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The Interaction of Federal Equitable Remedies with State Sovereignty—Puget Sound Gillnetters Association v. Moos, 88 Wn. 2d 677, 565 P.2d 1151 (1977)

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THE INTERACTION OF FEDERAL EQUITABLE REMEDIES WITH STATE SOVEREIGNTY—*Puget Sound Gillnetters Association v. Moos*, 88 Wn. 2d 677, 565 P.2d 1151 (1977).

The Washington Supreme Court held in *Puget Sound Gillnetters Association v. Moos*[1] that the State Director of Fisheries did not have authority to issue regulations required by a federal court order guaranteeing treaty Indians the opportunity to catch specific percentages of various salmon runs. After attempting to act in the face of conflicting interpretations of his powers,[2] the Director eventually bowed to the state court's determination and refused to promulgate the regulations.[3] To implement its order, the federal court assumed control of the Washington salmon fisheries.[4]

This conflict between the federal and state court decisions raises two general questions. The first involves the validity of state-imposed limitations on the power of state officers which interfere with the enforcement and protection of federal rights.[5] The second involves the scope of the federal judiciary's power to order state officers to perform affirmative acts.

I. BACKGROUND AND HOLDING OF *PUGET SOUND*

Beginning in 1854, the territorial governor of Washington negotiated a series of treaties with various Indian tribes of the area.[6] In virtually identical language, the treaties provide that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is fur-

1. 88 Wn. 2d 677, 565 P.2d 1151 (1977).

2. The federal decision ordering allocation of the salmon is United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The district court implicitly held that the Director had the authority to so allocate. *See* 384 F. Supp. at 399–420. The *Puget Sound* court explicitly held that he did not. 88 Wn. 2d at 692–93, 565 P.2d at 1159.

3. The Seattle Times, Oct. 8, 1977, § A, at 1, col. 5.

4. United States v. Washington, Civ. No. 9213 (W.D. Wash., Oct. 17, 1977) (preliminary injunction order removing fish allocation from state control), *aff'd sub nom.* Puget Sound Gillnetters Ass'n. v. District Court, 573 F.2d 1123 (9th Cir. 1978).

5. Throughout this note, "federal right" will refer to a right granted or guaranteed under the Constitution, a federal statute, or a treaty.

6. Treaty with the Quinault & Quillehute Indians (Treaty of Olympia), July 1, 1855, Jan. 25, 1856, 12 Stat. 971 (1859); Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939 (1859); Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933 (1859); Treaty of Point Elliot, Jan. 22, 1855, 12 Stat. 927 (1859); Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 (1854).

ther secured to said Indians, *in common with all citizens of the territory*."[7] The question of the scope of these fishing rights has spawned a long, complex, and often bitter controversy within Washington.[8] The United States Supreme Court has yet to interpret definitively the scope of the Indians' treaty rights,[9] leaving that task to state and lower federal courts. The result has been a morass of ambiguous and conflicting court interpretations.

Washington courts have consistently held that the "in common" clause guarantees treaty fishers the same opportunity to fish as that held by nontreaty fishers. In other words, treaty fishers were promised that they would not be discriminated against.[10] In *United States v. Washington,*[11] however, a federal district court reached a different result, holding that the "in common" clause guarantees treaty fishers the opportunity to catch one-half of the harvestable salmon.[12] The Director of Fisheries was ordered to allocate the salmon between treaty and nontreaty fishers under a framework designed by the court.[13] This drastically reduced the number of fish available to an already overcrowded commercial and sport fishing industry, resulting in severe economic injury to nontreaty fishers[14] and vocal opposition to the federal court decision.[15]

7. Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1133 (1854) (emphasis added).

8. *See generally* AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS, 72-106 (1970).

9. *See Puget Sound,* 88 Wn. 2d at 697-98, 565 P.2d at 1161 (Stafford, J., concurring).

10. *See, e.g.,* Department of Game v. Puyallup Tribe, Inc., 86 Wn. 2d 664, 676-79, 548 P.2d 1058, 1067-69 (1976). Treaty fishers argued that this interpretation made meaningless their "special fishing rights." The federal government apparently agreed, for in 1970, acting as trustee for the tribes, it filed suit against Washington, seeking declaratory relief to define the scope of the treaty rights and injunctive relief to protect the rights as established. United States v. Washington, 384 F. Supp. at 327.

11. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

12. 384 F. Supp. at 343.

13. *Id.* at 414-18. The district court granted injunctive relief of both mandatory and prohibitory form. Mandatory injunctions require a person to perform certain affirmative acts, while prohibitory or negative injunctions bar a person from performing certain acts. D. DOBBS, REMEDIES § 2.10, at 105 (1973).

The negative injunction issued in *United States v. Washington* barred the Director of Fisheries from enforcing certain fishing regulations against treaty fishers. 384 F. Supp. at 414-18. This portion of the federal court's order was not challenged in *Puget Sound.* The challenged portion of the order required the Director to regulate fishing times to insure that treaty fishers were given the opportunity to catch 50% of the harvestable portion of each run.

14. *See Puget Sound,* 88 Wn. 2d at 692, 565 P.2d at 1158.

15. *See* Puget Sound Gillnetters Ass'n v. District Court, 573 F.2d 1123, 1126, 1128-29 (9th Cir. 1978); United States v. Washington, 520 F.2d at 693 (Burns, J., con-

To prevent the implementation of *United States v. Washington,* the Puget Sound Gillnetters Association petitioned the Washington Supreme Court for a writ of mandamus barring the Director from allocating salmon between treaty and nontreaty fishers as required by the federal court order.[16] By a five to three majority, the court denied the writ, although it upheld the substance of the Association's challenge.[17] The court held that

> (1) the determination of the scope of the Director's powers is "solely and exclusively within the jurisdiction of the state courts";[18]
>
> (2) the Director is statutorily proscribed from allocating salmon for reasons other than conservation;[19] and
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> (3) the federal district court cannot order the Director to perform affirmative acts which the state courts have determined are beyond his authority.[20]

In short, the court held that the state, through its Department of Fisheries, could not be required to enforce the federal court decision.[21]

This note considers whether state limitations on the authority of state officers necessarily bar compliance with a valid federal court order. Primary emphasis is given to the scope of the equitable powers of federal courts to remedy a denial of federal rights.[22] The note concludes that state limitations do not pose an absolute bar to compliance

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curring). District Court Judge George Boldt, who decided *United States v. Washington,* has personally borne the brunt of local criticism. At one point, he was hung in effigy on the steps of his courthouse. The Seattle Times, March 17, 1974, § D, at 8, col. 3.

16. The Washington constitution grants original jurisdiction to the state supreme court in proceedings for mandamus against state officers. WASH. CONST. art. IV, § 4. Mandamus usually applies only to order affirmative acts of an official. D. DOBBS, *supra* note 13, at 112. Under Washington law, the writ is also available to bar performance of a given act. State *ex rel.* O'Connell v. Yelle, 51 Wn. 2d 620, 320 P.2d 1086 (1958).

17. The court denied the writ because of the Department of Fisheries' "evident good faith" and the "uniqueness of its position." 88 Wn. 2d at 680, 565 P.2d at 1152. The court held that the Director was not authorized to comply with the district court's order, *id.* at 692–93, 565 P.2d at 1159, and expressed "full confidence that the Director will abide by our decision." *Id.* at 680, 565 P.2d at 1152.

18. *Id.* at 689, 565 P.2d at 1157.

19. *Id.* at 680–83, 565 P.2d at 1153–54. The court also suggested that compliance would violate both the equal protection and privileges and immunities clauses of the United States Constitution. *Id. See* note 29 *infra.*

20. 88 Wn. 2d at 689, 565 P.2d at 1157.

21. Petitioners conceded that the correctness of the decision in *United States v. Washington* was not at issue. *Id.* at 693, 565 P.2d at 1159 (Horowitz, J., concurring). The court nevertheless analyzed the treaties, arriving at an interpretation at odds with that of the district court. *See* note 29 *infra.*

22. It should be emphasized that this note does not discuss any aspect of the merits of the fishing rights controversy, particularly the substance of the conflicting treaty interpretations. For an article examining both *United States v. Washington* and Indian

with a federal court order, and that the remedy formulated by the district court was proper.

II. THE *PUGET SOUND* COURT'S ANALYSIS

A. Determination of the Powers of the Director of Fisheries

"The judicial determination of the extent of a state official's authority to act is solely and exclusively within the jurisdiction of the state courts."[23] The implication of this statement from the *Puget Sound* opinion is that the extent of the Director's powers is purely a question of state law, upon which the state court's determination is final.[24] Although the court did not further discuss the issue, as a general proposition its statement holds true. State officers are, after all, creatures of state law. Since the source of their authority is the state, the extent of that authority should ordinarily be a question of state law.[25]

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fishing rights in general, see Comment, *Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study*, 51 WASH. L. REV. 61 (1976).

A significant question beyond the scope of this note is whether the state was a sufficiently adverse party to adequately present arguments in favor of protecting the judgment in *United States v. Washington*—particularly since the district court ruled largely against the state in that case. *See* Brief in Response to Application for Writ of Mandamus, Puget Sound Gillnetters Ass'n v. Moos, 88 Wn. 2d 677, 565 P.2d 1151 (1977). "At the outset, it must be known that Fisheries and the undersigned counsel do not believe some of [their] arguments to be correct on the law," *id.* at 2-3, and "[a]gain, Fisheries remains hopeful that some of these issues may be argued with more conviction by the tribes and the United States Government than can be done by Fisheries here." *Id.* at 3-4. The purpose of these quotations is not to suggest collusion or bad faith on the part of the state—indeed, it repeatedly requested the United States and the tribes to participate in *Puget Sound*—rather, they are included to raise a jurisprudential problem which arises in this kind of case.

Another question presented by *Puget Sound*, but not examined in this note, is whether the state courts can be estopped from denying the power of the Director as defined by *United States v. Washington*. The state was a party to that action, and litigated to the United States Supreme Court. Arguably the district court's holding should be binding on the state's judicial branch. *See* City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340 (1958) (decision binding on state, all its agencies, and all citizens). *Cf.* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951) (state supreme court holding of a lack of power in state officials to comply with an interstate compact was ineffective to bar compliance with the compact).

Lastly, whether the state court's interpretation of the Director's powers was proper is not considered.

23. *Puget Sound*, 88 Wn. 2d at 689, 565 P.2d at 1157.

24. The majority supports this proposition by reference to Boal v. Metropolitan Museum of Art, 19 F.2d 454 (2d Cir. 1927). *Boal* involved conflicting decisions by state and federal courts as to the validity of a will. The Court of Appeals for the Second Circuit held the state court's determination of this question to be binding on the federal courts.

25. The flaw in this argument is that the court in *United States v. Washington* held that exercise of the powers led to the denial of a federal right. *See* Part III-*A infra*. Fur-

In defining the Director's authority, the court first considered those acts which the Director is empowered to perform. It concluded that a statute which required the Department of Fisheries to "preserve, protect [and] perpetuate . . . the food fish"[26] authorized the Director to act for conservation purposes *only,* and therefore regulations promulgated for purposes other than conservation exceeded the Director's authority and were void.[27]

The court viewed the regulations required by *United States v. Washington* as doubly repugnant: first, the court held that their purpose was not conservation;[28] and second, the regulations were found

thermore, it assumes that all duties of state officers arise under state law. While this is generally true, state officials also have a duty to uphold the federal constitution. U.S. CONST. art. VI. *See* Part III–*B infra.*

26. R.C.W. § 75.08.012 (1976). The court analogized to Hartman v. State Game Comm'n, 85 Wn. 2d 176, 532 P.2d 614 (1976), in which the court interpreted the state Department of Game's authority under R.C.W. § 77.12.010 (1976). That statute provides, "The game animals . . . and game fish shall be *preserved, protected, and perpetuated,* and to that end such game animals and game fish shall not be taken at such times or places, by such means, in such manner, or in such quantities as will impair the supply thereof." (emphasis added). *Hartman* held this statute limits the authority of the Department of Game to regulate solely for conservation. The case involved a regulation banning whitefish and steelhead trout fishing from motorized boats. The court found the regulation's purpose was to ease tensions between on-shore fishers and those in boats, not to effect conservation. Therefore the court struck the regulation as beyond the Department's authority.

Justice Rosellini's *Puget Sound* opinion also relied on the following portions of R.C.W. § 75.12.010 (1976):

> [S]ubject to such seasons and regulations as may be established from time to time by the director, it shall be lawful to fish for commercial purposes [at specific times].

and

> That whenever the director determines that a stock or run of salmon cannot be feasibly and properly harvested in the usual manner, and that such stock or run of salmon may be in danger of being wasted and surplus to natural or artificial spawning requirements, the director may maneuver units of lawful gill net and purse seine gear in any number or equivalents at his discretion, by time and area, to fully utilize such harvestable portions of these salmon runs *for the economic well being of the citizens of this state* . . . .

(emphasis added). The court viewed this section as removing the Director's discretion: once he determines the existence of surplus salmon, he is required by the statute to "maneuver units of lawful gill net and purse seine gear" to harvest those fish. 88 Wn. 2d at 682, 565 P.2d at 1153. The court equated "the economic well-being and stability of the commercial fishing industry" with "conservation." *Id.* at 682–83, 565 P.2d at 1154.

For an interpretation of the Director's powers consistent with that of the district court's, see Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wn. 2d 276, 300–04, 571 P.2d 1373, 1386–88 (1977) (Utter, J., dissenting).

27. 88 Wn. 2d at 683, 565 P.2d at 1154.

28. *Id.* at 692, 565 P.2d at 1159. *See also* Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wn. 2d at 278, 571 P.2d at 1374–75 (quoting testimony of the Director stating that the regulations were to make more fish available to the treaty fishers).

It has been argued, however, that the regulations the Director was ordered to promulgate pursuant to *United States v. Washington* are for conservation purposes. This analy-

to require the Director to distinguish unconstitutionally "between fishermen based upon their race or ethnic background."[29] These determinations led the *Puget Sound* court to conclude that the federal district court's mandatory injunction required acts that were beyond the Director's power.

B. *The Power of Federal Courts To Compel Acts By State Officials*

The *Puget Sound* court stated that "a federal court will not compel governmental officers to do any act which they are not authorized to do by the laws of the state from which they derive their power."[30] In supporting this assertion, the court first cited several cases in which the Supreme Court had affirmed denials of writs of mandamus against

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sis assumes that *United States v. Washington* provides an allocation framework, within which the Director may regulate for conservation purposes. Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 87 Wn. 2d 417, 423-24, 553 P.2d 113, 117 (1976) (Utter, J., dissenting).

29. 88 Wn. 2d at 684, 565 P.2d at 1154. On the basis of this conflict, the Washington Supreme Court subsequently held the interpretation in *United States v. Washington* unconstitutional. Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wn.2d 276, 571 P.2d 1373 (1977). The *Passenger* court held that the allocation of 50% of the salmon to the small number of treaty fishers violated the equal protection clause of the fourteenth amendment. *Id.* at 285-86, 571 P.2d at 1378. The court, in order to reach this result, grouped treaty and nontreaty fishers into the same class of resource users, despite the treaty rights of the former group. It implied that to do otherwise would require improper distinctions based on race or ancestry. *Id.* at 281, 571 P.2d at 1376.

Weaknesses in this analysis make the court's conclusion suspect. First, the distinction between treaty and nontreaty fishers is based on the existence of rights reserved in a quid pro quo exchange rather than based on race. United States v. Winans, 198 U.S. 371, 381 (1905); *Passenger*, 89 Wn. 2d at 289-90, 571 P.2d at 1380-81 (Utter, J., dissenting). Secondly, even if the distinction were based on race, recent decisions hold that this is not necessarily improper. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 541-45 (1973) (preferences for Indians in Bureau of Indian Affairs hiring practices acceptable).

It is implicit in the Constitution that state courts will interpret federal law. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340-42 (1816). Thus the Washington court has the power to construe the treaty rights involved here if the question is properly before it. While a state court is bound by a United States Supreme Court determination of federal law, there is little case law to the effect that a state court is similarly bound by the determination of a lower federal court. In a case of conflicting judgments the federal courts are empowered to enjoin both the state court proceedings and the state courts' enforcement of their judgments. 28 U.S.C. § 2283 (1976). Where a state court is asked to defer to lower federal court decisions on the basis of stare decisis, however, state courts have usually considered federal authority as persuasive, but not binding, precedent. *See, e.g.*, York v. Gaasland Co., 41 Wn. 2d 540, 547, 250 P.2d 967, 971 (1952).

Subsequent to the *Puget Sound* decision, the federal court assumed control over the fishing seasons for salmon. It chose not to enjoin enforcement of *Puget Sound* or to coerce the Director to comply with its injunction against him. *See* note 4 *supra* and notes 87-89 and accompanying text *infra*.

30. 88 Wn. 2d at 684, 565 P.2d at 1155.

state officers.[31] In each case, the act sought to be compelled was beyond the scope of the state official's duties, and the Court refused to impose new duties upon the official.[32]

The *Puget Sound* court next extended its assertion of limited federal equitable power to cases involving, as here, mandatory injunctions.[33] Among the cases cited,[34] the most recent, *Rizzo v.*

31. Missouri *ex rel.* Laclede Gas Light Co. v. Murphy, 170 U.S. 78 (1898); United States v. County of Clark, 95 U.S. (5 Otto.) 769 (1878); Supervisors v. United States, 85 U.S. (18 Wall.) 71 (1873).

32. In Missouri *ex rel.* Laclede Gaslight Co. v. Murphy, 170 U.S. 78 (1898), a company's charter allowed it to lay gas lines without a permit. The lower court held that the charter did not also allow it to lay electrical lines without a permit. The Supreme Court agreed, and held that mandamus did not lie to compel issuance of a permit until the plaintiff met the statutory requirements therefor.

United States v. County of Clark, 95 U.S. (5 Otto.) 769 (1878), involved an attempt to collect interest on bonds for the period between the issue date on the face of the bond and the actual date of issue. Under state law, no interest was owed. In the absence of a duty to pay, the Court refused to mandate that the county levy additional taxes to pay the interest.

The Court held in Supervisors v. United States, 85 U.S. (18 Wall.) 71 (1873), that a county board could not be compelled to levy increased taxes to accelerate payment of a judgment in the face of a statutory ceiling on tax rates.

It should be noted that none of these cases involved a violation of federal right. *Murphy* noted the absence of any federal question, 170 U.S. at 99, while *Supervisors* indicated that the presence of a federal question might change the result reached therein, 85 U.S. at 82 (referring to impairing the obligations of contracts). Furthermore, theories of federal equity have changed substantially since 1898. *See, e.g.,* Griffin v. County School Bd., 377 U.S. 218 (1964) (federal court ordering state officials to perform affirmative acts); *Ex parte* Young, 209 U.S. 123 (1908) (injunction prohibiting state officials from enforcing state statute). Reliance on earlier cases is thus tenuous.

33. Analogy to mandamus, while perhaps instructive, did not resolve the issue of the propriety of the district court's injunction. Mandamus originated at common law as an extraordinary writ. It was subject to great discretion in its use, and could only be directed against governmental officials. D. DOBBS, *supra* note 13, at 112. Mandatory injunctions arose at equity and are subject to less stringent tests. *See generally id.* § 2.10.

The propriety of the invocation of injunctive relief, as opposed to the propriety of the scope of that relief, was not challenged in *Puget Sound*. *See* note 13 *supra*.

34. Rizzo v. Goode, 423 U.S. 362, (1976); Bradley v. School Bd., 51 F.R.D. 139 (E.D. Va. 1970); Wright v. County School Bd., 309 F. Supp. 671 (E.D. Va. 1970).

In *Bradley*, school board members facing a possible multi-district desegregation plan sought joinder of board members from the other districts. The court granted joinder, noting the defendants were powerless to comply with an injunction requiring them to exercise authority over the other districts. 51 F.R.D. at 142–43.

The *Puget Sound* court quotes dictum from *Wright* stating that "a court will only order a public official to perform . . . acts which are within the powers conferred upon him by law [citing case], and will deny relief when those before it are not fully empowered, under state law, to take the action requested." 309 F. Supp. at 677. *Wright* involved a city's attempt to cancel its school contract with a district which had been ordered to desegregate. The city desired to start its own school system. The court denied the city permission to do so, on the ground that it might interfere with the desegregation plan. The quoted statement arose in answer to the question of whether officials of the former district would be authorized to implement the federal court order in the new school system. The court opined that they would not, but noted that the city school officials would be bound to implement the plan in any event. *Id.* at 676–77.

It is important to note that in both of these cases, some official would be empowered

Goode,[35] is most directly concerned with the scope of federal equity. *Rizzo* involved a broad injunction directed towards the Philadelphia Police Department and aimed at halting an alleged pattern of police brutality against minority citizens.[36] The United States Supreme Court reversed for want of an adequate controversy between plaintiffs and defendant police officials.[37] In dictum, however, Justice Rehnquist's majority opinion presented a broad discussion of the federal judiciary's equitable powers. When a remedy is necessarily directed towards a state or its officers, framing that remedy requires that the interest in protecting the federal right be balanced against the interest of state sovereignty.[38] *Rizzo* involved only a minimal showing of constitutional violations,[39] and no showing of violations or encouragement thereof by defendants.[40] Balancing this against the district court's extreme intrusion "into the internal disciplinary affairs of [the police department]," [41] the Court found that the state interest in local control should prevail.[42] Although the *Puget Sound* court did not expressly so state, the inference to be drawn is that the intrusion in *United States v. Washington* was similarly too extreme.[43]

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to comply with the district court's order. Thus, in neither case did the holding that the official's powers were limited by state law result in the denial of a federal right. Further, in both cases the lack of authority was founded on geographical jurisdictional criteria as opposed to a narrow interpretation of the powers of a statewide official with statewide powers.

35. 423 U.S. 362 (1976).

36. After finding evidence of police brutality, Council of Organizations on Philadelphia Police v. Rizzo, 357 F. Supp. 1289, 1319 (E.D. Pa. 1973), the district court ordered police officials to formulate new procedures for filing and processing complaints of brutality, including the formation of a citizens' board of review and the revision of police manuals with respect to interaction with minority community members. *Id.* at 1321.

37. 423 U.S. at 371–73. None of the police officers who had allegedly participated in the brutality were defendants; only high police officials were before the Court. None of these officials was alleged to have been involved in the incidents, or had been shown to have acted in any way which would encourage such practices.

38. *See* 423 U.S. at 378–79.

39. *Id.* at 373–76.

40. *Id.* at 371.

41. *Id.* at 380.

42. *Id.*

43. In *Puget Sound*, the court quotes from the section of *Rizzo* in which Justice Rehnquist reversed the order because of the intrusiveness of the district court's injunction. 88 Wn. 2d at 688–89, 565 P.2d at 1156–57. But the Supreme Court in *Rizzo* held that the order was unwarranted under the facts of that case and not that every order directed towards a state official violates federalism. Judging the validity of a federal court remedy (assuming that a state court can do so) involves applying the principles of federalism to the case, balancing the state's interest in local control and discretion against protection of the federal right. 423 U.S. at 380. The Washington court in *Puget Sound* failed to either undertake this balancing test, or to explain why the order in *United*

C. *Summary*

In brief, the *Puget Sound* court held that (1) it alone could determine the authority of the Director of Fisheries; (2) the Director lacked authority to perform the acts ordered by the district court; and (3) therefore the Director could not be bound by the district court's injunction. This analysis reflects misconceptions with respect to both federal-state relationships and the scope of federal equity. The next section examines both areas in order to dispel these misconceptions.

III. ANALYSIS

A. *Limitations on the Power of the State Officials*

Although there are two sources of law under the Constitution—state and federal—social order demands that ultimately there be one supreme law.[44] The framers of the Constitution recognized the possibility for conflict under a dual system and resolved the problem by making federal law paramount.[45] The result is that the sovereignty of states is not equivalent to the sovereignty of a nation; it is a sovereignty limited by the strictures of our federal system.[46] When a state remains within the sphere of interests reserved to it, its powers are absolute.[47] But in the area of federal supremacy, the state's powers are subordinate to those of the national government.[48] If a state law im-

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States v. Washington is overly intrusive. *See* Part III–*C infra*.

The district court, on the other hand, was well aware of the principles enunciated in *Rizzo*. It examined the interests of both the state and the plaintiffs; in formulating its remedy, its goal was to keep intrusion to a minimum. 384 F. Supp. at 413.

44. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210–11 (1824); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489 (1954) ("People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown."). *See also* L. FULLER, THE MORALITY OF LAW 65–70 (Rev. ed. 1969).

45. The supremacy clause, U.S. CONST. art. VI, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

46. Tennessee v. Davis, 100 U.S. (10 Otto.) 257, 266–67 (1879); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210 (1824).

47. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324 (1816).

48. Cooper v. Aaron, 358 U.S. 1, 19 (1958); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 525 (1937); United States v. California, 297 U.S. 175, 183 (1936); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) at 324. The denial of federal treaty rights

pinges upon a federal right, the state law must defer.[49]

The fundamental flaw of the *Puget Sound* opinion is its failure to recognize this subordination. None of the cases cited in support of the decision dealt with the deprivation of a federal right.[50] Yet the treaty rights asserted in *United States v. Washington* are federal in origin.[51] The statement that "[t]he judicial determination of a state official's authority to act is solely and exclusively within the jurisdiction of the state courts"[52] is of doubtful validity in the context of a federal court decision that such a determination would lead to the denial of a federal right.[53] As the United States Supreme Court noted in *Gomillion v. Lightfoot*,[54]

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. . . . [The lack of insulation] *has long been recognized in cases which have prohibited a State from ex-*

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which had resulted from the Washington allocation system made the state method of regulation in part a question of federal law. *See* Jackson County Bd. of Comm'rs v. United States, 308 U.S. 343, 349-50 (1939) (county board could be compelled to pay interest on taxes unlawfully assessed against Indian lands despite state law barring such payment; equities in case were such that payment was not ordered); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938) (state court decision as to the existence of a contract held not free from federal judicial review under a claim of impairing the obligations of contracts).

49. This may result in invalidating the state law if it is completely repugnant to the federal right, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971), or merely limiting the application of the law to the extent necessary to protect the federal right, Jackson County Bd. of Comm'rs v. United States, 308 U.S. 343 (1939).

50. *See* notes 25, 32, 34, & 43 *supra*. The *Puget Sound* court asserts that relief was denied in *Rizzo* despite the violation of a constitutional right. 88 Wn. 2d at 688, 565 P.2d at 1156. But the reason that relief was denied was that no one before the court had violated, or encouraged the violation of, anyone's constitutional rights. 423 U.S. at 371-72. This contrasts with the instant case in which the regulatory practices of the state and its Department of Fisheries were held to violate the federal treaty rights of the tribes. United States v. Washington, 384 F. Supp. 312 *passim* (W.D. Wash. 1974).

51. Missouri v. Holland, 252 U.S. 416 (1920) (treaty rights superseded state sovereignty as supreme law of the land).

52. 88 Wn. 2d at 689, 565 P.2d at 1157.

53. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Of course, the state court also had authority to reach its own interpretation of the treaty. *See* note 29 *supra*.

54. 364 U.S. 339, 347 (1960) (emphasis added). *Gomillion* involved a change in the municipal boundaries of Tuskegee, Alabama, from a rectangle to a 28-sided irregularly shaped polygon. This change removed 99% of the city's black voters without removing a single white. *Id.* at 341. The Supreme Court did not deny the power of a state to define such boundaries, but held the power was subject to restrictions under the Constitution. Changes aimed at excluding citizens from the voting process on the basis of race were deemed not constitutionally permissible.

ploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition."

Thus, if state officials act at all, they can be required to act in accord with the Constitution.[55] This may include imposing duties beyond those the state requires—duties which are, in effect, federal duties.[56] The circumstances warranting the imposition of such duties, and the question of their scope, are examined in the following section.

B. Federal Equitable Powers

1. Mandatory injunctions may be ordered

The question whether the state can be required to implement the decision in *United States v. Washington* is not completely answered by a conclusion that the state will not be allowed to deny the rights therein defined.[57] The issue is the scope of the authority of the federal courts to require the state to enforce the right affirmatively.

Since *Ex parte Young,* the power of federal courts to issue orders against state executive officers has been clear.[58] The federal judiciary,

55. *See, e.g.,* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), in which the North Carolina constitution and several state statutes barred compliance with a federal court desegregation order. The Supreme Court brushed aside these prohibitions: "[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishment of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *Id.* at 45.

It is noteworthy in this context that the Constitution requires all state officials to swear to uphold it in the performance of their duties. U.S. CONST. art. VI.

56. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971) (statutory limitations on the power of school official insufficient to bar compliance with federal court order); Jackson County Bd. of Comm'rs v. United States, 308 U.S. 343 (1939) (dictum) (county board could be compelled to pay interest on taxes unlawfully assessed against Indian lands, despite state law barring such payment; equities in case were such that payment was not ordered).

57. Generally the source of a right defines the body which should enforce it. It would follow that the federal government should ordinarily enforce federal rights. There is clearly a difference between barring a state from violating a right (which can be construed as protection by the federal government) and requiring the state to take affirmative action to protect the right. It must be remembered, however, that the denial here arises indirectly through the state's use of its police power in managing natural resources. *See* Geer v. Connecticut, 161 U.S. 519 (1896) (game animals). The state's interest in local control and discretion is a significant factor in favor of state control of the fisheries. In order to protect both the state and federal interests, it may become necessary to require the state to enforce affirmatively the federal right in its regulation of the fisheries.

58. 209 U.S. 123 (1908). *Young* involved a challenge by railroads subject to a Minnesota rate regulation scheme. The federal court held the state plan unconstitu-

however, has been slow to order affirmative acts of those officers because mandatory injunctions are viewed as a serious affront to state sovereignty.[59] Yet awkward situations arise in which administrative control and discretion are generally regarded as best left to local officials, but the refusal of those officials to act in certain ways leads to a denial of federal rights. To preserve local sovereignty, while protecting federal rights, it is necessary to provide mandatory injunctive relief. It is now well settled that a federal court may order state officials to perform affirmative acts which state law does not require,[60] or, indeed, allow.[61]

Griffin v. County School Board[62] was the first major case in which this aspect of federal equity was asserted. In an attempt to avoid the

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tional and enjoined Young, Minnesota's attorney general, from enforcing it. Young nevertheless filed an enforcement action in state court. The federal court held him in contempt, and jailed him. On a writ of habeas corpus, the Supreme Court affirmed the contempt citation, implicitly affirming the original injunction. The Court held that the eleventh amendment's bar of citizens' suits against states did not prohibit a citizen from seeking injunctive relief against state officers violating federal rights. A state official is not clothed with the authority to violate the Constitution; Young's attempted enforcement of the statute stripped him of his status as a representative of the state and placed him before the Court as an individual, fully subject to its equitable powers.

59. In *Young*, although the Court approved use of negative injunctive relief, it suggested that mandatory relief would have been improper. *See* Hart, *supra* note 44, at 515-16 (citing the eleventh amendment's bar of suits against states as a second factor against mandatory injunctions). However, recent cases support the use of mandatory injunctions against state officers. *See* notes 60-62, & 64 and accompanying text *infra*.

60. Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*) (district court order requiring remedial programs to accompany desegregation program and to be funded by state and local governments held a valid exercise of equitable powers); Griffin v. County School Bd., 377 U.S. 218 (1964) (county could be required to reopen and fund public schools to meet compliance with a desegregation order; state law did not require the county to provide public schools, but the equal protection clause did); Brown v. Board of Educ., 349 U.S. 294 (1955) (Kansas statute allowing maintenance of segregated schools did not foreclose desegregation order).

61. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971) (state statute prohibiting assignment to schools on the basis of race held an invalid impingement on official's powers and not a bar to compliance with federal court desegregation order); Jackson County Bd. of Comm'rs v. United States, 309 U.S. 343 (1939) (dictum) (county board could be compelled to pay interest on taxes unlawfully assessed against Indian lands, despite state law prohibiting such payment; equities in case were such that payment was not ordered). *Cf.* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951), in which West Virginia entered a compact with seven neighboring states to prevent pollution of the Ohio River. A commission composed of representatives of the individual states and the federal government was to administer the plan. After the states had ratified the compact, and Congress had approved it, West Virginia's state auditor refused to pay the state's share of the cost. The West Virginia Supreme Court held that the auditor was correct because state law forbade payment of state funds to projects not under state control. The United States Supreme Court reversed, requiring the auditor to pay the funds.

62. 377 U.S. 218 (1964).

implementation of *Brown v. Board of Education,*[63] a county closed its public schools and instituted a private system which accepted only whites. The system was funded primarily through public tuition grants and property tax credits. The Supreme Court affirmed a district court order enjoining the public funding, but more important with respect to *Puget Sound,* it approved an order requiring the county to reopen the public schools and assess taxes to finance them.[64]

Since *Griffin,* federal courts have ordered state officials to perform affirmative acts on numerous occasions. School desegregation cases remain most prominent,[65] although mandatory injunctions have also issued in cases involving legislative redistricting,[66] upgrading state penal and mental institutions,[67] and establishing "affirmative action" employment programs.[68]

State-imposed limitations on an official's powers have not been viewed as a barrier to such orders. For instance, in many of the desegregation cases, state law barred compliance with the federal court order.[69] Typical was the law before the Supreme Court in *North Carolina State Board of Education v. Swann:*[70]

> The legislation before us flatly forbids assignment of any student on account of race . . . . The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court . . . .
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> . . . [T]he flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. . . . An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command . . . that all reasonable methods be available to formulate an effective remedy.

63. 347 U.S. 483 (1954).
64. 377 U.S. at 232–34.
65. *E.g., Milliken II,* 433 U.S. 267 (1977) (municipality required to provide and fund various remedial programs to effectuate district court school desegregation order).
66. Reynolds v. Sims, 377 U.S. 533 (1964).
67. Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975) (state prison hospital required to comply with minimum standards); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced,* 344 F. Supp. 373 (M.D. Ala. 1972) and 344 F. Supp. 387 (M.D. Ala. 1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (court set minimum standards of care and treatment for state mental institutions).
68. *See, e.g.,* NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd,* 403 F.2d 614 (5th Cir. 1974) (state highway patrol).
69. *See, e.g.,* Brown v. Board of Educ. 347 U.S. 483, 486–88 n.1 (1954) (laws requiring segregated schools).
70. 402 U.S. 43, 45–46 (1971).

Once the district court's order becomes final within the federal system, the local official becomes "clearly charged with the affirmative duty to take whatever steps might be necessary to [implement the order]."[71] This duty is federal in origin, arising from the Constitution.[72]

The *Puget Sound* court committed a dual error in this regard. First, it assumed that affirmative duties can only be imposed by, or derived from, state law.[73] Second, this premise led the court to conclude that the determination of the authority of state officials is *solely* a question of state law, with state courts the "sole and exclusive" determiners of that authority.[74] The cases indicate the law to be otherwise.

2. *Scope and validity of the remedy afforded*

Of course, a federal court may not order a specific official to perform any act it chooses.[75] Federal equity is limited as to both the availability and the scope of a remedy, and these limitations strike a delicate balance between state sovereignty and the protection of federal rights.

Before injunctive relief is ordered, the facts must present a proper case for the invocation of federal equity.[76] The basic requirement is that the remedy at law be inadequate,[77] and, in formulating its rem-

71. Green v. County School Bd., 391 U.S. 430, 437-38 (1968); *accord,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Cooper v. Aaron, 358 U.S. 1, 7 (1958).

72. Dictum in Jackson County Bd. of Comm'rs v. United States, 308 U.S. 343 (1939), indicates that a federal court is not precluded from ordering a county to pay interest on taxes unlawfully assessed against Indian lands, despite state law to the contrary:

> Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated . . . . The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights.

308 U.S. at 350 (citations omitted). Because state law barred the payment of interest, such a duty could only arise federally (in this case, created through the combined operation of the treaty-making power and the supremacy clause). The Court found that a judgment including interest was not warranted under the facts of the case.

73. *See* 88 Wn. 2d at 689, 565 P.2d at 1157. *See* notes 24 and 25 *supra.*

74. 88 Wn. 2d at 688, 565 P.2d at 1157.

75. It could not, for example, order the Director of Fisheries to take over the administration of the State Highway Department. Note, however, that the Department of Fisheries (with the exception of one species of fish) is the sole state agency charged with management of the fish resource. Any duty which is imposed on the state in its allocation framework must fall on the Department of Fisheries. This distinguishes many of the cases the *Puget Sound* court cited. *See* note 34 *supra.*

76. *See generally* D. DOBBS, *supra* note 13, §§ 2.2-.10.

77. *Id.* at § 2.5.

edy, the court should consider a variety of factors. *Swann v. Charlotte-Mecklenburg Board of Education*[78] provides three considerations:

(1) There must be a violation of a federal right;[79]

(2) The scope of the remedy is to be determined by the nature and extent of the violation;[80] and

(3) The remedy should balance the interests of local control against the need for protection of a federal right.[81]

The third factor has recently become of critical importance in determining the propriety of a given remedy[82] and reflects the growing concern for the protection of state rights which the Burger Court has manifested in a variety of areas.[83]

78. 402 U.S. 1 (1971). The order approved in *Swann* implemented the desegregation of the schools of Charlotte, North Carolina. It included a massive busing program, as well as "pairing" inner city and suburban schools.

79. *Id.* at 15–16. The *Swann* Court spoke in terms of the violation of a constitutional right, as distinguished from a federally guaranteed or created right. This higher standard is due to the use of remedial equity in *Swann*: *i.e.*, injunctions aimed at redressing past wrongs and bringing plaintiffs to the position they would have occupied but for the violation of the right. Statutory and decisional law establish that a constitutional violation, as such, is not required if equity is used only to insure the future protection of the right. *See, e.g.*, 42 U.S.C. §§ 1983, 1985 (1970); 28 U.S.C. § 2202 (1976) (making available necessary remedies to implement rights determined under 28 U.S.C. § 2201). In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), the board of a private park refused to allow the assignment of a share in the park to a black renter in the development in which the park was located. Justice Douglas, writing for the majority, stated that even though 42 U.S.C. § 1982 (under which the action was brought) is couched in declaratory terms, under it "a federal court has power to fashion an effective equitable remedy." *Id.* at 238. He continued, "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* at 239. Similar language appears in Bell v. Hood, 327 U.S. 678 (1946):

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Id. at 684 (footnotes omitted). *United States v. Washington* was brought under 28 U.S.C. §§ 2201, 2202 (1976). The latter provides that "necessary or proper" relief is available once rights (or violations thereof) are established under § 2201.

80. 402 U.S. at 16. *See Rizzo*, 423 U.S. 362 (1976) (relief available only to redress violation); Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*) (inter-district desegregation remedy unwarranted absent showing of segregation in all districts).

81. 402 U.S. at 15-16; *Milliken II*, 433 U.S. at 280–81.

82. *Rizzo*, 423 U.S. at 380 (infrequent, scattered incidents of police brutality without showing of encouragement of such activities by superiors did not justify intrusion into the internal disciplinary affairs of the Philadelphia Police Department); White v. Weiser, 412 U.S. 783 (1972) (district court should defer to state policies whenever possible).

83. *See, e.g., Rizzo*, 423 U.S. 362 (1976). The Court has also been concerned with

C. *Application to* Puget Sound

United States v. Washington established that prior state regulatory practices violated federally guaranteed treaty rights. The negative injunction in that case which barred the Director from enforcing certain state laws was not challenged in *Puget Sound*,[84] and the propriety of invoking equitable relief was thus not at issue. But the issue remains whether the district court properly limited the use of its equitable powers in requiring the state to allocate salmon between treaty and nontreaty fishers.

Theoretically there are at least four possible alternative plans for regulating the Washington salmon fisheries: [85]

Plan I. Leave regulation to the discretion of the state. This was the method employed before *United States v. Washington*, and which that case held led to a denial of treaty rights.[86]

Plan II. Leave regulation to the state, subject to the federal court order mandating division of the catch. This was the method adopted under *United States v. Washington* but rejected by the state court in *Puget Sound*.[87]

Plan III. Remove from state jurisdiction that portion of the salmon fisheries properly allocable to the treaty fishers, but al-

congressional intrusions into state control. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court held invalid an extension of the Fair Labor Standards Act to the states *qua* states as an unwarranted usurpation of state sovereignty and discretion. This trend has been noted in the circuit courts. In Brown v. E.P.A., 521 F.2d 827 (9th Cir. 1975), the Ninth Circuit Court of Appeals held that states could not be required to enforce federal air pollution standards under the Clean Air Act. *But see* Pennsylvania v. E.P.A., 500 F.2d 246 (3d Cir. 1974), in which the Third Circuit Court of Appeals upheld the enforcement provisions of the Act as a valid exercise of the federal commerce power.

84. *See* note 13 *supra*.

85. These are judicial alternatives. Of course, a nonjudicial alternative exists. Congress has power to abrogate treaties. Recent attempts to abrogate the fishing rights involved herein include H.R. 9054, 123 CONG. REC. H9304 (daily ed. Sept. 12, 1977), and H.R. 9950 § 207, 123 CONG. REC. H12242 (daily ed. Nov. 3, 1977).

86. Given this determination, the district court was forced to act in order to protect the treaty rights. The *Puget Sound* decision itself, and decisions such as Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wn. 2d 276, 571 P.2d 1373 (1977), reveal the state's continued unwillingness to enforce the rights as defined in *United States v. Washington*. *See* United States v. Washington, Civ. No. 9213 (W.D. Wash., Oct. 17, 1977) (preliminary injunction order) (criticizing the state and its court for noncompliance with the decision).

87. 88 Wn. 2d at 691-92, 565 P.2d at 1158-59. Of course, it is still possible for the district court to enjoin any state court actions against the Director which interfere with the effectuation of its judgment or its continuing jurisdiction over the controversy. *See* note 29 *supra*.

low the state to regulate the remainder as it had before. This was the method originally adopted in the aftermath of *Puget Sound*.[88]

Plan IV. Transfer total regulation to the federal government. This is the current method of allocation following a state court threat to bar the Department of Fisheries from complying with a type III plan.[89]

In light of the district court's rejection of a type I plan in *United States v. Washington,* and the state's continued hostility to the treaty rights therein defined,[90] a type II plan appears preferable under the criteria developed in *Swann* and *Rizzo*. It limits federal intervention to a minimum, while adequately protecting treaty fishing rights. Plans of types III and IV would remove at least part of the harvest from state control; under a type II plan, the state would retain control over all fish, subject to certain limitations with respect to treaty fish. State control would remain absolute over the nontreaty portion of the harvest, and at least partial over the treaty portion.[91] A type II plan is also the most efficient in terms of administration, research, and enforcement.[92] Types III and IV require dual systems of control, while a type II plan leaves ultimate management in one entity—the state.

88. United States v. Washington, Civ. No. 9213 (W.D. Wash., Aug. 31, 1977) (memorandum order and preliminary injunction removing state jurisdiction over the treaty portion of the fisheries).

89. The state court's suggestion was made during a preliminary hearing. Seattle Post-Intelligencer, Oct. 7, 1977, § A, at 9. The district court relied on the alleged order in reformulating its injunction. United States v. Washington, Civ. No. 9213 (W.D. Wash., Oct. 17, 1977) (memorandum order and preliminary injunction removing allocation from state control). The state order was never formalized, however, and the case was subsequently consolidated with another challenge by the Puget Sound Gillnetters Association. Grays Harbor Gillnetters Ass'n v. Sandison, No. 45144 (Wash. Oct. 11, 1977) (order consolidating cases).

90. *See* note 86 *supra*.

91. The district court's control should extend only over the treaty portion of the harvest; even that control should be minimized. The state should retain discretion to choose among various regulatory options within the district court's allocation guidelines. Plans of types III and IV do not provide this local control. Plan III prevents the state from exercising any allocatory control over the treaty portion of the fisheries, while plan IV removes all state allocatory control.

92. Imposing dual federal-state controls over the fisheries, as in plans III and IV, is wasteful and awkward. The degree of cooperation required to avoid conflicting orders in the face of constantly changing harvest projections would be so extensive as to force the two agencies to act as one; yet the expense and waste of dual enforcement and management would still be present. *See* First Iowa Hydro-Electric Coop. v. F.P.C., 328 U.S. 152, 171 (1945) (dual management wasteful). Further problems would be presented by the possibility of conflict in the regulatory goals and techniques of the two agencies. If the two could not agree, it would be difficult to resolve the impasse. Furthermore, fishers would be at a loss to determine which agency's order to obey. *See* New

IV. CONCLUSION

The *Puget Sound* holding that the district court remedy was improper is based on misconceptions and false assumptions regarding both federal-state relations and the equitable power of federal courts. Decisions such as *Puget Sound* provide a smoke screen for recalcitrant state officials to avoid compliance with valid federal court orders.[93] The Washington court's decision has resulted in an embarrassing situation in which a state official is subject to conflicting court determinations of his powers and duties. Furthermore, the ultimate result has been to leave a federal judge as the manager of Washington's fisheries.[94]

Whether the federally protected right involved is the right to a quality education for all citizens, to decent prison conditions, to equal voting power, or to fish as guaranteed by a treaty, it is the supreme law of the land and deserves protection. Regardless of the correctness of *United States v. Washington* on the merits, it is now law; decisions such as *Puget Sound* are not the proper method to attack that law.[95] The Washington Supreme Court should re–evaluate its position and at the next opportunity require all state officials to comply with *United States v. Washington*.

Bennet A. McConaughy

York *ex rel.* Kennedy v. Becker, 241 U.S. 556 (1916) (dual sovereignty by tribes and state).

93. *See* Puget Sound Gillnetters Ass'n v. District Court, 573 F.2d at 1126. *See generally* Johnson, *The Constitution and the Federal District Court Judge*, 54 TEX. L. REV. 903 (1976).

94. Usurpation of state sovereignty in this area is certainly not desirable. *See* notes 43 & 57 *supra*.

95. The words of Justice Frankfurter's classic concurring opinion in Cooper v. Aaron, 358 U.S. 1, 20, 22, 24-25 (1958) seem particularly appropriate here:

> For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. The State "must . . . yield to an authority that is paramount to the State."
>
> . . . .
>
> The duty to abstain from resistance to "the supreme Law of the Land," U.S. Const., Art. VI, § 2, . . . does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stilled. Active obstruction or defiance is barred. . . . The Constitution is not the formulation of the merely personal views of the members of this Court, nor can its authority be reduced to the claim that state officials are its controlling interpreters.