Fishing Vessel[184]

In May 1974, Judge Belloni, using the court's continuing jurisdiction in *Sohappy*, applied Judge Boldt's formula to fish runs in the Columbia Basin.[185] Because neither Washington nor Oregon chose to appeal *Sohappy*, the formula became binding law for Columbia Basin fisheries management. While Judge Boldt was being forced to assume direct control of fisheries regulation in the Washington area, Judge Belloni succeeded in convincing the tribes and the states to settle their differences through negotiation.[186] In early 1977, Oregon, Washington, and the four Columbia Basin tribes reached agreement on a

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181. *Id.* (emphasis added).

182. *Id.* at 405, 419.

183. Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151 (Wash. 1977); Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123 (9th Cir. 1978).

184. Wash. State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373 (Wash. 1977); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

185. COHEN, *supra* note 83, at 121.

186. *Id.* at 118. Various factors contributed to the states' willingness to negotiate in Oregon instead of litigating like Washington did. The Columbia Basin fishery was geographically simpler and had only one river system to manage instead of the numerous ones in northwestern Washington. *Id.* at 119. There were also fewer tribes participating in *Sohappy*. *Id.* at 119-20. More importantly, few salmon were still returning to the tribes' customary fishing sites on the middle and upper Columbia after four decades of dam building. By the time *Sohappy* was decided, nearly all remaining valuable fish runs in the Basin originated below Bonneville Dam. Most originated from hatcheries and were taken by non-Indians in the lower river. Because the customary sites at issue in *Sohappy* are above Bonneville Dam, while most of the Basin's valuable fish runs are below it, the court's reaffirmation of treaty rights on the Columbia had less immediate effect on the commercial value of the Basin's non-treaty fishery. The tribes in northwestern Washington, by contrast, had customary fishing sites along the lower portions of all the region's river systems and the valuable marine areas in Puget Sound, Grays Harbor, and the Pacific Coast along the Olympic Peninsula. The greater commercial value of the Washington tribes' fishing sites made the allocation rights at issue in *Washington* more contentious than the ones at issue in *Sohappy*.

comprehensive five-year plan for managing the Basin's fisheries and apportioning its fish on an equal-sharing basis.[187]

The situation in northwestern Washington was more bleak. Conflicts there between treaty and non-treaty fishers did not lend themselves to negotiated settlements. Trying halfheartedly to bring the state into compliance with Judge Boldt's ruling and the court's interim plan, the Washington Game Commission and Department of Fisheries began overhauling the state's salmon and steelhead fishing regulations. The goal, ostensibly, was to reduce non-treaty fishing and permit half the region's harvestable fish in any given season to be taken by the tribes. A few weeks after the court's decision was released, Judge Boldt ordered the parties to adopt an interim plan for regulating fishing in the treaty area, calling on the agencies and the Washington Reef Net Owners Association to make significant reductions in the non-Indian fishery.[188]

State officials and non-treaty commercial and sport fishers resisted the court's decision and the new regulations on multiple fronts. The state immediately appealed. While the appeal was pending, non-treaty commercial and sport fishers began systematically disobeying the new regulations.[189] Officers from the Game Commission and Fisheries Department made a weak attempt to enforce the new rules by issuing hundreds of citations for illegal non-treaty fishing.[190] At the local level, county prosecutors and judges responded to this affront by dismissing nearly all the citations.[191]

In June 1975, the Ninth Circuit Court of Appeals affirmed Judge Boldt's decision in every major respect, with only a slight modification to the equitable adjustments he had ordered for the tribes.[192] Six months later, the United States

187. *Id.* at 122.

188. *Id.* at 87, 92.

189. *Id.* at 92-93.

190. *Id.* at 93.

191. *Id.*

192. United States v. Washington, 520 F.2d 676, 689 (9th Cir. 1975). The court of appeals agreed that there should be periodic equitable adjustments in favor of the tribes to compensate them for offshore fishing by U.S. non-treaty fishers. *Id.* Where offshore fishing benefits Washington citizens, the court agreed that treaty fishers should be compensated with a greater-than-fifty percent share of the fish that make it back to Washington waters. *Id.* It held, however, that "the [district] court's equitable discretion does not extend so far as to permit it to compensate the tribes for the unanticipated heavy fishing by foreign ships off the coast." *Id.* Because treaty tribes and non-Indian Washington citizens are affected equally, the court of appeals found no need to compensate the tribes for offshore fishing by foreign vessels. *Id.* "The treaty granted equal rights at the traditional areas to Washington citizens, and their ability to fish is equally impaired by foreign fishing." *Id.* This minor modification in Judge Boldt's allocation formula had the effect of slightly reducing the number of fish allocated to the tribes.

Supreme Court denied certiorari and the decision became binding.[193] State officials and non-treaty commercial and sport fishing groups unrelentingly resisted. Even before the Ninth Circuit decision, the Puget Sound Gillnetters Association, Washington State Kelpers Association, and Washington State Commercial Passenger Fishing Vessel Association filed separate suits in Thurston County Superior Court against the Fisheries Department, seeking to enjoin the new regulations.[194] Against Judge Boldt's express order[195] and despite the fact that the suits involved collusive litigation,[196] the plaintiffs won favorable rulings in the county court.[197]

In June 1977, in *Puget Sound Gillnetters Ass'n v. Washington*, the Washington Supreme Court upheld a Thurston County Superior Court decision invalidating the new regulations.[198] Ignoring that the Boldt decision had been upheld by the Ninth Circuit, and that the U.S. Supreme Court had declined to review it, a five-member majority of the Washington Supreme Court declared that "[b]eing cited no authority for the proposition that federal district courts have exclusive jurisdiction[] to construe Indian treaties[,] treaties which affect important interests of the state[,] we adhere to our own interpretation of the treaty."[199] The court interpreted the treaties as reserving to the tribes only an equal opportunity to go fishing, not a percentage of the fishery.[200] The Fisheries Department, the court concluded, had authority to regulate fishing for purposes of conservation but not for purposes of allocating the resource; it was barred from apportioning fish specially to a particular class of fishers.[201]

Six weeks later, the state supreme court reinforced *Gillnetters* by upholding another decision from the same county court. In *Washington Commercial Passenger Fishing Vessel Ass'n v. Washington*, a seven-member majority again

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The formula's basic fifty-fifty division of harvestable fish was unaffected.

193. United States v. Washington, 423 U.S. 1086 (1976).

194. COHEN, *supra* note 83, at 92. The Puget Sound Gillnetters Association and the Washington Kelpers Association represented non-treaty commercial fishers. *Id.* The Washington State Commercial Passenger Fishing Vessel Association represented charter sport salmon fishing companies. *Id.*

195. United States v. Washington, 459 F. Supp. 1020, 1034 (W.D. Wash. 1978). Exercising his continuing jurisdiction, Judge Boldt ordered the Thurston County Court to refrain from carrying out rulings which deprived the tribes of their share of the fishery and noted that the Thurston County suits "hardly resembl[ed] contested cases." *Id.* at 1031 n.3.

196. *Id.* The plaintiffs and defendant had the same ultimate objective. *Id.*

197. Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151, 1152 (Wash. 1977).

198. *Id.* at 1159.

199. *Id.* at 1158.

200. *Id.*

201. *Id.* at 1159.

affirmed that the Department of Fisheries had no authority to allocate a specific share of fish to treaty fishers.[202] The court held that the allocative regulations violated the Equal Protection Clause of the Fourteenth Amendment because more than half of the area's harvestable fish were being allocated to a class of fishers who constituted a mere .028 percent of the state's overall population.[203]

In the wake of the state supreme court's rulings in *Gillnetters* and *Fishing Vessel*, the Fisheries Department found itself in the crossfire of conflicting state and federal rulings.[204] Thor Tollefson, Director of Fisheries, was caught between Scylla and Charybdis: he would be in contempt of the state supreme court if he maintained the restrictions and in contempt of the federal court if he did not.[205] The federal court soon freed him from his dilemma by assuming control of treaty-area fishing regulations under the court's continuing jurisdiction in *Washington (Phase I)*.[206] The Fisheries Advisory Board — a creature of the court consisting of one tribal representative, one state representative, and one court appointed chairman/technical advisor[207] — developed a management plan for the 1977 and 1978 fishing seasons, which Judge Boldt adopted as a court order.[208] The plan was enforced by a special team of federal officers from the Departments of Interior, Justice, Commerce, and Transportation.[209] Persons caught fishing in violation of the plan were charged with contempt of court.[210]

Shortly after adoption of the plan, the court's authority to manage treaty-area fisheries was challenged by the Puget Sound Gillnetters Association.[211] The Gillnetters' action was consolidated with another action brought by other non-treaty fishing groups against the court-ordered plan in *Sohappy*[212] and was heard by a three-judge panel of the Ninth Circuit Court of Appeals. Reprising arguments they had used successfully at the state court level, the fishing groups contended that the court-imposed plans denied equal protection to non-Indians

202. Wash. State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373, 1374 (Wash. 1977).
203. *Id.* at 1378.
204. COHEN, *supra* note 83, at 99.
205. *Id.*
206. *Id.* at 99-100.
207. *Id.* at 94.
208. *Id.* at 100.
209. *Id.*
210. *Id.*
211. Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123 (9th Cir. 1978).
212. *Id.*

by allocating a disproportionate share of treaty-area fish to Indians,[213] that the courts abused their discretion by seizing control of treaty-area fisheries,[214] and that even if the courts had acted within their authority, their orders were unenforceable against fishers and fishing groups who were not parties to the cases.[215]

The court of appeals firmly rejected each of these arguments. Before turning to the merits of the parties' claims, Judge Goodwin noted the unusually discordant campaign that had been carried out by Washington state officials and non-treaty fishing groups to resist Judge Boldt's apportionment order.

> The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be viewed by this court in the context of events forced by litigants who offered the court no reasonable choice.[216]

Addressing the plaintiffs' equal protection claim, Judge Goodwin began his opinion by noting the principle, established in *Morton v. Mancari*,[217] that preferential treatment by the federal government of members of Indian tribes is based on *political* distinctions, not racial distinctions, and is constitutional so long as it is given on the basis of membership in a "quasi-sovereign tribal entit[y]" and not on the basis of membership in a certain ethnic group.[218] As the *Mancari* Court reasoned, preferential treatment of Indian tribe members does not constitute invidious racial discrimination when the government's actions are rationally related to the United States' unique obligations toward the tribes.[219]

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213. *Id.* at 1127.
214. *Id.* at 1129.
215. *Id.* at 1132.
216. *Id.* at 1126 (citations omitted).
217. 417 U.S. 535 (1974).
218. *Gillnetters*, 573 F.2d at 1127 (quoting *Mancari*, 417 U.S. at 554 n.24).
219. *Mancari*, 417 U.S. at 555. In *Mancari*, the U.S. Supreme Court explained that preferences given to tribe members are "not directed towards a 'racial' group consisting of 'Indians'; instead, [such preferences] appl[y] only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id.* at 554 n.24. The *Gillnetters* court cited *Mancari* in its discussion of the special fishery rights held by treaty tribe members to emphasize that these rights are based on the tribal members' status, not as "Indians," but as enrolled members of sovereign tribal nations that have historically and politically unique

Under the *Mancari* principle, fish allocations favoring tribe members do not constitute invidious racial discrimination if the allocations are based on unique political relationships between the tribes and the federal government. Where these unique political relationships are concerned, "[c]omparisons between the numbers of treaty and nontreaty fishers, or the quantity of fish each category has an opportunity to take, are simply irrelevant under the law. The treaty tribes reserved their preexisting rights to fish, and they continue, as quasi-sovereign entities, to hold those reserved rights."[220]

According to the court, an equal protection issue would arise in the context of fish apportionment orders only if the district courts had attempted to apply those orders beyond the geographic scope of the treaties, which they did not do. Drawing an analogy from the rights of cotenants under a common law cotenancy, Judge Goodwin concluded that the present-day disparity arising under the equal sharing formula between the ratio of treaty-allocated fish to treaty fishers and the ratio of treaty-allocated fish to non-treaty fishers should be viewed simply as "the unremarkable result of normal principles of property law applied to changing numbers within cotenant classes."[221]

The court next addressed the fishing groups' assertion that the district courts had abused their discretion by taking control of state fisheries to enforce the apportionment orders. The issue here, as Judge Goodwin framed it, was not whether the orders themselves were proper, but whether some of the actions taken to enforce the orders were legitimately within the district courts' authority.[222] Reasoning that the district courts could not have protected the tribes' rights without imposing restrictions on non-treaty fishing, the appellate court concluded that these courts had broad discretion and had not abused it.[223] "If the nontribal fishery were not limited, the tribal fishery would never have the opportunity to take its full share . . . . Preserving the tribal opportunity requires limiting the nontribal opportunity."[224]

Lastly, the court held that in-state non-treaty fishers and fishing organizations who were never parties to either of the cases were bound by the courts' enforcement orders.[225] The issue here was whether treaty rights were enforceable against private citizens and companies as well as against state

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relationships with the United States.

220. *Gillnetters*, 573 F.2d at 1228.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 1132-33.

officials.[226] Judge Goodwin reasoned that treaty rights *are* enforceable against citizens and companies because citizens and companies are automatically *in privity* with one of the defendant states whenever they engage in fishing in treaty-area waters.[227] The court noted that under the laws of both Oregon and Washington, title to non-domestic fish within state boundaries belongs to the state, and a non-treaty fisher's right to take those fish is entirely derivative of the state's power to protect its possessory interest by regulating the fishery.[228] Reasoning that the interests of non-treaty fishers in Washington are derivative of the interests of the defendant state, the court concluded that they "are in privity with the state and are bound by actions affecting its sovereign interests to which it is a party. This being the case, the district court had authority to act against the fishers directly when it appeared that the state was unable to do so."[229]

The court's decision left state officials and non-treaty fishers in Washington with one remaining tool in their campaign against the federal courts' interpretation of the fishing clauses. Although the United States Supreme Court had already denied certiorari in *Washington*, it could still elect to review the case. Because the district court retained continuing jurisdiction, the case had not been finally adjudicated.[230] After the state supreme court's decisions in *Gillnetters* and *Fishing Vessel* and the Ninth Circuit's decision in *Gillnetters*, moreover, the federal Supreme Court could opt to review the equal-sharing rule in the context of two other cases now standing before it. *Gillnetters* and *Fishing Vessel* gave the Court a strong new incentive to revisit the Boldt decision, because now a state supreme court's interpretation of a federal treaty was in direct conflict with the interpretation supplied by federal courts.[231] In October 1978, the Court finally accepted the state's appeal in *Washington*, consolidating it for review with the state's appeal in *Fishing Vessel* and the fishing groups' appeal in *Gillnetters*.[232]

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226. *Id.* at 1132.

227. *Id.*

228. *Id.*

229. *Id.* at 1132-33 (citations omitted).

230. The Supreme Court explained its reasoning on this point by noting, "Our earlier denial [of certiorari] came at an interlocutory stage in the proceedings — the District Court has retained continuing enforcement jurisdiction over the case — so that we certainly are not required to treat the earlier disposition as final for our purposes." Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 672 n.19 (1979).

231. *Id.*

232. *Id.* Despite the fact that the state's appeal of *United States v. Washington* was the principal case on review and was by far the most important of the three consolidated cases,

Washington, represented by its attorney general (and soon-to-be U.S. Senator), Slade Gorton, reasserted the main argument it had made before the district court, that treaty fishers reserved no rights beyond those enjoyed by non-treaty fishers, except: 1) a right to cross over private lands to gain access to customary fishing sites and 2) an exemption from the payment of license fees.[233] Joined by the commercial fishing groups, the state also reasserted its objections to the district courts' remedial orders. The state and the fishing groups argued, first, that state Game and Fisheries Departments were prohibited from following the orders because doing so required them to take actions they were not authorized to take under state law, and second, that the courts exceeded their authority when they took control of treaty-area fisheries management.[234]

Writing for a six-member majority, Justice Stevens rejected each of these arguments. With two minor exceptions, the Court upheld every aspect of Judge Boldt's apportionment order, as well as the actions the district courts subsequently took to enforce his equal-sharing formula. The Court held that the fishing clauses reserve to treaty fishers the right to harvest a fair share of each run of fish passing through the tribes' customary fishing grounds.[235] Justice Stevens acknowledged that the key phrase, "in common with," could plausibly be interpreted both in the manner suggested by the United States and the tribes *and* in the manner suggested by Washington.[236] He concluded, however, that the interpretation suggested by the United States and the tribes was more consistent with the way the phrase was probably understood by tribal representatives at treaty time.[237]

> That each individual Indian would share an "equal opportunity" with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations .... Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to

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Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n was listed first in the case heading. As a result, the Supreme Court's review of *United States v. Washington* is often referred to as *Fishing Vessel* and will be referred to as such in the remainder of this article. The reader should be careful not to confuse *Fishing Vessel*, the United States Supreme Court case, with *Fishing Vessel*, the Washington Supreme Court case.

233. *Id.* at 670-71, 675.

234. *Id.* at 692-93.

235. *Id.* at 679, 684-85.

236. *Id.* at 677.

237. *Id.* at 677-78.

> perceive a "reservation" of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters.[238]

Justice Stevens found convincing support for this interpretation in all six previous cases in which the Court had ruled on the meaning of the fishing clauses.[239] "[T]he principal issue involved," he stated, "is virtually a 'matter decided' by our previous holdings."[240] In *Winans* and the *Puyallup* trilogy in particular, he reasoned, the Court had "adopted essentially the interpretation that the United States is reiterating here."[241] In the first place, Justice Stevens pointed out, the *Winans* court had explicitly rejected an earlier incarnation of the state's "equal opportunity" theory when it held that the fishing clauses promised more to tribe members than just the right to go fishing alongside and under the same terms as non-tribe members.[242] In the second place, the *Puyallup* trilogy "clearly establish[ed] the principle that neither party to the treaties may rely on the State's regulatory powers or on property law concepts to defeat the other's right to a 'fairly apportioned' share of each covered run of harvestable anadromous fish."[243]

The Court concluded that the district courts had calculated the treaty and non-treaty allocations of fish in the treaty area correctly.[244] Justice Stevens reasoned that a fair apportionment consistent with the wording of the fishing clauses should begin by dividing the harvestable portion of each run that passes the tribes' customary fishing sites into roughly equal treaty and non-treaty shares;[245] if tribal fishery-related needs have diminished and the tribes are able to earn a moderate living from a smaller percentage of harvestable fish, the treaty share should then be reduced accordingly.[246] Justice Stevens also agreed that the treaty share should be equitably adjusted to compensate treaty fishers

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238. *Id.* at 676, 678-79.

239. *Id.* at 679.

240. *Id.*; *see* Dep't of Game of Wash. v. Puyallup Tribe, (*Puyallup Tribe III*), 433 U.S. 165 (1977); Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup Tribe II*), 414 U.S. 44 (1973); Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup Tribe I*), 391 U.S. 392 (1968); Tulee v. Washington, 315 U.S. 682 (1942); Seufert Bros. Co. v. United States, 249 U.S. 194 (1918); United States v. Winans, 198 U.S. 371 (1905).

241. *Fishing Vessel*, 443 U.S. at 679.

242. *Id.* at 680-81.

243. *Id.* at 682-83.

244. *Id.* at 685.

245. *Id.*

246. *Id.* at 685-86 (citing Arizona v. California, 373 U.S. 546 (1963)).

for fish taken by domestic non-treaty fishers beyond the jurisdiction of the state.[247]

While agreeing with the district courts' basic harvest allocation formula, the Court simplified the apportionment rules by holding that fish caught on reservations and fish caught by treaty fishers for subsistence or ceremonial purposes should be included in the treaty allocation so that the *total* catch, rather than just the commercial catch, would count toward the tribes' share.[248] This had the effect of reducing the tribal share by a small percentage.[249] Any fish

> (1) taken in Washington waters or in United States waters off the coast of Washington, (2) taken from runs of fish that pass through the Indians' usual and accustomed fishing grounds, and (3) taken by either members of the Indian tribes that are parties to this litigation, on the one hand, or by non-Indian citizens of Washington, on the other hand, shall count against that party's respective share of the [treaty area] fish.[250]

Lastly, addressing the issues raised in *Gillnetters*, the Court held that the Washington State Supreme Court had erred in holding that state Game and Fisheries Departments were prohibited from complying with the district court's remedial orders and had erred in holding that the Washington district court exceeded its authority when it assumed control of treaty-area fisheries.[251] Under the Supremacy Clause of the federal Constitution,[252] state agencies that are parties to a federal lawsuit may be ordered to implement regulations designed to enforce a federal court's interpretation under federal law of the rights of one of the parties.[253] If the agencies are unable to or refuse to implement the regulations, the federal court has the power to implement them itself and impose federal enforcement measures to ensure they are followed.[254]

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247. *Id.* at 688.

248. *Id.*

249. *Id.*

250. *Id.* at 689. The Court did not resolve the issue of whether ceremonial and subsistence treaty fishing have to be given priority over non-treaty fishing during periods of scarcity to carry out the purposes of the treaties. The Court suggested, however, that conditions of scarcity could cause the treaty share to exceed fifty percent because a greater-than-fifty-percent share may be needed when fish are scarce just to fulfill the tribes' ceremonial and subsistence needs.

251. *Id.* at 695-96.

252. U.S. CONST. art. VI, cl. 2.

253. *Fishing Vessel*, 443 U.S. at 694.

254. *Id.* at 695-96.

"Even if those orders may have been erroneous in some respects, all parties have an unequivocal obligation to obey them while they remain in effect."[255]

In *Fishing Vessel*, the Supreme Court endorsed every major aspect of the district courts' handling of the allocation issue. The Court affirmed that the fishing clauses reserved to the tribes an implied right to a specific share of anadromous fish returning to rivers and streams containing customary tribal fishing sites, not just an equal opportunity to try and catch fish in common with non-treaty fishers. The Court also affirmed the broad outlines of Judge Boldt's formula for determining what the tribal share should be: the tribes are entitled to up to fifty percent of all harvestable fish from runs that pass through or are destined to pass through traditional tribal fishing grounds, subject to an equitable adjustment to make up for fish captured offshore by domestic non-treaty fishers. By specifying that fifty percent is a maximum but not a minimum share of the resource and that this share is subject to cutbacks in accordance with future reductions in the tribes' moderate living needs, the Court made it clear that the tribes' allocation rights are not absolute property rights and are meant to reserve nothing more than a moderate living for the tribes. On the question of enforcement, *Fishing Vessel* established beyond any doubt that federal courts have authority to require state agencies to enforce the tribes' allocation rights and to assume direct supervisory control, if necessary, over treaty-area fisheries for the purpose of enforcing those rights.

V. Habitat Conservation and Restoration: United States v. Washington (Phase II)[256]

In the first phase of *United States v. Washington*,[257] the district court reserved two contested issues for subsequent trial: whether hatchery fish should be counted with wild fish among the total number of fish allocable to the tribes[258] and whether the right of taking fish incorporates a right to protection against degradation of treaty fishery habitats.[259] These issues were considered in the second phase of *United States v. Washington*.[260] *Phase II* was decided once in the district court and three different times in the court of appeals. It ended with a ruling on the merits on the hatchery fish issue only. The tribes' assertion of

255. *Id.* at 696.
256. 759 F.2d 1353 (9th Cir. 1985).
257. United States v. Washington (*Phase I*), 384 F. Supp. 312 (W.D. Wash. 1974).
258. *Id.* at 344-45.
259. *Id.* at 328.
260. *Phase II*, 759 F.2d at 1355-56; United States v. Washington (*Phase II*), 506 F. Supp. 187, 191 (W.D. Wash. 1980).

a habitat conservation right was eventually dismissed on procedural grounds.[261] Although the hatchery fish issue is really a facet of the allocation issue, it is discussed in this section because it was litigated in *Phase II* alongside the habitat issue.

The district court held a bench trial on the hatchery and habitat issues and announced a ruling on the merits that was favorable to the tribes on both issues.[262] In its first hearing of the case, a three-judge panel of the Ninth Circuit Court of Appeals also ruled on the merits with respect to both issues, holding squarely for the tribes on the hatchery issue and partially for the tribes on the habitat issue.[263] Sitting en banc a few months later, the appellate court withdrew its initial decision, however, and vacated the trial court's ruling on the habitat issue on grounds that the issue had not been properly before it.[264] Eventually, the Supreme Court denied certiorari in *Phase II*.[265] The final result of *Phase II* for the tribes was thus a positive holding on the hatchery issue (hatchery fish would be counted as part of the sum total of allocable treaty-area fish) but no holding at all on the habitat issue. After an arduous nine-year process and four separate decisions, the most controversial and potentially far-reaching issue in the entire record of litigation over the Stevens Treaties was left unresolved, and remains unresolved to this day.

Phase II commenced in August 1976 when the United States and the tribes filed amended and supplemental complaints in Judge Boldt's district court, soon after the Supreme Court initially denied certiorari in *Phase I*.[266] In their opening pleadings in *Phase II*, the tribes and the United States requested declarations that hatchery-bred fish are included in the allocable fish population and that the tribes' right of taking fish impliedly incorporates a right to have treaty fishery habitats protected from human-caused degradation.[267] The tribes and the United States also asked the court to order further remedies at its discretion to the extent necessary to safeguard the tribes' rights to conservation of treaty fishery habitats.[268] The plaintiffs moved for summary judgment on the habitat issue in November 1978.[269] After the Supreme Court finally affirmed the tribes' allocation rights in *Fishing Vessel*, each of the parties filed new

261. *Phase II*, 759 F.2d at 1357.
262. *Id.* at 1355.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 1355-56.
267. *Id.*; United States v. Washington (*Phase II*), 506 F. Supp. 187, 194 (W.D. Wash. 1980).
268. *Phase II*, 759 F.2d at 1355-56.
269. *Id.* at 1356.

cross-motions for summary judgment on the hatchery fish issue.[270] The plaintiffs moved again for partial summary judgment on the habitat issue, asking for a declaration of their rights to protection of fishery habitats but apparently leaving for trial the question of whether the state had violated these rights and the question of what remedies, if any, the tribes were entitled to.[271]

In September 1980, the district court ruled in favor of the tribes on both of their motions. Judge William Orrick, who had replaced Judge Boldt on the bench, held that hatchery fish are "fish" within the meaning of the fishing clauses and must be included in the tribes' treaty share to fulfill the purposes of the treaties.[272] On the habitat issue, the court held that a right to protection of treaty fishery habitats is impliedly incorporated in the right of taking fish as secured by the treaties, and that the state, the United States, and third parties have a correlative duty "to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs."[273]

At the court's direction, the tribes then filed a proposed order for declaratory relief on the two main issues, again leaving aside the subsidiary question of whether the state had actually violated the tribes' habitat conservation rights and the question of what remedies, if any, the tribes were entitled to.[274] In January 1981, Judge Orrick adopted the tribes' proposed order as an amended judgment.[275] Finding that there were no genuine issues of material fact regarding the parties' motions and that the plaintiffs were entitled to summary judgment on the hatchery fish issue and partial summary judgment on the habitat issue, the court decreed, inter alia, that:

> 1. Hatchery-bred and artificially-propagated fish released into public waters are "fish" within the meaning of the fishing clause of each of the Stevens Treaties and consequently are subject to allocation thereunder in order to effectuate the parties' intent and the purposes of the fishing clause.
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> ***
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> 3. The Tribes have an implicitly incorporated right under the fishing clauses of the Stevens Treaties not to have the fishery habitat degraded by the actions of man which cause environmental damage resulting in such a reduction of available harvestable fish that the

270. *Id.*
271. *Id.*; *see also Phase II*, 506 F. Supp. at 194.
272. *Phase II*, 506 F. Supp. at 197.
273. *Id.* at 203, 208.
274. United States v. Washington (*Phase II*), 759 F.2d 1353, 1356 (9th Cir. 1985).
275. *Id.*

> moderate living standard, as implemented through the allocation orders of the District Court in Phase I, cannot be met.
>
> 4. The state has a correlative duty under the Supremacy Clause of the Constitution of the United States, independent of the duty of the United States and of third parties, to refrain from degrading or authorizing others to degrade the fish habitat to the extent that it would deprive the Tribes of their moderate living needs, as implemented through the allocation orders of the District Court in Phase I.
>
> ***
>
> 8. The issue of whether the state has violated the Tribes' [habitat conservation rights] and has breached its duty to the Tribes and the issue of what remedies, if any, plaintiffs are entitled to were not included in the motion for partial summary judgment, have not yet been presented to the Court, and are not covered by this Amended Judgment.[276]

In an attempt to resolve concerns about how the parties would handle grievances based on alleged violations of the tribes' habitat conservation rights, the court ordered that the tribes must carry the burden of proving that state actions proximately cause fishery habitats to be degraded and that the state in return must carry the burden of showing that such degradation will not affect the tribes' ability to earn a moderate living from fishing.[277] The court noted that it would be especially difficult for the state to show that a particular instance of habitat degradation will not impair the tribes' moderate living needs if the tribal allocation is already at its maximum of fifty percent: "If the treaty allocation of harvestable fish is at 50 percent, then there is a presumption that the [tribes'] moderate living needs are not being met."[278] The court concluded its January 1981 order by pronouncing, "This Amended Judgment constitutes a final declaratory judgment and is reviewable as such."[279]

On appeal by the state to the Ninth Circuit, *Phase II* was heard and re-decided three different times. The case was heard first by a three-judge panel. In a decision released in November 1982, the panel affirmed the district court's declaratory judgment on the hatchery fish issue[280] but significantly modified it

276. United States v. Washington, Civil No. 9213, at 2-3 (W.D. Wash. Jan. 12, 1981) (*Phase II* amended judgment).

277. *Id.*

278. *Id.* at 3.

279. *Id.*

280. United States v. Washington, 694 F.2d 1374, 1380 (9th Cir. 1982).

with respect to the habitat issue. Reaching the merits but rejecting the district court's treatment of the habitat issue, the panel held that the treaty right of taking fish did not incorporate a right to protection of treaty fishery environments but instead required the state and the tribes to each "take reasonable steps commensurate with the respective resources and abilities of each to preserve and enhance the fishery."[281]

The panel's ruling was withdrawn when a majority of active judges on the Ninth Circuit voted to rehear the case en banc.[282] Initially, the en banc court overturned the panel's decision and dismissed the state's appeal for lack of jurisdiction.[283] The court reasoned that the district court's Amended Judgment was not final since it granted only partial summary judgment on the habitat issue and apparently reserved for trial the subsidiary issues of whether the state had actually breached its habitat protection duties and what remedies, if any, to which the tribes were entitled.[284] Because the plaintiff's 1976 supplemental complaint had included these subsidiary issues and the district court had not yet decided them, the en banc court at first concluded that the Amended Judgment was not reviewable — despite the district court's characterization of it as "a final declaratory judgment . . . reviewable as such."[285]

A majority of active judges on the Ninth Circuit still had deep misgivings about the outcome of the case. The state petitioned for rehearing, and the court again withdrew its opinion. In its third and final decision, sitting en banc and writing per curiam, the court retreated from its previous position and held that the state's appeal of the district court's Amended Judgment was within its jurisdiction after all.[286] The court decided that the district court's order was final and reviewable because it granted the full relief sought by the plaintiffs and completely resolved the tribes' primary claims in *Phase II*.[287] That the order failed to resolve two of the issues raised in the plaintiffs' supplemental complaint did not detract from its finality under the court's new analysis because these issues had been expressly excluded by the plaintiffs from the scope of the order.[288] After revising its analysis and deciding that the Amended Judgment was final and reviewable, the en banc court affirmed the district

281. *Id.* at 1381.

282. United States v. Washington (*Phase II*), 704 F.2d 1141 (9th Cir. 1983).

283. Judith Constans, *The Environmental Right to Habitat Protection: A* Sohappy *Solution*, 61 WASH. L. REV. 731, 734 n.27 (1986).

284. *Id.*

285. *Id.*

286. United States v. Washington (*Phase II*), 759 F.2d 1353, 1356 (9th Cir. 1985).

287. *Id.*

288. *Id.*

court's declaratory judgment on the hatchery fish issue but vacated its declaratory judgment on the habitat issue.[289]

In its third and final decision, the Ninth Circuit never reached the merits of the tribes' contention that the right of taking fish incorporates a right to conservation of fishery environments. Instead, it rested its reversal of this part of the district court's ruling on procedural grounds. Declaratory relief on the habitat issue, the court reasoned, was inappropriate because under the circumstances it neither resolved the parties' legal relations nor provided them with relief from uncertainty and controversy.[290] In its third and final opinion, the court concluded that the *Phase II* litigation was not a proper forum for entering declaratory relief on the habitat issue. Entering a declaratory judgment in the absence of a litigated dispute over a specific, tangible instance of human-caused fishery habitat degradation, without the clear factual record that such a dispute would provide, the court reasoned, was "contrary to the exercise of sound judicial discretion."[291]

> It serves neither the needs of the parties, nor the jurisprudence of the court, nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension. Precise resolution, not general admonition, is the function of declaratory relief. These necessary predicates for a declaratory judgment have not been met with respect to the environmental issue in this case.[292]

The district court's declaratory judgment on the hatchery fish issue, according to the Ninth Circuit's final opinion, did not suffer from the procedural infirmities that tainted its declaratory judgment on the habitat issue. Because the decree regarding hatchery fish served to "clarif[y] and settl[e] the legal relations of the parties and afford[ed] relief from a precise dispute identified in the proceedings," the court viewed declaratory judgment as an appropriate mechanism for handling the hatchery fish issue.[293]

At trial, and again before the appellate court, the state argued that first-generation hatchery fish belonged to the state and should be excluded from the tribes' share of each season's harvest.[294] If accepted by the court, the state's

289. *Id.* at 1355.
290. *Id.* at 1357.
291. *Id.*
292. *Id.*
293. *Id.* at 1357-58.
294. *Id.* at 1359.

approach would have reduced the tribes' allocation to a much smaller share of available fish, consisting only of wild fish and naturalized descendants of hatchery fish.[295] Rejecting these arguments, the court found that equitable considerations supported the tribes' contention that returning hatchery-reared fish should be counted equally in the tribes' allocation with returning wild and naturalized fish.[296]

The court cited four considerations that weighed in favor of affirming the district court's declaratory judgment on the hatchery fish issue: "(1) the lack of State ownership of the fish once released; (2) the lack of any unjust enrichment of the Tribes; (3) the fact that hatchery fish and natural fish are not distinguished for other purposes; and (4) the mitigating function of the hatchery fish programs."[297] Focusing on the last of these factors, the court concluded, "For the Tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries, would be an inequity and inconsistent with the Treaty."[298]

The full outcome of *Phase II* was a disappointment to all parties. The state appealed the decision, but the Supreme Court denied certiorari in November 1985.[299] The tribes were happy to win a victory on the hatchery fish issue, and the state was certainly relieved that the district court's judgment on the habitat issue had been vacated. Still, each party had strong reasons for wanting the court to decide the habitat issue on the merits. By the late 1970s, with the allocation issue largely resolved, environmental degradation had become by far the single greatest threat to treaty fisheries. The tribes wanted standing to ask the court to enjoin specific instances of fisheries habitat degradation. An adverse ruling on the merits of their habitat claim would have posed a setback for them, but it would have clarified their legal position in future lawsuits and negotiations over fisheries habitats. Similarly, Washington and the United States wanted the court to rule on the merits of the tribes' claim because uncertainty and confusion about the scope of treaty rights made it difficult to move forward on countless routine projects that posed a threat to fishery habitats — projects such as timber harvests, dam operations, irrigation diversions, and waterfront developments.

Given the important interests at stake on both sides and the significant consequences of a final ruling on the merits of the tribes' habitat rights claim,

295. *Id.*
296. *Id.* at 1359-60.
297. *Id.* (citing Douglas v. Seacoast Prod., Inc., 431 U.S. 265, 284 (1977)).
298. *Id.* at 1360.
299. Washington v. United States, 474 U.S. 994 (1985).

the Ninth Circuit's decision to vacate the district court's ruling on the habitat issue is puzzling. The appellate court seems to have concluded that the consequences of upholding a treaty right to habitat conservation were too uncertain to warrant the action taken by the district court; the tribes' failure to ground its pleadings in specific instances of human-caused habitat degradation made declaratory judgment inappropriate.

> Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties. . . . Legal rules of general applicability are announced when their consequences are known and understood in the case before the court, not when the subject parties and the court giving judgment are left to guess at their meaning.[300]

The court's conclusion is puzzling because it seems to contradict the position taken by both sides on the importance of a ruling on the merits of the tribes' claim. Both the tribes and the state seem to have assumed and expected at the outset of *Phase II* that a declaration on the tribes' asserted habitat conservation rights would clarify and settle certain essential legal relations between the parties, just as earlier declarations by the court had clarified and settled some of the parties' other legal relations. Although the conflict over habitat protection was not marked by physical confrontations between the parties, as previous disputes had been, *Phase II* was nevertheless litigated under a shared belief that the conflict over habitat had serious practical ramifications, and that a declaratory judgment would help resolve ongoing tensions between the parties.

As Judge Nelson pointed out in a dissenting opinion, all of the necessary conditions for the use of the declaratory judgment procedure were present in *Phase II*. First, the facts showed that there was "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[301] The tribes alleged that state officials were under a duty to prevent human-caused degradation of treaty fishery environments and were breaching this duty by carrying out and/or authorizing projects that damaged the spawning, rearing, and migratory habitats of treaty-area fish. The state countered that it was under no such duty because the tribes had no rights to fisheries habitat protection. These conflicting claims

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300. *Phase II*, 759 F.2d at 1357.

301. *Id.* at 1363 (Nelson, J., concurring in part and dissenting in part) (citing Md. Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)).

reflected a controversy whose resolution would have immediate, tangible consequences for the parties. Second, a declaratory judgment resolving the habitat issue would have served a useful purpose by clarifying and settling the legal relationships between the tribes and the state. The majority's claim to the contrary is simply disingenuous. A declaratory judgment on the habitat issue would have settled the central question of whether treaty-area fisheries must be protected from human-caused environmental degradation.

> The State needs to know whether [the tribes' asserted right] exists in order to make intelligent decisions about future development in the treaty area. The same is true with respect to the United States .... If the right does exist to some extent, the State and the United States must take it into account in their development decisions. Likewise, the treaty fishermen need to know where they stand after the Supreme Court's decision in [*Fishing Vessel*]. They are entitled to an answer concerning the treaty their forebears accepted.[302]

Lastly, as Judge Nelson argued, declaratory judgment on the habitat issue was proper — even though it left undecided certain questions about the scope of the state's duties — because it resolved at least one significant issue in contention between the parties. The Declaratory Judgment Act[303] authorizes the use of declaratory judgment regardless of whether doing so leaves some of the issues at stake in a given case open for future litigation.[304] The Ninth Circuit majority used an artificially inflated standard to reject the district court's resolution of the habitat issue. In reality, the application of declaratory judgment in *Phase II* could have resolved all questions about the scope of the parties' treaty rights and duties concerning fishery environments only if it had held that the tribes had absolutely *no* right to habitat conservation. A judgment more favorable to the tribes, even one only *slightly* more favorable, would leave open the possibility of future litigation and would therefore be, to some extent, "uncertain in dimension." This alone would not make the procedure improper, however; declaratory judgment remains proper "as long as it resolves a significant disputed issue."[305]

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302. *Id.* at 1364 (citations omitted).

303. 28 U.S.C. § 2201 (2000).

304. *Phase II*, 759 F.2d at 1364.

305. *Id.* (Nelson, J., dissenting in part and concurring in part) (citing Harris v. U.S. Fid. & Guar. Co., 569 F.2d 850, 852 (5th Cir. 1978)); 6A JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 57.08[4] (Matthew Bender 2d ed. 1983) (1938)).

The procedural flaw the appellate court purported to find in the district court's handling of the habitat issue seems to have been little more than a pretext for overturning a controversial ruling without having to reach the merits of the tribes' claim. By vacating the district court's judgment on the habitat issue, the Ninth Circuit erased a decision that carried potentially dramatic consequences for economically vital extractive industries and politically powerful resource-dependent interest groups. The economic backbone of the Pacific Northwest is comprised of industries that depend on the same natural resources that salmon depend on: rivers, streams, and forests. These industries rely on activities that modify or destroy the natural watershed conditions that sustain salmon.[306]

If the appellate court had upheld Judge Orrick's decree, the tribes would have gained a strong legal foothold for challenging a wide array of watershed-affecting policies and projects. Such a decision would have fundamentally altered the legal framework of natural resource policy-making throughout the treaty area. Although the appellate court tried to mask its reasoning in a theory about the province and role of the declaratory judgment procedure, it is difficult to escape the conclusion that its decision was guided mainly by prudential considerations, and that the court found fault, not with the district court's use of declaratory judgment per se, but with the *outcome* of its use of declaratory judgment. The majority even seemed to admit this. "Declaratory relief should be denied," they wrote, "when prudential considerations counsel against its use and the decision to grant declaratory relief should always be made with reference to the public interest."[307]

If the *Phase II* district court was correct — if the right to take fish impliedly incorporates a right to have treaty fishery habitats protected to the extent needed for the tribes to earn a moderate living from fishing, and if this right conveys a correlative duty on the part of the United States and successor governments to conserve and, where necessary, restore these habitats — then the federal government and treaty-area states have, in countless instances, long been

306. Industrial logging, for instance, relies on clearcuts, which cause erosion, eliminate shade, and elevate water temperatures. Real estate development along streams eliminates shade and elevates water temperatures. Utilities companies and power-intensive industries such as aluminum manufacturers rely on hydropower generated at dams, which destroy spawning, rearing, and migratory habitats. Barge companies on the Columbia and lower Snake rely on slack water created by dams. Farmers in eastern Washington and Idaho rely on irrigation-diversions from tributaries of the Columbia and Snake, leaving insufficient water for spawning salmon and leaving millions of juvenile salmon stranded in ditches each year. Industrial mining destroys the gravel beds that salmon rely on for spawning.

307. *Phase II*, 759 F.2d at 1357 (citations omitted).

systematically in violation of the treaties. Breaches of federal and state governments' duties to conserve fishery environments are evident in most treaty-area watersheds. Treaty-area rivers and streams have been drastically and continuously modified by dams, logging, grazing, mining, pollution, and development. The destruction of fishery environments is especially evident along the middle and upper reaches of the Columbia and throughout the Snake River Basin. Here, treaty fisheries have collapsed under the cumulative demands of industry and agriculture. In 1991 at congressional hearings on petitions to list once-abundant Snake River salmon runs under the Endangered Species Act, fisheries biologist Ed Chaney warned that salmon recovery efforts on the Snake and its tributaries would be pointless unless the hydropower system was fixed to allow safe passage of juvenile salmon.[308]

> According to the region's fishery agencies, the dams are responsible for more than 95% of all man-caused mortality of the petitioned Snake River salmon runs. If the dams are not fixed, all past, present and future investments in habitat and hatcheries, and the enormous social and economic cost of devastated fisheries and dependent economies, will be for nothing. The fish will eventually be lost.[309]

If the right to take fish includes a right to protection of treaty fishery habitats, then these dams and reservoirs form a series of ongoing treaty violations.[310]

Twenty years after *Phase II*, the habitat issue remains undecided. Two decades after the appellate court's third and final decision, the tribes are in basically the same legal position they occupied at the outset of *Phase II* except that today they enjoy a recognized right to having hatchery fish included among their share of the fishery. At any point during the past two decades, the tribes could have filed suit to reassert their habitat protection rights and enjoin specific

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308. Testimony of Ed Cheney Before Congressional Oversight Hearing, Senate Committee on Appropriations, Portland, Oregon Field Hearing (May 2, 1991) (on file with the *American Indian Law Review*).

309. *Id.*

310. According to a study published in 1986 by the Northwest Power Planning Council, fifty to eighty percent of the Basin's aboriginal salmon runs have been permanently lost as a result of dams and reservoirs. ROCKY BARKER, SAVING ALL THE PARTS: RECONCILING ECONOMICS AND THE ENDANGERED SPECIES ACT 93 (1993). All dam-related losses affect salmon runs originating in or above Columbia Basin treaty-area waterways. Every salmon run destroyed by Columbia and Snake River dams has thus been a loss to treaty fishers. *See also* NAT'L RESEARCH COUNCIL, U.S. DEP'T OF COMMERCE, UPSTREAM: SALMON AND SOCIETY IN THE PACIFIC NORTHWEST 226-37 (1996); LISA MIGHETTO & WESLEY J. EBEL, SAVING THE SALMON: A HISTORY OF THE UNITED STATES CORPS OF ENGINEERS EFFORTS TO PROTECT ANADROMOUS FISH ON THE COLUMBIA AND SNAKE RIVERS 81-92 (1994).

instances of habitat degradation. Instead, rightly or wrongly, they have focused all their efforts on negotiations with the states and the federal government. In the Columbia Basin, these negotiations have secured tighter restrictions on non-treaty fishing and increased production at upriver hatcheries. Negotiations have not, however, addressed conflicts over habitat protection and habitat restoration. The most recent management agreement for Columbia Basin fisheries contains detailed hatchery production quotas and detailed provisions for harvest but no provisions for conservation and restoration.[311] The dams are as lethal as ever. The tribes, however, seem to have accepted inaction on the habitat issue in exchange for favorable agreements on harvest and hatcheries.

For tribes whose fishing grounds are in watersheds where habitat restoration is essential to reviving treaty fisheries, this trade-off will ultimately be of little value. Without reinstatement of natural flow conditions along significant portions of the mainstem Columbia and lower Snake, the Basin's tribes will eventually lose their fisheries. Increased hatchery production and restrictions on non-treaty fishing will never be enough, by themselves, to restore mid-Columbia salmon runs to numbers large enough and consistent enough to sustain viable treaty fisheries. Recognizing this, the tribes' own fisheries restoration plan has long called for reservoir drawdowns at each of the four lower Snake dams and at John Day Dam on the mainstem Columbia.[312] The tribes' plan, however, is merely aspirational; it carries no legal force. Until their rights to healthy fishery habitats are fully recognized, the tribes will stay on the margins of treaty-area resource policy-making. Their harvest rights give them a voice in setting hatchery policies and regulating what is left of their fisheries. The greatest impact on most treaty-area fisheries, however, is caused not by hatchery and harvest policies but by policies on dams, timber harvest, riparian area development, livestock grazing, pollution, and the like. Without recognized rights to habitat protection, the tribes are powerless to change the status quo in precisely the areas where change needs to happen for their fisheries to survive.

Resource policies that consistently favor power production over fish production and industry and agriculture over natural river and stream conditions will lead to a final collapse of treaty fisheries in the Columbia Basin and elsewhere. Before this happens, the Basin's treaty tribes and other Northwest treaty tribes might conclude that they have little to lose by reasserting their habitat rights in court. To avoid any hint of the procedural shortcomings of the

311. 2005-2007 Interim Management Agreement for Upriver Chinook, Sockeye, Steelhead, Coho, & White Sturgeon 5-31, 41-60 (n.d.).

312. COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 5, at 29.

tribes' *Phase II* habitat claim, new litigation should be directed at specific instances of human-caused degradation, and the consequences of a declaratory judgment should be stipulated. As shown in the district court's *Phase II* holding, the tribes have a strong case. The canons of treaty construction and the Supreme Court's reading of the fishing clauses in all the major cases, from *Winans* through *Fishing Vessel*, provide strong support for the conclusion that the right to take fish impliedly incorporates a right to protection of fishery environments from human-caused degradation.

In *Fishing Vessel*, of course, the Court was faced with the issue of whether a state has a duty to regulate *the activity of fishing* to ensure treaty fishers a fair share of the harvest. The habitat issue, by contrast, is whether the state also has a duty to regulate *other types of fishery-affecting activities*, activities that do not involve directly taking fish but that deprive treaty fishers just the same of their fair share of the fishery. From the tribes' point of view, the treaty share of harvestable fish is a share of the Basin's fishery *as a whole*. The fishery as a whole includes both mature fish taken directly by fishers and fish taken *prematurely* through the destruction or modification of fishery habitats by dams, timber harvests, waterfront development, pollution, etc. While the habitat issue is different from the harvest allocation issue, Justice Stevens' reasoning in *Fishing Vessel* is equally applicable to both.

In numerous cases stretching back to the Marshall Trilogy,[313] including the main Stevens Treaty cases, the Supreme Court has relied on three principal canons of construction to guide its reading of the rights and duties established through treaties between the United States and Indian tribes: treaties should be liberally construed in favor of the tribes;[314] treaty provisions should be interpreted as tribal representatives would have understood them at treaty time;[315] and treaties should be interpreted in a manner that promotes their central purposes.[316] In *Fishing Vessel*, the Court reasoned that allowing the state to apportion the lion's share of harvestable treaty-area fish to non-treaty fishers through discriminatory fishing regulations was inconsistent with treaty provisions as understood by tribal representatives at treaty time. In Justice

313. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

314. Antoine v. Washington, 420 U.S. 194, 199 (1975) (citing *Worcester*, 31 U.S. (6 Pet.) at 515).

315. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 676 (1979); United States v. Winans, 198 U.S. 371, 380-81 (1905) (citations omitted).

316. *Fishing Vessel*, 443 U.S. at 679-88; *Winans*, 198 U.S. at 381; Winters v. United States, 207 U.S. 564, 576-77 (1908).

Stevens' analysis, the fishing clauses were understood by the tribes as reserving not merely the right to go fishing — to dip their nets in the water — but the right, more substantially, to *sustain a moderate living* from fishing.[317] Because securing their customary livelihood was, for the tribes, the central purpose of the fishing clauses, Justice Stevens reasoned that enforcement of the treaties requires restrictions on non-treaty fishing to allow fish to reach treaty fishing grounds in sufficient numbers to sustain viable commercial treaty fisheries.

The same reasoning applies to the habitat issue. At treaty time, all parties seem to have accepted that the treaties obligated the United States to refrain from interfering with the tribes' use of treaty-area fisheries for nourishment, commerce, and cultural and spiritual sustenance. At treaty time, the parties assumed that threats to treaty-area fisheries would come in the form of non-Indian settlers crowding tribal members out of their customary fishing sites.[318] It is unlikely that any of the parties envisioned the possibility of treaty fisheries being monopolized through over-fishing or habitat destruction. Changes in circumstances, however, and the emergence of new, post-treaty human-caused threats to the region's fisheries, do not alter the basic promise that the tribes have always understood to be enshrined in the treaties: that the United States — and, if necessary, successor states — would, to the best of their abilities, protect the tribes' rights to use treaty-area fisheries for food, commerce, and cultural and spiritual sustenance.

The tribes believed that in surrendering their territories they were gaining protection against real and potential human-caused threats to their fishery-based way of life — threats posed by American settlement of the region. One hundred fifty years later, as courts discern the contemporary meaning of the fishing clauses, it is immaterial whether these threats come in a form recognized at treaty time or in a form that did not emerge until a few decades later. As the court held in *Fishing Vessel*, the state is prohibited from allowing the tribes'

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317. Justice Stevens cited the district court's findings on this point:

> At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species, and extent as they had or were exercising. The Yakimas relied on these promises and they formed a basic and material part of the treaty and of the Indians' understanding of the meaning of the treaty.

Fishing Vessel, 443 U.S. at 667-68 (citations omitted).

318. Justice Stevens noted that "contemporaneous documents make it clear that [U.S. negotiators] recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries." *Id.* at 666 (citation omitted).

share of treaty-area fish to be taken by non-treaty fishers because doing so would deprive the tribes of precisely what the treaties were supposed to have secured. The state and the federal government should likewise be prohibited from allowing the tribes' share of treaty-area fish to be taken by other non-treaty resource users, whether timber companies, dam operators, mining companies, farmers, or real estate developers. The *Fishing Vessel* rationale for requiring the state to restrict non-treaty fishing applies readily to the problem of habitat degradation, so readily that Judge Orrick concluded that *Fishing Vessel* "all but resolved the environmental issue."[319]

Fishing Vessel held that the state has a duty to restrict non-treaty fishing to the extent needed to allow a fair share of treaty-area fish to reach tribal fishing grounds. Without such restrictions, the Court held, the tribes' right of taking fish would be meaningless.[320] If degradation of fishery environments continues, "the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty."[321]

Millions of young salmon destined to return as adults to treaty-area waterways are "taken" each year by forest- and river-dependent industries. They are smothered by silt from clearcuts, stranded in irrigation ditches, shredded in turbines, and gobbled by exotic predators that thrive in reservoirs. Tribal fisheries no longer exist in many treaty-area watersheds. The right to take fish is meaningless where there are no fish or where the only remaining fish are on the endangered species list. Habitat destruction by industry and agriculture cuts off the tribes' fishing rights more directly and irreparably than discriminatory regulations and excessive non-treaty fishing. Judge Orrick redeemed the tribes' rights to take fish and gave them a true practical significance by extending the *Fishing Vessel* holding to the habitat issue. His judgment should not have been overturned. Future courts that decide the habitat issue should follow his precedent. The right to take fish incorporates a right of having fish to be taken.

VI. Conclusion

If the tribes elect to relitigate, and the courts rely on long-established canons of treaty construction and the logic followed in previous cases, then the habitat conservation issue should be resolved in favor of the tribes. To the tribes, the

319. United States v. Washington (*Phase II*), 506 F. Supp. 187, 203 (W.D. Wash. 1980) (citation omitted).

320. *Fishing Vessel*, 443 U.S. at 679.

321. *Phase II*, 506 F. Supp. 187 at 203.

central purpose of reserving the right to take fish was to ensure that after ceding their territories they would be able to maintain traditional fishing-based economies and cultures. Healthy fisheries, access to fishing sites, and a share of harvestable fish are essential to fishing-based economies and cultures.

In the face of intense controversy, courts have affirmed the tribes' rights of access and harvest allocation. As courts have recognized, exercise of the right to take fish at customary fishing sites requires, at a minimum, access to those sites[322] and fish at those sites available to be taken.[323] For fish to be available at customary fishing sites, two conditions must exist: a meaningful share of harvestable fish destined to pass tribal fishing sites must be allowed to actually reach those sites, and the portion of the fishery that spawns above tribal fishing grounds must be relatively healthy. Specific treaty-area environmental conditions must be maintained, and, if necessary, restored, to support a treaty fishery capable of meeting the tribes' moderate living needs.

The central purpose of the fishing clauses cannot be promoted unless the clauses are read as reserving rights to fisheries habitat protection as well as rights of access and allocation. Each set of rights — access, allocation, and habitat conservation — is essential to the web of values that sustains the way of life reserved by the tribes through the treaties. Denying these rights would be inconsistent with the central purpose of the fishing clauses and would deviate sharply from the reasoning that has guided fishing clause jurisprudence for over a century.

Judicial affirmation of the tribes' fisheries habitat conservation rights, and of correlative state and federal responsibilities to protect fishery environments, would extend legal recognition to the last major judicially unrecognized prerequisite to exercising the right of taking fish, and would complete the long process of making the law consistent with what the treaties promised.

322. *See* United States v. Winans, 198 U.S. 371, 381 (1905).

323. Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969); United States v. Washington (*Phase I*), 384 F. Supp. 312, 343 (W.D. Wash. 1974); United States v. Washington, 520 F.2d 676, 688 (9th Cir. 1975); *Fishing Vessel*, 443 U.S. at 679.