Indian Fishing Rights in the Pacific Northwest: The Need for Federal Intervention

Brian Richard Ott
INDIAN FISHING RIGHTS IN THE PACIFIC NORTHWEST: THE NEED FOR FEDERAL INTERVENTION

Brian Richard Ott*

I. INTRODUCTION

In the days before European explorers discovered the New World, abundant supplies of fish existed throughout the waterways of the Pacific Northwest. Every stream and river served as a spawning ground for large numbers of salmon and steelhead trout. These fish, commonly described as anadromous, supplied a base for the complex Indian economies existing in the region. Because spawning runs occur at predictable intervals over precise waterways, the tribes were able to harvest millions of pounds of salmon and steelhead trout annually. The tribes preserved the captured fish for later use by drying or smoking, thereby insuring a steady year-round food sup-

*Citations Editor, 1986-1987, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

1 AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE NISQUALLY, PUYALLUP, AND MUCKLESHOOT INDIANS 148 (1970), [hereinafter UNCOMMON CONTROVERSY]. An early settler commented “The waters of the Bay and all the streams that flow into it, are well stocked with fish. Salmon of several varieties abound, and are taken in great numbers by the Indians for their own food or for trading with the whites.” Id. Archeological evidence indicates that Indian fishing has existed on the Columbia River System for 6,000 years. Comment, State Power and the Indian Treaty Right to Fish, 59 CALIF. L. REV. 485 (1971).

2 Anadromous fish are marine species which hatch in the gravel beds of fresh water streams and migrate to the open ocean where they mature into adults. After three to five years the lifecycle is completed when the fish return to fresh water to spawn. Six species of anadromous fish exist in the Pacific Northwest. Five are salmon—the chinook, coho, sockeye, pink, and chum or dog, while one is an anadromous variety of rainbow trout, the steelhead. Brief for Petitioners, Washington State, at 15–16, Washington v. Washington Comm’l Passenger Fishing Vessel Ass’n, 443 U.S. 658 (1979) (No. 77-983).

3 The anadromous species have a homing instinct, allowing them to return to their natal stream. UNCOMMON CONTROVERSY, supra note 1, at 148.

4 It is estimated that the tribes took 18 million pounds of salmon annually from the Columbia River system before the White man’s arrival. Id. at 4 n.3.
Further, the preserved fish were an important trading commodity. Salmon was traded in high volume over an extensive geographic region. The Northwest Indians bartered the preserved meat for lumber, blankets, vermilion, ceremonial masks, and other valuable items. Later they exchanged the fish for kettles and guns from European explorers.

Along with their economic importance, the anadromous species served as the focal point for Indian culture. Social cohesion within the loosely-knit tribal groups was founded on the harvest. Every member of the community had a specific harvesting function. While men caught the fish using weirs, spears, and dip nets, the women cleaned and smoked them. Children gathered fire wood and helped clean fish.

Each community, in turn, was identified by its traditional fishing grounds. Detailed procedures developed to prevent pollution of the streams and allow spawning to occur. Elaborate religious ceremonies sought to insure the perpetual return of the fish. Even the Indians' interpretation of constellations had fishing themes. So vital were fish to the Indian way of life that one jurist described them as "not much less necessary to the existence of the Indians than the atmosphere they breathed."

The Indian's way of life, however, was forever altered when the white man began his inexorable push into the Pacific Northwest. The earliest permanent white presence was fur trading posts, set up in the early eighteenth century to exploit the large beaver and otter populations. Protestant and Catholic missionaries arrived shortly thereafter in an attempt to convert the tribes to Christianity. By 1843, the Great Emigration brought hundreds of white settlers into the region. Within ten years, these settlers organized Oregon and Washington as separate territories of the United States. As more and more settlers entered the area, pressure soon mounted on the federal government to extinguish existing Indian land claims. To

---

5 From 80 to 90 percent of the Northwest Indians' diet consisted of salmon. Id. at 4.
7 Id. at 13.
8 Id.
9 UNCOMMON CONTROVERSY, supra note 1, at 5.
10 Id. at 6.
11 Brief of Respondent, Indian Tribes, at 12, 443 U.S. 658 (1979) (No. 77-983).
12 UNCOMMON CONTROVERSY, supra note 1, at 4.
13 Brief of Respondent, Indian Tribes, at 12, 443 U.S. 658 (1979) (No. 77-983).
accomplish this task, the United States authorized Isaac Stevens, as both governor and Superintendent of Indian Affairs in the Washington territory, to negotiate treaties on its behalf with the various tribes.

Stevens arrived in the Washington territory in 1853. During negotiations that commenced soon after his arrival, Stevens discovered that, while the Indians recognized that the white man's growing presence required them to sell much of their homeland, they desperately sought to retain their traditional fishing grounds. Indeed, the government negotiators recognized that preserving the right to fish was indispensable to the conclusion of any treaty with the Pacific Northwest Indians. As one treaty negotiator said, "[T]hey [the Indians] require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found."

Eager to placate the signatory tribes, Stevens repeatedly assured the Indians that a treaty would preserve their fishing rights. His statement to the Indians negotiating the Treaty of Point-No-Point epitomizes this fact:

Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home . . . . This paper secures your fish? [sic] Does not a father give food to his children?

Similarly, Stevens encouraged a reluctant Nez Perce Chief during a signing ceremony by declaring, "Looking Glass knows that he can . . . catch fish at any of the fishing stations."

Along with the Indian insistence upon retaining customary fishing grounds, other barriers impeded the negotiations. Foremost among these was language. Most of the Indians did not speak English. As a result, the negotiations were conducted in Chinook jargon, a simple language of limited vocabulary primarily used for barter transac-
The language proved to be ill-suited to the task. It lacked words for such essential terms as "common," "usual," "accustomed," "citizens," and "steelhead." Furthermore, a vast majority of Indians present did not even understand Chinook jargon; interpreters had to translate the negotiations into tribal languages.

Despite the problems associated with the negotiations, Stevens concluded ten treaties within the space of one year. The treaties, involving over 17,000 Indians, extinguished Indian land claims to more than one hundred thousand square miles of territory. In return, the Indians received monetary payments and express government recognition of certain reserved rights. Two of these reserved rights are significant. First, the Indians reserved small parcels of land for their exclusive use—what are commonly known as reservations. Second, each treaty contained a provision securing traditional fishing rights. For example, Article III of the Treaty of Medicine Creek states: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing . . . ."

For some time after the signing of the treaty, little controversy arose from this provision. The number of white settlers were small and anadromous fish harvests remained bountiful. By the beginning of the twentieth century, however, the supply of harvestable fish dwindled. Many factors caused this decline. New fishing devices,
such as pound nets and fish wheels, enabled non-Indian fishermen to take unprecedented numbers of fish. The perfection of modern canning techniques allowed salmon to reach distant markets, causing demand to skyrocket.28 Logging operations, a major economic activity throughout the Northwest, choked waterways with sedimentation and erosion run-off.29 Diversion of streams for irrigation dried up spawning beds,30 and water pollution in the form of sewage and agricultural fertilizers deprived the fish of needed oxygen.31

The greatest cause of decline, however, was the building of a series of dams on the Columbia river system. These dams eradicated spawning beds on 1,100 miles of river and tributaries.32 They also created tremendous passage problems for the fish. While fish ladders and other means provide a passageway around most dams,33 each dam still claims an estimated fifteen to thirty percent of all fish attempting to pass.34 In addition, dams alter the river in a manner detrimental to the spawning process. The backup of water behind a dam increases its temperature and deprives the salmon and steelhead of dissolved oxygen.35 Because the anadromous species have an exceedingly low tolerance for alterations in their environment, these changes will often severely impair or kill the fish.36

In an attempt to halt this decline in the fish stocks, the affected state governments37 have enacted comprehensive resource management plans, intended to have universal applicability. The Indian

---

28 In 1866, while packing techniques and fishing devices were unsophisticated, the total non-Indian output consisted of 4,000 pounds. Twenty years later, the output had ballooned to approximately 30,000,000 pounds. Comment, Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest, 10 ENVTL. L. 413, 419 (1980) [hereinafter EMPTY VICTORIES].
29 Id. at 421 n.51.
30 UNCOMMON CONTROVERSY, supra note 1, at 158.
31 Id. at 161.
32 Id. at 156.
33 Some dams, however, such as the Grand Coulee, provided no means of passage. As a result, the runs on the upper Columbia were obliterated. Id. at 155.
35 UNCOMMON CONTROVERSY, supra note 1, at 158.
36 See id.
37 Four states on the Pacific Coast have significant spawning runs on anadromous fish on their waterways: California, Oregon, Washington, and Alaska. While all four have experienced problems conserving their anadromous resources, most of the litigation concerning Indian fishing rights has centered in Washington and Oregon. Therefore, unless otherwise indicated, any general reference to states or state governments are meant to indicate Washington and Oregon.
tribes, in turn, have claimed exemption from the regulations, based on the wording of the treaty provisions and the Supremacy Clause of the United States Constitution. The resulting controversy has been heated and, at times, violent. Part II of this Comment will lay out the legal context of the dispute. Part III will outline the opposing arguments. Part IV will analyze the federal judiciary's handling of the dispute, and Part V will argue that federal legislative and administrative intervention is necessary in order to achieve a permanent solution.

II. LEGAL CONTEXT OF THE CONTROVERSY

A. The Legal Relationships

An analysis of the Indian fishing rights dispute may best be performed by first defining the legal relationships existing between the three principal characters: the federal government, the Indian tribes, and the state government. Of these, the relationship between the federal government and the Indian tribes is the most distinctive. The relationship is premised on the broad power, often described as plenary, which the United States holds over Indian tribes. The source of this power is an amalgam of several constitutional provisions, most notably the Indian Commerce Clause, the Treaty Clause, and the Property Clause. Taken together, these provisions enable the national government to exercise comprehensive

---


39 Chief Justice Marshall, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), noted that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." Id. at 16.

40 Under the Commerce Clause, Congress has authority to "regulate Commerce . . . with the Indian Tribes" U.S. Const. art. I, § 8, cl. 3.

41 U.S. Const. art. II, § 2, cl. 2. This provision gives the federal government exclusive power to enter treaties. In 1851, however, Congress prohibited the government from entering into treaties with the Indian tribes. 16 Stat. 544, 566, 25 U.S.C. § 71 (1982). As a result, the importance of this provision as a source of federal power has diminished.

42 The Property Clause allows Congress to control " Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. This provision is relevant because the United States holds ultimate fee title in all Indian lands. See infra notes 72-77 and accompanying text. At one time, the war powers of Congress, U.S. Const. art. I, § 8, clts. 1, 11, 12, 15-17, were also an important source of federal power over the Indian tribes.
control over many aspects of Indian life. For example, Congress may validly regulate any commercial transaction involving Indians, either individually or as a tribal unit,\textsuperscript{43} it may regulate and dispose of Indian property without consent,\textsuperscript{44} and it may freely alter the tribal power of self-government.\textsuperscript{45}

Despite its characterization as plenary, federal power over the Indian tribes is not absolute. It has been subject to limitations, the greatest of which flows from the federal government’s trust responsibility. Because Indian tribes have historically been considered dependents of the United States,\textsuperscript{46} the federal-tribal relationship has been considered similar to that which exists between a ward and his guardian.\textsuperscript{47} As a result, the national government owes a special fiduciary duty to the tribes. This obligation contains many of the characteristics of a legally enforceable private trust. For example, it requires the United States, as trustee, to advance the best interests of the beneficiary tribes. In \textit{Manchester Band of Pomo Indians v. United States}, a federal district court determined that the United States had not acted in the best interests of the plaintiff Indian band when it placed tribal trust funds in investments yielding less than the market rate of interest.\textsuperscript{48} As a result, the court required the government to pay the difference between the return which a reasonably prudent trustee would have gained and the actual return.\textsuperscript{49}

As a corollary to the principle of acting in the best interests of its guardian, the trust responsibility requires the government to subordinate its own interests to those of the Indian tribes. In \textit{Pyramid Lake Paiute Tribe v. Morton}, an Interior Department regulation allowing diversion of river water for a federal irrigation project was struck down because it would adversely affect an Indian tribe living


\textsuperscript{46} \textquotedblleft They [the tribes] are communities \textit{dependent} on the United States. Dependent largely for their daily food. Dependent for their political rights." United States v. Kagama, 118 U.S. 375, 383–84 (1886) (emphasis in original).

\textsuperscript{47} \textit{Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) at 16.


\textsuperscript{49} \textit{Id.} at 1248.
on the shores of a downstream lake. The federal district court noted that the Secretary of Interior had abused his discretion by enacting the regulation without properly recognizing his fiduciary duties.

Another manifestation of the government's trustee obligation is a duty of loyalty. Unless expressly authorized by Congress, the United States may not abandon its fiduciary responsibilities. In White v. Califano, the federal government attempted to pass the responsibility for Florence Red Dog, a mentally ill member of the Sioux tribe, to the state of South Dakota. The Eighth Circuit Court of Appeals found that, since part of the government's fiduciary obligation consisted of maintaining adequate health care on reservations, refusal to pay for Red Dog's treatment was an impermissible evasion of responsibility.

One final aspect of the United States' trust obligation are the rules of treaty construction which the judiciary has imposed upon itself. These rules, often described as canons, apply to any judicial interpretation of Indian treaties. First, the treaties must be interpreted as the signatory Indians would have understood them, rather than in their strict legal sense. Second, because the government had enormous advantages in negotiation and diplomacy skills, any ambiguous terms must be resolved in favor of the Indians. Finally, the treaties must be construed in accordance with their objectives.

The federal judiciary has construed the government's fiduciary duty to the Indian tribes strictly. For instance, where the federal government mistakenly appropriated Creek tribal land due to a surveying error, it was required to compensate the tribe at prices equivalent to the value of the land at the time of disposition plus interest. Similar violations will generally result in either legal or equitable relief. Consequently, the United States' trustee status

---

51 Id. at 256-57.
52 581 F.2d 697 (8th Cir. 1978).
53 Id. at 698.
56 See Squire v. Capoeman, 351 U.S. 1, 9–10 (1956); United States v. Winans, 198 U.S. at 381.
58 E.g., Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978) (injunctive relief granted against federal plan to terminate a small Indian community); Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977) (money damages awarded for government's disposition of a right of way across Indian land at below market value).
serves as a significant limitation on its plenary power over Indian tribes.

While the federal government has broad authority over the Indian tribes, state law has a much more restricted application in tribal affairs. Courts faced with the issue of state law applicability have distinguished on-reservation activities from those based off the reservation. Regarding on-reservation activities, courts generally follow the traditional rule, laid out in *Worcester v. Georgia*, which immunizes Indian tribes from state regulation. 59 The *Worcester* rule of tribal immunity has been based on two premises. First, the exclusion from state regulation is considered necessary to protect the Indian tribes' limited sovereignty.60 Second, Indian affairs have historically been an exclusively federal province not subject to state encroachment.61 This doctrine remains vital today.62 For instance, when Arizona attempted to impose its individual income tax on reservation Indians, the Supreme Court held the tax unlawful.63 While some degree of state intrusion has been allowed,64 these exceptions to the rule are carefully insulated and do not alter the basic premise of tribal on-reservation immunity.

In contrast to the immunity granted to Indians for on-reservation activities, off-reservation conduct is subject to normal state author-

---

59 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, the Supreme Court held a Georgia statute prohibiting white settlers from living on Cherokee reservation lands to be void. *Id.* at 561–62.

60 Although the concept of tribal sovereignty has been substantially modified over the course of the nation's history, recent Supreme Court cases have reaffirmed its vitality. *See generally*, United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); United States v. Mazurie, 419 U.S. 544, 547 ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.").

61 *See supra* notes 40–45 and accompanying text. For a history of the federal government's relations with the Indian tribes, *see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW*, 50–206 (1982 ed.).


64 For example, if a state obtains tribal consent, Congress has authorized it to assume general civil and criminal jurisdiction over reservation Indians. 25 U.S.C. § 1322(a) (1982). In addition, the actions of non-Indians on reservation lands are subject to state laws when they relate solely to other non-Indians, N.Y. ex. rel. Ray v. Martin, 326 U.S. 496 (1946) (state has jurisdiction to prosecute the murder of one non-Indian by another on reservation land); Langford v. Monteith, 102 U.S. 145 (1880) (service of process by state court allowed on white living on reservation land). Finally, where Indian tribes have lost their status as a separate entity and have become fully assimilated citizens, state laws are sometimes considered applicable. Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 610 (1943).
ity in most circumstances. The only major exception to this rule lies in specific Indian rights retained in ceded areas.

The relationship between the federal and state governments, so far as it concerns Indians, is controlled by the Supremacy Clause and its concept of preemption. Application of the principles of preemption varies according to the field of law in question. In the area of Indian law, however, the Supremacy Clause has been consistently and forcefully applied. Because of the federal government's trustee status and the Indian tribes' traditional position as distinct political sovereigns, courts will often invalidate state action based only on the general purposes of federal statutes and treaties.

---


66 Each state, as an aspect of its ultimate sovereignty, has broad power to enact legislation concerning the health and welfare of its citizens. This power, the so-called police power, has long included the ability to regulate the taking of game within state borders. See, e.g., Manchester v. Massachusetts, 139 U.S. 240 (1891); Smith v. Maryland, 59 U.S. 71 (1855). In Geer v. Connecticut, the United States Supreme Court upheld a Connecticut statute forbidding the shooting of certain gamebirds for the purpose of transporting them beyond state boundaries. 161 U.S. 519, 535 (1896). The court supported its decision by citing language of the California Supreme Court: "The wild game within a state belongs to the public in their collective capacity . . . . [T]hey may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation, or the public good." Id. at 529, quoting Ex parte Maier, 103 Cal. 476, 483, 37 P. 402, 404 (1894). The Supreme Court did overrule Geer in Hughes v. Oklahoma, 441 U.S. 322 (1979), because the regulation involved violated the Commerce Clause. Despite this reversal, Geer's lengthy discussion of the state right to regulate wildlife resources retains validity. For a detailed discussion of relevant cases, see Comment, State Regulation of Indian Treaty Fishing Rights: Putting Puyallup III into Perspective, 13 Gonz. L. Rev. 140, 150–57 (1977).

67 See, e.g., Williams v. Lee, 358 U.S. 217 (1959) (state of Arizona preempted from exercising jurisdiction over a non-Indian general store located just outside reservation land since such action would undermine the authority of tribal courts); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (land held by Indian tribes immune from state taxation despite the failure of the tribes to retain former lifestyle).

68 According to the Supremacy Clause of the United States Constitution, the "Laws of the United States . . . and all Treaties . . . 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." U.S. Const. art. VI, § 2. Through resort to this provision, state laws which contradict those of federal government are held void. The conflict need not be direct; preemption also exists where Congress has demonstrated its intention solely to occupy an entire field and a state attempts to legislate in the area.

A clear example occurred in *Fisher v. District Court.* A Montana state court acting under authority of state law, conducted an adoption proceeding for Ivan Firecrow, a young member of the Northern Cheyenne tribe. Firecrow's natural mother sought to invalidate the proceeding, claiming that a federal statute permitting tribal self-government preempted application of the state act. The Supreme Court agreed, holding that the general purpose of the act was to allow the Cheyenne tribe to govern itself independent of state interference. Because application of the state law unlawfully interfered with this purpose, the Court invalidated the adoption proceeding.

**B. Aboriginal Title**

The underlying base of any analysis concerning Indian property rights is the longstanding doctrine of aboriginal title. This concept has its roots in early decisions of the federal judiciary, which recognized that although European explorers claimed ultimate sovereignty over all lands they discovered, the Indian tribes retained a subservient interest known as aboriginal or Indian title. Aboriginal title, which extends to all lands occupied or used by an identifiable tribe since time immemorial, is a possessory interest; it provides the tribes holding it with an exclusive right to occupy the land, along with the right to take all beneficial incidents of such occupancy. These beneficial incidents include the right to hunt and fish.

Although aboriginal title provides the Indian tribes with many of the benefits of land ownership, broad limitations do exist. Since the ultimate fee interest remains with the federal government, the Indian tribes may not transfer their interest without Congressional approval. The government also retains absolute authority to modify or abrogate aboriginal title. Moreover, any abrogation does not give rise to a claim for compensation.
As a result of aboriginal title, the treaty provisions regarding Indian fishing did not actually convey any rights to the tribes. Instead, they merely acknowledged that the tribes wished to retain their pre-existing fishing rights. As the Supreme Court in United States v. Winans observed, "[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."  

III. OPPOSING ARGUMENTS OF THE CONTROVERSY

A. State Argument

In claiming that their fishing regulations apply on an equal basis to both Indians and non-Indians, the state governments of the Pacific Northwest have relied on two essential arguments. First, the governments believe that a careful reading of the treaty guarantee itself allows them to regulate Indian fishing. Second, beyond any purely legal arguments, the states contend that the preservation of the anadromous species requires regulation of all user groups, including the Indian tribes.

1. Treaty Language

On the surface, the language of the treaties seems unequivocal. Each treaty contains a provision which secures to the Indians "[t]he right of taking fish, at all usual and accustomed grounds and stations."  

This right, however, contains an important qualification. It is to be exercised "in common with all citizens of the territory." The states contend that a plain reading of the phrase mandates that equality is to exist between Indian and non-Indian fishermen. Since non-Indian citizens are subject to fishing regulations consistent with the police power, Indians should be equally affected. Consequently, the prohibitions of certain types of gear, the catch limitations, and location restrictions, which apply to non-Indian commercial and sport fishermen, would also apply to their full extent to Indian fishermen.

In support of this interpretation of the "in common with" language, the Northwest states turn to another place where the same language appears. The Treaty with the Yakimas provides that the tribe has "the right, in common with citizens of the United States, to travel..."
upon all public highways."\textsuperscript{83} The states point out that the drafters of the treaties clearly desired that the use of highways be equally shared among Indians and non-Indians alike with the same police power restrictions on both sides. Otherwise, the Indian tribes would be allowed to travel on public highways with no regard to the safety rules applicable to non-Indians. Therefore, since the "in common with" language of the highway provision mandates equal treatment of Indians and non-Indians, the states contend that the "in common with" language of the fishing rights provision should be interpreted similarly in order to maintain consistency.\textsuperscript{84}

2. Necessity for Conservation

Perhaps the states' strongest argument comes from an analysis of the effects, both actual and potential, that unimpeded Indian fishing would have on conservation efforts. The precipitous decline in salmon and steelhead stocks in recent years\textsuperscript{85} has made management of the resource a difficult and exacting chore. Starting when a spawning run begins, fish biologists must quickly calculate the run size and escapement needs of the species while factoring in such man-made influences as dams and water pollution in order to determine the maximum catch allowable. Due to the declining numbers of fish, this calculation must be extremely accurate. Any mistake may lead to overfishing and quick obliteration of the anadromous species.\textsuperscript{86}

When the Indian tribes are allowed to fish unimpeded by regulation, the states contend that the task of insuring species survival becomes very difficult, if not impossible. Any assessment of the maximum allowable catch becomes meaningless, since the state has no way of enforcing its determination on the tribes. Thus, the whole regulatory system, designed to insure species survival, breaks down. The effects can be devastating, particularly when traditional tribal fishing grounds are located on the upper reaches of river tributaries. At such locations, the salmon are very concentrated and often just

\textsuperscript{83} Treaty with the Yakimas, art. III, 12 Stat. at 952-53 (emphasis added).

\textsuperscript{84} See Brief of Petitioner, Department of Game, at 19, Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392 (1968)(No. 247).

\textsuperscript{85} See supra notes 25-29 and accompanying text.

\textsuperscript{86} In 1880, the state of California made mistaken estimates of escapement needs for anadromous species. As a result, overfishing nearly eliminated salmon in Southern California. Brief of Amicus Curiae, Northwest Steelhead and Salmon Council of Trout Unlimited, at 11, Washington v. Washington State Comm't Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (No. 77-883).
milling in pools, resting or waiting to spawn. As a result, a small number of Indian fishermen, left unregulated, could remove those last remaining fish needed to propagate the species. The Washington Department of Fisheries reported that in 1964, a year in which Indian fishing went virtually unregulated, only thirty-three spring run chinook, less than three percent of the entire run, escaped Indian fishing on the Yakima river system. In the same year, only seventy-five chinook escaped to spawning grounds on the Naches River.

These statistics, along with a host of others, prompted a Department of Interior official to comment, "... Indian fishermen, particularly Indian commercial fishermen, can seriously imperil or even destroy fish runs if they are not subject to some restraint." Consequently, the states argue that the need to preserve the anadromous species negates any possible counterargument.

B. The Indian Claim of Exemption

In contrast to the state argument that their game regulations apply with uniformity, the Indian tribes of the Pacific Northwest have long claimed immunity from such rules. This belief is based on a two-part argument. First, the tribes argue that the effect of the treaty guarantee is to prevent state regulation of their rights. Second, the Indians contend that in order to maintain consistency with the three basic canons of Indian treaty construction, the "in common with" language must not be interpreted as a measure of equality between Indian and non-Indian fishermen.

1. The Force and Effect of the Treaties

The treaties made between Stevens and the Northwest tribes extinguished aboriginal title on all lands in the region, save the small reservations. Each treaty did, however, preserve and expressly recognize one important component of aboriginal title: the right to hunt

89 Id. at 4.
and fish on traditional tribal grounds.\textsuperscript{92} This federal recognition has important legal consequences.\textsuperscript{93} Perhaps the most important effect lies in the protection from state regulation that such a recognized right receives. Whereas unrecognized aboriginal hunting and fishing rights appear to be subject to state wildlife regulation,\textsuperscript{94} federal recognition insulates Indian hunting and fishing rights from state laws through the Supremacy Clause.\textsuperscript{95} Under this provision, states are restrained from either amending or abrogating federal treaty provisions. When state law contradicts federal treaties, the state law must yield. In \textit{Missouri v. Holland},\textsuperscript{96} the seminal case under this doctrine, the Supreme Court confronted an argument by the state of Missouri that a treaty between the federal government and Great Britain to protect migratory waterfowl impermissibly interfered with the state's own wildlife management. In rejecting this argument, the Court held that while the regulation of wildlife resources is clearly encompassed in the state police power, a valid federal treaty provision may override this right.\textsuperscript{97}

Based on the Supremacy Clause and its interpretation in \textit{Missouri v. Holland}, the Northwest tribes argue that their right to hunt and fish is immune to state regulation. After all, the treaties made between the United States and the Indian tribes have the same force and effect as the treaty in \textit{Missouri v. Holland}. The Supreme Court does not draw a distinction between treaties made with Indian tribes and those made with foreign nations.\textsuperscript{98} In addition, the fishing rights provision appears to be as conclusive as the prohibition in \textit{Missouri v. Holland}. In both cases, the Court made no mention of any concurrent state regulation. Hence, the Indians argue that the possibility of state regulation, having been rejected in \textit{Missouri v. Holland}, should similarly be foreclosed in the present controversy.

\textsuperscript{92} See supra note 26 and accompanying text.
\textsuperscript{93} For example, federal recognition of aboriginal rights gives the holder a property right which is accorded the same protection against an uncompensated taking as any other property right. See Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).
\textsuperscript{94} See Organized Village of Kake v. Egan, 369 U.S. 60 (1962). In \textit{Kake}, the Thlinget Indians brought suit to enjoin Alaska's threatened enforcement of a statute prohibiting the use of salmon traps. The Supreme Court upheld the state's rights to enforce its law. Justice Frankfurter, in an unanimous opinion, noted that since Congress had not spoken on the issue, the state of Alaska has a right to regulate Indian fishing pursuant to its police powers. \textit{Id.} at 76.
\textsuperscript{95} See supra notes 66--73 and accompanying text.
\textsuperscript{96} 252 U.S. 416 (1920).
\textsuperscript{97} Id. at 434.
\textsuperscript{98} See United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
thereby allowing Indian fishing to exist unimpeded by state regulation.

2. The "in common with" Provision

The actual language of the treaties serves as an important obstacle to the Indian claim of immunity. The "in common with" clause has been seized upon by the Northwest states as requiring an equality of treatment between Indian and non-Indian fishermen. In contrast, the tribes argue that the phrase merely extends the right of fishing, which heretofore had been exclusively Indian, to white settlers. In this sense, "in common with" actually means "as well as to." Moreover, the Indians argue that their interpretation must be accepted in order to maintain consistency with the three basic canons of Indian treaty construction.

Regarding the first rule of treaty construction, which states that treaties must be interpreted as the signatory tribes would have understood them, rather than in their strict legal sense, Indian rights advocates argue that the Indians who signed the treaty surely did not understand the treaty as allowing for state limitations on their right. At the time of signing, natural resources in the Pacific Northwest existed in such abundance that no one contemplated future shortages. Given the Indians' strong desire to retain their cherished fishing rights, however, it seems unlikely that the tribal representatives would have signed the documents had they foreseen limitations.

As far as the canon that any ambiguous terms be resolved in favor of the Indians, the tribes argue that to interpret "in common with" according to the state definition would be erroneous. As noted previously, "in common with" has two inconsistent interpretations. The states interpret the phrase as a symbol of equality, while the tribes believe it merely bestowed fishing rights on white fishermen. In such circumstances, this rule of construction obligates courts to interpret the clause in a manner favorable to the Indians.

99 See supra notes 82-84 and accompanying text.
102 See Brief of Respondent, Indian Tribes, at 119, 443 U.S. 658 (1979) (No. 77-783).
103 See supra notes 99-101 and accompanying text.
104 See supra note 55 and accompanying text.
Finally, the Indians argue that “in common with” should be construed in favorable terms in order to maintain consistency with the treaty objectives, as the third canon mandates. They contend that both parties sought to preserve Indian fishing for future generations. From the Indian point of view, this contention seems obvious. The objective of Governor Stevens and the other white settlers, though, was also to preserve Indian fishing. Just as the anadromous fish were vital to the Indian tribes, they served as an integral component of the pioneer economy. The white settlers relied on the salmon caught by Indians as an export product and as a ready source of food. Indeed, Stevens told the Indians that he wanted to send them modern fishing equipment in an attempt to encourage their fishing activity. It also seems unlikely that the white negotiators, realizing that fishing was essential to the Indians, would have created the possibility of leaving the tribes with no means of providing for their livelihood. Thus, in order to give effect to this objective, the Indians argue that the term “in common with” must not be interpreted as denoting equality.

IV. JUDICIAL RESOLUTION OF THE CONTROVERSY

Although the trustee obligations which the United States has towards the Indian tribes seems to mandate affirmative actions to protect tribal hunting and fishing rights, the federal legislative and executive branches have seldom interceded in the controversy. Consequently, the problem has fallen on the judiciary. The treatment of Indian fishing rights claims by federal and state courts has fluctuated greatly over the course of the last century. Early case law shows a partiality towards state arguments favoring their wildlife regulations. Later cases tend to favor the Indians’ arguments, but contain dicta which provide strong ammunition for future state arguments. This dicta set the stage for modern case law, which, while acknowledging the special status of Indian fishing rights, has sought to uphold reasonable state regulation of Indian fishing.

106 Id. at 126.
107 Id. at 129.
108 See supra notes 46–53 and accompanying text.
109 See infra notes 201-13 and accompanying text. The administrative branch has intervened to bring suit on behalf of the Indian tribes. See United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974). This action, however, merely passes the controversy on to the judiciary.
A. The Early Cases

The earliest Supreme Court case dealing with Indian wild game rights is *Ward v. Race Horse*. Race Horse, a Bannock tribesman, was convicted of killing seven elk on state land in violation of a Wyoming game law. He sought a writ of habeas corpus, claiming immunity under an 1868 treaty which provided that "they [the Indians] shall have the right to hunt on the unoccupied lands of the United States . . . so long as peace subsists among the Whites and Indians on the borders of the hunting districts." The Court reversed a Court of Appeals decision granting the writ. Justice White, writing the majority opinion, concluded that the subsequent Congressional action of admitting Wyoming into the Union superseded the Indians' treaty right. Because the act terminated the hunting districts referred to in the treaty, the Indian hunting guarantee no longer had effect.

The Supreme Court again rejected Indian immunity claims in *New York ex. rel. Kennedy v. Becker*. Three Seneca Indians were arrested for spear fishing on land which the Seneca Nation had ceded to Robert Morris, a colonial settler, in 1797. The treaty contained a provision reserving the Indians' right to hunt and fish. The Court categorized the provision as a privilege, subject to any valid state regulation. To hold otherwise, the Court concluded, would rob New York of a necessary incident of its inherent sovereignty.

B. Later Case Law

Soon after *Race Horse*, the Supreme Court, in a reflection of the white man's more advanced understanding of Indian culture, began to accord greater deference to reserved fishing rights. At the same time, state courts dealing with the dispute soon followed the Supreme Court lead. See, *e.g.*, *State v. Towessnute*, 89 Wash. 478, 481, 154 P. 805, 807 (1916) (court upheld the arrest of a Yakima Indian fishing without a license by denying the existence of aboriginal title). See, *also*, *People v. Chosa*, 252 Mich. 154, 233 N.W. 205 (1930). Because of such opinions on both the state and federal level, the Indian tribes were routinely denied any degree of immunity from state regulation.

---

110 163 U.S. 504 (1896).
111 Treaty with the Shoshones and Bannacks, art. IV, 15 Stat. 673, 674–75 (1868).
113 Id.
115 Id. at 602.
116 The treaty was subsequently ratified by the Senate. It did not contain the same "in common with" clause of later treaties. 7 Stat. 601 (1797).
117 241 U.S. at 563–64.
118 Id. State courts dealing with the dispute soon followed the Supreme Court lead. See, *e.g.*, *State v. Towessnute*, 89 Wash. 478, 481, 154 P. 805, 807 (1916) (court upheld the arrest of a Yakima Indian fishing without a license by denying the existence of aboriginal title). See, *also*, *People v. Chosa*, 252 Mich. 154, 233 N.W. 205 (1930). Because of such opinions on both the state and federal level, the Indian tribes were routinely denied any degree of immunity from state regulation.
time, however, the Court did offer important dicta favoring the state regulatory powers. The first case of this new current was *United States v. Winans*. The federal government, along with a group of Yakima Indians, brought suit to enjoin Winans and other white landowners from depriving the Indians of access to their fishing sites. Winans contended that the treaty right existed only as long as the land remained federally owned, since private landowners gained property rights which foreclosed Indian intrusion. Further, the landowners, relying on the *Race Horse* precedent, argued that the admission of Washington into the Union superseded the treaty provision.

The Supreme Court rejected both of these arguments without mentioning *Race Horse*. Regarding the first argument, the Court held that the rights reserved to the Indians by the treaties imposed a servitude on all affected lands. As far as the second argument, the Court limited *Race Horse* by declaring that the federal government has the power to create rights in territories which remain binding when the territory becomes a state. The opinion is notable for the strong rhetorical support shown Indian fishing rights. In a peculiar piece of dictum, however, the Court made its first comment on the relation between state regulation and a valid treaty reservation. Justice McKenna, in his majority opinion, states, "Nor does [the treaty] restrain the State unreasonably, if at all, in the regulation of the right [to fish]." This off-hand comment, appearing near the end of the opinion, has served as a basis for the Northwestern states' position in countless cases.

The Supreme Court continued to support Indian fishing rights in *Tulee v. Washington*. Sampson Tulee, a Yakima Indian, was con-

---

120 *Id.* at 379. This argument rests on the condition that the property rights gained by the white landowners did indeed relate to the Indians on an equal basis as non-Indians. To prove this, Winans argued that the treaty clause "in common with the citizens of the Territory" meant that Indian and non-Indian fishing rights were to be treated equally. *Id.*
121 *Id.* at 382.
122 *Id.* at 381.
123 *Id.* at 383.
124 "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Id.* at 381.
125 The court determined that the treaty provision involved in *Race Horse* was abrogated. *See supra* notes 111-13 and accompanying text.
126 198 U.S. at 384.
127 315 U.S. 681 (1942).
victed of violating state game laws by catching salmon without a license. He argued that the treaty guaranteed him unimpeded fishing rights. The state, in contrast, contended that the “in common with” language restricted Indians and whites equally. The Court reversed Tulee’s conviction, holding that the state had no power under the treaty to impose a license fee on Indian fishing for revenue-producing purposes. Nonetheless, the Court once again acknowledged in dictum that the states were entitled to regulate Indian fishing for non-financial purposes: “[T]he treaty leaves the state with the power to impose on Indians, equally with others, such restrictions . . . of a purely regulatory nature concerning the time and manner of fishing outside the reservation as necessary for the conservation of fish . . . .” This “necessary for conservation” standard serves as a building block for modern cases dealing with the controversy.

C. The Modern Cases

After Tulee, the Supreme Court remained silent on the controversy for twenty-six years. In these intervening years, lower courts struggled to apply the Tulee test. A wide range of applications resulted. On one extreme was the Idaho Supreme Court’s opinion in State v. Arthur which rejected any application of the Tulee standard at all. David Arthur, a member of the Nez Perce tribe, was prosecuted for killing a deer out of season on land ceded to the federal government in a treaty. The defense rested with the treaty guarantee of the hunting and fishing rights. In its opinion, the Idaho Supreme Court, using a Supremacy Clause argument and ignoring the “in common with” language altogether, ruled that the Indian tribes were entitled to complete immunity from state regulation. The court, describing the Tulee test as irrelevant dictum, denied its applicability.

Although the Arthur decision received some support, its ultimate precedential value has been minimal. Other courts were more willing to adopt the Tulee test. For instance, the Ninth Circuit Court of Appeals attempted a straightforward application of the test in Makah Tribe v. Schoettler. The Makah Indians sought injunctive

---

128 Id. at 685.
129 Id. at 684.
130 74 Idaho 251, 261 P.2d 135 (1953).
131 Id. at 262-65, 261 P.2d at 141-43.
132 Id. at 263, 261 P.2d at 142.
133 E.g., State v. Satiacum, 50 Wash. 2d 513, 314 P.2d 400 (1957).
134 192 F.2d 224 (9th Cir. 1951).
relief against a Washington regulation prohibiting their net and trap fishing at traditional grounds on the Hoko River. The state contended that the regulation was necessary to preserve the fall silver salmon run and as a result, was valid under _Tulee._ In addition, the state of Washington asserted that any alternative regulation would be prohibitively expensive. The Makahs denied that the regulation was necessary. They argued that the same conservation result could be achieved by a partial stopping of all fishing during key periods of the spawning run. Reversing a District Court decision, the Court of Appeals restrained enforcement of the regulation against the tribe. Because of the existence of a less burdensome alternative regulation, the court found that the state had not met the “necessary for conservation” test. Further, the Court ruled that financial costs cannot be considered in applying the _Tulee_ test.

The _Tulee_ rule was again applied in _Maison v. Confederated Tribes._ In a situation similar to the Makah case, three tribes brought suit seeking to enjoin enforcement of Oregon Game Commission regulations prohibiting fishing at traditional, off-reservation sites. The court, interpreting the “necessary for conservation” test, ruled that, while a regulation need only be reasonable to have effect against non-Indians, it must be “indispensable” to control Indian fishing. The rules failed this requirement because Oregon could have achieved the same conservation results by limiting non-Indian sport fishing. Consequently, the court upheld an injunction against their enforcement.

In an attempt to clarify the confusion surrounding the _Tulee_ standard, the Supreme Court heard the case of _Puyallup Tribe v. Department of Game of Washington._ Once again, the affected Indian tribes sought equitable relief from a state game regulation, this time a prohibition on the use of set nets. For the first time, the Supreme Court squarely faced the issue of whether a state may regulate

---

135 _Id._ at 225.
136 _Id._
137 _Id._
138 _Id._ at 226.
139 _Id._
140 _Id._ at 225.
141 314 F.2d 169 (9th Cir. 1963).
142 _Id._ at 174.
143 _Id._
144 391 U.S. 392 (1968). Three Supreme Court opinions concerning the Puyallup tribe and the state of Washington came down within the space of ten years. These opinions will be referred to as _Puyallup I, Puyallup II, and Puyallup III_ according to chronological order.
Indian off-reservation fishing. Justice Douglas, writing for a unanimous Court, began his analysis with an interpretation of the treaty clause “at all usual and accustomed places.”145 Because the clause mentions only the places in which fishing is done and not the way in which it is performed, the Court ruled that while a state may not prevent Indians from fishing at their accustomed grounds, it may impose controls on the manner of fishing and size of a take provided that any such regulation is “in the interest of conservation, . . . meets appropriate standards and does not discriminate against the Indians.”146 The Court was unclear about what the appropriate standard should be, but did seem to favor the “necessary for conservation” test.147 In doing so, it expressly rejected Maison’s interpretation of necessary as meaning indispensible.148

The Puyallup I case signaled the end of litigation concerning the issue of whether a state has any power to regulate Indian off-reservation fishing.149 Nevertheless, the Supreme Court left the door open for Indian advocates by ordering that “the issue of equal protection implicit in the phrase ‘in common with ’” must be addressed on remand.150 As a result, the Indian tribes began to incorporate an equal protection argument into their suits against state fishing regulations. The United States District Court for the District of Oregon handled this argument in Sohappy v. Smith.151 Rearticulating the standards of Puyallup I, the District Court held that state regulation of Indian fishing must “not discriminate against the Indians.”152 The Court found an institutional discrimination existed in the Oregon regulatory system for, while the state policies were meant to insure an equitable division between sport and commercial fishermen, the needs of Indian fishermen were ignored.153 Therefore, in order to meet the non-discrimination requirement of Puyallup I, state restrictions must allow the treaty Indians to catch “a fair share” of harvestable fish.154

145 Id. at 225.
146 Id. at 398.
147 Id. at 398-401.
148 Id. at 401-02 n. 14. According to the Court, the indispensable standard should only be used where the regulation is revenue-producing, as in Tulee. The Malson opinion erred by applying the indispensable standard to a regulatory law. Id.
149 For a strong criticism of the Puyallup I decision, see Johnson, supra note 41.
150 391 U.S. at 403.
152 Id. at 907.
153 Id. at 910-11.
154 Id.
The Supreme Court acknowledged Sohappy's "fair share" approach in *Puyallup II*.\(^{155}\) After the *Puyallup I* case was remanded, the Department of Fisheries removed its prohibition on net fishing for salmon. The Department of Game, however, continued to ban net fishing for steelhead.\(^{156}\) Justice Douglas, noting that only Indian fishermen use set gill nets to catch steelhead, found that the regulation essentially granted the entire run to sport fishermen.\(^{157}\) This result, he concluded, discriminated against the treaty Indians.\(^{158}\) Therefore, the state must regulate fishing so that the steelhead runs are "in some manner fairly apportioned between Indian net fishing and non-Indian sports fishing . . . ."\(^{159}\)

The District Court case of *United States v. Washington*\(^{160}\) provided the first chance to define the fair apportionment mandated by *Puyallup II*. In this case the United States, in its trustee role, sought a declaratory judgment concerning Indian fishing rights and injunctive relief to provide enforcement of those rights.\(^{161}\) In an opinion thoroughly detailing all aspects of the controversy, Judge George Boldt ultimately determined that the Supreme Court's fair apportionment standard required a fifty-fifty split of harvestable fish between Indian and non-Indian fishermen.\(^{162}\) Judge Boldt determined this division based on the "in common with" language of the treaties. Since "in common with" is defined by the dictionary as sharing equally, the Indian tribes and the white fishermen should divide the harvestable fish equally.\(^{163}\)

While such an approach has the merit of simplicity, the *United States v. Washington* decision recognized that the implementation of such a plan contained many snags. Primary among these was the definition of harvestable fish. Judge Boldt ruled that this figure did not include those fish caught by Indians for ceremonial purposes nor any fish required for spawning escapement.\(^{164}\) Further, any apportionment approach was soon adopted by an Oregon federal court. Sohappy v. Smith, 529 F.2d 570, 572 (9th Cir. 1976).

\(^{155}\) Department of Game of Washington v. Puyallup Tribe, 414 U.S. at 46-47.

\(^{156}\) While salmon fishing is controlled by the Department of Fisheries, steelhead, considered a gamefish, are under the jurisdiction of the Department of Game.

\(^{157}\) Department of Game of Washington v. Puyallup Tribe, 414 U.S. at 46-47.

\(^{158}\) Id. at 48.

\(^{159}\) Id.

\(^{160}\) 384 F. Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976).

\(^{161}\) Id. at 327-28.

\(^{162}\) Id. at 343.

\(^{163}\) Id. The apportionment approach was soon adopted by an Oregon federal court. Sohappy v. Smith, 529 F.2d 570, 572 (9th Cir. 1976).

\(^{164}\) 384 F. Supp. at 343.
tionment scheme would not include on-reservation fishing, which was immune from state regulation.165

Because the United States v. Washington decision heavily favored the Indian argument, resistance and outright defiance of its mandates were widespread.166 Indeed, the Ninth Circuit concluded that with the exception of the desegregation cases, the United States v. Washington decision faced "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."167 In an attempt to calm the storm, the Supreme Court granted certiorari in the case of Washington v. Washington State Commercial Passenger Fishing Vessel Association.168 The Court began its opinion by reiterating the requirement that the Indians must be given the right to harvest a share of all harvestable fish in any state management scheme.169 Justice Stevens, writing the majority opinion, found this requirement to be inherent in the treaty guarantee of the "right of taking fish."170 The Court went on to determine the share to which the Indian tribes were entitled. In

165 Id. This holding was rejected by the Supreme Court in Puyallup Tribe v. Dep't of Game of Washington (Puyallup III), 433 U.S. 165 (1977).

166 The Washington Supreme Court was particularly adamant. In Puget Sound Gillnetters Association v. Moos, 88 Wash.2d 677, 683-84, 565 P.2d 1151, 1154 (1977), the court sidestepped the United States v. Washington decision by finding that it had usurped legislative authority by requiring state agencies to act beyond the scope of their authority. Id. at 684-89, 565 P.2d at 1154-58. The equal protection clause offered another justification to ignore the United States v. Washington decision. In Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wash.2d 276, 571 P.2d 1373 (1977), the Washington Supreme Court determined that a plan providing fifty percent of the anadromous resources to Indian tribes, which comprise less than one half of one percent of the entire state population, "violate[d] the equal protection clause on its face." Id. at 281, 571 P.2d at 1376. The United States Supreme Court summarily rejected this equal protection argument in a footnote. Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 673 n.20 (1979) ("The simplest answer to this argument is that this Court... has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf...."). The Court also specifically rejected the Moos holding. Id. at 695 ("It is also clear that [the Department of] Game and Fisheries... may be ordered to... implement the Court's interpretation of the rights of the parties even if state law withhold from them the power to do so.").

167 Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978). The state agencies charged with the duty of enforcing the United States v. Washington regulation promulgated regulations with great reluctance. These regulations were essentially meaningless, however, because the state seldom issued citations and even less frequently prosecuted the cited violations. Id. at 1128. The Moos decision subsequently stripped the state agencies of the power to enforce the United States v. Washington plan. 88 Wash.2d at 677.


169 Id. at 679.

170 Id. at 678 (emphasis in original).
accord with the *United States v. Washington* decision, the Court ruled that the “in common with” language entitled the Indians to harvest up to fifty percent of the fish.\(^{171}\) Nevertheless, this was to be a maximum, not a minimum allocation. The factor determining the actual allotment is the number of fish required to provide the Indians with “a moderate living.”\(^{172}\) Hence, if the number of tribal fishermen dwindles or the value of the product rises relative to the cost of living, the percentage allocated to the Indians can be accordingly lowered.\(^{173}\)

The Supreme Court also altered Judge Boldt's classification of harvestable fish. Salmon caught for ceremonial and religious needs were includable in the Indian fishermen's allocation.\(^{174}\) Fish caught at on-reservation sites were also included.\(^{175}\)

V. THE NEED FOR FEDERAL INTERVENTION

A. Problems with the Status Quo

Since the *Washington Commercial Passenger* case, the number of substantive court cases dealing with Indian fishing rights in the Pacific Northwest has dropped as courts attempt to implement apportionment.\(^{176}\) Superficial examination of the controversy, therefore, might lead to the conclusion that it is essentially solved. Nonetheless, fundamental defects still exist with the present solution. If

---

\(^{171}\) *Id.* at 685.

\(^{172}\) *Id.* at 686.

\(^{173}\) This determination is to be made by federal district courts upon proper submission of interested parties. *Id.* at 686-87.

\(^{174}\) *Id.* at 688.

\(^{175}\) *Id.* at 687.

left unattended, these problems will once again make Indian fishing rights an explosive controversy.

In order to understand these problems, it is first necessary to comprehend the political context in which they fester. The white commercial and sport fishing interests are an important component of the state economy. For example, in Washington, approximately 6,600 white commercial fisherman make their living on the harvest of salmon, taking over 80 percent of the entire catch. In addition, 283,650 sport fishermen contribute large sums to the state government in the form of license fees. Together, these user groups add $132 million to the state of Washington's economy each year. As a result white fishermen exercise a powerful voice in state government.

In contrast, Indian fisherman have little power. Most Indians fish for subsistence; only a small minority are involved in commercial enterprises. Treaty fishermen annually catch less than five percent of the entire run. Further, the Indian tribes in general have traditionally been politically weak. Victimized by racial prejudice and isolated both culturally and physically, the tribes often have little ability to protect their interests. Indeed, one commentator draws an analogy between the political voice of the black community and that of the Indian tribes.

As a result of the relative political weakness of Indian fishermen compared to non-Indian fishing interests, an institutional bias has grown in state governments. Indeed, a long history of discrimination against Indian fishing exists in the Northwest states. During the 1960s, state agencies pursued a vigorous policy aimed at denying Indian fishermen their rights. Systematic harassment resulted in gear confiscation, fines, and jail sentences. While the states ac-

177 United States v. Washington, 506 F. Supp. 187, 192 (W.D. Wash. 1980), modified, 694 F.2d 374 (9th Cir. 1982), withdrawn for rehearing en banc, 704 F.2d 1141 (9th Cir. 1983), aff'd on rehearing, 759 F.2d 1353 (9th Cir. 1985). See also UNCOMMON CONTROVERSY, supra note 1, at 126-29.
178 Id.
179 See EMPTY VICTORIES, supra note 26, at 426-27 n. 70.
180 In the Yakima Indian Reservation, for instance, while 2,000 tribal members fish for subsistence, only 5 fish commercially. United States v. Washington, 384 F. Supp. at 382.
181 The tribal court in Puget Sound put the annual figure at between 3 and 5 percent annually. 422 P.2d at 767.
183 Id. at 1843.
185 Id.
tively encouraged the growth of white fisheries, the Indians were denied any form of assistance. These actions led one tribesman to complain that "the State of Washington has deprived our people of a livelihood through harassment and restrictions in our accustomed fishing grounds . . . ."\(^{187}\)

It is in the context of this discrimination that the standards of *Washington Commercial Passenger* must be examined. The ultimate conclusion of the case is that the share of salmon allotted to the Indians must afford them a "moderate living."\(^{188}\) Many possible standards exist to define this term. On the one hand, comparative per capita income provides a possible standard. Alternatively, a standard containing the historical living conditions, including tribal customs and traditions, would result in entirely different decisions.

Certainly countless other manners of definition exist. Given the institutional bias against Indian fishing rights, it seems clear that the states will use the most restricted definition of the term. Hence, the vague language of the *Washington Commercial Passenger* rule will allow an outlet for states to impinge once again upon Indian fishing rights.

Another defect of the present judicial approach lies in enforcement. The *Washington Commercial Passenger* court ordered state agencies to draft rules in accordance with the apportionment order.\(^{189}\) Accompanying this order was a ruling which allowed the District Court to assume direct supervision over the fisheries.\(^{190}\) Given the inherent state bias against Indian fishing rights, state agencies will be extremely reluctant to enforce judicial allowances,\(^{191}\) and the task of enforcing the allocations will fall on the federal district court judges. This is a role for which the judges, inexperienced in making scientific inquiries, are ill-suited.\(^{192}\) Indeed, when Judge Boldt was forced to take over management of the western Washington fishery, he had only the part-time assistance of a college professor and an advisory council to make regulatory decisions which normally require the efforts of many dozens of field biologists.\(^{193}\) The result was sub-

---

\(^{186}\) Brief of Respondent, Indian Tribes, at 51, 443 U.S. 658 (1979).

\(^{187}\) Id. at 50–51.

\(^{188}\) See supra text accompanying note 172.

\(^{189}\) 443 U.S. at 695.

\(^{190}\) Id.

\(^{191}\) See supra notes 184-86 and accompanying text.

\(^{192}\) For a discussion of the inadequacies of judicial review of complex technical issues, see Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

\(^{193}\) Brief of Amicus Curiae, Northwest Steelhead and Salmon Council of Trout Unlimited,
stantial overfishing in many rivers. Thus, the judiciary's entrance into the regulation of anadromous fisheries merely poses another threat to the survival of salmon and steelhead.

While the federal judges clearly lack the expertise to manage the fisheries, there is also a serious question whether it is their proper role. The judicial system has traditionally been wary of invading the powers vested in other branches by deciding political questions. The judicial system has taken a particularly restrained role in enforcing treaties because, as Justice Marshall explains, a "treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court." In other words, courts will generally not make affirmative judgments on how to implement a treaty; rather, the judiciary will only determine whether government action violates the treaty. When, however, the federal district court implements a fish allocation plan, it breaks this tradition and as a result, usurps legislative powers.

For the reasons stated above, neither the state governments nor the judicial system are fit to manage the fish resources of the Pacific Northwest. A better solution is to have Congress undertake this role. Congressional intervention into the issue has several advantages. First, regulation by the federal government offers uniformity. Part of the problem in managing salmon and steelhead resources is their wide range of movement. On spawning runs, the anadromous species travel through the jurisdictions of several states and two nations, each with its own wildlife regulations. The resulting lack of coordination hampers attempts to maintain an adequate stock. In contrast, federal regulation would provide a uniform approach to the problem since any federal rule would take precedence over state laws and would be undeniably applicable to the Indian tribes. This uniformity will take on increased importance if the stock of salmon and steelhead continues to decline.

---

194 Id. at 18–19.
196 For a Supreme Court denunciation of such active judicial management in the realm of desegregation see Milliken v. Bradley, 418 U.S. 717, 743–44 (1974).
197 The result has been some embarrassingly vague opinions. See supra part IV.
198 See supra notes 66–73 and accompanying text.
Second, a federal regulatory agency is in a better position to make objective determinations of the needs of both the anadromous species and all the user groups. Unlike state governments, federal agencies are more insulated from the voters. As a result, they are further removed from the strong external pressures felt by state agencies and will be less likely to engage in institutional discrimination.

Finally, if the eventual survival of the anadromous species is considered, then the federal government needs to become involved. The pressures faced by the salmon and steelhead could ultimately lead to their extinction.\textsuperscript{200} Easing these pressures requires costly enhancement programs such as the repurchase of fishing equipment and the creation of better means of circumnavigating dams. The vast financial resources of the federal government are best able to fill this need.

\textbf{B. Two Attempted Interventions}

Over the course of the fishing rights controversy, the federal government has generally avoided involvement, believing that the matter is properly handled on a local basis. Consequently, very little precedent exists for federal intervention. On two occasions, however, the United States has entered the field.

The first case of federal intervention occurred not in the Pacific Northwest, but in the Great Lakes region. In 1979, a federal district court judge, citing canons of treaty interpretation, ruled that the Michigan Department of Natural Resources may not regulate treaty-based fishing rights of the Bay Mills Indians.\textsuperscript{201} Alarmed at the potential harm to Great Lakes fish species, the Department of Interior quickly enacted a set of emergency regulations governing off-reservation fishing.\textsuperscript{202} These rules contained provisions defining minimum mesh sizes for gill nets, areas closed to fishing, and fishing seasons for various species. Unfortunately, since the emergency regulations had a lifespan of just over one year,\textsuperscript{203} very little is known about their effectiveness in protecting fish resources. Nonetheless,

\textsuperscript{200} In 1978, the National Marine Fisheries Service and the Fish and Wildlife Service requested public assistance in reviewing the status of salmon and steelhead populations of the upper Columbia in order to determine whether the species should be listed as threatened or endangered under the Endangered Species Act. 43 Fed. Reg. 45, 628 (1978).


\textsuperscript{203} The regulations expired on January 1, 1981.
the rules could serve as a model for future regulation of Indian off-reservation fishing.204

The federal government again intervened in the fishing rights controversy when Congress passed the Salmon and Steelhead Conservation and Enhancement Act in 1980.205 Unlike the Great Lakes regulations, the Act allowed the Department of the Interior to take a more restrained role in handling the dispute. Instead of placing the burden of enacting standards on the federal agency, the Act created the Salmon and Steelhead Advisory Commission, an entity composed of federal, state, and tribal officials, to prepare a comprehensive management plan.206 The plan was to contain standards in accordance with nine stated objectives. The most important of these objectives were the prevention of overfishing, the coordination of management and enhancement activities by the various jurisdictions, and the optimizing of enforcement efforts.207 According to the act, the completed management plan was to be submitted to the Secretary of Commerce, who in consultation with the Secretary of Interior, would determine whether it conformed with the stated objectives.208 If so, the Secretary was authorized to allocate funds for the implementation of qualified enhancement programs proposed by any group represented on the commission which obligated itself to enforce the standards of the management plan.209 The total sum allocated to enhancement programs was $77 million.210 The Act authorized an additional $37.5 million for the purchase of fishing vessels and licenses in order to lower demand.211

The Act seemed to provide a workable solution to the dispute. A presidential task force estimated that the enhancement programs, if fully implemented, would double the number of harvestable fish,212

---

204 A related problem surrounding federal regulation is whether Congress ever authorized the Secretary of Interior to promulgate regulations concerning Indian off-reservation fishing. Although the Secretary enjoys a general supervisory power over Indians, 25 U.S.C. § 1.4 (1985), this power does not include a “power to make rules governing Indian conduct” unless authorized by Congress. Organized Village of Kake v. Egan, 369 U.S. at 63. Congress has never specifically authorized Interior department regulation of off-reservation fishing.


206 Id.

207 Id. at 3278.

208 Id.

209 Id. at 3279. The Act required enhancement proposals to contain certain elements such as an analysis of impact on fish populations and user groups, cost estimates, and data supporting conclusions. Id. at 3782.

210 Id. at 3283.

211 Id. at 3285.

thereby satisfying the needs of user groups to a greater extent and reducing concerns for species survival. Further, the concept of a joint state-tribal commission suggests the possibility of cooperation and negotiation between user groups which has been lacking to a large extent. Despite these positive features, the Act never had an opportunity to function. The Reagan Administration, as a cost-cutting measure, allocated no funds for the enhancement programs and without such inducement, the Commission never produced a management plan.\textsuperscript{213}

VI. CONCLUSION

The Indian off-reservation fishing controversy has developed out of the clash of two equally valid interests. The Indian tribes have a vested interest in preserving an ageless way of life guaranteed them by federal treaties. In contrast, the state governments are concerned with the continued existence of a wildlife resource. Resolution of the controversy lies not with federal and state judiciaries, but with the federal government.

Under the present federal administration, such intervention into local affairs is discouraged. While this restrained approach may be understandable in some instances, it has no place in the controversy over Indian fishing rights. Federal intervention is required both to insure the Indian fishing rights guaranteed by treaty and to provide for effective management and for continued survival of the fish resource. These interests are certainly worthy of protection.

\textsuperscript{213} Phone conversation with Mr. Robin Friedman, Attorney-Advisor, Department of Interior, Office of Solicitor, Division of Indian Affairs (Nov. 14, 1985).