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Winner, Best Appellate Brief in the 2001 Native American Law Student Association Moot Court Competition

Nicholas K. Rohner

Raj Mehta
University of Cincinnati

SPECIAL FEATURE

WINNER, BEST APPELLATE BRIEF IN THE 2001 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

Nicholas K. Rohner & Raj Mehta***

Questions Presented

I. Whether the ESA applies to the CTCR's exercise of its treaty-reserved fishing rights when there is no clear evidence on the face of the Act, in the Act's legislative history, or in the surrounding circumstances that indicates Congress intended for the ESA to abrogate Indian treaty rights.

II. Whether the NMFS should be required to first impose all reasonable restrictions on non-Indian activities before enforcing the ESA against the CTCR when the NMFS plan currently applies restrictions that are not essential to the conservation of salmon and when the conservation purpose of the plan can be achieved by reasonable regulation of non-Indian activities.

III. Whether the CTCR has a right to co-manage NFS lands in order to protect its members' ability to exercise their treaty fishing rights in light of the federal government's trust responsibility and the well-established judicial respect for Indian sovereignty.

IV. Whether the USFS has an obligation to at least manage fisheries on NFS lands to the level necessary to provide the CTCR members with sufficient salmon harvest so that they can maintain a moderate standard of living when the CTCR treaty guarantees the CTCR a moderate standard of living and the federal government's deep-rooted trust responsibility implicitly requires it.

Opinion Below

The opinion of the United States District Court for the District of Oregon has not been officially reported. The opinion is set out at pages 1-18 in the Transcript of Record.

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*J.D., 2001, University of Cincinnati College of Law. Attorney, Weltman, Weinberg & Reis Co., L.P.A., Cincinnati, Ohio.

**J.D., 2002, University of Cincinnati College of Law.

Statement of the Case

A. Statement of the Facts

In 1855, the Confederated Tribes of the Columbia River (hereinafter "CTCR") negotiated a treaty ("CTCR treaty" or "treaty") with Isaac Stevens ("Stevens") and Joel Palmer ("Palmer"), governors respectively of the Washington and Oregon Territories, peacefully agreeing to cede most of its member tribes' lands to the United States government in exchange for the solemn promise that its members' fishing rights would be protected in perpetuity. (R. at 6.) The salmon harvest and consumption was of great economic, cultural, and religious importance to the CTCR. *Id.*

The record of the treaty negotiations reflects the CTCR's insistence on the maintenance of tribal fishing rights both on and off its member tribes' reservations. *Id.* As a result of these negotiations, the CTCR treaty, like most other treaties negotiated by Stevens and Palmer, contained provisions promising the CTCR the exclusive right to fish on the lands it retained, as well as "the right of taking fish at all usual and accustomed stations . . . in common with all citizens" off its members' reservations. *Id.* The latter language provided the crucial guarantee that the CTCR members would be able to harvest an adequate food supply, as the relatively small tract of land the treaty reserved did not contain enough fishing sites to sustain the CTCR's traditional way of life. *Id.*

Pursuant to the treaty, CTCR members harvest salmon from sites along the Columbia River and its tributaries. (R. at 8.) The CTCR promotes self-regulation with regard to fishing by maintaining a Department of Natural Resources that monitors the salmon resource and regulates tribal members' fishing rights. *Id.*

Unfortunately, the salmon harvest has declined in recent years and the CTCR has been forced to curtail its fishery. *Id.* This decline is due in large part to the industry and agriculture that has sprung up near the Columbia River. *Id.* In late 1993, in response to concerns about habitat for certain Columbia River salmon stocks, the United States Forest Service ("USFS") began working on a Riparian Management Strategy for National Forest System Lands in the Columbia River Basin. (R. at 10.)

The USFS Strategy called for 50-foot buffers around riparian areas in which no logging or grazing would be permitted, and additional 50-foot buffers in which only selective logging and grazing would be allowed. (R. at 11-12.) The CTCR complained that the USFS Strategy was not sufficient to provide enough protection to salmon rearing and spawning habitat to ensure that there would be sufficient fish to provide the CTCR members with their treaty-protected "moderate standard of living." (R. at 12.)

The CTCR Department of Natural Resources subsequently developed its own Riparian Management Strategy. (R. at 11.) This strategy called for

200-foot "no activity" buffers around all known salmon spawning and rearing streams, and 100-foot "no activity" buffers around all other riparian areas. *Id.* The CTCR Strategy identified 1000 stream miles of salmon spawning and rearing riparian areas requiring the 200-foot buffer. *Id.* In spite of this more conservation-conscious alternative, the USFS issued a Record of Decision adopting its own Riparian Strategy on November 10, 1999. (R. at 11.)

The salmon death tolls since have risen so high that some species of salmon are now listed as "threatened" or "endangered" under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq. (R. at 2.) In response, the National Marine Fisheries Service ("NMFS") issued an ESA-mandated recovery plan ("NMFS Plan" or "Plan") for the mainstem Columbia River and its tributaries. *Id.* The NMFS Plan, issued January 1, 2000, sets out resource management criteria that NMFS scientists and policy makers have determined are necessary for the preservation of these species from extinction. *Id.* While the NMFS consulted with various parties involved in order to develop the Plan, including the CTCR, the CTCR and the other fishing interests ultimately did not agree with the management recommendations. (R. at 3.)

The NMFS Plan adopts the USFS Riparian Strategy and further recommends restrictions or modifications to a broad spectrum of industries: hydropower activities, farming, timber harvest, livestock grazing, home building, and other industrial development. (R. at 14.) While the Plan's economic analysis indicates that compliance with the Plan would result in a 10% to 35% reduction in profitability for each of these industries, job losses would be minimal and most businesses would remain and show growth within ten or twenty years. (R. at 15.)

The Plan's impact on the CTCR is another story. The Plan further recommends a harsh, ten-year ban on all fishing in the Columbia and its tributaries. *Id.* Moreover, because of the Plan's minimal protections of salmon spawning and rearing habitat, the levels of harvest would be such that each tribal fisherman would be permitted to harvest a maximum of only ten pounds of fish per month after the expiration of the ten-year moratorium, far below the 100 pounds per month that the members of the CTCR need to harvest to attain a "moderate standard of living." (R. at 16.) In short, the effect of the NMFS Plan on the CTCR would be devastating. *Id.*

Quite significantly, the NMFS Plan did not recommend the removal of four dams on the lower Snake River, which many environmentalists as well as the CTCR had urged as necessary for preventing the extinction of Snake River salmonids. (R. at 2, 15, n. 8.) The reasons listed in the Plan for this omission were three-fold: 1) only Snake River fish show a benefit from dam removal; 2) dam removal is expensive; and 3) there is scientific uncertainty as to whether dam removal is necessary for the recovery of these species

from the ESA listing. (R. at 15, n. 8.) While there is definitely some scientific uncertainty as to whether removal of the Snake River dams would be necessary for the recovery of the species to non-listed status, the scientific evidence is overwhelming that dam removal is necessary to provide a harvestable surplus that would permit the harvest of at least 100 pounds per month of fish per each tribal fisherman. (R. at 16.)

Because of the inadequacies of the USFS' Riparian Strategy and the NMFS Plan with regard to its fishing rights, the CTCR conducted its own analysis and developed its own basin-wide recovery plan. (R. at 15-16.) This analysis and subsequent plan, based on NMFS' own data, indicate that with more stringent requirements on each of the other affected industries, some tribal fishing could occur in the short term without harming the resource. (R. at 15.) In particular, the CTCR analysis and plan demonstrate that the removal of the four Snake River dams and implementation of the CTCR Riparian Strategy, which calls for larger buffers around salmon spawning and rearing streams, would result in sufficient short and long-term recovery of salmon resources to permit levels of harvest necessary to provide tribal members with a moderate standard of living. (R. at 15-16.)

The NMFS reviewed the CTCR plan and rejected it as being too burdensome to implement (R. at 4.) The NMFS also threatened that it would undertake enforcement actions against the CTCR and any of its members if tribal harvest was permitted to proceed. *Id.* The CTCR, openly adamant that the NMFS Plan sacrificed tribal treaty-reserved rights to benefit more powerful economic interests, instructed its enforcement officers to accompany tribal fishermen and to take any means necessary to protect the exercise of treaty-reserved rights. *Id.* After a few days of tense standoffs at various docks around the Columbia River, the CTCR filed this lawsuit. *Id.*

B. Procedural History

The CTCR filed a lawsuit in the United States District Court for the District of Oregon against the NMFS and the USFS, seeking to enjoin federal enforcement of the ESA against CTCR members exercising their treaty-reserved fishing rights, and additionally to require the USFS to develop a "co-management" plan for the protection of critical spawning and rearing habitat on National Forest System lands. (R. at 4.)

The Defendants filed a motion for summary judgment. (R. at 2.) The parties stipulated to most of the facts, with the exception of the testimony of two experts, whose testimony was presented via affidavits attached to the CTCR's responsive pleading: Dr. Jack Karr ("Dr. Karr"), a fisheries scientist with a Ph.D. in aquatic ecology and riparian habitat management; and Dr. Ellen Meiler ("Dr. Meiler"), an economist with a Ph.D. in natural resource and subsistence economics. *Id.* The Defendants did not contest the assertions in those affidavits nor offer any contrary affidavits. *Id.*

The District Court granted the Defendants' Motion for Summary Judgment on all claims. (R. at 17-18.) In entering judgment in favor of the USFS and the NMFS, the District Court found: (1) The ESA applies to the CTCR's exercise of its treaty-reserved fishing rights; (2) The NMFS need not first impose all necessary restrictions on non-Indian activities before enforcing the ESA against the CTCR; (3) the USFS does not have an obligation to manage fisheries habitat on National Forest System lands to the level necessary to provide the CTCR members with sufficient fish so that they can exercise their treaty fishing rights to maintain a moderate standard of living; (4) the CTCR does not have a right to "co-manage" National Forest System lands in order to protect its members' ability to exercise their treaty-reserved fishing rights to maintain a moderate standard of living. *Id.*

The CTCR filed an immediate appeal to the Ninth Circuit Court of Appeals. In a highly unusual move, the Ninth Circuit affirmed the District Court decision without opinion, in order to facilitate an immediate appeal to the United States Supreme Court. *Id.* The CTCR filed a notice of appeal in the Supreme Court, and the Supreme Court granted certiorari. *Id.* The CTCR now appeals the Order of the District Court in favor of the USFS and the NMFS. *Id.*

Summary of the Argument

This Court should reverse the Order of the District Court. This Court should find that the ESA does not apply to the CTCR's treaty-reserved fishing rights. If it finds that the ESA applies, however, this Court should require the NMFS to initiate a conservation plan that first imposes all reasonable restrictions on non-Indian activities. Moreover, this Court should find that the CTCR has a right to co-manage National Forest System lands in order to protect its members' ability to exercise their treaty fishing rights to maintain a moderate standard of living. If this Court finds that the CTCR has no such right, however, this Court should hold that the USFS at least has an obligation to manage fisheries habitat on National Forest System lands to the level necessary to provide the CTCR members with sufficient fish so that they can exercise their treaty-reserved fishing rights to maintain a moderate standard of living.

This Court should find that the ESA does not apply to the CTCR's treaty-reserved fishing rights. Because the NMFS' ESA-mandated Plan completely abrogates the CTCR's treaty rights, the *Dion* test should be applied to determine whether Congress intended for similar treaty rights to be abrogated by the ESA. Under the *Dion* test, the CTCR should retain its treaty rights in full force because there is no clear evidence on the face of the Act, in the Act's legislative history, or in the surrounding circumstances that indicates Congress intended for the ESA to abrogate Indian treaty rights.

If this Court finds, however, that the ESA applies, the NMFS should be required to initiate a plan that first imposes all reasonable restrictions on non-Indian activities. The NMFS Plan currently applies restrictions to the CTCR's treaty-reserved fishing rights that are not 'essential' to the conservation of the salmon. Furthermore, the conservation purpose of the Plan can be achieved by the reasonable regulation of non-Indian activities. Such regulation is consistent with the ESA's goal of recovering the salmon and with the government's deep-rooted trust responsibility to the Indians.

Moreover, this Court should find that the CTCR has a right to co-manage National Forest System lands in order to protect its members' ability to exercise their treaty-reserved fishing rights to maintain a moderate standard of living. Because the Supreme Court has repeatedly held that an Indian tribe under treaty should be treated as a sovereign nation and is one towards which the United States owes a trust obligation, the CTCR must be granted the right to participate in decision-making that significantly affects its lands and treaty-reserved rights.

Even if this Court finds that the CTCR has no right of co-management, this Court should hold that the USFS at least has an obligation to manage fisheries habitat on National Forest System lands to the level necessary to provide the CTCR members with sufficient fish so that they can exercise their treaty-reserved fishing rights to maintain a moderate standard of living. The NMFS Plan, which incorporates the USFS' Riparian Strategy, completely abrogates the CTCR's treaty-reserved rights and would severely diminish the CTCR's standard of living, causing a negative impact on tribal health and welfare. With the signing of the 1855 treaty, the CTCR was guaranteed at least a moderate standard of living, and in light of the government's trust obligation and the well-established judicial respect for Indian sovereignty, that standard of living must be upheld by any reasonable means.

Argument

I. The Lower Court Erred in Holding that the ESA Applies to the CTCR's Exercise of its Treaty-Reserved Fishing Rights

An Indian treaty is "not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted." *U.S. v. Winans*, 198 U.S. 371, 381 (1905). Many years ago, the Indians of the Northwest, through written treaties, peacefully gave up much of their land to the white settlers in exchange for the solemn promise that their fishing rights would be protected in perpetuity by the United States. After all, fish were as important to the Indians as "the atmosphere they breathed." *Id.*

Over the years, this Court has interpreted these treaties very liberally, clearly recognizing the "trust responsibility" the United States has with regards to Indians. *See, e.g., Washington v. Washington State Commercial*

Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). While this Court has granted Congress the right to unilaterally abrogate Indian treaties, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903), courts should not construe statutes as abrogating treaty rights in a "backhanded way," *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968), and "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Id.* (quoting *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934)).

Acting congruously with the aforementioned principles, the Supreme Court recently established, in *United States v. Dion*, 476 U.S. 734 (1986), the "actual choice and consideration" test, discussed *infra*, as the proper standard to be applied in instances where Congress' intent to abrogate treaty rights has been called into question. 476 U.S. at 739-40. Under the standard set forth in *Dion*, this Court should find that the ESA does not abrogate the CTCR's treaty-reserved fishing rights.

A. The Dion Test Is the Proper Standard to Apply to a Question of Treaty Abrogation.

Under the CTCR treaty, the CTCR are entitled to harvest enough fish to sustain a "moderate [standard of] living." *Passenger Fishing Vessel*, 443 U.S. at 686. The Meiler Affidavit concluded that in order to maintain a "moderate standard of living," CTCR fishermen would have to harvest a minimum of 100 pounds of fish per month. (R. at 13.) In spite of this, the NMFS seeks to implement a plan that not only calls for a ten-year ban on all treaty fishing (R. at 15), but one that permits each tribal fisherman a harvest of only ten pounds of fish per month after the ten year moratorium. (R. at 16.)

Because the CTCR would never again be able to maintain a moderate standard of living under the ESA-mandated NMFS Plan, its treaty rights would effectively be abrogated by the ESA. Therefore, the ESA should be subjected to the *Dion* test in order to determine whether if Congress, in enacting the ESA, demonstrated sufficient intent to abrogate Indian treaty rights.

In *Dion*, this Court was asked to determine whether the Bald Eagle Protection Act (BEPA) and the ESA were treaty-abrogating acts of Congress after an Indian was arrested and convicted of shooting four bald eagles on the Yankton Sioux Reservation. 476 U.S. at 735-36. In deciding that the Court of Appeals erred in recognizing Dion's treaty defense to his BEPA and ESA prosecutions, *id.* at 746, the Court ruled that, to determine congressional intent under an abrogation question, a court should look first and foremost to the face of the statute, but it may also look to the statute's legislative history and surrounding circumstances. *Id.* at 739. The Court decisively set forth that although an express statement by Congress is preferable for determining an intent to abrogate treaty rights, "*[w]hat is essential is clear evidence that Congress actually considered the conflict*

between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 739-40 (emphasis added).

The Court decided that, based upon the express language of the statute and the entire legislative history of the BEPA, Congress actually considered the conflict between the BEPA and Indian treaty rights and decided to abrogate the treaty rights. *Id.* at 743. The Court focused especially on a 1962 amendment that provided in part that the Secretary of the Interior may exempt, by permit, takings of bald or golden eagles for the religious purpose of Indian tribes. *Id.* at 741. The Court reasoned that this provision likely was a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians. *Id.* at 743-44.

The treaty having been abrogated by the BEPA, the Court decided that there was no reason to determine if the ESA abrogated the treaty. *Id.* at 745. However, the Court seemed to agree with Dion's assertion that the ESA and its legislative history are . . . "to a great extent silent regarding Indian hunting rights." *Id.* The Court nevertheless concluded that "[e]ven if Congress did not address Indian treaty rights in the Endangered Species Act sufficiently expressly to effect a valid abrogation . . . [Dion] can [still] assert no treaty defense to a prosecution under that Act for a taking already explicitly prohibited under the [Bald] Eagle Protection Act." *Id.* at 746.

While *Dion* set forth a test to determine congressional intent to abrogate Indian treaties, it failed to address specifically whether Congress intended for the ESA to abrogate Indian treaty rights. This question is now squarely before the Court.

B. Under the Dion Test, the CTCR Should Retain Its Treaty Rights in Full Force Because There Is No Clear Evidence on the Face of the Act, in the Act's Legislative History, or in the Surrounding Circumstances That Indicates Congress Intended for the ESA to Abrogate Indian Treaty Rights.

As is stated above, this Court has never construed the ESA in the context of abrogation of Indian treaty rights. Furthermore, no federal circuit court of appeals to date has addressed the issue. While one federal district court applied the *Dion* test and decided that the ESA abrogated a Seminole Indian's treaty-reserved right to hunt and fish on his reservation, *U.S. v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987), many learned commentators criticized this decision and concluded that other courts would likely find that the ESA does not abrogate Indian treaty rights. *See* Sally J. Johnson, *Honoring Treaty Rights and Conserving Endangered Species After United States v. Dion*, 13 Pub. Land L.Rev. 179 (1992); Robert Laurence, *The Abrogation of Indian Treaties By Federal Statutes Protective of the Environment*, 31 Nat. Resources J. 859 (1991); Robert J. Miller, *Speaking With Forked Tongues: Indian Treaties, Salmon, and the Endangered Species*

Act, 70 Or. L. Rev. 543 (1991); *but see* Conrad A. Fjetland, *The Endangered Species Act and Indian Treaty Rights: A Fresh Look*, 13 Tul. Envtl. L.J. 45 (1999) (agreeing with the *Billie* decision).

The *Billie* court's argument for congressional intent on the face of the statute, likely to be reiterated by the Respondents, was as follows: "[The ESA's] general comprehensiveness, its nonexclusion of Indians, and the limited exceptions for certain Alaskan natives . . . demonstrates that Congress considered Indian interests, balanced them against conservation needs, and defined the extent to which Indians would be permitted to take protected wildlife." 667 F. Supp. at 1490.

This argument falls well short of the mark under the *Dion* test for a number of reasons. First, "general comprehensiveness" and the "nonexclusion of Indians" is inconclusive under this standard. After all, many federal statutes are comprehensive. Furthermore, any statute that raises the issue of abrogation of treaty rights will logically not have an exclusion for Indians. *See* Laurence at 879. Furthermore, the fact that a statute allows for a limited exception for certain Alaskan natives is irrelevant for purposes of treaty rights analysis because Native Alaskans do not have treaty rights. *U.S. v. Bresette*, 761 F. Supp. 658, 663 (D.Minn. 1991). "To treat the consideration of indigenous Alaskans' rights as the consideration of Native American treaty rights nationwide, for the simple reason that both groups are regarded as Indians, is disingenuous." *Id.* Thus, there is no "clear evidence" on the face of the ESA indicating that Congress considered Indian treaty rights and chose to abrogate them.

The *Billie* court based part of its holding on the legislative history of two companion bills before the 92nd Congress. 667 F. Supp. at 1490. Those unpassed bills contained exemptions encompassing the taking of protected species for Indian religious purposes pursuant to a treaty, executive order, or statute. *Id.* However, during the discussion period, an official warned the Committees that, without an express abrogation clause, Indian treaty rights would survive. *Id.* at 1491.

As stated above, the bills never passed. *Id.* While the ESA was passed by the 93rd Congress in 1973, it is undisputed that there is no mention of the abovementioned exemptions or Indian treaties in the records of the 93rd Congress. *Id.* Quite significantly, this Court has held that "mute intermediate legislative maneuvers" are not reliable indicators of congressional intent. *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). So while some of the congressmen discussing the proposed legislation in the 93rd Congress were obviously carry-overs from the previous term, this does not amount to clear evidence that the 93rd Congress considered the question of Indian treaty abrogation when it enacted the ESA. If in fact they had considered treaty rights and chosen to abrogate them, the carry-overs likely would have heeded the warning of the official before the previous Congress, *supra*, and installed an express statement in the ESA regarding Indian treaty

abrogation. Instead, the legislative history of the ESA is completely devoid of any mention of Indian treaty rights.

The *Billie* case was wrongly decided. *See, e.g.*, Johnson, *supra*. Under the *Dion* "actual consideration and choice" test, the ESA should be found to abrogate Indian treaty rights only if there is *clear* evidence of such consideration and choice. However, the face of the ESA, its legislative history, and the surrounding circumstances reflect nothing that demonstrates clear evidence that Congress actually considered the conflict between the ESA and Indian treaty rights and chose to resolve that conflict by abrogating treaty rights. In light of the above, this Court should refuse to apply the ESA to the CTCR's treaty-reserved fishing rights without more explicit guidance from Congress.

II. The Lower Court Erred in Holding that the NMFS Need Not First Impose all Necessary Restrictions on non-Indian Activities Before Enforcing the ESA Against the CTCR.

Even if this Court decides under the *Dion* test that the ESA applies to the CTCR's treaty-reserved fishing rights, the Court should nevertheless require the NMFS to adopt a plan that, while promoting the conservation of the salmon at issue, is the least restrictive alternative with regards to Indian treaty rights. To do this, the Court should require that the plan first seek to achieve the conservation of the salmon through the reasonable restriction of non-Indian interests. Such a plan would be consistent with the conservation purpose of the ESA and with the federal government's long-recognized trust responsibility to the Indians.

A. The NMFS Plan Currently Applies Restrictions to the CTCR's Treaty-Reserved Fishing Rights That Are Not 'Essential' to the Conservation of the Salmon.

In *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968), this Court held that a State could regulate various aspects of off-reservation fishing "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." 391 U.S. at 398; *See United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980) (recognizing a *Puyallup*-like "conservation standard" in the context of the Bald Eagle Protection Act). The 'appropriate standards' requirement means that the State must demonstrate that 1) its regulation is a reasonable and necessary conservation measure, and that 2) its application to the Indians is necessary in the interest of conservation. *Antoine v. Washington*, 420 U.S. 194, 207 (1975).

In the context of the first of the *Antoine* sub-criteria, 'reasonable' requires that a specifically identified conservation measure is appropriate to its purpose; and 'necessary' means that such purpose, in addition to being reasonable, must be 'essential' to conservation. *United States v. Washington*,

384 F. Supp. 312, 342 (W.D. Wash. 1974) (emphasis added). In this case, the CTCR has already proven that the restrictions imposed on its treaty rights are not 'necessary' in that they are not 'essential' to the conservation of the salmon. The CTCR has shown, through its analysis and the development of its own plan, that there are other reasonable alternatives for preserving the salmon population. (R. at 15-16.)

The CTCR's plan becomes especially relevant when viewed in light of the second of the *Antoine* sub-criteria: *it must be necessary to regulate the Indians.* Courts have expounded on the meaning of 'necessary' in relation to non-treaty fishermen: "If alternative means and methods of . . . conservation regulation 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 . . . ." *U.S. v. Michigan*, 505 F. Supp. 467, 475 (W.D. Mich. 1980) (quoting *Washington*, 384 F. Supp. at 342).

The CTCR vigorously asserts that the *Washington* court's "alternative means" rule regarding non-Indian fishermen should be extended to also encompass non-Indians partaking in *non-fishing* activities near the Columbia River. Such a holding would perfectly reconcile the conservation purpose of the ESA with the government's deep-rooted trust responsibility to the Indians.

B. The Conservation Purpose of the Plan Can Be Achieved by Reasonable Regulation of All Non-Indian Activities.

Some support for extending the "alternative means" rule to all non-Indian activities can be found in the *Secretarial Order on Tribal Rights, Trust Responsibilities and Endangered Species* ("Order") that was issued by the Departments of Commerce and Interior on June 5, 1997. The Order attempts to "harmonize" the federal trust responsibility to tribes and the statutory missions of the Departments in implementing the ESA. Secretarial Order § 1. With respect to habitat modifications which could result in incidental takings, the Order adopts the "conservation standard," *supra*, and adds another requirement for a sovereignty seeking to regulate treaty-reserved rights: ". . . (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; . . . ." Secretarial Order § 5, princ. 3(C).

This Court should adopt the abovementioned requirement in the context of off-reservation treaty fishing, and should hold that the NMFS must initiate a plan that first seeks to achieve its conservation purpose through the reasonable regulation of all non-Indian activities. As the CTCR's plan and its Riparian Management Strategy illustrate, there are plenty of 'reasonable' regulations that exist that were not utilized by the NMFS in its ESA-mandated Plan. (R. at 11, 16.) For example, greater restrictions than those recommended by the NMFS could be placed on the industries

surrounding the Columbia River basin; larger "buffer zones" could be employed; and perhaps most significantly, the Snake River dams could be removed. (R. at 11, 16.) These regulations would preserve the salmon, while allowing the CTCR to continue to fish and maintain a moderate standard of living. (R. at 13, 16.)

The Respondents will argue, and the CTCR concedes, that additional regulations on all non-Indian activities will likely result in more cost to those industries and to the government. However, additional cost does not make these regulations unreasonable if compared to the alternative. Rather, 'unreasonable' would be taking away the CTCR's ability to fish, a practice that the entire CTCR community relies on for its health and welfare. 'Unreasonable' would be preventing the CTCR from obtaining a moderate standard of living. 'Unreasonable' would be causing the permanent decline of a group of people that peacefully gave up much of its land in exchange for the promise that it would be allowed to continue fishing. 'Unreasonable' would be what the Government is trying to do in this case: go back on its solemn word.

In light of the above, this Court should find that the NMFS must first impose all reasonable restrictions on all non-Indian interests before enforcing the ESA against the CTCR.

III. The Lower Court Erred in Holding that the CTCR Does Not Have a Right to "Co-manage" National Forest System Lands in Order to Protect Its Members' Ability to Exercise Their Treaty Fishing Rights to Maintain a Moderate Standard of Living.

A. The CTCR Has the Right to Co-manage the NFS Lands Because the Inherent Sovereignty of Indian Nations Implicates that the Governing of Their Lands Without Their Co-management Is a Breach of that Sovereignty.

A sovereign state is a state that possesses an independent existence, being complete in itself, without being merely part of a larger whole to whose government it is subject. *Black's Law Dictionary*, 1401 (7th ed. 1999). Sovereignty is the supreme political authority of an independent state. *Id.* at 1402. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The Indian tribes' claim to sovereignty long predates the government of the United States. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973). Indian tribes even retain inherent sovereign power to exercise some form of civil jurisdiction over non-Indians on their reservations. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

The CTCR is a sovereign body and must be respected accordingly. The NMFS Plan simply does not respect the sovereignty of the CTCR. As the record indicates, the NMFS consulted with the various other federal

agencies with jurisdiction over the Columbia River basin to develop a strategy for recovery of the listed stocks of salmon. (R. at 14.) At the same time, NMFS began working with the states and private parties in the region to develop a comprehensive plan aimed at saving and restoring Columbia River salmon. *Id.* The participation of the CTCR, whose treaty-reserved fishing rights were to be significantly affected by the Plan, was barely encouraged. *Id.*

While the NMFS availed itself to suggestions of CTCR experts and environmentalists, none of the CTCR-developed provisions were included in the Plan. *Id.* In short, a plan that severely affected the CTCR's treaty-reserved rights was developed and instituted by the government, and yet evidence of consideration of these treaty-reserved rights is non-existent. Thus, the sovereignty of the CTCR was clearly violated.

B. The United States Owes a Trust Obligation to the CTCR that Requires It to Allow the CTCR to Co-manage the Lands So Its Member Tribes Can Protect Their Best Interests.

Indian tribes are "domestic dependent nations" toward which the United States has a trust obligation. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). The tribal relationship to the United States "resembles that of a ward to his guardian." *Id.* at 17. The United States "has charged itself with the moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).

Decisions affecting a tribe must be discussed on a government-to-government basis, ensuring that the resources on which the Tribes' treaty rights depend will be protected. *See* Edmund J. Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-Management as a Reserved Right*, 30 Envtl. L. 279, 337 (2000). Consultation is a treaty-reserved right, as well as a component of the United States' trust responsibility. *Id.* The USFS has both a "substantive" and a "procedural" obligation to the CTCR to assure its members that they can participate in matters affecting their treaty-guaranteed moderate standard of living. *Id.*

The NMFS Plan's unilateral governing effect on the CTCR's treaty rights represents a clear breach of the long-recognized trust responsibility the government has toward the Indians. The CTCR has a right to participate in the decision-making process that significantly impacts its lands and treaty rights. "The era of paternalistic, unilateral decision-making by the federal government is over, superseded by the more forward-looking policy of encouraging the exercise of tribal sovereignty and tribal self-determination." Edmund J. Goodman, *The Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management*, 20 J. Land Resources and Envtl. L. 185, 187 (2000).

1. The CTCR Is a Capable Co-managing Body.

In *United States v. Oregon*, 699 F. Supp. 1456 (D.Or. 1988), *affirmed*, 913 F.2d 576 (9th Cir. 1990), a federal district court validated the Columbia River Fish Management Plan that specified coordinated management and resource planning of all involved bodies, including tribal expert groups. Similar reasoning should be applied in this case: the inclusion in management of all involved groups, including the CTCR, would be the best way to address the concerns of all those potentially affected by the Plan.

The CTCR is an established and able managing body that must be included in the specified coordinated management and resource planning for the Columbia Basin in which its members reside. After all, the CTCR has developed and currently maintains a Department of Natural Resources that monitors the salmon resource and regulates tribal members' fishing rights. (R. at 11.) Furthermore, the CTCR's Department of Natural Resources has developed detailed management recommendations for the fishery resource. (R. at 11-12.)

The CTCR's interdisciplinary environmental analysis of the NMFS Plan, based on NMFS's own data, showed that with more stringent requirements on each of the other affected industries, some tribal fishing could occur in the short term without harming the resource. *Id.* In particular, the CTCR analysis demonstrated that the breaching of four Snake River dams and implementation of the CTCR Riparian Strategy would provide for sufficient short and long-term recovery of salmon resources to permit levels of harvest necessary to provide tribal members with a moderate standard of living. (R. at 16.)

The CTCR's internal regulation of its own treaty-reserved fishing rights and its ability to develop detailed conservation plans indicate that it is fully capable of co-managing NFS lands. Based on this, and in light of the abovementioned inherent sovereignty of Indian nations and the deep-rooted trust responsibility of the federal government towards the Indians, this Court should find that the CTCR has a right to co-manage the NFS lands at issue.

IV. The Lower Court Erred in Holding that the USFS Does Not Have an Obligation to Manage Fisheries Habitat on NFS Lands to the Level Necessary to Provide the CTCR Members with Sufficient Fish So That They Can Exercise Their Treaty-Reserved Fishing Rights to Maintain a Moderate Standard of Living.

The CTCR are entitled to harvest enough fish to sustain a "moderate [standard of] living." *Passenger Fishing Vessel*, 443 U.S. at 686. Therefore, in light of this and the federal government's deep-rooted trust responsibility to the Indians, this Court should find that even if the CTCR does not have a right to co-manage the NFS lands at issue, the USFS at least has an obligation to manage the fisheries to the level necessary to provide the

CTCR members with sufficient fish so that they can exercise their treaty-reserved fishing rights to maintain a moderate standard of living.

A. The United States v. Washington Standard Requiring Proof of Specific Harms Necessitates Adjudication and Affirmatively Proves in This Case the Absence of the Treaty-Guaranteed Moderate Standard of Living.

In *Washington, supra*, the district court, referencing the Supreme Court's decision in *Passenger Fishing Vessel, supra*, interpreted a treaty clause enforcing treaty-reserved fishing rights on the Columbia River as having "overriding importance" to the tribe at issue and that in order to ensure the tribe a "moderate living" as guaranteed by the treaty, the state must protect the fishery habitat to the necessary degree. 506 F. Supp. at 193. The decision ensured the tribes a share of up to 50% of the off-reservation salmon harvest, or whatever share up to 50% that is sufficient to provide the tribes with a "moderate standard of living." *Id.*

The *Washington* decision was eventually vacated, but only because the tribes had not alleged any specific harm in seeking broad declaratory relief. 506 F. Supp. at 193. The court decided that concrete facts must be set forth prior to adjudication. *Id.* In the instant case, such facts are clearly present and therefore the "moderate living" standard is undoubtedly applicable.

1. The CTCR's Interdisciplinary Environmental Analysis of the NMFS Plan Establishes Specific Harm and Discrimination Suffered by the CTCR Which Eliminates Any Hope for a Moderate Standard of Living.

The record in the present matter is replete with examples of specific, concrete harms, previously articulated by the CTCR, that would result if the NMFS Plan is implemented. The CTCR previously notified the government that the NMFS Plan places an unfair burden on tribal fishing, and that while the riverside industries faced some prospect of loss, the CTCR faced a ten-year ban on the treaty fishing that is the heart of its sustenance. (R. at 15.) The CTCR also previously asserted that their treaty rights require that the NMFS impose more substantial restrictions on non-Indian use of the affected resources before any limits could be placed on tribal treaty fishing. *Id.* The CTCR further argued that, because of the location of its members' usual and accustomed treaty fishing sites on the Snake River, it relies much more heavily on Snake River fish than do the non-Indian fisheries in the basin. *Id.*

As is stated above, the CTCR produced an interdisciplinary environmental analysis of the NMFS Plan that showed that with more stringent requirements on each of the other affected industries, some tribal fishing could occur in the short term without harming the resource. (R. at 15-16.) In particular, the CTCR analysis demonstrated that the breaching of four Snake River dams and implementation of the CTCR Riparian Strategy would provide for sufficient short and long-term recovery of

salmon resources to permit levels of harvest necessary to provide tribal members with a moderate standard of living. *Id.* The NMFS' blatant lack of consideration of these recommendations will cause serious harm to the CTCR.

2. Uncontested Affidavits Further Establish the Discrimination and the Potentially Devastating Effects upon the CTCR That Would Result from the Implementation of the NMFS Plan.

In an uncontested affidavit, Dr. Meiler concluded that the plentiful salmon harvest was central to the political, economic, and cultural well being of the CTCR. (R. at 13.) Any deviation from that level of harvest could pose very harmful effects. *Id.* Specifically, Dr. Meiler summarized the significant harmful effects as follows:

> Salmon are the absolute bedrock of the CTCR community; when fish are plentiful, the society thrives, and when they are scarce, the entire community suffers. In my review of the entire literature of socio-economic/ethnographic research, there is no example of such a direct and powerful correlation between the condition of a particular resource and the health and welfare of an entire community as there is between the condition of the salmon population and the health and welfare of the CTCR community.
> Meiler Aff., ¶ 28; R. at 13.

The Meiler affidavit concluded that the lower standard of living caused by the smaller harvest yielded negative correlations to the health, welfare, infant mortality, general mortality rates, income levels, employment rates, and mental health of the tribes. (R. at 13.) The NMFS Plan is estimated to result in monthly harvests of only ten pounds — ninety pounds less than the estimated harvest necessary for the healthy survival of the CTCR community. (R. at 12.)

To reiterate, without a harvest of at least 100 pounds of fish per month, the aforementioned consequences would result and any hope for maintaining the treaty-ensured moderate standard of living will be eliminated.

3. The Respondent Will Argue that the Effects of the NMFS Plan Are Widespread and Balanced.

The Respondents will likely argue that the NMFS Plan spreads the negative effects of the Plan appropriately and is a "reasonable" solution to the issue at hand. However, the NMFS Plan clearly discriminates against the CTCR. "While other industries faced *some* prospect of loss, the CTCR faced a ten year ban on treaty fishing." (R. at 15.) (emphasis added). In addition, after the ten-year ban that only partially affects industry, industry "would be free from further enforcement actions by the NMFS." *Id.*

Moreover, the Karr affidavit affirmatively concludes that the USFS Riparian Strategy would provide for only "minimal protection" of salmon spawning and rearing habitat. (R. at 12.) The affidavit states that such minimal protections would only protect the habitat sufficiently enough to maintain minimum viable populations of each of the listed salmon species. *Id.* Dr. Karr specifically concluded the following:

> Under the USFS Riparian Strategy, assuming that other measures set out in the NMFS Plan were taken, there would likely be sufficient fish to prevent extinction and provide for minimal levels of harvest. However, the levels of harvest would have to be restricted for a number of years, perhaps as many as ten years. Even after the harvest moratorium were lifted, in the long term this Strategy will only produce enough fish to permit each tribal fisherman to harvest a maximum of 10 pounds of fish per month.
> Karr Aff., ¶ 30; R. at 17.

Under the NMFS Plan, the CTCR would never again be able to maintain a moderate standard of living, and would therefore suffer immeasurably as a tribal society. In short, the implementation of the NMFS Plan, while only temporarily producing disadvantageous consequences for other Columbia River constituents, would almost certainly result in the complete and irreversible decimation of the CTCR community. Because of this, and in light of the CTCR's treaty rights and the government's deep-rooted trust responsibility to the Indians, this Court should find that the USFS has an obligation to at least manage the fisheries at issue to the level necessary to provide the CTCR members with sufficient salmon harvest so that they can maintain a moderate standard of living.

Conclusion

For the foregoing reasons, the Petitioner, Confederated Tribes of the Columbia River, respectfully requests that this Court find in its favor.