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# ACCOMMODATION OF INDIAN TREATY RIGHTS IN AN INTERNATIONAL FISHERY: AN INTERNATIONAL PROBLEM BEGGING FOR AN INTERNATIONAL SOLUTION

## I. INTRODUCTION

The anadromous fish resources of the Pacific Northwest<sup>1</sup> have been threatened for decades by an oversized fleet and by regulatory complexities and uncertainties.<sup>2</sup> In recent years they have been subjected to the additional burdens of unlawful and lawful resistance to implementation of U.S. District Judge George H. Boldt's 1974 decision in *United States v. Washington*<sup>3</sup> regarding Indian fishing rights.

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1. Anadromous fish are those which ascend the rivers of their birth from the sea for breeding. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 76 (14th ed. 1961). Salmon and steelhead trout are among the anadromous fish native to the Pacific Northwest. J. TOMASEVICH, INTERNATIONAL AGREEMENTS ON CONSERVATION OF MARINE RESOURCES 221 (1943).

2. See Part II-B-2 *infra*.

3. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied* 423 U.S. 1086 (1976). Judge Boldt's decision construed the Indians' off-reservation treaty fishing rights reserved to them in the Stevens treaties, listed in note 5 *infra*, as entitling them to the opportunity to take up to 50% of the harvestable number of fish returning to their traditional fishing grounds. 384 F. Supp. at 343. To account for harvest of fish by nontreaty fishermen outside the jurisdiction of the State of Washington, the district court added an "equitable adjustment" to its definition of the harvestable number of fish on which the Indian share is based. *Id.* at 344. This "equitable adjustment" compensates treaty Indians for the opportunity lost when fish are taken before they reach the Indians' "usual and accustomed fishing places." *Id.*

Unlawful opposition to Judge Boldt's decision has ranged from destruction of Indian fishing gear to hostilities between non-Indian fishermen and enforcement officials. See, e.g., *Man Convicted of Violating Indian Rights*, Seattle Times, Mar. 30, 1978, § B, at 10; *Angry Fishermen Protest During Ford's Visit*, Seattle Times, Oct. 25, 1976, § A, at 1 (fisherman shot by enforcement official when it appeared fisherman's boat was ramming enforcement vessel); *Injured Gillnetter's Suit Settled for \$250,000*, Seattle Times, Oct. 10, 1978, § D, at 8. It has included a history of violating the court orders. See, e.g., *State 'Powerless' to Stop Illegal Fishing*, Seattle Post-Intelligencer, Aug. 31, 1977, § A, at 16; *Boldt Raps 'Outlaw' Non-Indian Fishing*, Seattle Post-Intelligencer, Oct. 28, 1975, § A, at 3.

Much lawful opposition has been funneled into the federal and state courts. See *Puget Sound Gillnetters Ass'n v. United States Dist. Court*, 573 F.2d 1123 (9th Cir. 1978), *cert. granted*, 99 S. Ct. 277 (1978); *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wn. 2d 276, 571 P.2d 1173 (1977), *cert. granted sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 99 S. Ct. 276 (1978); *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn. 2d 677, 565 P.2d 1151 (1977), *cert. granted sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 99 S. Ct. 276 (1978); *Washington State Commercial Passenger*

The resistance has come not only from non-Indian commercial fishermen, but also from the Canadian government and the International Pacific Salmon Fisheries Commission<sup>4</sup> (the Commission). Consequently, the efforts of the United States to incorporate the Indian treaty rights into the regulations of the Commission have failed.

The United States faces a dilemma which results from having treaties with two different signatories, Canada and native Northwest Indians, with respect to the same subject matter. After promising the Indians an *opportunity* to catch fifty percent of the harvestable fish returning to their traditional fishing grounds,<sup>5</sup> the United States en-

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*Fishing Vessel Ass'n v. Tollefson*, 87 Wn. 2d 417, 553 P.2d 113 (1976), *cert. granted sub nom.* *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 99 S. Ct. 276 (1978); *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn. 2d 664, 548 P.2d 1058 (1976), *vacated and remanded*, 433 U.S. 165 (1977). This volume of opposition has led the Ninth Circuit to comment:

Agencies of the State of Washington and various of its constituencies continue to attack the judgment in *United States v. Washington*. . . . Except for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

*Puget Sound Gillnetters Ass'n v. United States Dist. Court*, 573 F.2d at 1126.

Opposition has also been expressed through legislative channels in efforts to modify or abrogate the Indian treaty rights. H.R. 9054, 95th Cong., 1st Sess. (1977). See *Cunningham Continues Attack on Boldt Decision*, *Seattle Post-Intelligencer*, Oct. 28, 1977, § A, at 10; *Fishing Plea Fails; Next Stop, Congress*, *Seattle Post-Intelligencer*, Jan. 27, 1976, § A, at 1.

Lawful opposition has also taken the form of protest demonstrations. See, e.g., *Sportsmen Rise up on Rights*, *Seattle Post-Intelligencer*, Oct. 28, 1977, § A, at 10; *Angry Fishermen Protest During Ford's Visit*, *Seattle Times*, Oct. 25, 1976, § A, at 1.

4. Canada has resisted implementation of the decree in *United States v. Washington* through its three members on the International Pacific Salmon Fisheries Commission. This resistance plagued U.S. implementation efforts in each of the past four seasons. See notes 65, 76, 83, 101 & 117 and accompanying text *infra*.

5. 384 F. Supp. at 343 (construction of the Stevens treaties). The Stevens treaties are a series of similarly worded treaties entered into with various Indian tribes throughout what is now the State of Washington. Treaty with the Nisqually and Other Indian Tribes, Dec. 26, 1854, 10 Stat. 1132 (Treaty of Medicine Creek); Treaty with the Duwamish and Other Indian Tribes, Jan. 22, 1855, 12 Stat. 927 (Treaty of Point Elliott); Treaty with the S'klallam and Other Indian Tribes, Jan. 28, 1855, 12 Stat. 933 (Treaty of Point No Point); Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939 (Treaty of Neah Bay); Treaty with the Yakima and Other Indian Tribes, June 9, 1855, 12 Stat. 951 (Treaty of Camp Stevens); Treaty with the Quinaielt and Other Indian Tribes, July 1, 1855, 12 Stat. 971 (Treaty of Quinaielt River). Typical treaty language providing for Indian fishing rights states that "[t]he 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 . . . ." Treaty with the Nisqually and Other Indian Tribes, art. III, Dec. 26, 1854, 10 Stat. 1132, 1133 (Treaty of Medicine Creek). Judge Boldt, in applying rules of construction applicable to Indian treaties, construed "in common with" according to its common dictionary meaning, i.e., sharing equally. *United States v. Washington*, 384 F. Supp. at 343 (W.D. Wash. 1974). See also *id.* at 356.

tered into a treaty with Canada providing for joint management of the fishery through the Commission.<sup>6</sup> While proving extremely beneficial to the health of the resource,<sup>7</sup> this joint management scheme has proven to be an impediment to the fulfillment of the obligations of the United States to its treaty Indians.

As guardian or trustee of the Indian treaty rights,<sup>8</sup> the United States must make good faith efforts to secure these rights in the international fishery. But the subject matter of these rights, the fish resource, is dependent on the success of joint United States-Canadian management of the salmon runs under the Commission's jurisdiction. Thus, it is imperative that the Indian treaty rights be implemented without jeopardizing the spirit of cooperation essential to the Commission's successful management.<sup>9</sup>

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6. Convention Concerning Sockeye Salmon Fisheries in the Fraser River System, May 26, 1930, United States-Canada, 50 Stat. 1355 [hereinafter cited as Sockeye Convention], as amended by Protocol to the Sockeye Convention, December 28, 1956, United States-Canada, [1957] 8 U.S.T. 1058 [hereinafter cited as Pink Salmon Protocol]. For the full text of the treaty, as amended to 1974, with additional commentary, see LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS ON FISHERIES, OCEANOGRAPHIC RESOURCES AND WILDLIFE TO WHICH THE UNITED STATES IS A PARTY 654-75 (Comm. Print 1974) (prepared for Senate Committee on Commerce, 93d Cong., 2d Sess.).

The Pink Salmon Protocol amended the Sockeye Convention by placing pink salmon within the jurisdiction of the Sockeye Convention. Where operation of the Convention has been amended by the Pink Salmon Protocol, reference will be made to the specific provisions. Except for such instances of specific amendment, future references to the Sockeye Convention include pink salmon.

The Sockeye Convention was not a self-executing treaty and, by Article X, the United States was obligated to enact domestic legislation implementing the Convention. Sockeye Convention, *supra* at 1359. The United States Congress passed legislation for this purpose, the Sockeye Salmon Fishery Act of 1947, ch. 345, 61 Stat. 511 (1947), which was amended to include pink salmon by Act of July 11, 1957, Pub. L. No. 85-102, 71 Stat. 293. This implementing legislation is codified in 16 U.S.C. §§ 776-776f (1976).

7. See note 49 *infra*.

8. See, e.g., *United States v. Kagama*, 118 U.S. 375 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (dictum); Message of President Nixon to Congress on Indian Affairs, [1970] PUB. PAPERS 564, 565-66 (July 8, 1970); *Hearings on S. 2035 before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (Nov. 22, 1971) (statement of Rogers C. B. Morton, Secretary of the Interior). *United States v. Washington* was brought by the United States "on its own behalf and as trustee" for the Indian tribes. 384 F. Supp. at 327.

In general, the courts have not attempted to define precisely the nature of the special responsibilities assumed by the United States in treaties and statutes. *United States v. Seminole Nation*, 173 F. Supp. 784 (Ct. Cl. 1959), is typical: "Whatever the expression or term used, the relationship is one founded upon a distinctive obligation of trust." *Id.* at 790. For a similar view, see *Oneida Tribe v. United States*, 165 Ct. Cl. 487, *cert. denied*, 379 U.S. 946 (1964). Without attempting to arrive at a precise definition, further references to this special responsibility will be in terms of "trustee."

9. As stated by Circuit Judge Kennedy, "The State and, absent its cooperation, the

This comment will analyze the relative success of the various approaches taken to implement Indian treaty rights in the international fishery. It will discuss the domestic litigation resulting from these approaches and will identify the key legal issues involved. Finally, it will suggest possible means of resolving the dilemma in which the United States currently finds itself. By providing an appreciation of both the scientific complexities of managing this valuable resource and the limitations on unilateral judicial efforts in the United States, it will become apparent that the solution to this sensitive problem rests not in unilateral, but in cooperative United States-Canadian efforts. Only through diplomatic negotiations can we be assured that these recently resurrected Indian treaty rights will be accommodated in harmony with the conservation and enhancement of the salmon resource. It is hoped that the two national governments will come to realize the role of cooperation and act to avoid imposing upon the resource and its beneficiaries the futility of future summers in court.

## II. MANAGEMENT OF THE FRASER RIVER FISHERIES

### A. *Pre-Convention Separate Management and Resource Depletion*

By their nature, the great majority of the sockeye and pink salmon returning to spawn in the Fraser River pass through the Strait of Juan de Fuca and northern Puget Sound waters.<sup>10</sup> Vulnerable to the commercial fishing fleets of both the United States and Canada, the fishery has always posed an international problem.<sup>11</sup> Prior to the es-

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federal courts, must protect the fishing resource in a manner that respects the rights of the treaty parties." Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F.2d 1123, 1136 (9th Cir. 1978) (concurring opinion). This reflects the importance of preserving the resource as opposed to the parties' interest in harvesting the resource.

10. J. CRUTCHFIELD & G. PONTECORVO, *THE PACIFIC SALMON FISHERIES* 122 (1969); D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 384 (1965); [1944] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 5 (1945). These Fraser River sockeye salmon form the basis for the most prosperous fishery in the Puget Sound-Gulf of Georgia region. *Id.*

11. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 122. Virtually all of the sockeye salmon taken in this fishery spawn in the Fraser River system. *Id.* See also D. JOHNSTON, *supra* note 10, at 384 & n.82. As the fish passed through the waters of the State of Washington enroute to the Fraser, they were subject to the jurisdiction of the state. During the latter part of their migration when the fish were in Canadian waters, they were subject to the exclusive legislative authority of the Canadian Parliament. *Id.* Thus, no one body was responsible for management of the fishery. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 131.

tablishment of the Commission by the Sockeye Convention,<sup>12</sup> there was no single body charged with research concerning and management of this valuable salmon resource.

Separate Canadian and United States management proved incompatible with the effective conservation and management of this resource,<sup>13</sup> and the abundance of fish available in the early days of the commercial fishery showed signs of drastic depletion by 1917.<sup>14</sup> As it became increasingly apparent that rational management depended upon a joint system of regulations that would cover the whole fishery, the two countries intensified treaty negotiations.<sup>15</sup> But it was not until

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12. Sockeye Convention, *supra* note 6, at 1356. The composition, duties, powers, and management problems of the Commission are discussed in Part II-B *infra*.

13. This basic principle of rejecting separate fishery management was recognized by the United States Supreme Court in reference to claims of Indian sovereignty over the off-reservation fishing rights of its members. *Kennedy v. Becker*, 241 U.S. 556 (1916). It applies equally to managing the Fraser River fish resources. The Court said that "[s]uch a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both." *Id.* at 563. "Divided authority over the sockeye-salmon fishery of the Fraser River system proved one of the hardest obstacles barring a rational system of regulation, and hence one of the major causes of its far-reaching depletion." J. TOMASEVICH, *supra* note 1, at 235. One reason for the failure of separate management is the tendency for the two agencies to pursue different regulatory philosophies, especially when scientific knowledge of the resource is lacking. These instances of competing philosophies are often the result of different gear-types being favored by the two regulating agencies. *Id.* at 242-47. The attitude of the fishermen of the two countries also detracts from the effectiveness of any regulations because, in the environment of separate management, "fishermen of either side are inclined to operate to the limit when the fish are in their waters and place the responsibility for untoward results on those of the other country." U.S. DEP'T OF STATE, REPORT OF THE AMERICAN-CANADIAN FISHERIES CONFERENCE OF 1918, at 24 (1920), *quoted in* J. TOMASEVICH, *supra* note 1, at 242-43.

14. Since the life cycle of the sockeye and pink salmon is four years, any trends in the run sizes must be determined by comparing the runs every fourth year. Thus, the 1913 cycle compares with the runs in 1917, 1921, 1925, 1929, etc. *See* [1945] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 8 (1946). By 1917, the serious decline in the sockeye fisheries was evident. [1960] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1961); 80 CONG. REC. 9580 (1936). The market for pink salmon had not fully developed by 1917, and although meaningful catch data from these early years of the pink salmon fishery is not available, the decline of the pink salmon runs had also occurred by 1917. [1957] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 21, 32 (1958). *See also* J. TOMASEVICH, *supra* note 1, at 240.

15. Although the first joint study of the fishery in 1892 pronounced it to be in healthy condition, the failure of certain expected runs in the "big run" years that had occurred every fourth year led to other efforts at coming to an agreement on joint control. These efforts intensified after the failure of the 1917 "big run" to appear as expected on the basis of the record 1913 brood year run. *See generally* J. TOMASEVICH, *supra* note 1, at 250-56.

the Sockeye Convention was ratified in 1937 that forty-five years of effort to establish joint control reached fruition.<sup>16</sup>

*B. The Sockeye Convention and Commission Management*

*1. The Commission: Its duties, powers, and limitations*

The stated purpose of the Sockeye Convention is the protection, preservation, and extension of the sockeye and pink salmon fisheries in the Fraser River system, which in the years prior to the Convention had been greatly depleted.<sup>17</sup> To this end, the two nations agreed to establish and maintain a Commission consisting of six members, three from the United States and three from Canada.<sup>18</sup>

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16. D. JOHNSTON, *supra* note 10, at 385; [1946] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 9-10 (1947). The previous efforts were blocked in part by the reluctance of the State of Washington to give up its right to regulate its fisheries without federal interference. J. TOMASEVICH, *supra* note 1, at 253. The official opposition to the Sockeye Convention, as voiced by Governor Hartley, was based primarily on the principle of state rights versus federal interference. *Id.* at 259. But it is likely that the real underlying factors were the desire to obtain more than the 50% share allocated each country by the terms of the Sockeye Convention and opposition to the inclusion in the Convention jurisdiction "of the high seas where the U.S. purse seiners fished for sockeye without restriction and enjoyed a special advantage." *Id.* Desire for a greater share of the catch was not surprising because the U.S. catch exceeded the Canadian catch prior to 1935. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 140. In deference to the Washington opposition, the United States Senate refused to advise ratification of the Sockeye Convention without inclusion of three understandings. *Id.* at 142; [1946] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 10 (1947). See note 26 *infra*. Canadian approval of the Sockeye Convention came within four days of its May 26, 1930, signing. Act Respecting Sockeye Convention, May 30, 1930, 20 & 21 Geo. 5, c. 10 (present version codified in CAN. REV. STAT. c. F-16 (1970)). U.S. approval, however, was delayed for seven years. Sockeye Convention, *supra* note 6, at 1355. Joint control was further delayed because the second understanding denied the Commission any regulatory powers for an additional eight years. *Id.* at 1360. In effect, the Washington opposition delayed implementation of the joint regulation contemplated by the Sockeye Convention for 15 years. See J. TOMASEVICH, *supra* note 1, at 48, 250-56.

17. Sockeye Convention, *supra* note 6, at 1355. The Convention emphasizes that this purpose is to be pursued through "joint effort and expense." *Id.* at 1358 (emphasis added).

18. Sockeye Convention, *supra* note 6, at 1356. The Commissioners are appointed by their respective national governments and the duration of their office is "during the pleasure of the [nation] by which they were appointed." *Id.* at 1356-57. This provision reflects the desire of both nations to retain their sovereignty over the fishery rather than vest it in the Commission. See note 31 *infra*. The treaty provides that "[t]he Commission shall continue in existence so long as this Convention shall continue in force," Sockeye Convention, *supra* note 6, at 1357, and the duration of the Convention is stated to be "for a period of sixteen years, and thereafter until one year from the day on which either [nation] shall give notice to the other of its desire to terminate it." *Id.* at 1360.

The Convention limits the authority of the Commission to specifically defined Convention waters.<sup>19</sup> It provides for a thorough investigation of the natural history of the sockeye and pink salmon.<sup>20</sup> The Commission is authorized to conduct fish cultural operations and, in aid of such operations, to improve streams, establish and maintain hatcheries, recommend the removal of obstructions to salmon migration, and to use any other measures that may be required for the restoration of the depleted runs. In these investigative and scientific functions, the Commission is given wide discretion.<sup>21</sup>

The Commission's regulatory authority is not so broad or so clearly defined as its scientific and investigative authority. The Commission is empowered to issue regulations, but they must be affirmed by two of the three Commissioners of each country.<sup>22</sup> Further, all such regulations are subject to the approval of the respective governments<sup>23</sup> with the exception of adjustments and emergency orders required to carry out the provisions of the Convention.<sup>24</sup> It is unclear

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19. *Id.* at 1357. Convention waters include the territorial waters and high seas adjacent to British Columbia and the State of Washington between the 48th and 49th parallels, the Strait of Juan de Fuca, the Strait of Georgia as far north as Lasqueti Island, and the Fraser River as far as Mission, British Columbia. *Id.* at 1355-56. See map in rear pocket of [1945] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. (1946).

20. The Commission is directed to "make a thorough investigation into the natural history of the Fraser River sockeye salmon, into hatchery methods, spawning ground conditions and other related matters." Sockeye Convention, *supra* note 6, at 1357 (emphasis added).

21. The Sockeye Convention states:

[I]t shall have power to improve spawning grounds, construct, and maintain hatcheries, rearing ponds and other such facilities as it may determine to be necessary for the propagation of sockeye salmon in any of the waters covered by this Convention, and to stock any such waters with sockeye salmon by such methods as it may determine to be most advisable.

*Id.* (emphasis added). See also J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 142.

22. Sockeye Convention, *supra* note 6, at 1358.

23. Pink Salmon Protocol, *supra* note 6, at 1060. Although approval of the two national governments was not required by the terms of the Sockeye Convention prior to the 1956 amendment, Sockeye Convention, *supra* note 6, at 1357, it was the accepted practice. [1953] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1954). Established practice has been for the Commission to promulgate separate regulations for fishing in U.S. waters and Canadian waters and then to request approval of those regulations by the government of the country to which they apply. Neither the Commission nor the parties to the treaty have interpreted the Convention to require approval of one country for the regulations pertaining to fishing in the other country. Affidavit of Mary Elizabeth Hoinkes, Ass't Legal Adviser for Oceans, Environment & Scientific Affairs, U.S. Dep't of State (Apr. 14, 1978) & Affidavit of Donald R. Johnson, Chairman of the International Pacific Salmon Fisheries Commission (Apr. 10, 1978), Record on Appeal at 32-36, *United States v. Marriott*, No. 78-1987 (9th Cir., argued Jan. 10, 1979).

24. Pink Salmon Protocol, *supra* note 6, at 1060.

whether this latter clause grants the Commission the power to act at its discretion without governmental approval.<sup>25</sup> Regulatory authority is further limited by the three understandings added to the Convention to obtain Senate ratification.<sup>26</sup>

25. If the exercise of this emergency power is at the absolute discretion of the Commission, it would seem to render nugatory the requirement of governmental approval of all regulations contained earlier in the very same sentence of the treaty. See *Pink Salmon Protocol*, *supra* note 6, at 1060. However, such a broad interpretation of the emergency power is not without support. See D. JOHNSTON, *supra* note 10, at 389 n.97 (1965). The Commission has apparently shared this broad view, as evidenced by its actions in 1976 and 1977. See notes 101 & 117 *infra*. A more reasonable interpretation would limit the exercise of the emergency power to those situations in which an adjustment of the government-approved annual regulations is necessary in response to variations from the expected run size and timing, and adjustment cannot wait for the procedure of obtaining governmental approval.

26. Sockeye Convention, *supra* note 6, at 1360. By the first understanding, the Commission is denied the power to authorize the use of any type of gear contrary to the laws of the State of Washington or the Dominion of Canada. *Id.* This was a concession granted the State of Washington to defer to the judgment of the people of Washington, who had only a few years before outlawed the use of "fish traps" by the passage of Initiative 77. See generally J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 137.

By the second understanding, the Commission was denied any regulatory authority for the first two cycles (eight years) of the Convention. See note 16 *supra*.

By the third understanding, the Commission was required to set up an Advisory Committee composed of five persons from each country representing various branches of the fishing industry. Sockeye Convention, *supra* note 6, at 1360. The Commission is required to afford the Advisory Committee "full opportunity to examine and to be heard on all proposed orders, regulations or recommendations." *Id.* The size of the Advisory Committee was increased to six persons from each country by the *Pink Salmon Protocol*, *supra* note 6, at 1060. Newly appointed Advisory Committee members serve a four-year term with reappointment subject to review by the Commission. [1970] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7 (1971). The Advisory Committee serves the purpose of keeping the Commission in close touch with the industry and its needs and problems. J. TOMASEVICH, *supra* note 1, at 57. This furthers observance of regulations by fishermen and cooperation between the Commission and the industry without which a conservation program in fisheries could hardly succeed or endure. *Id.* The Advisory Committee exerts some influence on the Commission's eventual regulations. [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1978) (U.S. proposal to incorporate directly special treaty Indian fishing regulations tabled by Commission after unanimous opposition of Advisory Committee); Notes of an Interview with Donald R. Johnson, Chairman of the International Pacific Salmon Fisheries Commission, in Seattle, Washington, at 4 (Feb. 14, 1978) (approved by Donald R. Johnson) (on file with *Washington Law Review*). See also note 110 *infra*.

The U.S. Commissioners were instructed to seek appointment of a treaty Indian to the Advisory Committee to provide representation of the treaty Indians. Letter from William L. Sullivan, Jr., to Donald R. Johnson at 2 (Oct. 1, 1974) (on file with *Washington Law Review*). Although no such appointment has occurred to date, Notes of an Interview with Donald R. Johnson, *supra* at 3, the United States has secured Canadian approval of an increase in the size of the Advisory Committee, 76 DEP'T STATE BULL. 425 (1977). This newly created vacancy could be used to provide representation on the Advisory Committee to treaty Indians without denying it to a presently represented segment of the non-Indian fleet.

In practice, the Commission's recommended regulations are promulgated prior to the season based on Commission estimates of the expected size, timing, optimum escapement, and allowable catch of each race.<sup>27</sup> They are generally formalized prior to the time when the industry must prepare for the coming fishing season.<sup>28</sup> As the season develops, variations in the timing and size of the migrations of the various races often require the Commission to exercise its emergency regulatory power to attain its primary goal of proper escapement.<sup>29</sup> Emergency orders are also issued to realize the secondary goal of a fifty-fifty split of the harvest between the two nations.<sup>30</sup>

In creating the Commission, the two nations were careful to preserve their sovereignty.<sup>31</sup> This is evident in, among other things, the

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27. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 143. See also note 41 *infra*. These recommended regulations are no more than proposals until accepted by the respective governments. See note 23 *supra* and note 119 *infra*.

28. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 143. The Commission has explained:

Prediction, six months or more in advance, of the number of sockeye and pink salmon expected to return to the Fraser River has become an expected function of management. The forecast serves as a basis for formulating fishing regulations, but it is also used by the fishing industry and its suppliers to plan operations.

[1973] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 29 (1974). This advance notice allows commercial fishermen to assess whether or not another coastal fishery might be more profitable. [1964] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 11 (1965); [1954] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1955).

The diplomatic meetings surrounding the 1976 and 1977 recommended annual regulations delayed Commission adoption for about five weeks in 1976 and about four months in 1977. Compare Affidavit of Kathryn Clark-Bourne, Record, vol. 1, doc. no. 5, attachment 3, at 3 (filed June 27, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977) (Commission adoption of 1977 recommendations on June 1) and [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 4 (1977) (Commission adoption of 1976 recommendations on March 4) with, e.g., [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1975) (Commission adoption of 1974 recommendations on February 1).

29. The issuance of emergency orders facilitates the day-by-day management requirements inherent in this complex fishery. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 144. See, e.g., [1969] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 12-17 (1970).

30. The Sockeye Convention contemplated regulation with "a view to allowing, as nearly as may be practicable, an equal portion of the fish that may be caught each year to be taken by the fishermen of each [country]." Sockeye Convention, *supra* note 6, at 1358-59 (emphasis added). From both this text and the actions of the Commission, it is clear that the goal of equal division of catch is secondary to the requirements of proper escapement. [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1975); [1950] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 27 (1951); [1944] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 23 (1945). See also J. TOMASEVICH, *supra* note 1, at 53-54.

31. The two nations were careful to retain control over their Commissioners, see note 18 *supra*, and the regulations, see note 23 *supra*. Also, in agreeing to fund the Com-

enforcement scheme which places the sole responsibility for enforcing Commission regulations on the two national governments.<sup>32</sup> As a result of its narrow political powers, the Commission has consistently limited its concerns to its stated purpose of preserving, protecting, and extending the salmon resource<sup>33</sup> and has avoided involvement in other "political" issues except when they have posed a threat to the Fraser River salmon.<sup>34</sup>

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mission's activities, the two nations retained additional control. They agreed to divide equally the costs of the Commission, but in the very same provision agreed only "to appropriate annually such money as each may deem desirable for such work in the light of the reports of the Commission." Sockeye Convention, *supra* note 6, at 1357 (emphasis added). This effectively reduces the level of the Commission's activities to that deemed desirable by the country providing the lesser annual funding. [1939] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 4 (1940). These and other limitations have been recognized by the Commission as being "[i]n the interest of preserving national sovereignty." [1953] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1954).

32. "Each [nation] shall be responsible for the enforcement of the orders and regulations adopted by the Commission under the authority of this Convention, in the portion of its waters covered by the Convention." Sockeye Convention, *supra* note 6, at 1359. Each nation is also responsible for enforcement on the high seas in respect to its own nationals, inhabitants, vessels, and boats. *Id.* In aid of this high seas enforcement scheme, each nation is given authority to seize and detain violators who are subject to the enforcement power of the other nation. *Id.* This scheme is in harmony with other fisheries agreements in which care is taken to prevent enforcement procedures from creating precedents for encroachment upon the principle of national sovereignty. See J. TOMASEVICH, *supra* note 1, at 56. For an account of how the United States has discharged its enforcement obligations under the Convention, see note 58 *infra*.

33. Sockeye Convention, *supra* note 6, at 1355. The Commission has been guided over the years by this declared purpose, but has not limited itself to responsibilities listed in the Sockeye Convention. [1964] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1965). Although not specifically enumerated as one of its functions, the Commission has kept a watchful eye on the utilization of the natural resources of the Fraser River watershed, e.g., logging, hydroelectric power, industrial development, flood control, and placer mining, and has actively reported to the Canadian government whenever such utilization would have a potentially detrimental impact on the salmon resource. [1966] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3-7 (1967); [1964] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1965); [1956] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 5 (1957). Without political powers over these operations, the Commission has relied upon the cooperation of the Canadian government for the protection of the spawning environment of the Fraser River. [1968] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1969). The Commission has boasted "without qualification that there is no historical precedent for the quality of planning inherent in the development and protection of the natural resources of the Fraser River basin." [1966] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7 (1967).

34. Although it has consistently denied possessing the legal powers and responsibilities to deal with "political" problems, the Commission has been most vocal in airing its views and documenting any potential adverse impact on the salmon resources. [1975] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1976) (management, industry, and governmental problems); [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1975) (domestic allocation of U.S. share of the fishery); [1966] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1967) (utilization of other natural resources in the

### 2. *Commission management: Practical and biological complexities*

The history of the Commission has reflected an emphasis on scientific investigation.<sup>35</sup> Consequently, an understanding of the biological nature of the Fraser River salmon is essential in order to grasp the complexities and uncertainties which burden the Commission's regulatory program.

The annual runs of salmon to the Fraser River are not homogeneous but are composed of a number of interrelated subpopulations usually referred to as races. Each race migrates through the commercial fishery waters at its own characteristic time and spawns consistently in its home stream at a specific time each year.<sup>36</sup> The Commission's scientific advances in identifying these separate races and the need to treat each race as a separate management unit have complicated the regulatory tasks faced by the Commission.<sup>37</sup>

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Fraser River watershed); [1964] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1965) (pollution); [1961] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 16 (1962) (economic plight of individual fishermen as result of their increased numbers); [1953] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7 (1954) (economic plight of the fishermen). In this fashion, the Commission has not ignored the various problems, but rather has relegated the solutions to the respective governments pursuant to the scheme of the Sockeye Convention. "Important as it may be to resolve these problems, it is even more important that attention not be diverted from the objective of increasing the resource." [1975] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1976).

35. [1962] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1963); [1955] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7 (1956); [1949] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3, 5 (1950); [1944] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 23 (1945). *See also* J. TOMASEVICH, *supra* note 1, at 59-60. This scientific orientation has resulted in construction of artificial spawning channels, [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 13-15 (1977), rehabilitation of severely depleted races of salmon, *id.* at 15, biological research into the delicate environmental sensitivity of the salmon, *id.* at 16-20, participation in efforts to protect the environment necessary for the successful propagation of the runs, *id.* at 20-23, and engineering investigations to monitor and predict the effects of hydroelectric generation, tributary diversion, river flow fluctuations, waste discharges, and gravel removal on the sockeye and pink salmon runs, *id.* at 23-28. The sophistication of Fraser River salmon management has been attained through just such scientific endeavor. [1965] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1966). *See also* [1950] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1951).

36. [1956] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 5-6 (1957). *See also* J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 123-24.

37. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 143-45 (1969). A perusal of the Annual Reports of the Commission issued pursuant to the provisions of the Sockeye Convention, *supra* note 6, at 1357, will reveal the complexities of the Commission's regulatory and enhancement programs. *See, e.g.*, [1967] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3-14 (1968); [1965] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3-6 (1966); [1962] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 17-21 (1963). *See also* note 41 *infra*.

Although the commission's duties were limited initially to scientific and historical investigations,<sup>38</sup> it was during these years that its regulatory philosophy evolved. Early investigations determined that a man-made obstruction to salmon migration in the Fraser River had caused selective depletion of various races.<sup>39</sup> To remedy the imbalances, the Commission, where possible, protects the endangered races with closures and allows liberal harvesting of the abundant races.<sup>40</sup> This philosophy is burdened with biological complexities which belie its apparent simplicity.<sup>41</sup>

38. Sockeye Convention, *supra* note 6, at 1357 (defining investigative authority); *id.* at 1360 (second understanding denying regulatory authority for initial eight years of Convention). [1953] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1954).

39. See, e.g., [1941] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3-5 (1942). As a result of the blockade at Hell's Gate Canyon, an estimated one-half to two-thirds of all sockeye salmon reaching the blockade failed to pass and died without successfully spawning. *Id.* at 9. The impact on the pink salmon was even more drastic. [1957] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 21 (1958). For the story of the Hell's Gate discovery and the solution of the problem through construction of an innovative "fish-way," see [1946] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3-7 (1947). It was ultimately determined that Hell's Gate and other obstructions in the Fraser River basin, not overfishing as formerly believed, were primarily responsible for the great decline in the fishery in the early 20th century. [1966] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1967); [1955] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1956); [1948] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3-4 (1949). See also note 14 *supra*.

40. [1948] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 5 (1949). See also J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 145-46.

41. Although simple in theory, the philosophy of allowing self-rehabilitation of the endangered races is often not compatible with other conservation goals. For example, there is an optimum level of escapement for each race, depending upon such factors as the capacity of the spawning grounds and the abundance of plankton which the sockeye fry depend upon in their period of fresh-water rearing in the large lakes of the Fraser River watershed. [1965] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1966); [1955] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 9-11 (1956). The optimum levels of escapement also vary from year to year to account for natural variations in run size within a quadrennial cycle. [1965] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1966). The Commission is conscious of the dangers of overescapement to its program. [1969] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 19 (1970); [1954] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 28 (1955); [1953] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 19 (1954). See also J. TOMASEVICH, *supra* note 1, at 244-45. Since several races may migrate through the commercial fishery at the same time, it is obviously difficult to regulate abundant races and endangered races which migrate together. [1966] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 18 (1967). Added to this problem is a management objective of obtaining racial escapement from the peak of a run, since these fish tend to be most suitable for propagation. [1955] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 8 (1956); [1953] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7 (1954).

The Commission is also plagued with management uncertainties. Its annual regulations are dependent upon predicting the size of the returning runs, and although its scientific prediction methods are quite detailed, they lack certainty. [1967] INT'L PAC.

## Accommodation of Indian Treaty Rights

The Commission is further burdened by the realities of the salmon fishing industry. The immense harvesting capability<sup>42</sup> of the large and efficient commercial fleet competing for the salmon which move through the fishery at considerable speed necessitates daily evaluations and regulatory adjustments throughout the season.<sup>43</sup> Without

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SALMON FISHERIES COMM'N ANN. REP. 3-14 (1968). The annual regulations are also based upon predicting gear efficiencies for the coming season, which in turn depends upon predicting the average size of the fish. [1966] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 16 (1967). The Commission also must estimate the size of the actual runs and escapements. [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 19, 24 (1978); [1962] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 21 (1963). Such predictions and estimates are inherently uncertain.

The provisions of the Convention also serve to complicate the Commission's task further. Article VII requires the Commission to "regulate the fishery with a view to allowing, as nearly as may be practicable, an equal portion of the fish that may be harvested to be taken by the fishermen of each [country]." Sockeye Convention, *supra* note 6, at 1358-59. This allocative requirement complicates management and "dooms the Commission to a series of second-best solutions, year by year, since only the most miraculous of coincidences could assure that closures to balance the catch would also result in optimum escapement." J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 146. See [1954] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 28 (1955).

An additional complication is introduced by the variability of migration routes because when an unexpectedly large proportion of the Fraser runs migrates down the east side of Vancouver Island from the north, and thus can be taken in areas outside the regulatory authority of the treaty, the Commission is forced to make adjustments within its jurisdiction, the Convention waters. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 144-45.

To complicate matters further, the addition of pink salmon to the Commission's jurisdiction as a result of the Pink Salmon Protocol, *supra* note 6, has resulted in an overlap between the late-running sockeye races and the pink salmon runs. [1959] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 13 (1960).

This list of biological complexities and management uncertainties is far from exhaustive. The extremely complex scientific management of the Fraser River fishery is detailed further in the annual reports issued by the Commission. The annual reports are required by the Sockeye Convention, *supra* note 6, at 1357.

42. [1958] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 13 (1959); [1946] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 14 (1947). "Further evidence of the alarming capability of the current Convention waters fishery was observed in 1965 when on July 28 and 29, the United States catch of sockeye represented 42.4 percent of the total season's catch." [1965] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 16 (1966).

43. "The quantity and composition of the escapement becomes more difficult to control as the intensity and effectiveness of the fishery increases and longer closed seasons are provided to permit escapement." [1955] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 12 (1956). The fishery has become overdeveloped to the "point where management of the fishery has become extremely difficult and liable to possible errors of importance." [1961] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 16 (1962. See also [1956] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 22 (1957). "With a rapidly increasing number of fishermen each year the need for flexible regulation and periodic adjustment in fishing time increases in importance. Inflexible control endangers seasonal division between the two countries and tends to upset the proper

proper regulatory adjustments, nearly all returning fish from a particular race could be harvested in a short period.<sup>44</sup> Consequently, prompt and accurate data acquisition and evaluation are of critical importance to effective regulation.<sup>45</sup>

In accounting for this matrix of complexities in its regulations, the Commission is also faced with pressure from each competing type of gear (e.g., gill nets, reef nets, purse seines, and trollers) for a greater share of the fishery. Although the Commission has no jurisdiction over the numbers or types of gear that may be operated in Convention waters,<sup>46</sup> its regulations allocate certain fishing gear to certain areas at

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balance between the catch and escapement of individual races." [1949] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 13 (1950). *See also* [1962] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 17 (1963). When the Commission regulates in recognition of the overdeveloped fishery, labor strikes within the fishing industry seriously hamper Commission efforts to obtain proper escapements and division of catch. [1975] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 14 (1976); [1963] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1964); [1959] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 10-11 (1960). "An absolute necessity for [obtaining proper escapement and division of catch] is a relatively stable fishery that is reasonably controlled as to size, efficiency and fishing area." [1955] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 30 (1956). *See also* [1961] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 16 (1962). Since the problem of accommodating Indian treaty rights in this international fishery is directly related to the heavy restrictions on fishing times, *see* note 60 and accompanying text *infra*, which are necessitated by the overdeveloped nature of the commercial fishery, a reduction in the fleet size would be a major step toward both an improved environment for scientific regulation and accommodation of Indian treaty rights. *See* Part V-B *supra*.

44. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 146. While a fleet of some 900 vessels is capable of harvesting nearly all of a particular race, *id.*, the present commercial fleet in U.S. Convention waters alone far exceeds 900 vessels. *See* note 60 *infra*.

45. As noted by the Commission:

*Prompt compilation of the daily catches indicates any deviation from the pre-season calculations of the expected size of the run, the related catch by gear and by area, and the expected efficiency of the fishermen of the two countries, and guides the preparation of any necessary modifications of the fishing regulations.*

[1949] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 28 (1950) (emphasis in original). Besides being essential for formulation of regulations to protect and rehabilitate the salmon runs, [1944] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1945), the acquisition and evaluation of statistics is necessary to solve the problem of equal division of catch between the two countries. *Id.* at 51-52. To augment its acquisition of data during the season, the Commission conducts its own test fishery. [1962] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 21 (1963). The test fishery is especially important during periods when the commercial fishery is closed, *id.*, because the flow of catch data from the commercial fishery is not then available. *See also* [1960] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 12-13 (1961).

46. Jurisdiction over these matters rests with the respective national or state or provincial governments as matters of domestic law. *United States v. Washington*, Civ. No. 9213, slip op. at 103 (W.D. Wash. July 16, 1975) (Record, vol. 31).

particular times.<sup>47</sup> Through this regulatory segregation of gear-types, the Commission has attempted to provide for an equitable distribution of the harvest among the gear-types.<sup>48</sup>

It is apparent that the intricacies inherent in the fishery management provide the Commission with a difficult task requiring scientific solution. The importance of United States-Canadian cooperation in keeping this task as manageable as possible is self-evident.

### 3. *The Sockeye Convention today: Forty years of cooperative success threatened*

The joint management scheme of the Sockeye Convention has been highly effective and the resulting achievements of the Commission are unprecedented in the field of fishery management.<sup>49</sup> Although the Commission deserves much of the credit for its rational, scientific approach to the complexities and uncertainties inherent in the Fraser River fishery, its successes could not have been realized without the cooperation of the two national governments.<sup>50</sup>

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47. This regulation by gear-type is not the result of any such grant of power, but the product of requests from the commercial fishing industry around 1957. Hearing Transcript at 95-96 (July 11, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). It should be noted that although the governments never granted the Commission this power, they have consistently approved such regulations since 1957. *See, e.g.*, [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 4-7 (1977); [1958] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7-10 (1959).

48. "Equitable regulation of all aspects of the harvest in Convention Waters is desirable to ensure that all users of the resource participate in conservation measures." [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 4 (1975). *See* [1953] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7 (1954). "As . . . the economic competition increases between fishermen and between fishing areas within a national section, national action by the Governments concerned or national recommendations for action may be required to control the changes in the national interest." *Id.* It seems quite likely that such action would go a long way toward improving the quality of the Commission's scientific management and accommodating American Indian treaty rights. *See* note 43 *supra*; Part V-B *infra*.

49. *See* J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 142-43. The investment of two million dollars for construction of fishways after the discovery of Hell's Gate and other impediments to the upstream migration of the salmon, in conjunction with sound scientific regulation to protect the endangered races of salmon, has resulted in an increase in annual value of \$9,298,000 to fishermen and \$17,737,000 wholesale, based on 1968 dollars. [1968] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1969). The Commission's research and experimentation has indicated that a further investment of \$14 million dollars for a recommended development program would result in future benefits in excess of \$14 million dollars annually. [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 4 (1975).

50. The Commission's programs would be ineffective if either nation refused to approve or enforce the regulations. They depend upon funding from the two nations as

It necessarily follows that future success in preserving and enhancing the fishery depends upon continued cooperation between the two national governments and the Commission. This cooperation has been threatened in the past few years by disagreement over accommodation of American Indian treaty rights within the Commission's regulatory framework. The next section of this comment documents the various United States accommodation efforts, the resistance encountered, and the consequent strain on both the resource and the essential spirit of cooperation.

### III. U.S. EFFORTS TO ACCOMMODATE THE INDIAN TREATY RIGHTS WITHIN THE REGULATORY FRAMEWORK OF THE COMMISSION

A portion of the Fraser River salmon runs pass through traditional Indian treaty fishing grounds enroute to the spawning grounds of the Fraser River.<sup>51</sup> A literal application of Judge Boldt's decision<sup>52</sup> would entitle certain Indians with rights under the Stevens treaties<sup>53</sup> to the *opportunity* to catch fifty percent of the U.S. harvest of this portion. By the terms of the Sockeye Convention, the U.S. harvest is fifty percent of the total allowable Fraser River harvest.<sup>54</sup> The relationship

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well. See notes 31 & 32 *supra*. Without the cooperation of the Canadian government, which is directly concerned with the development of the Fraser River watershed, the success of the Commission would be impossible. [1968] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1969). Since the Commission's task is already greatly burdened by the difficulties inherent in the management of this complex fishery, it is essential that the United States and Canada avoid disagreements which would further complicate its task. See also J. TOMASEVICH, *supra* note 1, at 57, 61.

51. Judge Boldt's decision provides only for treaty rights exercisable over fish that the treaty Indians could trace to their "usual and accustomed fishing places." See *United States v. Washington*, 384 F. Supp. at 344. To date eight tribes have established that they have historical fishing sites within the migratory path of the Fraser River salmon: Makah Tribe, Lower Elwha Band Clallam Tribe, Port Gamble Band Clallam Tribe, Suquamish Tribe, Lummi Tribe, Nooksack Tribe, Swinomish Indian Tribal Community, and Tulalip Tribe. 42 Fed. Reg. 31, 450-51 (1977). For the sake of convenience, these tribes will be referred to as treaty Indian fishermen.

52. See note 3 *supra*.

53. These treaties are discussed in note 5 *supra*.

54. Sockeye Convention, *supra* note 6, at 1358-59, *quoted in* note 30 *supra*. In reality, the United States does not receive 50% of the Fraser River pink and sockeye harvest because a significant number of sockeye follow a migratory path along the eastern side of Vancouver Island which is outside Convention waters and thus not subject to the Convention requirements. J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 144-45. In 1977 this non-Convention Canadian catch amounted to approximately 763,000 sockeye alone. [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 16 (1978). Furthermore, Canadian Indians harvested an additional 246,528 sockeye directly from

## Accommodation of Indian Treaty Rights

between the Stevens treaties and the Sockeye Convention was judicially defined in 1974 when Judge Boldt's opinion stated that "[t]he 1937 convention does not explicitly or implicitly modify the Stevens' treaties. However . . . treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the Commission."<sup>55</sup> Therefore, within the constraints of the Commission regulations, the treaty Indians would be entitled to the *opportunity* to catch half of the American harvest of Fraser River salmon migrating through their traditional fishing sites.<sup>56</sup>

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the Fraser River, which is also outside the authority of the Sockeye Convention. *Id.* at 20. Thus, over one million sockeye were taken by Canadians over and above their 50% Convention share. In comparison, the total treaty Indian catch of both sockeye and pink salmon for 1977, which counted as part of the United States' 50% Convention share, was less than 474,000. *Compare id. with* National Marine Fisheries Service, U.S. Dep't of Commerce, Preliminary Summary of the 1977 Sockeye and Pink Salmon Commercial Fisheries in U.S. Convention Waters, table 6 (on file with *Washington Law Review*) [hereinafter cited as 1977 Preliminary Summary]. Thus, Canada received over 62% of the harvest reported by the Commission. *See generally* [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 15-16 (1978). This does not include catches of salmon that may have occurred in Alaskan, coastal Canadian, and international waters.

55. *United States v. Washington*, 384 F. Supp. at 411. This was Judge Boldt's answer to a motion to reconsider the role of the Sockeye Convention vis-a-vis the Indian treaty rights. He had earlier stated:

A considerable number of fish taken within the territorial waters of Washington are under the regulatory authority of the International Pacific Salmon Fisheries Commission, an international body established by treaty between the United States and Canada. While the defendants [State of Washington] cannot determine or control the activities of that Commission, the Washington Department of Fisheries does have some input into development of the harvest program which is prescribed or permitted by that Commission, particularly as it pertains to harvest within Washington. . . . Consequently, while it must be recognized that these large harvests by non-treaty fishermen cannot be regulated with any certainty or precision by the state defendants, it is incumbent upon such defendants to take all appropriate steps within their actual abilities to assure as nearly as possible an equal sharing of the opportunity for treaty and non-treaty fishermen to harvest every species of fish to which the treaty tribes had access at their usual and accustomed fishing places at treaty times.

*Id.* at 344.

56. It is incorrect to conclude that the treaty Indians are entitled to the opportunity to harvest 50% of the total U.S. Convention catch because not all of the salmon that are harvested in U.S. Convention waters migrate through traditional treaty Indian fishing sites. *See* Defendant's Supplemental Memorandum in Opposition to Motion for Injunctive Relief at 2-3, Record, vol. 31, doc. no. 1171 (filed July 14, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). For example, assuming that one million harvestable fish enter the Strait of Juan de Fuca, of which only 100,000 pass through traditional treaty Indian sites, literal application of Judge Boldt's decision would dictate that the treaty Indians are entitled to the opportunity to harvest 50,000 fish, not 500,000. 384 F. Supp. at 343. The federal court, however, has at times ignored this distinction in its orders and held that treaty Indian fishermen be given "an opportunity to take up to

The 1974 Commission regulations made no provision for allocating this opportunity to treaty Indian fishermen.<sup>57</sup> After several Indian tribes indicated an intention to fish in violation of these regulations, the Washington State Department of Fisheries (Fisheries), at that time responsible for U.S. enforcement of the Commission regulations,<sup>58</sup> obtained an order from Judge Boldt permitting Fisheries to enforce

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50% of the U.S. [Convention] share of the harvestable fish." See, e.g., *United States v. Washington*, Civ. No. 9213, slip op. at 9 (W.D. Wash. July 16, 1975) (findings of fact, conclusions of law, and decree regarding 1975 Fraser River sockeye and pink salmon harvest, Record, vol. 31, doc. no. 1176). For further discussion of what opportunity is guaranteed by Indian treaty rights, see note 71 *infra*.

57. [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 8-12 (1975). Treaty Indians are identified in note 51 *supra*.

58. Pursuant to 16 U.S.C. § 776d(a) (1976), the President designated the Fish and Wildlife Service of the Department of Interior as the enforcement agency. Exec. Order No. 9892, 12 Fed. Reg. 6345 (1947). This designation was transferred to the National Marine Fisheries Service, a subagency of the National Oceanic and Atmospheric Administration of the Department of Commerce, by Reorganization Plan No. 4 of 1970, 35 Fed. Reg. 15,627, 84 Stat. 2090 (1970). The designated enforcement agency is empowered to authorize officers and employees of the State of Washington to act as federal law enforcement officers. 16 U.S.C. § 776d(b) (1976). Although no such formal authorization ever occurred, enforcement of the Convention was handled by officers of the Washington State Department of Fisheries from 1947 through 1976. See *United States v. Washington*, 384 F. Supp. at 392. Contrary to the provisions of the federal law authorizing delegation of enforcement to state officers, 16 U.S.C. § 776d(b) (1976), these state officers have acted as state, not federal, officers and have enforced state law which adopted the Commission regulations. WASH. REV. CODE § 75.40.060 (1976). See also note 84 *infra*. This enforcement scheme was changed for the 1977 and 1978 seasons. Report of Annual Meeting of the International Pacific Salmon Fisheries Commission in Vancouver, B.C., at 4 (Dec. 9, 1977) (on file with *Washington Law Review*). Enforcement is now handled by the designated federal agency, the National Marine Fisheries Service, and the United States Coast Guard. *Id.*; *United States v. Washington*, 573 F.2d 1118, 1120 (9th Cir. 1978). This change in enforcement responsibility was prompted by the breakdown in state law enforcement as evidenced by the issuance of very few citations to violators, the refusal of state prosecutors to prosecute those issued, and the series of Washington Supreme Court decisions attempting to strip state agencies and officials of their power to comply with the district court's orders. *Puget Sound Gillnetters Ass'n v. United States Dist. Court*, 573 F.2d 1123, 1128 (9th Cir. 1978).

This narrowing of the role of the State of Washington in the management of its fisheries is consistent with a narrowing of the state's role in non-Convention waters of the state as well. *United States v. Washington*, Civ. No. 9213, slip op. at 19-20 (W.D. Wash. Aug. 31, 1977) (memorandum order removing the Indian treaty allocation from the state's jurisdiction, leaving the state with limited control over only the non-Indian share of the catch, Record, vol. 68, doc. no. 3265E); *United States v. Washington*, Civ. No. 9213, slip op. at 5 (W.D. Wash. Oct. 17, 1977) (memorandum order removing the state's jurisdiction over appropriate year and season openings for the non-treaty allocation as well, Record, vol. 73, doc. no. 3545). The Ninth Circuit has stated that "[t]he state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees." *Puget Sound Gillnetters Ass'n v. United States Dist. Court*, 573 F.2d 1123, 1126 (9th Cir. 1978).

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Commission regulations against such tribes.<sup>59</sup> Consequently, the relatively small and less efficient treaty Indian commercial fishing fleet was forced to fish side by side with the large, efficient non-Indian commercial armada to obtain their treaty share.<sup>60</sup>

### A. *The 1975 Season: International Disagreement and Unilateral Action by the United States*

Because the United States is the trustee of the Indian treaty rights<sup>61</sup> and is also directly involved in enacting Commission regulations,<sup>62</sup> efforts were made to remedy the resultant large imbalance between the treaty Indian and the all-citizen harvest.<sup>63</sup> The United States sought 1975 Commission regulations that allowed the small treaty Indian fleet to fish during periods when the fishery was closed to the other American fishermen. This would have created a special treaty Indian fishery in U.S. Convention waters.

The U.S. Department of State formally instructed the U.S. Commissioners to propose that the 1975 Commission regulations include language "sufficiently flexible to ensure that domestic decisions on the Indian fishery can be implemented, within the salmon treaty constraints of conservation and the 50/50 split of the treaty catch between

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59. *United States v. Washington*, Civ. No. 9213, slip op. at 2-3 (W.D. Wash. July 18, 1974) (enforcement order, Record, vol. 18, doc. no. 655). The order stated:

[R]egulations adopted by the International Pacific Salmon Fisheries Commission shall be presumed to be controlling with respect to fishing by any treaty tribe or its members and the Defendants [State of Washington] may enforce the provisions of said regulations as incorporated in the regulations of the Defendants against members of such tribes.

*Id.*

60. In 1974, fishing was generally limited to two days per week. [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 8-12 (1975). These two days were broken into shorter overlapping periods according to gear-type (purse seines, gill nets, reef nets, trollers), further limiting the treaty Indian opportunity to fish. *Id.* See also note 80 *infra*. The size of the treaty Indian fishing fleet has doubled from 108 vessels in 1975 to 215 in 1977. The size of the all-citizen fleet has decreased slightly from 1,466 units in 1974 to 1,327 units in 1977. Compare *United States v. Washington*, Civ. No. 9213, slip op. at 4 (W.D. Wash. July 16, 1975) (findings of fact, Record, vol. 31, doc. no. 1176) with 1977 Preliminary Summary, *supra* note 54, table 7. The treaty Indian fleet managed only 1.4% of the total U.S. Convention waters harvest for 1974. *United States v. Washington*, Civ. No. 9213, slip op. at 5 (W.D. Wash. July 16, 1975) (findings of fact, Record, vol. 31, doc. no. 1176).

61. See sources cited in note 8 *supra*.

62. See note 23 and accompanying text *supra*.

63. The all-citizen fishery includes all citizens, whether Indian or non-Indian, other than treaty Indian fishermen fishing at "usual and accustomed fishing places" within the migratory path of Fraser River salmon. See note 51 *supra* (treaty Indians identified).

Canada and the [United States]."<sup>64</sup> Pursuant to these instructions, the U.S. Commissioners offered a proposal that would permit the United States to make a domestic allocation of its share of the catch in Convention waters to treaty Indian fishermen. This proposal, however, was rejected by the Canadian Commissioners.<sup>65</sup> The Canadian

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64. Letter from William L. Sullivan, Jr. to Donald R. Johnson (Oct. 1, 1974) (on file with *Washington Law Review*):

Further, the Government has a responsibility to protect Indian treaty rights. The decision in *U.S. v. Washington* should thus be implemented to the extent possible by affirmative action by U.S. officials in matters within their purview, including the I.P.S.F.C. Commissioners.

In the case of I.P.S.F.C., the regulations adopted should provide, to the extent possible, for affirmative action to secure the Indian fishing rights, but in any event should not serve as an impediment to domestic action to secure those rights. . . .

In conveying these instructions, I wish to add the following for the guidance of the U.S. Commissioners. The Department of State does not consider that either the Indian treaties, or Judge Boldt's decision in *U.S. v. Washington*, is inconsistent with our legal obligations under the salmon treaty, and we intend to continue our full support of the I.P.S.F.C.

*Id.* See Letter from William L. Sullivan, Jr., to Donald W. Moos (Apr. 11, 1975), Record, vol. 29, doc. no. 1122, at 14-15 (filed June 10, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975).

65. [1975] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 4 (1976). No Commission action is effective without the vote of at least two of the three Commissioners from each country. Sockeye Convention, *supra* note 6, at 1358. Therefore, one country can always block action proposed by the other country, as in this particular instance.

This Canadian rejection was expected. Negotiations prior to the season had indicated that the Canadian government preferred that the 1975 fishing season begin under Commission regulations. It felt that the United States could specify under domestic legislation that certain of the days open under the Commission regulations be restricted to fishing by treaty Indian fishermen only. If the effort by the treaty Indians was insufficient to permit the total U.S. Convention fishery to reach the division of catch goals set by the Commission, then, following its normal practice under such circumstances, the Commission could have issued emergency orders allowing an increased number of days open to the U.S. fisheries to assure that the targets would be reached. Letter from M.P. Shepard to William L. Sullivan, Jr., (Jan. 10, 1975), Record, vol. 29, doc. no. 1122, at 12-13 (filed June 10, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975).

In practical effect, the Canadian proposal would produce the same results as the United States' separate regulatory scheme, *see* note 112 *infra*, which gave treaty Indians an "extra day" of fishing each week during the 1977 and 1978 seasons. For 1977, *see* 42 Fed. Reg. 31,450-53 (1977), *revoked* 42 Fed. Reg. 58,744 (1977) (regulations for treaty Indians); 42 Fed. Reg. 30,841-43 (1977) (regulations for all-citizens). For 1978, *see* 43 Fed. Reg. 27,187 (1978) (to be codified in 25 C.F.R. §§ 251.11-21) (regulations for treaty Indians); 43 Fed. Reg. 26,737 (1978) (to be codified in 50 C.F.R. §§ 371.1-9) (regulations for all-citizens). The Canadians proposed that U.S. domestic measures preclude fishing by anyone but treaty Indians on one Commission-allowed day each week. They anticipated that, because fishing on that day would be of low intensity, Commission emergency orders later in the season would increase fishing time to make up for the resulting loss of expected harvest. The United States' separate regulatory scheme allowed the full-intensity fishery on Commission-allowed days plus an "extra day" each

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reluctance to specifically recognize the treaty rights of U.S. treaty Indians allegedly stems from fear that if they support special rules for them, they will have "a burden placed upon themselves to give greater recognition to their own Indians."<sup>66</sup> Consequently, the Commission regulations adopted for 1975 by the respective national governments contained no provisions for a special treaty Indian fishery.<sup>67</sup>

Prior to the opening of the 1975 season, the Ninth Circuit Court of Appeals affirmed Judge Boldt's decision regarding the relationship between the Stevens treaties and the Sockeye Convention<sup>68</sup> and indicated that the treaty Indians' remedy was an equitable adjustment to the treaty Indians' permitted catch in non-Convention waters.<sup>69</sup> This solution compensated the Indian treaty rights without interfering with the Commission, but it was an impractical solution to the treaty Indians who would be forced to obtain their equitable adjustment from

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week for treaty Indians, thus resulting in a greater harvest than anticipated by the Commission regulations and forcing the Commission to decrease fishing time later in the season. The Canadian proposal and the U.S. scheme would have the same net effect of providing treaty Indians with an "extra day" of fishing each week.

66. Oral Deposition of Thor C. Tollefson, United States Commissioner, at 29 (filed June 11, 1974), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1974). Canadian Indians are not without fishing rights in the Fraser River salmon fisheries. They are allowed a subsistence fishery in their historically established fishing locations. [1953] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 19 (1954). Permits are required and the subsistence fishery is controlled by Fisheries Inspectors of the Canadian Department of Fisheries *Id.* at 18. See also note 192 *infra*.

67. See [1975] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6-10 (1976); Letter from William L. Sullivan, Jr., to William R. Hourston (Apr. 11, 1975) (transmitting United States approval). On the same day, the approved regulations were transmitted to the State of Washington for implementation. Letter from William L. Sullivan, Jr., to Donald W. Moos (Apr. 11, 1975), Record, vol. 29, doc. no. 1122, at 14-15 (filed June 10, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). Consistent with its previous instructions to the United States Commissioners, the Department of State instructed "that the State will regulate in a manner consistent with Indian treaty rights." *Id.* See note 64 *supra*.

68. See note 55 and accompanying text *supra*.

69. *United States v. Washington*, 520 F.2d 676, 689-90 (9th Cir. 1975). The court explained:

We reject the State's contention that the Convention and Act have "preempted" Indian treaty rights to harvest Fraser River salmon. . . . Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulations, but, in the absence of an explicit expression of intent to terminate treaty rights, losses to other citizens sustained through compliance with those regulations should be redressed as above stated by adding to the treaty Indians' permitted catch in areas under state jurisdiction.

*Id.* This court placed great reliance on a Supreme Court decision exhibiting extreme reluctance to find congressional abrogation of treaty rights in the absence of explicit abrogative language. *Id.* (relying on *Menominee Tribe v. United States*, 391 U.S. 404 (1968)).

non-Convention waters.<sup>70</sup> Petitioning the federal district court, the treaty Indians sought to secure their treaty right to fish unregulated in Convention waters, except for non-discriminatory regulations necessary for conservation.<sup>71</sup> The court issued a preliminary injunction against Fisheries, enjoining it from allowing any non-Indian fishing in

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70. There are several impracticalities associated with such a solution. Any such equitable adjustment fishery "would result in a duplicitous fishing opportunity for [treaty Indians], or require them to fish later in a region which is not their usual and accustomed fishing area." *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M, slip op. at 4 (W.D. Wash. July 8, 1977) (findings of fact, conclusions of law, and order denying motion for preliminary injunction, Record, vol. 2, doc. no. 25), *aff'd*, 584 F.2d 931 (9th Cir. 1978). Since the Fraser River fisheries are by far the most productive of all the area's fisheries, *see* sources cited in note 10 *supra*, it would be impractical to have such a large equitable adjustment come from non-Convention salmon runs that have very limited numbers of harvestable fish. It would require a total closure of non-Indian fishing in non-Convention waters. Memorandum from Alvin J. Zientz, attorney, to United States v. Washington case file (Aug. 23, 1976) (on file with *Washington Law Review*). *See also* note 105 *infra*.

71. In view of Fisheries' refusal to provide by regulation for extra treaty Indian fishing time, the United States requested preliminary and permanent injunctions. Motion for Injunction, Record, vol. 29, doc. no. 1122 (filed June 10, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). It was claimed that the imbalance between the relative fleet sizes of the treaty Indian and the all-citizen fisheries and the lack of sophisticated treaty Indian gear required that the treaty Indians be given more fishing time in which to harvest their treaty share. *Id.* at 7.

The Indians' treaty fishing rights have been held by the United States Supreme Court to be federally secured rights that are not subject to state regulation without a showing that such regulations are nondiscriminatory and necessary for conservation. *Puyallup Tribe, Inc. v. Department of Game*, 391 U.S. 392, 398 (1968). *See also* *Department of Game v. Puyallup Tribe, Inc.*, 414 U.S. 44, 49 (1973).

In quantifying these rights to guarantee treaty Indians the opportunity to catch 50% of the harvestable fish passing through treaty fishing sites, Judge Boldt's decision leaves the word "opportunity" open to construction. In the context of the Fraser River salmon fishery, there are two plausible constructions: (1) the right to have fishing gear in the water exposed to 50% of the salmon migrating through treaty Indian sites which are harvestable by the United States under Commission regulations, or (2) the right to fish unregulated until the 50% share is obtained. In considering these and other possible constructions, one should be aware that there are conceptual difficulties in applying Judge Boldt's decision to open-water treaty Indian participation in an international fishery. First, since the treaty Indian sites do not cover the entire route which migrating salmon cross, the treaty Indians are entitled to less than 50% of the total harvestable Fraser River salmon allocated to the United States. *See* note 56 *supra*. This is not the case with river fishing when a river's entire returning run is destined for the treaty fishing sites. Second, because harvesting efficiency is significantly lower in open-water fishing than in gillnetting in rivers, it is more difficult to make a meaningful comparison between actual harvest and the opportunity to harvest. *See generally* note 97 *infra*. Thus, application of Judge Boldt's decision to the Fraser River salmon fishery is conceptually even more complex than it has proved to be as applied to other fisheries terminating in Washington rivers.

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U.S. Convention waters until it had provided by regulation for a special treaty Indian fishery.<sup>72</sup>

Fisheries adopted the position "that to change the regulations once adopted by the [Commission] and approved by the two nations would require action by the [Commission]."<sup>73</sup> Consequently, Fisheries identified four alternative special treaty Indian fishery regulations and requested the Commission to grant authority to adopt one of them.<sup>74</sup> The court stayed its injunction to allow the fishery to commence under existing Commission regulations and to give the Commission time in which to consider and respond to Fisheries' request.<sup>75</sup>

After the Commission responded negatively,<sup>76</sup> the court further

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72. *United States v. Washington*, Civ. No. 9213, slip op. at 1-2 (W.D. Wash. June 26, 1975) (Record, vol. 31, doc. no. 1148). The order gave the Director of Fisheries until July 1, 1975, to file the court-ordered regulations. *Id.* at 2.

73. Memorandum in Support of Motion for Stay at 6 (filed Aug. 15, 1975), *United States v. Washington*, 573 F.2d 1118 (9th Cir. 1978).

74. Letter from Donald W. Moos to William R. Hourston (June 27, 1975), in Defendant's Response to Preliminary Injunction, Record, vol. 31, doc. no. 1163, attachment no. 1, at 1-2 (filed July 10, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975).

75. Upon the state's motion, without objection from the United States, the court modified its preliminary injunction to allow the Director of Fisheries until July 10, 1975, to submit appropriate regulations in conformance with the preliminary injunction. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. June 30, 1975) (order, Record, vol. 31, doc. no. 1151). Thus, the fishery commenced on July 6, 1975, under the Commission regulations for 1975. On July 10, 1975, the Director of Fisheries suspended the state regulations which had adopted the Commission regulations. Defendant's Response to Preliminary Injunction (Fisheries Order No. 1218), Record, vol. 31, doc. no. 1163, attachment no. 4 (filed July 10, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975).

76. Letter from William R. Hourston to Donald W. Moos (July 8, 1975), in Defendant's Response to Preliminary Injunction, Record, vol. 31, doc. no. 1163, attachment no. 3 (filed July 10, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). The Commission responded that the subject of division of the U.S. catch between Indians and non-Indians "was not a proper concern for the International Pacific Salmon Fisheries Commission, whose areas of responsibility are defined by the Sockeye Salmon Convention." *Id. Accord*, [1975] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 4 (1976); [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1975); Report of Annual Meeting of the International Pacific Salmon Fisheries Commission in Vancouver, B.C., at 3 (Dec. 9, 1977) (on file with *Washington Law Review*).

Subsequently, Fisheries Director Donald W. Moos contacted the U.S. Department of State, outlining four alternative proposals with respect to its fisheries under the jurisdiction of the Commission and requesting guidance as to whether any or all of these alternatives would be consistent with U.S. Sockeye Convention obligations. The response from William L. Sullivan, Jr., after consultation with the Canadian government, was that the first alternative (extra days for treaty Indian fishermen) would be objectionable to the State Department; the second alternative (restricting non-Indian fishing more than the Commission regulations would otherwise require) would be acceptable; the

suspended its preliminary injunction until midnight, July 16, 1975, thereby allowing another week of the Commission-regulated fishery.<sup>77</sup> On July 16, the court issued a permanent injunction ordering Fisheries to establish by regulation two special treaty Indian fisheries,<sup>78</sup> but this injunction was stayed that same day "[p]ending the conclusion of discussions between representatives of the United States and Canada" scheduled for later that week.<sup>79</sup> The diplomatic meeting failed to achieve agreement permitting implementation of the two special treaty Indian fisheries.<sup>80</sup> Consequently, the United States initiated steps to suspend its approval of that part of the 1975 Commission regulations which allocated fishing time to specific types of gear in U.S. Convention waters.<sup>81</sup>

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third alternative (allowing all treaty Indians to fish with any gear whenever the Commission allowed fishing by any U.S. fishermen) was not objectionable in principle, but the State Department was opposed to it given existing Commission regulations; and the State Department had no legal objection to the fourth alternative (closing down the United States' non-Indian fishery) although it might seem to violate the spirit of the Convention. *United States v. Washington*, Civ. No. 9213, slip op. at 6-8 (W.D. Wash. July 16, 1975) (findings of fact, conclusions of law, and decree).

77. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. July 14, 1975) (further stay of June 26, 1975, preliminary injunction, Record, vol. 31, doc. no. 1169). This stay was granted to allow the court time to consider the substance of the full hearing conducted this day before issuing or denying a permanent injunction.

78. *United States v. Washington*, Civ. No. 9213, slip op. at 1-2 (W.D. Wash. July 16, 1975) (injunction regarding 1975 Fraser River sockeye and pink salmon harvest, Record, vol. 31, doc. no. 1177). The two special treaty Indian fisheries were as follows: (1) a five-day-per-week fishery in the Strait of Juan de Fuca (exceeding by several days per week the Commission regulations, [1975] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 8-9 (1976)); and (2) a fishery allowing treaty Indians to fish, regardless of gear-type, whenever the United States Convention waters were open for any type of gear. *United States v. Washington*, Civ. No. 9213, slip op. at 2 (W.D. Wash. July 16, 1975). The five-day-per-week fishery in the Strait of Juan de Fuca was later deleted in an amendment of this injunction. See note 85 *infra*. Judge Boldt had considered the Canadian proposal, *supra* note 65, but chose the action noted above upon his finding that it "would cause the least disruption to the commission's management scheme and to the non-Indian fishery." *United States v. Washington*, Civ. No. 9213, slip op. at 7 (W.D. Wash. July 16, 1975) (findings of fact, Record, vol. 31, doc. no. 1176).

79. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. July 16, 1975) (minute order staying permanent injunction of same day, Record, vol. 31, doc. no. 1172).

80. The meeting and its results are discussed in the affidavit of William L. Sullivan, Jr., the official who headed the U.S. delegation. Affidavit of William L. Sullivan, Jr., Record, vol. 31, doc. no. 1187 (filed July 23, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). Upon considering the results of the meeting, Judge Boldt continued his stay of the July 16 injunction. *United States v. Washington*, Civ. No. 9213, slip op. at 1-2 (W.D. Wash. July 22, 1975) (minute order further staying July 16 injunction, Record, vol. 31, doc. no. 1186½).

81. It should be noted that the limited U.S. withdrawal of its previous approval of the 1975 Commission regulations, Letter from T.A. Clingan, U.S. State Department, to International Pacific Salmon Fisheries Commission (July 19, 1975), in Memorandum

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In compliance with the stayed federal court order, Fisheries issued an order allowing the two special treaty Indian fisheries,<sup>82</sup> but this prompted protest from both the Commission<sup>83</sup> and from representatives of the all-citizen commercial fishery. The latter brought suit and the Superior Court of the State of Washington issued a preliminary injunction ordering Fisheries to suspend its special treaty Indian fisheries regulations.<sup>84</sup> The federal district court subsequently modified its permanent injunction and vacated the earlier stay, making the modified injunction immediately effective.<sup>85</sup> Pursuant to this modi-

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Supporting Court's Jurisdiction, Record, vol. 32, doc. no. 1239 (filed Aug. 6, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975), was not contrary to the admitted authority of the Commission: "The Commission has no jurisdiction over the numbers or types of gear that may be operated in Convention Waters. Jurisdiction over these matters rests with the respective national or state or provincial governments as matters of domestic law." *United States v. Washington*, Civ. No. 9213, slip op. at 4 (W.D. Wash. July 16, 1975) (finding of fact no. 273, Record, vol. 31, doc. no. 1176). Commission regulations allocate certain fishing gear to certain areas at particular times as a result of requests from the commercial fishing industry in order to avoid conflicts, and not as a result of any such grant of power. See note 47 *supra*.

82. Fisheries Order No. 1229 (July 21, 1975), Record, vol. 31, doc. no. 1199, attachment A (filed July 25, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975).

83. The Commission sent a letter to the Washington State Director of Fisheries protesting Order No. 1229 for not complying with the existing Commission regulations, and urging that appropriate steps be taken immediately to implement the Commission regulations as originally approved. Letter from William R. Hourston to Donald W. Moos (July 22, 1975) (on file with *Washington Law Review*). The Commission also sent a letter to the U.S. Secretary of State protesting the action of the Department of State in rescinding its approval of part of the Commission regulations and urging support for the Commission regulations as originally approved. Letter from William R. Hourston to Dr. Henry Kissinger (July 25, 1975) (on file with *Washington Law Review*).

84. Upon motion of the Purse Seine Vessel Owners Association, the Superior Court of the State of Washington for Thurston County issued a preliminary injunction ordering the Director of Fisheries to suspend the regulations authorizing the special Indian fisheries. *Purse Seine Vessel Owners Ass'n v. Moos*, No. 52881 (Wash. Super. Ct., Thurston County, July 23, 1975) (order granting preliminary injunction). The basis of this injunction was that any Fisheries order that did not adopt verbatim the Commission regulations was beyond the authority granted the Director by R.C.W. § 75.40.060 which authorizes him to "adopt and to enforce the provisions of the convention between the United States and the Dominion of Canada . . . and the regulations of the commission promulgated under authority of said convention." WASH. REV. CODE § 75.40.060 (1976). The state court replaced this preliminary injunction with a permanent injunction after a hearing on the merits. *Purse Seine Vessel Owners Ass'n v. Moos*, No. 52881 (Wash. Super. Ct., Thurston County, Sept. 19, 1975) (permanent injunction replacing preliminary injunction of July 23, 1975, as amended on Aug. 1, 1975). This lower court decision was affirmed by the Washington State Supreme Court. *Purse Seine Vessel Owners Ass'n v. Moos*, 88 Wn. 2d 799, 567 P.2d 205 (1977).

85. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. July 30, 1975) (modification of injunction and dissolution of stay, Record, vol. 32, doc. no. 1211). This modification deleted the special five-day-per-week Indian fishery in the Strait of Juan

fied injunction, Fisheries issued another order<sup>86</sup> which the Washington court ordered suspended the next day.<sup>87</sup> Faced with conflicting injunctions from the state and federal courts, Fisheries suspended entirely the state regulations which had adopted the Commission regulations and in this way attempted to avoid contempt of either court.<sup>88</sup> The federal court defeated this scheme by issuing an injunction ordering Fisheries to repromulgate the suspended regulations and by enjoining further proceedings in the state courts.<sup>89</sup> Fisheries there-

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de Fuca which was clearly in violation of the Commission regulations and hence the Sockeye Convention. *Id.* This court action was apparently pursuant to State Department advice opposing such a fishery and requesting that it be deleted. Affidavit of William L. Sullivan, Jr., Record, vol. 32, doc. no. 1239 (filed Aug. 6, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975); *see* Affidavit of William L. Sullivan, Jr., Record, vol. 31, doc. no. 1187, at 3 (filed July 23, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). *See also* *United States v. Washington*, Civ. No. 9213, slip op. at 6-7 (W.D. Wash. July 16, 1975) (Department of State rejected proposal of Director of Fisheries that treaty Indians be given extra days).

Although it objected to giving treaty Indians extra time not authorized by the Commission regulations, the State Department fully supported the remaining special treaty Indian fishery allowing treaty Indians to fish whenever U.S. Convention waters were open to any fisherman. Affidavit of William L. Sullivan, Jr., Record, vol. 31, doc. no. 1187 at 3, (filed July 23, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). The State Department position was that such a fishery would not harm proper escapement or proper division of the catch and that its effect on the Commission's program would be de minimus. *Id.*

86. *See* Appellant's Memorandum in Support of Motion for Stay at 10 (filed Aug. 15, 1975), *United States v. Washington*, 573 F.2d 1118 (9th Cir. 1978). This Fisheries order conformed the regulations to the modified injunction, *United States v. Washington*, Civ. No. 9213 (W.D. Wash. July 30, 1975), discussed in note 85 *supra*, by deleting the special five-day-per-week treaty Indian fishery in the Strait of Juan de Fuca. *See also* note 88 *infra*.

87. *Purse Seine Vessel Owners Ass'n v. Moos*, No. 52881 (Wash. Super. Ct., Thurston County, Aug. 1, 1975) (amendment of preliminary injunction of July 23, 1975).

88. Fisheries Order No. 1237 (Aug. 1, 1975), Record, vol. 32, doc. no. 1260, attachment (filed Aug. 12, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). The federal court injunction ordered the Director of Fisheries not to allow any non-Indian (more accurately, all-citizen) fishing until special treaty Indian fishery regulations were enacted. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. June 26, 1975). The state court injunction enjoined the Director from issuing any regulations contradictory to the Commission regulations. *See* cases cited in notes 84 & 87 *supra*. By suspending his previous orders, the Director essentially removed the state from its enforcement role, *see* note 58 *supra*, since there was no longer any state law to enforce and the state officers were never authorized to act as federal enforcement officers pursuant to 16 U.S.C. § 776d(b) (1976). Thus, the Director was neither "allowing" all-citizen fishing in contempt of the federal court order nor issuing regulations in contempt of the state court. However, the Director was still arguably in contempt of the federal court for failing to promulgate special treaty Indian fishery regulations as ordered. *See* notes 78 & 85 *supra*.

89. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. Aug. 6, 1975) (Record, vol. 32, doc. no. 1240). The basis of this federal court injunction was a finding that

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after issued emergency regulations providing for a special treaty Indian fishery.<sup>90</sup>

### *B. The 1976 Season: A Diplomatic Agreement and its Strained Judicial Interpretation*

The approach taken by the United States for the 1976 season sought to avoid the disagreement, confusion and continuous litigation which had characterized the 1975 season. Diplomatic efforts were made far in advance of the season to obtain Canadian approval of 1976 Commission regulations with language drafted broadly enough to allow domestic implementation of Indian treaty rights.<sup>91</sup> The Canadian government accepted a U.S. proposal that the 1976 Commis-

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it was "necessary, in aid of this [federal] Court's jurisdiction, to protect and effectuate the judgment of this [federal] Court . . . pursuant to 28 U.S.C. 2283." *Id.*, slip op. at 1. The federal court also amended its previous findings of fact, conclusions of law, and decree to reflect the intervening diplomatic and judicial proceedings. *United States v. Washington*, Civ. No. 9213, slip op. at 1-3 (W.D. Wash. Aug. 6, 1975) (Record, vol. 32, doc. no. 1241).

90. Fisheries Order No. 1244 (Aug. 8, 1975), Record, vol. 32, doc. no. 1257, attachment (filed Aug. 11, 1975), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1975). As ordered by the July 16 permanent injunction, as modified on July 30, the state regulations allowed treaty Indian fishing at treaty sites continuously each week during the times when U.S. Convention waters were open for any type of gear. See notes 78 & 85 *supra*. See also Brief of Intervenor-Appellees at 14, *United States v. Washington*, 573 F.2d 1118 (9th Cir. 1978).

The State of Washington appealed the district court injunctions issued during the 1975 season, but this appeal was recently dismissed as moot. *United States v. Washington*, 573 F.2d 1118 (9th Cir. 1978). This appeal was rendered moot by the fact that the 1975 regulations of the Commission are now fully superceded and the enforcement of existing and future regulations is no longer entrusted to Washington State officials. Therefore, injunctions against state officials are not likely to recur in the context of the Sockeye Convention fishery. *Id.* The State of Washington has petitioned for and has been granted certiorari by the United States Supreme Court to review this Ninth Circuit decision as well as others. *Washington v. United States*, 99 S. Ct. 277 (1978); *Washington v. Washington State Passenger Fishing Vessel Ass'n*, 99 S. Ct. 276 (1978); *Washington v. Puget Sound Gillnetters Ass'n*, 99 S. Ct. 276 (1978).

91. These efforts were prompted by a telegram from the Commission to the two national governments advising them that the Commission had reached an impasse on adoption of recommended 1976 regulations. [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1977).

At a January 14, 1976, meeting between representatives of the U.S. Departments of State, Commerce, and Interior, it was agreed to seek Canadian assent to a proposal including certain broadly drafted language in the 1976 Commission regulations. It was felt that this approach, using language that would not on its face purport to allocate the U.S. catch, would be compatible with the Canadians' extreme reluctance to adopt any regulations making reference to United States Indians. Affidavit of Rozanne L. Ridgway, Department of State official, at 2-3 (April 9, 1976) (on file with *Washington Law Review*).

sion regulations be qualified by the following language: "Insofar as the foregoing regulations prescribe the type of gear to be used during times open to fishing for sockeye and pink salmon, such regulations shall be implemented to the extent permissible under the law of the Parties."<sup>92</sup>

This broad language became part of the 1976 Commission regulations, but was subject to the understanding that it would be narrowed in its domestic application,<sup>93</sup> and would prohibit all fishing during periods when Commission regulations prohibited fishing with all types of gear.<sup>94</sup> Pursuant to this understanding, the United States published the regulations with a preamble explaining the extent to which such regulations would be applicable to treaty Indian fishermen.<sup>95</sup> Thus, the 1976 season opened under regulations understood to limit all-citizen fishing to the open periods specified for each particular gear-type (e.g., gill nets, reef nets, purse seines, and trollers) and to limit treaty Indian fishing with *any* gear to all such open periods.<sup>96</sup>

Although this scheme for implementation of Indian treaty fishing rights provided the treaty Indians with an expanded fishery not available to other fishermen, it failed to compensate for the large catch dif-

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92. Affidavit of Rozanne L. Ridgway, *supra* note 91, at 5. Canadian approval "was based upon an understanding that U.S. authorities would take appropriate actions before the commencement of the 1976 IPSFC control period, in order to ensure that IPSFC regulations would be clearly delimited and would be adequately enforced." *Id.* at 4. "Based on their mutual understanding of the meaning and intended effect of the words to the extent permissible under the law of the Parties, Canada and the United States . . . instructed their respective Commissioners that gear regulations for 1976 be qualified by the insertion of these words." *Id.* See Letter from Rozanne L. Ridgway to Donald R. Johnson (Feb. 17, 1976) (on file with *Washington Law Review*). For an account of the diplomatic negotiations, see Affidavit of Rozanne L. Ridgway, *supra* note 91, at 2-6.

93. [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1977). See note 92 *supra*.

94. Aide-Memoire from United States to Canada at 2 (Feb. 17, 1976) (on file with *Washington Law Review*).

95. 41 Fed. Reg. 22,392-93 (1976).

96. For example, in U.S. Puget Sound Convention waters for the week of July 18 to July 24, the open periods for non-Indian fishermen started with gill nets from 7 p.m. Sunday through 9:30 a.m. Monday, overlapped by purse seines from 5 a.m. through 9:30 p.m. Monday and reef nets from 3 p.m. through 9:30 p.m. Monday. The gill nets were allowed to resume from 7 p.m. Monday through 9:30 a.m. Tuesday, followed by overlapping periods again for the reef nets and purse seines. The result of this overlapping scheme was that there was non-Indian fishing of one type or another continuously from 7 p.m. Sunday through 9:30 p.m. Tuesday. [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1977). The gear-flexibility language of the regulations, see note 92 and accompanying text *supra*, thus allowed treaty Indians to fish irrespective of gear type during this period of continuous U.S. non-Indian fishing.

ferences attributable to the relative fleet sizes.<sup>97</sup> The treaty Indians subsequently pressed the district court for an even more expansive fishery based upon a strained interpretation of the 1976 diplomatic agreement and corresponding Commission regulations.<sup>98</sup>

Without considering the practicalities which made the interpretation unreasonable,<sup>99</sup> the federal district court implemented the treaty

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97. The 1976 scheme roughly doubled the treaty Indian fishing time over that which resulted in a 1.4% share of the 1975 U.S. Convention harvest. It is uncertain whether this gives treaty Indians their treaty-guaranteed opportunity to catch half of the harvestable Fraser River salmon which pass through the Indians' treaty sites. This uncertainty stems from the lack of a determination of just what proportion of the returning salmon pass through treaty fishing sites, *see* note 56 *supra*, and the further difficulty of comparing harvest to the opportunity to harvest. Clearly, if the treaty Indians were allowed an opportunity to fish when half of the harvestable fish were passing through their fishing sites, then they would have been given their treaty opportunity irrespective of whether they actually harvested that half or not. *See generally* note 56 *supra* and note 201 *infra*.

98. The Indian interpretation was premised on the fact that the Commission did not regulate, and therefore "allowed" all-citizen commercial troll fishing on the coastal U.S. Convention waters. For a discussion of the reasons the Commission does not attempt to regulate these waters, *see* note 99 *infra*. Since the Commission "allowed" this all-citizen fishing, the treaty Indians reasoned that the 1976 Commission regulatory scheme, permitting treaty Indians to fish whenever any U.S. gear was allowed to operate in U.S. Convention waters, permitted a seven-day-per-week treaty Indian fishery in Convention waters. Affidavit of Alvin J. Zientz, attorney, in motion for temporary restraining order and preliminary injunction, Record, vol. 53, doc. no. 2325 (filed Aug. 4, 1976), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1976).

99. The troll fishery in offshore U.S. Convention waters is unregulated for several practical reasons, the foremost being the extremely small incidental catch of sockeye, consisting of only 0.03% of the total U.S. catch for 1976. [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7, 29 (1977). Any such regulation would be of little practical value without some corresponding regulatory scheme in the waters adjacent to the Convention waters which are not within the authority of the Commission. [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 4 (1978); Report of Annual Meeting of the International Pacific Salmon Fisheries Commission, in Vancouver, B.C., at 6 (Dec. 9, 1977) (on file with *Washington Law Review*). The regulation would also cause serious enforcement problems due to the great expanses of water involved and the lack of jurisdiction over foreign nationals. *See* J. TOMASEVICH, *supra* note 1, at 28-29. Net fishing on the high seas has been prohibited in Convention waters since 1957. [1957] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 9, 12, 15 (1958). *See* [1970] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1971).

The offshore pink salmon troll fishery in Canadian waters has been significant at times and has prompted the concern of the Commission. [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3-4 (1978). The Commission has not regulated this fishery to date because it has adhered to its stand that allocation among the various gear-types is not within its Convention responsibilities. *See* notes 46-48 and accompanying text *supra*. Furthermore, the Commission has developed its expertise in the regulation of net fisheries and tends to feel less competent to regulate the troll fishery. Notes of an Interview with Donald R. Johnson, Chairman of the International Pacific Salmon Fisheries Commission, in Seattle, Washington, at 1 (Feb. 14, 1978) (approved by Donald R. Johnson) (on file with *Washington Law Review*). The Commission has deferred this

Indian interpretation with an order providing a five-day-per-week treaty Indian fishery.<sup>100</sup> This order was met with resistance from the Commission<sup>101</sup> and the United States<sup>102</sup> and was subsequently modi-

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problem to the Canadian government consistent with its respect for the national sovereignty preserved by the Convention. *Id.* The Commission has indicated that when this allocation problem becomes a conservation problem, they will act promptly. *Id.* at 2.

Thus, the federal district court apparently failed to balance the difficulties of Commission regulation of coastal U.S. Convention waters with the fact that there is really no fishery there to regulate. A comprehension of this offshore fishery in the context of the 1976 diplomatic agreement and understanding would preclude a finding that the Commission regulations "allow" it. Yet, this is the finding upon which the Indian interpretation, *see* note 98 *supra*, and the federal court order, *United States v. Washington*, Civ. No. 9213 (W.D. Wash. July 31, 1976), were based.

100. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. July 31, 1976) (temporary restraining order, Record, vol. 52, doc. no. 2312½).

101. The Commission issued an emergency order on August 3, 1976, "relinquishing control over the off-shore troll fishery." [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7 (1977). This was an attempt to avoid responsibility for "allowing" an offshore seven-day-per-week non-Indian fishery. In addition:

[I]n the interest of clarification, the Commission amended the exceptions to its regulations by the addition of the underlined words in the following quotation from the regulations:

"Insofar as the foregoing regulations prescribe the type of gear to be used during times open to fishing for sockeye and pink salmon in those parts of Convention Waters open to net fishing east of the Bonilla-Tatoosh Line, such regulations shall be implemented to the extent permissible under the laws of the Parties."

*Id.* This amendment of the regulations through an emergency order is arguably beyond the authority of the Commission as defined by the Pink Salmon Protocol, *supra* note 6, at 1060. The emergency order power was granted the Commission to facilitate the day-to-day problems that arise with respect to escapement goals and division of catch, and not to be used as a vehicle for amending the annual regulations that expressly require the approval of the two governments. If the emergency order was intended to be used for amendment of the annual regulations, this express approval provision of the Pink Salmon Protocol, *supra* note 6, at 1060, would be rendered nugatory. *But see* D. JOHNSTON, *supra* note 10, at 389 n.97 (1965).

102. Plaintiffs' Motion for Interpretation and Dissolution of Temporary Restraining Order, Record, vol. 53, doc. no. 2322 (filed Aug. 4, 1976), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1976). *See also* Memorandum of Makah and Lummi Indian Tribes in Support of Preliminary Injunction, Record, vol. 53, doc. no. 2343 (filed Aug. 12, 1976), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1976). The interpretation of the gear-flexibility regulations adopted by the treaty Indians and the district court in 1976 was never asserted during the 1976 negotiations; nor was it asserted during the 1975 season, when the United States withdrew its approval of the Commission's gear-restrictive regulations, *see* note 81 and accompanying text *supra*, so as to allow implementation of the court's gear-flexibility plan, *see* note 78 *supra*. This, together with the United States' and the Commission's opposition to this 1976 district court order, shows that such an interpretation was not intended by either nation. Were the United States to adopt this interpretation, it would not seem to be acting in accordance with its policy of protecting both treaties and would be blatantly violating the understanding that the broadly drafted gear-flexibility language would be narrowly applied.

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fied to allow a more limited treaty Indian fishery, though still larger than that anticipated by the diplomatically agreed upon gear-flexibility language of the 1976 regulations.<sup>103</sup>

To insure proper escapement, the Commission later issued an emergency order closing, until further notice, the U.S. fishery for the week commencing August 15, 1976.<sup>104</sup> This necessitated an interpretation of the modified district court order for the situation in which *all* fishing is closed in U.S. Convention waters.<sup>105</sup> Upon information that the sockeye run for American fishermen was essentially over and that the Commission would soon be relinquishing control, Judge Boldt issued a memorandum suggesting mootness.<sup>106</sup> By an agreed order, the motion for preliminary injunction still pending hearing was terminated,<sup>107</sup> and days later the Commission did indeed relinquish control.<sup>108</sup>

In summary, after beginning on a note of diplomatic agreement, the 1976 season ended with Canadian bitterness stemming from the

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103. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. August 5, 1976) (minute order modifying July 31 temporary restraining order, Record, vol. 53, doc. no. 2331). This order limited the treaty Indian fishery to three days per week and in the event of changes in Commission regulations, to one day over and above days permitted the all-citizen fishery. *Id.*, slip op. at 2. This still is in violation of the understanding that no treaty Indian fishing would be permitted during periods when U.S. Convention waters were closed to all fishing. See note 94 and accompanying text *supra*.

104. [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7 (1977).

105. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. August 19, 1976) (minute order, Record, vol. 54, doc. no. 2364). This order announced that "[n]ational interests . . . require that in the present situation [the] Indian fishery should not be approved by the Court when all American fishing is prohibited." *Id.*, slip op. at 1. Furthermore, the order required the parties to "attempt to agree upon a method of providing the treaty fishermen with an equitable adjustment for their lost opportunities to catch fish." *Id.* at 1-2. The federal court eventually ordered an "equitable adjustment" which depended upon three conditions: (1) that some other treaty tribe invite the tribe to their traditional areas, (2) that there be additional fish available, and (3) that the treaty tribe entitled to the adjustment be willing to go long distances from their traditional areas to fish. The failure of these conditions to occur simultaneously in the remainder of the 1976 season led treaty Indian fishermen to characterize the concept of "equitable adjustment" as "meaningless." Affidavit of Hubert Markishtum, Record, vol. 1, doc. no. 10 (filed June 29, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977). See also *United States v. Washington*, Civ. No. 9213 (W.D. Wash. Sept. 6, 1976) (order, Record, vol. 54, doc. no. 2436); Hearing transcript at 227-31 (Sept. 3-4, 1976), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1976).

106. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. August 23, 1976) (court memorandum, Record, vol. 54, doc. no. 2375).

107. *United States v. Washington*, Civ. No. 9213 (W.D. Wash. August 25, 1976) (agreed order, Record, vol. 54, doc. no. 2386).

108. [1976] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 8 (1977).

strained interpretation of the 1976 regulations by the American court.<sup>109</sup>

*C. The 1977 Season: A Return to Separate Management*

The domestic interpretation of the 1976 diplomatic agreement adversely affected chances for future diplomatic agreement to aid the United States in implementing Indian treaty rights in a manner consistent with its obligations under the Sockeye Convention. With the spirit of cooperation dampened, diplomatic negotiations for the 1977 season failed to result in 1977 Commission regulations providing for domestic implementation of the treaty Indian fishery.<sup>110</sup>

Acting in its role as trustee of the Indian treaty rights, the United States unilaterally purported to remove from the Commission any authority for regulating U.S. treaty Indians.<sup>111</sup> However, in an apparent

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109. During meetings immediately after the 1976 season, the official in charge of Canadian fisheries was reported to have informally indicated Canadian regret for its cooperation prior to the 1976 season in attempting to ease the difficult position of the United States. Memo from Alvin J. Ziontz, attorney, to United States v. Washington case file (October 18, 1976) (on file with *Washington Law Review*). The Canadian official further indicated that the agreement and strained domestic interpretation of the 1976 regulations would guide the Canadian Government in future decisions as to regulation language. *Id.* at 1.

110. The U.S. Department of State made a series of proposals to Canada, developed by the concerned domestic agencies, which would have allowed increased treaty Indian fishing through modifications of fishing time for certain gear-types in U.S. Convention waters and a proposed special gill net fishing period in subarea 4B (the outer Strait of Juan de Fuca). Affidavit of Kathryn Clark-Bourne, Record, vol. 1, doc. no. 5, attachment 3, at 2 (filed June 27, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977). An understanding was initially reached for insertion of these proposals in the 1977 Commission regulations and was reflected in a letter from the Department of State to the U.S. Commissioners. *Id.* See Letter from Rozanne L. Ridgway to Donald R. Johnson (March 16, 1977), Record, vol. 1, doc. no. 5, attachment 3, at 9 (filed June 27, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977).

Subsequent to the aforementioned understanding, the Canadian government informed the United States that it was unlikely that the Commission would adopt the proposals. See Affidavit of Kathryn Clark-Bourne, *supra* at 2. "As a result of strenuous and unanimous objection to the proposal by the Advisory Committee members and subsequent withdrawal of support by the Canadian government, the proposal failed to pass in the Commission." Report of Annual Meeting of the International Pacific Salmon Fisheries Commission, in Vancouver, B.C., at 3 (Dec. 9, 1977) (on file with *Washington Law Review*). On June 1, the Commission adopted recommended staff regulations which did not include the U.S. proposals. *Id.* See also Affidavit of Kathryn Clark-Bourne, *supra* at 3; [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6-7 (1978); 42 Fed. Reg. 30,841 (1977).

111. The United States' approval of the recommended 1977 Commission regulations was qualified by the caveat, "except as to U.S. Indians who are entitled to exercise

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effort to satisfy its Convention responsibilities, the U.S. Department of Interior implemented a domestic regulatory scheme for the treaty Indian fishery that was to be coordinated with Commission regulatory goals of proper racial escapement and division of catch.<sup>112</sup> Though

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fishing rights by virtue of treaties with the United States." Letter from Robert C. Brewster to Donald R. Johnson (June 17, 1977), Record, vol. 1, doc. no. 5, attachment 3, at 6-7 (filed June 28, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977); [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 7-8 (1978); see 42 Fed. Reg. 30,841 (1977). Since these annual Commission regulations require the approval of the concerned governments, Pink Salmon Protocol, *supra* note 6, at 1060, the United States felt that by exempting treaty Indians in its approval of the recommended U.S. regulations, there would be no approved regulations to enforce against treaty Indians. The U.S. Department of State advised the Canadian government in advance that it was considering such a move. "Canada did not object to the State Department's means for implementing the regulations of Indian fishing." *Purse Seine Vessel Owners v. United States Dep't of State*, 584 F.2d 931, 933 (9th Cir. 1978). The Sockeye Convention, as amended by the Pink Salmon Protocol, does not provide any guidelines governing the exercise of the approval function, and it is therefore unclear whether the qualified approval of the Commission regulations operates as claimed by the United States or as a mere "counteroffer" requiring Commission approval. Because the regulations recommended by the Commission are applicable to all fishermen, and the United States approved the recommended regulations as applied to less than all fishermen, the United States arguably has approved something that the Commission has not recommended with the net result being no regulations *both* recommended by the Commission and approved by the United States for U.S. Convention waters. This argument was made in Brief for Appellant at 6-7, *United States v. Decker*, No. 77-3961 (9th Cir., argued Jan. 10, 1979).

112. The scheme provided for Department of Interior "emergency orders" which would be coordinated with Commission emergency orders. 42 Fed. Reg. 31,450, 31,452 (1977), *revoked*, 42 Fed. Reg. 58,744 (1977). See also Defendant's Brief in Opposition to Motion for Preliminary Injunction, Record, vol. 1, doc. no. 5 (filed June 28, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977). "In accordance with an agreement between the United States and Canada, and the arrangements between the Departments of State, Commerce, and Interior, decisions on in-season adjustments of [treaty] Indian fishing schedules, required by emergency changes in the Commission's regulations, are made by representatives of the [National Marine Fisheries Service] and the U.S. Fish and Wildlife Service of the Department of the Interior." R. Thompson, Summary of the 1978 Sockeye Salmon Commercial Fisheries in U.S. Waters Under the Jurisdiction of the International Pacific Salmon Fisheries Commission at 3 (Nov. 1978) (unpublished paper available from National Marine Fisheries Service, U.S. Dep't of Commerce). Following changes made by the Commission—either reduction or extension of fishing periods—the representatives discussed changes for the treaty Indian fisheries. After attainment of an agreement, the Fish and Wildlife Service representative contacted the Northwest Indian Fisheries Commission which distributed the Department of Interior "emergency order" through its telephone "hot line." *Id.* See also U.S. Dep't of Interior, Memorandum of Understanding Between Department of Commerce and Department of the Interior Concerning Regulation of Treaty Indian Fishing for Fraser River Convention Salmon (June 21, 1977) (on file with *Washington Law Review*).

The domestic regulations issued by the U.S. Department of Interior for treaty Indians fishing in Convention waters allow one additional day per week over and above that al-

well-intentioned, this represented a return to separate management, albeit concerning a different pair of user groups,<sup>113</sup> still posing the detrimental potential inherent in separate management which the Sockeye Convention sought to eliminate by vesting regulatory responsibility in a single body.<sup>114</sup>

Besides occasioning new litigation,<sup>115</sup> the 1977 season yielded the first evidence of an adverse impact on the salmon resource, at least partially attributable to the lack of cooperation in implementing Indian treaty rights and the resultant regression to separate management.<sup>116</sup>

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lowed to non-Indians by the Commission regulations, except in the case of the Makah Tribe in subarea 4B which is allowed two extra days per week to allow for the smaller numbers of fish which pass through Makah fishing grounds in their migration toward the Fraser River. *Compare* 42 Fed. Reg. 31,452 (1977) with 42 Fed. Reg. 30,842-43 (1978). The net result for the 1977 season was that treaty Indians were allowed 31 fishing periods, except the Makahs with 39, compared to 18 fishing periods for the non-Indian fleet. [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 17 (1978). During the "extra periods," the treaty Indians harvested 196,000 sockeye which amounted to 11% of the total U.S. Convention harvest. *See* note 133 *infra*. The "extra days" were placed at the beginning of the fishing week to provide the treaty Indians with significantly higher catches per landing. Consequently, 57% of the treaty Indian catch of sockeye was taken on the "extra days." 1977 Preliminary Summary, *supra* note 54, at 5-6.

The Department of Commerce published the 1977 Commission regulations for United States Convention waters with a caveat stating that they would not apply to Indians exercising treaty-secured fishing rights. 42 Fed. Reg. 30,841 (1977).

113. Prior to the Sockeye Convention and the advent of Commission regulation in 1946, each nation regulated its respective nationals. The 1977 separate management scheme imposed by the United States was based upon a treaty/non-treaty dichotomy (treaty fishermen regulated by United States Interior regulations/non-treaty fishermen regulated by the Commission), rather than the pre-Convention national dichotomy. *see* Part II-A *supra*.

114. *See* note 13 and accompanying text *supra*. For an account of the complexities and uncertainties inherent in managing this fishery, *see* Part II-B-2 *supra*. In such a complex fishery, the Commission has proved that successful management requires a single authority responsible for scientific research, development, and regulation.

115. All litigation concerning implementation of Indian treaty rights in Convention waters had previously occurred as part of the continuing jurisdiction of the federal district court established in *United States v. Washington*, 384 F. Supp. 312, 420 (W.D. Wash. 1974). The new litigation reversed the role of the United States from plaintiff asserting the treaty Indian rights to defendant defending them. *Compare id.* with *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, 584 F.2d 931 (9th Cir. 1978). The *Purse Seine* complaint charged that the Department of State could not exclude certain citizens from the jurisdiction of the Commission, and that the Departments of Commerce and Interior lacked statutory authority to adopt regulations which exempted certain U.S. citizens from Commission regulation in waters under the jurisdiction of the Commission. Complaint Requesting Declaratory Judgment and Permanent Injunction & Motion for Preliminary Injunction, Record, vol. 1, doc. nos. 1 & 2 (filed June 24, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977).

116. The Commission has reported a substantial over-harvest of the Early Stuart

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As in the past two seasons, the Commission resisted the efforts of the United States to implement Indian treaty rights in Convention waters. It issued an emergency order purporting to retain authority over the treaty Indian fishery.<sup>117</sup> In response, the U.S. Department of State indicated that the Commission's emergency order could not give the Commission authority over the treaty Indian fishery and was thus without effect.<sup>118</sup>

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run of Fraser River sockeye salmon attributable to a combination of factors. Report of Annual Meeting of the International Pacific Salmon Fisheries Commission, in Vancouver, B.C., at 4-5 (December 9, 1977) (on file with *Washington Law Review*). One factor was the difficulty of estimating the catch by U.S. treaty Indians as a result of difficulty in obtaining Indian catch data promptly. *Id. Accord*, note 45 *supra*. Not all of this overharvest is attributable to the catches by treaty Indians on the "extra days" granted them by the U.S. domestic regulations, but the end result was an Early Stuart spawning escapement of 118,000 whereas the goal had been 300,000. Report of Annual Meeting of the International Pacific Salmon Fisheries Commission, *supra* at 4. Of the 182,000 fish deficit, an estimated 102,000 were taken on the "extra days." [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 18 (1978). The efforts to restore the Early Stuart run to optimum size were set back two cycles or eight years, to the 1969 level. Report of Annual Meeting of the International Pacific Salmon Fisheries Commission, *supra* at 5. Another major factor was the substantial amount of illegal fishing that occurred primarily in the Fraser River itself. *Id.*; [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 18 (1978).

Early in the season, the Commission staff had informed the federal court that the separate regulatory scheme set up for treaty Indians would "create severe management problems for the Commission in subsequent days in order to assure adequate escapement of the Early Stuart run." Affidavit of John F. Roos, Assistant Director of the Commission, Record, vol. 2, doc. no. 14, at 2 (filed June 29, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977).

117. At a formal meeting of the Commission on June 27, 1977, it issued an emergency order stating that the regulations as approved by the Commission for the 1977 season for U.S. Convention waters "apply to all citizens, without exception." Commission News Release No. 3 (June 28, 1977), Record, vol. 1, doc. no. 5a, exhibit E (filed June 28, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977). See also [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6, 13 (1978). In an effort to justify the use of its emergency order power, the Commission publicly announced that "[t]he Convention does not allow for two management authorities, and in view of the potential chaotic situation in the fishery, the Commission considered an emergency order was necessary to carry out the provisions of the Convention." Commission News Release No. 3, *supra*. See generally *Pink Salmon Protocol*, *supra* note 6, at 1060 (Commission emergency order authority). The Commission also sent a letter to the U.S. Department of State specifying that the "Commission is not aware of any provision in the Convention for alteration of the regulations by either government" and requesting the authority for such action by the United States in qualifying its approval. Letter from Donald R. Johnson to Robert C. Brewster (June 27, 1977), Record, vol. 1, doc. no. 5a, exhibit D, *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977). The Commission requested that the United States adhere to the Articles of the Convention and enforce any violations of the regulations, stating that any fishing other than as allowed by the Commission would be in contravention of the Sockeye Convention. *Id.*

118. Affidavit of Ronald J. Bettauer, Record, vol. 1, doc. no. 5, attachment 2 (filed

The federal district court shared this view and denied the motion for preliminary injunction filed by the Purse Seine Vessel Owners Association which had alleged that the Commission's authority over *all* fishermen in Convention waters was exclusive.<sup>119</sup> A month further into the season, a second motion for preliminary injunction was filed, alleging that the Interior regulatory scheme failed to account for emergency closures by the Commission.<sup>120</sup> The federal court rejected

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June 27, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977). The affiant, who has responsibility for interpreting international agreements of the United States relating to fisheries, asserted the view of the Department of State that the United States has authority under the Sockeye Convention to make a qualified approval of Commission regulations as it did. He also stated that the Commission's emergency order was not an emergency order within the meaning of the Sockeye Convention, as amended by the Pink Salmon Protocol. The U.S. position was that the Commission could not, by labeling its action an "emergency order," circumvent the requirement contained in Article VI for government approval of its regulations. *Id.* at 2-3. *See also* note 101 *supra*.

119. Judge Walter T. McGovern, in denying the motion for preliminary injunction, issued a memorandum opinion rejecting the plaintiff's contention that Commission regulations are exclusive within Convention waters and that the United States is therefore obligated to enforce those regulations. *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. July 5, 1977) (memorandum opinion on file with *Washington Law Review*). The opinion states:

It is evident from the language of the Convention that the broad regulatory powers granted to the Commission under Article IV of that Convention are thereafter vacated in Article VI, which expressly provides that those same broad regulatory powers are "subject to the approval of the two governments." Without that approval, the Commission's proposed regulations remain just that—PROPOSED—and nothing more.

The ultimate purpose of the Convention is to ensure a proper escapement of the fishery for propagation purposes and an equal division of the catch by the citizenry of the contracting nations. The delegated authorities to the Commission point to those ends and nothing in the language of the Convention can be construed to express or infer any greater purpose.

Therefore, in the opinion of the Court, it must be said that Article VI, as amended, does not give to the Commission the authority to direct the domestic allocation of the fishery allotted to the United States. . . .

It is further the opinion of the Court that the Commission's so-called "emergency order" adopted by it on June 27, 1977 is of no force and effect because . . . the subject matter of that order, to-wit the domestic allocation of the U.S. fish catch is not a matter within the delegated authorities of the Commission.

*Id.* at 3.

This opinion was reiterated when the court entered its formal order. *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. July 8, 1977) (findings of fact, conclusions of law, and order denying motion for preliminary injunction, Record, vol. 2, doc. no. 25). *See also* note 70 *supra* (finding that an equitable adjustment in lieu of this order would be impractical).

120. Motion for Preliminary Injunction & Memorandum in Support, Record, vol. 2, doc. nos. 27 & 29 (filed Aug. 10, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977).

the allegation and dismissed the motion,<sup>121</sup> and the 1977 season ended without disposition of the request for declaratory judgment made by the Purse Seiners in conjunction with their first motion for injunctive relief.<sup>122</sup>

*D. The 1978 Season: A Continuation of Separate Management*

After again failing to secure Canadian approval of direct regulation of the treaty Indian fishery through Commission regulations,<sup>123</sup> the United States reverted to its 1977 scheme of qualifying approval of the recommended Commission regulations and thereby withholding jurisdiction over treaty Indian fishing from the Commission. As in 1977, the Department of Interior issued separate regulations for treaty Indians, and U.S. enforcement officials adhered to a dual scheme of enforcement, enforcing Commission regulations as to non-treaty fishermen<sup>124</sup> and the Interior's less restrictive regulations as to treaty Indian fishermen.<sup>125</sup>

In resistance to this separate management scheme, the Purse Seiners revived their 1977 suit. By agreement of the parties, the plaintiffs did not respond to the August 1977 summary judgment motion of the United States, but instead sought leave to file a second, amended

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121. The federal district court viewed this second motion as simply a reiteration of the arguments previously rejected by the court in dismissing the first motion. *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, C77-471M, slip op. at 2 (W.D. Wash. Aug. 12, 1977) (findings of fact, conclusions of law, and order denying motion, Record, vol. 2, doc. no. 33).

The Ninth Circuit has affirmed both orders denying these motions, 584 F.2d 931 (9th Cir. 1978). The Ninth Circuit's position on the validity of regulations which have been approved only as to non-Indians remained unclear. The court considered the appellant's arguments concerning "the traditional judicial unwillingness to intrude into foreign relations matters [*sic*] the appropriate scope of judicial review of executive discretion in interpreting treaties, and the appropriate limitations upon the use of equitable relief as a means of avoiding potential criminal liability." *Id.* at 934. Because the court felt that "the real attack [was] upon the decree in *United States v. Washington*," the interpretation and effect of which were pending before the Supreme Court, the court decided that "it would be inappropriate . . . further to pursue the issues." *Id.* It merely held that "under the existing law of the Circuit, the district court did not abuse its broad discretion in denying injunctive relief to the non-Indian fishermen." *Id.*

122. After the court rejected the second motion, the U.S. Department of State sought summary judgment denying the request for declaratory judgment made by plaintiffs, Purse Seiners, in their original complaint. Motion for Summary Judgment, Record, vol. 2, doc. no. 37 (filed Aug. 22, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977).

123. Notes of a Telephone Interview with Kay Oberly, Attorney with U.S. Dep't of Justice, in Washington, D.C., at 1 (Oct. 4, 1978), (on file with *Washington Law Review*).

124. 43 Fed. Reg. 26,737 (1978) (to be codified in 50 C.F.R. §§ 371.1-.9).

125. 43 Fed. Reg. 27,187 (1978) (to be codified in 25 C.F.R. §§ 251.1-.21).

complaint.<sup>126</sup> The district court denied the request in all respects except one, allowing the plaintiffs to allege that the Stevens treaties only secured to treaty Indians a right to fish on an equal basis with other citizens of the State of Washington.<sup>127</sup> The United States subsequently moved for summary judgment.<sup>128</sup> The 1978 season ended without disposition of this motion.

Furthermore, the Purse Seiners initiated another suit.<sup>129</sup> This new suit attacked the 1978 regulations in a manner similar to the prior year's attack on the 1977 regulations.<sup>130</sup> This new suit is pending.

### *E. Summary of U.S. Implementation Efforts*

Initial efforts by the United States to implement the Indian treaty rights in the international fishery occurred in 1975. After failing to achieve a diplomatic solution, the United States unilaterally modified its approval of the 1975 Commission regulations and ordered the State of Washington to implement a special fishery for treaty Indians. The federal and state courts subsequently spent the summer issuing conflicting orders as to the authority of the State Director of Fisheries to implement such a special fishery. The net result was that state regulations authorizing special Indian treaty fisheries were in effect for a total of only nine days during the season and proved of little benefit in making any meaningful progress toward providing treaty Indians with their share of the Fraser River fishery.<sup>131</sup>

126. Memorandum Supporting Motion for Summary Judgment at 1, Record, vol. 2, doc. no. 40, *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1978).

127. *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. May 12, 1978) (order, Record, vol. 2, doc. no. 54).

128. Motion for Summary Judgment, Record, vol. 2, doc. no. 59 (filed Sept. 1, 1978), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1978).

129. *Purse Seine Vessel Owners Ass'n v. Bureau of Oceans and Int'l Environmental and Scientific Affairs*, Civ. No. C78-578V (W.D. Wash., filed Sept. 28, 1978).

130. *Id.* With this new suit, the Purse Seiners accomplished several of the objectives that they had sought and been denied in their motion for leave to file a second amended complaint in their 1977 suit, namely removal of certain defendants and the addition of others, as well as the addition of a claim for damages. Compare *id.* with *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. May 12, 1978) (order denying motion for leave to amend in all respects except one, Record, vol. 2, doc. no. 54).

131. Brief of Intervenor-Appellees at 14, *United States v. Washington*, 573 F.2d 1118 (9th Cir. 1978). The treaty Indian share of the fishery rose from 1.4% in 1974 to 3.6% of the total U.S. share of the Fraser River sockeye fishery in 1975. 1977 Preliminary Summary, *supra* note 54, at table 8. Data concerning the increase in pink salmon catches are not available.

Diplomatic efforts prior to the 1976 season yielded an understanding between the United States and Canada that allowed implementation of a limited special fishery for treaty Indians. At the urging of the treaty Indians, the federal court ordered enforcement of a special fishery that was more expansive in scope than that contemplated by the diplomatic understanding. This resulted in an increased share of the 1976 fishery for the treaty Indians,<sup>132</sup> but at the cost of Canadian bitterness threatening to hamper future cooperative efforts to implement the Indian treaty rights.

Diplomatic efforts failed to provide for Commission implementation of a special treaty Indian fishery for either the 1977 or 1978 seasons. The United States then unilaterally withdrew treaty Indians from the jurisdiction of the Commission and set up separate regulations providing for a special treaty Indian fishery. This represented a return to the separate resource management that the two nations agreed to abolish in the Sockeye Convention. The United States defended this position in the federal courts and, by enforcing its separate regulations, resisted Commission efforts to retain authority over treaty Indians. This separate management scheme provided significant increases in the treaty Indian share of the fishery for both seasons.<sup>133</sup> The potential evils of separate resource management were largely unrealized, thanks to the intensive coordination efforts of the Departments of Interior and Commerce.<sup>134</sup> However, this separate scheme contributed to the failure in the management of at least one important race of Fraser River sockeye.<sup>135</sup> Unfortunately, the surprising relative success of the operation of the separate management scheme in 1977 and 1978<sup>136</sup> may divert attention from efforts at

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132. 1977 Preliminary Summary, *supra* note 54, at table 8 (6.7% of U.S. Convention harvest).

133. Treaty Indians harvested 19.23% of the U.S. share of the Convention harvest in 1977. *Id.* In 1978, the treaty Indian share decreased slightly to 18.94%, which was still within the target of 18 to 20% set by the United States. R. Thompson, U.S. Dep't of Commerce, National Marine Fisheries Service, Summary of the 1978 Sockeye Salmon Commercial Fisheries in U.S. Waters Under the Jurisdiction of the International Pacific Salmon Fisheries Commission, at 2, 14 (Nov. 1978) (available from National Marine Fisheries Service, U.S. Dep't of Commerce). This target was based on various factors; the most significant were estimates of the amount of treaty Indian fishing gear that would participate in the Fraser River salmon fishery and the recommendation of the Regional Team of the Federal Task Force on Washington State Fisheries. *Id.* at 2.

134. See note 112 *supra*.

135. See note 116 *supra*.

136. Notes of a Telephone Interview with Kay Oberly, Attorney with U.S. Dep't of Justice, in Washington D.C., at 1 (October 4, 1978) (on file with *Washington Law Review*). The significantly increased treaty Indian opportunity afforded by the separate United States regulations. 1977 Preliminary Summary, *supra* note 54, table 1 & figure

achieving the ultimate solution: regulation of *all* fishermen consistent with their domestic rights by *one* regulatory body, the Commission.

#### IV. THE LEGAL INTERACTION OF INDIAN TREATY RIGHTS WITH A LATER TREATY

##### A. *Legal Coexistence of the Two Treaties*

The focus until now has been on the attempts to implement the Indian treaty fishing rights in the arena of an international commission created by a subsequent treaty. The assumption has been that the Indian treaty rights were not abrogated or modified by the later Sockeye Convention. This assumption warrants scrutiny.

Basic constitutional law teaches that a treaty has the same domestic legal status as an act of Congress. Congress, by the enactment of a subsequent law, may abrogate or modify a prior treaty as domestic law.<sup>137</sup> This principle is applicable to Indian treaties,<sup>138</sup> subject to procedural limitations to prevent inadvertent treaty abrogations.<sup>139</sup>

The focus is upon the intent of Congress in passing the legislation,<sup>140</sup> and an intent to abrogate or modify a prior treaty must be clearly expressed.<sup>141</sup> But the absence of words of abrogation is not de-

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1. should be commended as a giant step in the direction of meeting the United States' treaty obligations.

137. *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67 (1903); *The Head Money Cases*, 112 U.S. 580 (1884). "The last expression of sovereign will must control." *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889). In such a situation, enforcement of the international obligation, if any, must be found in diplomatic negotiations or an international tribunal.

138. *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Thomas v. Gay*, 169 U.S. 264, 270 (1898); *Ward v. Race Horse*, 163 U.S. 504, 511 (1896).

139. *Bennett County, South Dakota v. United States*, 394 F.2d 8, 11-12 (8th Cir. 1968). Indian tribes and individuals may be entitled to be compensated in cash for the loss of their treaty fishing rights through such abrogation. *Menominee Tribe v. United States*, 391 U.S. 404, 407, 413 (1968). *See also* *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955); *United States v. Tillamooks*, 329 U.S. 40, 52, 57 (1946); *Shoshone Tribe v. United States*, 299 U.S. 476, 497-98 (1937); *United States v. Creek Nation*, 295 U.S. 103 (1935).

140. *See, e.g.*, *Chew Heong v. United States*, 112 U.S. 536, 547-50 (1884).

141. *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Winnebago Tribe*, 542 F.2d 1002, 1005 (8th Cir. 1976). The law of Indian treaty abrogation was recently analyzed by leading commentators on Indian law who proposed a rule requiring express legislative action. Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975). Such a rule would permit the United States to break its solemn promises given to the Indians only after deliberate congressional consideration on the merits. *Id.* at 660-61.

cisive. When subsequent legislation is necessarily inconsistent with a prior treaty, it is deemed to abrogate the treaty to the extent of the inconsistency.<sup>142</sup> Such abrogation by implication is not favored, and the Supreme Court will harmonize a later statute with the letter and spirit of a prior treaty to the extent possible.<sup>143</sup>

Thus, the determination whether the Sockeye Convention and its domestic implementing legislation abrogated the Indian treaty fishing rights turns on ascertaining congressional intent. The Court has considered three factors as bearing on such intent: the wording, legislative history, and stated purpose of the legislation.<sup>144</sup>

There are apparently no indications from the legislative history of the Senate ratification of the Sockeye Convention<sup>145</sup> or the enactment of the Sockeye Salmon Fishery Act of 1947 and later amendments<sup>146</sup> that Congress was even aware of any impact on Indian treaty rights. The congressional purpose was to implement the provisions of the Sockeye Convention<sup>147</sup> and in no way suggested abrogating the Indian treaty rights.<sup>148</sup>

The only factor arguably supporting an abrogative intent is the statutory wording that “[i]t shall be unlawful for *any* person to engage in fishing for sockeye salmon or pink salmon in convention waters in violation of the convention or of this chapter or of any regulation of the Commission.”<sup>149</sup> The general rule is that a statute in terms applying to all persons includes Indians and their property

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142. See *Reid v. Covert*, 354 U.S. 1, 18 (1957); *Whitney v. Robertson*, 124 U.S. 190 (1888); *The Head Money Cases*, 112 U.S. 580 (1884); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1878); *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961); *Seneca Nation v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958).

143. *United States v. Payne*, 264 U.S. 446, 448 (1924). See *Menominee Tribe v. United States*, 391 U.S. 404, 412–13 (1968). This attitude in ascertaining the abrogative intent of Congress has been summed up by stating that “the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.” *Id.*

144. See *Menominee Tribe v. United States*, 391 U.S. 404, 408–13 (1968). See also *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975); *United States v. White*, 508 F.2d 453, 459 (8th Cir. 1974) (dissenting opinion).

145. See 80 CONG. REC. 9576–81 (1936); 74 CONG. REC. 392, 1010 (1930).

146. See 93 CONG. REC. 8358–60, 9284–85 (1947); H.R. REP. NO. 729, 80th Cong., 1st Sess., reprinted in [1957] U.S. CODE CONG. & AD. NEWS 1310–16.

147. The Senate ratified the Sockeye Convention with no debate. 80 CONG. REC. 9576–81 (1936). The congressional purpose to implement the provisions of the Convention can be said to echo the stated purpose of the Sockeye Convention: the protection, preservation, and extension of the dwindling Fraser River fishery. See note 17 and accompanying text *supra*.

148. See note 17 and accompanying text *supra*.

149. The Sockeye Salmon Fishery Act of 1947, 16 U.S.C. § 776a(a) (1976) (emphasis added). All wording in this legislation is in such general “any person” terms. See 16 U.S.C. §§ 776a–776f (1976).

interests.<sup>150</sup> This rule, however, does not apply when the interest sought to be affected is reserved to the Indians by treaty.<sup>151</sup> Thus, the statutory wording of the Convention implementing legislation involved here also fails to evidence the necessary abrogative intent on the part of Congress.

The issue of abrogation can best be assessed by comparing the present facts to those in *Menominee Tribe v. United States*.<sup>152</sup> In that landmark case, the Supreme Court refused to construe an act of Congress which terminated the Menominee Indian reservation as abrogating the treaty hunting and fishing rights.<sup>153</sup> It is noteworthy that the hunting and fishing rights were not even expressed in the Indian treaty, but were implied by the Court.<sup>154</sup> After refusing to allow Indian reservation termination legislation to abrogate implied Indian treaty rights, it should be clear that the Court would not allow the general Sockeye Convention legislation containing no particular Indian reference to abrogate the express Indian treaty rights reserved in the Stevens treaties.

Most likely, the lack of reference to Indian treaty fishing rights in the legislative history, purpose, and wording can be attributed to congressional ignorance of the scope of the Indian treaty rights, undefined until Judge Boldt's decision. Congress could not have intended to abrogate those rights, unaware that they existed. On the basis of the existing law of Indian treaty abrogation and the facts of the present case, it is not surprising that both the federal district court and the Ninth Circuit Court of Appeals rejected contentions that the Sockeye Convention and implementing domestic legislation preempted Indian

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150. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). This decision overruled the previous rule that "general acts of congress do not apply to Indians unless so expressed as clearly to manifest an intention to include them." *Elk v. Wilkins*, 112 U.S. 94, 100 (1884).

151. In *Federal Power Comm'n v. Tuscarora Indian Nation*, the Court was careful to note that the language of the congressional enactments involved specifically dealt with Indian property and that the "lands in question [were] not subject to any treaty between the United States and the Tuscaroras." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 123 (1960). The treaty/nontreaty distinction has been honored since *Tuscarora*. *United States v. Winnebago Tribe*, 542 F.2d 1002, 1005 (8th Cir. 1976); *United States v. Burns*, 529 F.2d 114, 117 (9th Cir. 1976); *United States v. White*, 508 F.2d 453, 455 (8th Cir. 1974).

152. 391 U.S. 404 (1968).

153. The Court refused to construe the subsequent legislation "as a backhanded way of abrogating the hunting and fishing rights of these Indians." *Id.* at 412.

154. Mr. Justice Douglas, writing for the majority, stated: "Nothing was said in the 1854 treaty about hunting and fishing rights. Yet we agree with the Court of Claims that the language 'to be held as Indian lands are held' includes the right to fish and to hunt." *Id.* at 405-06 (footnote omitted).

treaty rights to harvest Fraser River salmon.<sup>155</sup> With the coexistence of the Indian treaty rights and the Sockeye Convention established, the role of the federal courts in implementing Indian treaty rights needs to be examined.

### *B. Jurisdictional and Practical Limitations on the Federal Courts*

Any judicial efforts to implement the Indian treaty fishing rights within the framework of the Sockeye Convention will necessarily be indirect. The federal courts lack jurisdiction over an international organization and its foreign representatives.<sup>156</sup> Consequently, the courts are limited to exerting an indirect influence on the international agency through jurisdiction over either the U.S. representatives<sup>157</sup> or the federal enforcement agency charged with executing the interna-

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155. See notes 55 & 69 and accompanying text *supra*.

156. It is a rule of international law that an international organization and its officials have such immunity from the laws of a member state as is necessary for the fulfillment of the organization's purposes as they are stated in the international agreement creating it and defining its purposes and functions. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 83, 85-86 (1965). This rule has not been tested in the United States because the United Nations and most of her international organizations functioning in the United States have qualified for the broad statutory immunity provided by the International Organizations Immunities Act. 22 U.S.C. §§ 288-288f (1976). See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 83, Comment f (1965). By this statutory immunities law, agencies designated by executive order as public international organizations and persons designated by their foreign governments to serve as their representatives in such organizations are immune from domestic judicial process while performing their official duties. 22 U.S.C. §§ 288a(b), 288d(b) (1976). While other international fisheries agencies have been so designated, the International Pacific Salmon Fisheries Commission has not been so designated and is therefore not entitled to this statutory immunity. 22 U.S.C. § 288 (1976). Thus, its immunity from judicial process must rest upon the rule of international law, or upon some domestic judicial doctrine such as the "political question" doctrine discussed in Part IV-C *infra*.

These immunities have evolved from traditional concepts of diplomatic and parliamentary immunities, and from recognition of the vital importance of the independent functioning of international organizations and their personnel in order to achieve their objectives. *United States v. Melekh*, 190 F. Supp. 67, 89 (S.D.N.Y. 1960). These concepts are of importance in the case of the Commission which is a nonpolitical body which finds itself in the middle of conflicting political pressures from its member nations.

157. It is not doubted that the federal courts would have jurisdiction over the U.S. commissioners. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 91 (1965). Such jurisdiction is based upon the expectation that a representative of a state is expected to act under instructions from it. *Id.*, Comment a. The provisions of the Sockeye Convention retaining executive authority over the commissioners, see note 18 *supra*, reinforce this expectation. Statutory federal district court subject matter jurisdiction to compel an officer of the United States to perform his duty can be based on 28 U.S.C. § 1361 (1976).

tional regulations.<sup>158</sup> Furthermore, any suit directed against such federal officials must also survive claims that it is really against the United States and therefore barred by sovereign immunity.<sup>159</sup>

Compounding these jurisdictional limitations on federal court intervention, the terms of the Sockeye Convention require any Commission action to be supported by two of the three Commissioners from *each* nation.<sup>160</sup> Thus, any influence that the federal courts may exert through orders to the United States Commissioners may be thwarted by Canadian disapproval. Therefore, in any attempt to implement the Indian treaty fishery, the federal courts are effectively limited to directing the federal enforcement agency and its officers.

### C. *The "Political Question" Limitation on Justiciability*

Any pressure that the courts may exert on the federal enforcement agency and its officers is subject to limitations inherent in the doctrine of separation of powers. By article X of the Sockeye Convention, the United States agreed to enact and enforce such legislation as may be necessary to make effective the provisions of the Convention and the

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158. The National Marine Fisheries Service is the federal enforcement agency empowered to authorize officers and employees of the State of Washington to act as federal enforcement officers. No such authorization has occurred, but state officers have traditionally handled enforcement duties. *See* note 58 *supra*. The orders of the federal district court to date have been directed towards these state officers although the federal statutory mandamus jurisdiction is only available to compel federal officers to perform a duty owed to plaintiffs. In *United States v. Washington*, the State of Washington and its officers were compelled to recognize the primacy of the Indian treaty rights over state law. Jurisdiction there was not based on mandamus pursuant to 28 U.S.C. § 1361 (1976), but rather on the original jurisdiction of the federal district court in all civil actions brought by the Indians in which the matter in controversy arises under the Constitution, laws, or treaties of the United States. *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974); 28 U.S.C. § 1362 (1976).

159. 28 U.S.C. § 1361 (1976) has been construed to confer jurisdiction only to compel the performance of a ministerial as opposed to discretionary act of a federal officer. *United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969); *Prairie Band v. Udall*, 355 F.2d 364, 367 (10th Cir. 1966). The courts have recognized that the enactment of section 1361 was not intended by Congress to make any substantial inroads on sovereign immunity and thus was not intended to allow suits against the United States. *See White v. Administrator of General Services Adm'n*, 343 F.2d 444 (9th Cir. 1965); *Switzerland v. Udall*, 337 F.2d 56 (4th Cir. 1964); *Smith v. United States*, 333 F.2d 70 (10th Cir. 1964). Thus, sovereign immunity remains a bar to actions against governmental officials which are in reality suits against the United States unless the official can be shown to have acted in excess of his authority or in violation of the Constitution in refusing to perform the duty sought to be compelled. *Dugan v. Rank*, 372 U.S. 609 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *CCCO-Western Region v. Fellows*, 359 F. Supp. 644 (N.D. Cal. 1972).

160. Sockeye Convention, *supra* note 6, at 1358.

orders and regulations adopted by the Commission.<sup>161</sup> Therefore, whenever a court compels enforcement activities inconsistent with the Commission orders or regulations, it is compelling a violation of the treaty obligation of the United States. Since the conduct of foreign affairs is committed exclusively to the political branches of the government by the Constitution,<sup>162</sup> any such action would constitute an intrusion into the exclusive political domain in violation of the constitutional scheme of separation of powers.<sup>163</sup> It is in this area of foreign relations that the "political question" doctrine has been most extensively invoked.<sup>164</sup>

The "political question" doctrine recognizes that there are indeed some rights guaranteed by the Constitution for the violation of which the courts will not give redress.<sup>165</sup> The doctrine was comprehensively analyzed in *Baker v. Carr*.<sup>166</sup> In discussing its application in the field of foreign relations, the Court rejected the notion that all questions touching foreign relations were "political questions."<sup>167</sup> The Court indicated that in foreign relations cases the doctrine requires a discriminating analysis of the particular question posed in terms of the history of its management by the political branches, of its susceptibility to ju-

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161. *Id.* at 1359. Article VIII reiterates the enforcement obligations. *Id.*

162. See U.S. CONST. art. I, § 8, cl. 3, art. II, § 2, cl. 2; *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). See also *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 320 (1936); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 45-50 (1972); W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 77-78 (1908).

163. Although there has been some question about the relative roles of the executive and legislative branches in disregarding our treaty obligations and committing other violations of international law, the courts have recognized that it is not for the judiciary to prevent another branch from terminating or breaching a treaty. *Chae Chan Ding v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 602-03 (1889); L. HENKIN, *supra* note 162, at 167-71.

164. L. HENKIN, *supra* note 162, at 210. See *Baker v. Carr*, 369 U.S. 186, 211-13 (1962). But see Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597, 612 (1976) (suggesting there is no special "political question" doctrine of judicial abstention in foreign affairs cases).

165. *Baker v. Carr*, 179 F. Supp. 824, 828 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962). The Supreme Court did not reject the "political question" doctrine when it stepped into what had formerly been the exclusively political domain of legislative apportionment in *Baker v. Carr*; it merely rejected the application of it to that case. The Court stressed the need for a case-by-case analysis, rejecting the lower court's labeling of any case involving apportionment as a "political question." 369 U.S. at 208-11, 216. The Court recognized "the impossibility of resolution by any semantic cataloguing." *Id.* at 217.

166. 369 U.S. 186 (1962).

167. *Id.* at 211.

dicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.<sup>168</sup>

The issue here is whether the "political question" doctrine precludes the federal courts from protecting Indian treaty rights by compelling either the U.S. Commissioners or enforcement officials to act in possible derogation of the treaty obligations owed Canada pursuant to the Sockeye Convention.<sup>169</sup> Application of the "political question" doctrine to potential judicial implementation of the treaty fishing rights in the international fishery will show that the courts may act, but only in a manner consistent with the directives from the political branches.

### 1. *The historical commitment of treaty rights and obligations*

In the conduct of foreign relations, the power to act is distributed between the executive and legislative branches, some belonging to the President, some to Congress, and some to the President and the Senate.<sup>170</sup> Historically, the political branches have managed all policy regarding treaty obligations and it is they, not the courts, who authorize activities that affect those obligations.<sup>171</sup> Thus, it is a long-established practice that the courts do not take actions that constitute treaty violations without prior authorization from the political branches.

### 2. *Susceptibility to judicial handling*

By ordering enforcement activities contrary to Commission regulations, a court would be engaging in the regulation of the fishery. An understanding of the complexities and uncertainties inherent in regulating this fishery<sup>172</sup> compels the conclusion that the courts are inca-

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168. *Id.*

169. Rather than evaluating each specific issue that the district court has faced and reacted to during its attempted implementation of the treaty rights, this comment limits the inquiry to this general question which underlies the specific issues raised.

170. L. HENKIN, *supra* note 162, at 32. Some of the powers can be exercised by either the President or the Congress and some require the joint authority of both. *Id.* The President, either personally or through his appointed officers, has the power to assert violations of international law rights, stake out new claims for the United States, waive rights arising from a breach of international law, disregard international law obligations, and commit other violations of international law. *Id.* at 39, 48-49. Congress has the power to effectively breach treaties by passing inconsistent subsequent legislation. See note 137 and accompanying text *supra*.

171. See L. HENKIN, *supra* note 162, at 170-71.

172. By requiring enforcement officers to enforce broader regulations for Indians than promulgated by the Commission, the court is itself regulating the fishery. The diffi-

pable of this scientifically oriented regulation. Furthermore, the courts do not possess the data acquisition and handling capabilities necessary to monitor the size and racial composition of the returning runs of salmon. It is on such monitoring that effective regulation depends.<sup>173</sup> Even assuming that a court had the necessary data on which to act in ordering enforcement activities, the dilatory nature of the judicial process would prove incompatible with the prompt adjustments frequently necessary for sound regulation of the fishery.<sup>174</sup> It should be clear that the management of this fishery is not susceptible to judicial handling but rather requires scientific expertise and the ability to apply this expertise with a minimum of delay.

### 3. *Possible consequences of judicial action*

The potential consequences of judicial action are two-fold: an effect on the resource and an effect on Canadian-American foreign relations. Without the necessary data acquisition and handling capabilities, a court would be unable to monitor the effects of its orders on the resource, and would also lack the scientific basis for sound regulatory orders. Compelling action contrary to Commission regulations may breach both the express terms and purpose of the Sockeye Convention.<sup>175</sup> When the judicial action is contrary to the Convention or diplomatic agreements, it may also have a detrimental impact on future relations with Canada, at least in the area of fisheries.<sup>176</sup>

Of course, if a court is merely following directions from the political branches, the responsibility for any breach lies where it constitutionally belongs, in the political branches. To date, the federal court involved in this foreign affairs problem has respected the executive

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culties of regulating the Fraser River salmon fishery have been discussed earlier. See Part II-B-2 *supra*. Although at present the impact of such separate Indian regulation would be minimal because of the relatively small and inefficient Indian fishery, see note 60 *supra*, such impact can be expected to increase as a result of the federally funded buy-back program which will result in a proportionately increased Indian fishery. See generally note 187 *infra*.

173. See note 45 and accompanying text *supra*.

174. See note 29 and accompanying text *supra*.

175. Articles VIII and X of the Sockeye Convention require the United States to pass and enforce appropriate legislation to effectuate the Commission regulations. Sockeye Convention, *supra* note 6, at 1359. Compelling enforcement activities inconsistent with the Commission regulations would be a literal breach of these express terms. A court's inability to effectively regulate this complex fishery and weigh the impact of its actions would be inconsistent with the stated conservation purpose of the Sockeye Convention. Compare Part IV-C-2 *supra* with note 17 and accompanying text *supra*.

176. See note 109, *supra*. See generally Part III-B *supra*.

prerogative with at least one exception.<sup>177</sup>

#### 4. *Propriety of judicial restraint in the preservation of cooperation*

The "political question" doctrine suggests the propriety of the court's refraining from compelling enforcement activities that would amount to Sockeye Convention violations, unless such violations are authorized by the political branches entrusted with making, terminating, and violating our treaties. Although it has been stated that the doctrine would not be used to avoid adjudicating a claim that a foreign policy action denies individual liberty under the Bill of Rights,<sup>178</sup> this limitation should not be extended to a situation, such as this, in which judicial interference poses an unauthorized threat to foreign relations and also to the management of the resource.

The welfare of the resource itself must not be neglected in the legal scramble to allocate it. Cooperation has been responsible for the success to date in protecting and enhancing the salmon resource. Such a complex fishery can be expected to flourish only with the assurance of continued cooperation. Regardless of what the judiciary might do, it is incapable of resolving the differences between the United States and Canada as to the status of native Indian treaty rights and their role in this fishery. This is an international problem which requires an international solution. Therefore, the focus must be redirected toward the executive branch.

### V. SOME EXECUTIVE BRANCH ALTERNATIVES

The Indian treaty rights arose from the solemn promises of our ancestors. To quote Justice Black, "Great nations, like great men, should keep their word."<sup>179</sup> Since Congress has not chosen to break these promises by passing abrogative legislation, these treaty rights remain intact and must be recognized and implemented.<sup>180</sup> In the set-

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177. See generally Part III *supra*. The one definite exception occurred during the 1976 season. The federal court issued orders that were inconsistent with the diplomatic agreement and understandings negotiated by the executive branch. See Part III-B *supra*.

178. L. HENKIN, *supra* note 162, at 215-16. The case for judicial intervention would be strongest when the government in the exercise of its foreign affairs power directly abridges constitutional guarantees. That is not the case when, as here, treaty rights are involved.

179. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

180. With the lack of State of Washington cooperation blocking implementation of

ting of an international fishery, the executive branch is the body responsible for discharging the duty of the United States as trustee of these Indian treaty rights. Some executive branch alternatives need to be explored.

### A. *A Continued Special Indian Fishery Unrecognized by Commission Regulations—An Inefficient and Risky Solution*

Diplomatic efforts to date have failed to result in the direct implementation of Indian treaty rights within the jurisdiction and expertise of the Commission.<sup>181</sup> This has prompted unilateral action by the United States, which has drawn Commission protest,<sup>182</sup> and the return to a conservation-deficient regulatory scheme that the Sockeye Convention sought to eliminate.<sup>183</sup>

Without the coordination of the two management authorities, such a scheme can only prove detrimental to the resource.<sup>184</sup> The necessary

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the Indian treaty rights, the Ninth Circuit has stated, "Until the state decides to cooperate, the district court will have to continue protecting the tribes' rights. The state and the fishers hold the key to lifting federal judicial interference with their fish-management prerogatives." *Puget Sound Gillnetters Ass'n v. United States Dist. Court*, 573 F.2d 1123, 1133 (9th Cir. 1978). In the context of the international fishery, the Canadian government also holds the key.

181. See notes 78, 109–10 and accompanying text *supra*. Negotiations prior to the 1976 season resulted in a diplomatic agreement allowing a limited implementation of the Indian treaty rights. See notes 91–94 and accompanying text *supra*. This diplomatic progress was nullified by the strained judicial interpretation of the agreement by the federal district court. See note 109 and accompanying text *supra*.

Diplomatic progress has been thwarted more recently by the apparent refusal of the Canadian Commissioners to implement a proposal agreed upon by the two countries. Defendant's Brief in Opposition to a Motion for a Preliminary Injunction at 3–4, Record, vol. 1, doc. no. 5 (filed June 28, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77–471M (W.D. Wash. 1977). Thus, the most recent failure to directly implement the treaty Indian fishery through the Commission regulations can be attributed to the Canadian Commissioners' failure to heed the commands of their government, and to the Canadian government's failure to use the control over its Commissioners reserved by the Sockeye Convention, see note 18 *supra*, to implement its desires.

182. See notes 80–83, 100–01 and accompanying text *supra*.

183. See notes 111–14 and accompanying text *supra*. See also notes 13–16 and accompanying text *supra*.

184. See note 13 *supra*. The necessary coordination would require parallel harvesting philosophies, *id.*, run prediction and determination techniques, see note 41 *supra*, as well as a prompt and free flow of catch data between the agencies, see note 45 *supra*. Coordination is especially important when, as here, one of the agencies does not have access to the terminal areas (the Fraser River system) where the escapement of the individual races can be monitored and the regulations modified accordingly. Even with

coordination has not been demonstrated, nor can it be expected to occur when the Canadians, through either their Commissioners or the Commission staff, oppose implementation of U.S. Indian treaty fishing rights. The failure of the Commission to include an expanded treaty Indian fishery in its regulatory thinking will inevitably result in the overharvest of some races,<sup>185</sup> some of which are already endangered. Such a threat to the resource exists whether the special treaty Indian fishery unrecognized by the Commission is the product of a separate management scheme unilaterally imposed by the United States, or of the lack of enforcement against treaty Indians of Commission regulations designed to include them.<sup>186</sup>

Without the power to compel Commission recognition of the treaty Indian fishery in its regulations, the United States must look to the Canadian government for a viable solution that respects the treaty rights as well as the conservation purposes of the Sockeye Convention.

*B. International Agreement Within the Framework of the Sockeye Convention*

Management of the fishery under the Sockeye Convention has proved too successful to discard because of differences in domestic al-

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intensive coordination efforts by one of the regulatory bodies, the refusal of the other body to include in its regulatory thinking the expected harvest of those not within its regulations will lead to management failures. See note 186 *infra*. Furthermore, two bodies doing what one alone could accomplish represents inefficient utilization of human and technical resources.

185. Had the Commission anticipated the harvest of over 100,000 sockeye on the treaty Indians' "extra days," they theoretically could have reduced fishing time for the all-citizen fishery and guarded against overharvest of the Early Stuart run of Fraser River sockeye. See notes 116 *supra*, 186 *infra*.

186. The Commission regulations provide closed fishing periods to allow the desired escapement from the peak of each racial run. See note 41 *supra*. By not accounting in its escapement determination for the harvest of any treaty Indian fishery operating during closed periods, the special treaty Indian fishery would be harvesting from the optimum escapement. This would either result in overharvesting or in Commission emergency orders to close additional periods to compensate for the harvest of fish it intended to escape. Even such emergency orders would not provide a result consistent with optimum management because they would obtain the escapement deficiency from the latter part of the racial run, which is less suitable for propagation. *Id.* In practice, the granting to treaty Indians of an "extra day" each week has forced the Commission to guard against overharvest by issuing emergency orders making additional closures of the U.S. fishery beyond those anticipated by the Commission regulations. This has resulted in a reduction of fishing time for the all-citizen fishery. Affidavit of Paul L. Anderson & Commission News Release No. 9 dated July 15, 1977, Record, vol. 2, doc. nos. 30 & 31 (filed Aug. 10, 1977), *Purse Seine Vessel Owners Ass'n v. United States Dep't of State*, Civ. No. C77-471M (W.D. Wash. 1977).

location policies and lack of defined mechanisms for allowing each nation to pursue its own policy free from the influence of the other nation. The problem could be mitigated by an international agreement setting limits on the number of licenses issued for participation in the fishery.

Such a solution would surely be politically unpopular in the established but overdeveloped fishing industry. Even so, it would be a long overdue measure from the standpoint of conservation.<sup>187</sup> It would also reduce the number of days each week that the fishery would need to be closed to fishing,<sup>188</sup> a result that is economically sound because it would represent greater utilization of the more limited number of vessels.<sup>189</sup> The large imbalance between the treaty Indian and the all-

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187. The Commission has recognized for over 20 years the detrimental impact that an overdeveloped fishery has on the quality of its management and hence on the resource. [1956] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 22 (1957); [1955] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 12, 30 (1956). It has appealed to the national governments to bring the intensity of the fishing pressure to a "rational standard." [1961] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 16 (1962).

The governments have been slow in responding. The United States has recently provided federal support to a recently enacted State of Washington gear-reduction program which authorizes the Department of Fisheries to purchase fishing vessels, gear, licenses, and permits. WASH. REV. CODE § 75.28.500-.540 (1976 & Supp. 1977). This buy-back program depends on federal funds. *Id.* § 75.28.535 (Supp. 1977). It operates in conjunction with the state moratorium on issuance of new commercial fishing licenses. *Id.* § 75.28.450 (1976 & Supp. 1977). The legislature initiated these programs because it realized that the overdeveloped fishery resulted in great economic waste and prohibited conservation programs from achieving their goals. *Id.* §§ 75.28.450 (1976 & Supp. 1977), .500 (Supp. 1977).

Under the buy-back statute, vessels purchased by the state are auctioned off subject to the condition that they not be used for commercial fishing in the State of Washington. *Id.* § 75.28.520 (1976). Treaty Indians petitioned the federal court for a determination of whether treaty Indian purchases of these auctioned-off boats would be subject to the use limitations imposed by the state. The federal court decided that treaty Indians were not subject to such conditions. *United States v. Washington*, Civ. No. 9213 (W.D. Wash., Dec. 22, 1976) (order, Record, vol. 59, doc. no. 2715). The state subsequently suspended the buy-back program because of management shortcomings, but the program is expected to resume. *See State Audit Hits Boat Buy-back*, *Seattle Times*, Nov. 4, 1978, § E, at 6.

188. *See generally* [1955] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 12 (1956).

189. The economic waste of an overdeveloped fishery is apparent by viewing the hundreds of fishing vessels that are confined to port five days a week or more by the regulations and emergency orders necessary to obtain the required escapement. The Commission has considered the economic plight of the individual fishermen in the overdeveloped fishery, but its concern is limited by the Convention to the resource and not to such political issues. [1961] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 16 (1962). The State of Washington has recognized the "great economic waste" resulting from the "over-abundance of commercial salmon fishing gear in our state waters." WASH. REV. CODE § 75.28.450 (1976). The state has taken measures to reduce the amount of com-

citizen fleets, which causes the need for an expanded treaty Indian fishery,<sup>190</sup> would also be reduced. By taking the further step of appropriating funds to replace the less efficient Indian fleet with the more efficient boats that would be idled by the overall fleet reduction, the United States would go far toward fulfilling its obligation to provide the treaty Indians with an opportunity to harvest their share.

By adopting this politically delicate course of action, the United States would be acting consistently with its stated intention to honor both treaties<sup>191</sup> and would do so without requiring the Canadians to expressly recognize special Indian treaty rights, a sensitive issue in Canadian policy toward native Canadian Indians.<sup>192</sup> The net result

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mercial gear. See note 187 *supra*. See also Suffia, *Who is Right?*, Seattle Times, Apr. 1, 1978, § A, at 10.

190. See notes 60-62 and accompanying text *supra*.

191. See note 64 *supra*.

192. Canadian reluctance to cooperate in making Commission regulations that specifically recognize United States Indian treaty rights apparently stems from fear that their native Indians will demand similar rights. Oral Deposition of Thor C. Tollefson, United States Commissioner, at 29 (filed June 11, 1974), *United States v. Washington*, Civ. No. 9213 (W.D. Wash. 1974).

In general, the narrower scope of Canadian Indian fishing rights in the Fraser River fishery is attributable to both the lack of Indian treaties and the exercise of legislative authority over Indians by Parliament. The province of British Columbia is primarily a nontreaty area with few very limited exceptions. See Sanders, *Indian Hunting and Fishing Rights*, 38 SASK. L. REV. 45, 49, 52 (1974). Thus, the source of any special fishing rights or privileges generally is Parliament, which has exclusive legislative authority over "Indians, and Lands reserved for the Indians." British North American Act, 1867, 30 & 31 Vict., c. 3, § 91(24), reproduced in Appendices to CAN. REV. STAT. at 215 (1970). In exercising this authority, Parliament has provided that "[s]ubject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province." Indian Act, CAN. REV. STAT. c. I-6, § 88 (1970).

Because British Columbia is primarily a nontreaty area, its Indians are subject to the laws of general application in force in British Columbia, which include Commission regulations implemented domestically by the Governor in Council. Pacific Salmon Fisheries Convention Act, CAN. REV. STAT. c. F-14, § 4 (1970). But it should be recalled that Commission regulations apply only to Convention waters and the greater part of the Fraser River system is not classified among Convention waters. See note 19 and accompanying text *supra*. Therefore, only fishing by Canadian Indians in Canadian Convention waters is subject to Commission regulations.

Fishing in Canadian non-convention waters is subject to other laws of general application in force in British Columbia. The only other major national law dealing with fishing is the Fisheries Act, CAN. REV. STAT. c. F-14 (1970), which applies to Indians. Sanders, *supra* at 47. Certain of the regulations under the Fisheries Act make special provisions for Indians. There are separate regulations for each province, and the regulations are in fact drafted by the province involved and not by Parliament. *Id.* British Columbia regulations permit Indians to fish for themselves and their families, subject to restrictions that may be written into the Indian's license. *Id.* Consequently, Canadian Indians fishing for Fraser River salmon generally enjoy special rights only in

would be improved management of the resource, increased economic efficiency in the harvest, and an expanded treaty Indian opportunity to share in the harvest. These positive results, however, must be balanced against the domestic problems inherent in the sudden loss of employment of thousands of non-Indian fishermen.

It should be pointed out that although Canadian agreement in such a fleet reduction program would be desirable for the resource, the United States could still achieve greater treaty Indian opportunities through reduction in only the United States fleet. This is so because the Commission promulgates separate regulations for the American and Canadian fisheries; and American reduction would simply result in fewer closed periods for only the American fishery.

### *C. Renegotiation of the Sockeye Convention—Modernization to Meet Today's Problems*

Difficulty in implementing the Indian treaty rights stems from the fact that rights of such scope were not contemplated at the time of the Sockeye Convention.<sup>193</sup> Consequently, no provision was secured by the United States to facilitate implementation. Renegotiation of the Sockeye Convention could provide an opportunity to remedy this and other problems that were not contemplated originally.

In renegotiating, the Commission's scientific and investigative powers should be preserved or expanded. This is where the Commission

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the non-Convention waters and only to the extent of a subsistence fishery. See [1953] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 19 (1954).

This Canadian Indian fishery along the Fraser River has increased to the point of causing Commission concern. [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 20 (1978). This concern derives from the fact that the Commission regulates Convention waters to provide a gross escapement into the river that, after the Canadian Indian fishery, will result in the necessary escapement. [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 18 (1975). When this fishery is not kept in check by provincial officials and exceeds Commission estimates, it cuts directly into the necessary escapement. In 1977 this Canadian Indian fishery harvested 246,528 sockeye, compared to the total U.S. treaty Indian catch of 320,728 sockeye. Compare [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 20 (1978) with 1977 Preliminary Summary, *supra* note 54, table 2.

193. Neither the Senate ratification of the Sockeye Convention nor Congress' enactment of implementing legislation indicates an awareness of an impact on Indian treaty rights. See notes 132–35 and accompanying text *supra*. In all probability, the Indian treaty rights were thought of as only exempting treaty Indians from state licensing fees and not from state regulations. See generally *Tulee v. Washington*, 315 U.S. 681, 684 (1942); *United States v. Winans*, 198 U.S. 371 (1905). Thus, it is unlikely that Congress considered that it would be necessary to allow treaty Indians to fish during periods otherwise closed to fishing in order to secure their treaty share.

has made its greatest impact and it must be the basis for any sound regulation of the fishery.<sup>194</sup> In the present Convention scheme, the Commission has consistently denied responsibility for making the domestic allocation of each nation's share of the fishery.<sup>195</sup> However, the exercise of its regulatory powers with the required approval of both nations has prevented the United States from achieving its own desired domestic allocations through the Commission. One plausible solution would be to supplant the Commission's regulatory powers with a more limited power to set the domestic harvest quotas.<sup>196</sup> The Commission could continue to engage in investigation and data acquisition to provide the necessary basis for setting quotas of harvestable fish for each race.<sup>197</sup> By continually evaluating daily catch data, the Commission could adjust its quotas for variations in the run sizes, racial compositions, run timing, and other factors. This much at least would not be a departure from present practice.<sup>198</sup>

Allowing each nation to regulate the allocation of its share of the quotas would seem to be a radical departure from the Sockeye Convention; however, such independent allocation is parallel to the present operation of the Commission,<sup>199</sup> and consistent with the desired retention of sovereignty over each nation's share of the fishery.<sup>200</sup> This suggested scheme would result in a unified management authority dictating research, investigation, and harvesting policies while

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194. See note 35 and accompanying text *supra*. See also [1950] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 3 (1951).

195. See, e.g., [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 13 (1978); [1975] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 4 (1976); [1974] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 6 (1975).

196. In setting the quotas of harvestable fish from each race, the Commission could also designate the periods during which these fish should be taken and thereby insure obtaining the escapement from the most prolific spawners, which tend to be those fish coming from the peak of the run. See note 41 *supra*.

197. See generally J. CRUTCHFIELD & G. PONTECORVO, *supra* note 10, at 143. See also note 41 *supra*.

198. See note 45 *supra*.

199. The present scheme provides control over the allocation through the regulations proposed by the Commission which must be supported by the Commissioners of each nation as well as by the national governments. But the requirement that all Commission action be supported by two of the three Commissioners from each nation provides each nation with a veto over regulations desired by the other for domestic allocation. The proposed quota scheme would retain the same input for each nation into its regulations and would eliminate the veto power arising from the Commission's procedural restraints in promulgating regulations.

200. See notes 31-32 and accompanying text *supra*. The elimination of a veto power over the other nation's domestic allocation would guarantee sovereignty by assuring that the domestic allocation of each nation's treaty share of the resource would be totally controlled by that nation.

leaving each nation with exclusive authority over its own regulations and enforcement. This would provide the necessary flexibility for each nation to allocate its share of the resource within the dictates of its respective domestic law, while retaining the major benefits of a unified management authority.

A better solution could be achieved by more specifically directing the Commission's use of its regulatory powers. The two nations could agree to make their domestic allocations part of the Commission's responsibilities.<sup>201</sup> Furthermore, *all* fishery groups harvesting Fraser River salmon could be brought within the Commission's authority by the expansion of the Convention waters to include the Fraser River itself.<sup>202</sup> This would provide the Commission with direct control of all elements of the fishery, desirable from a viewpoint of conservation, and with specific directions for the exercise of that control which would result in satisfying the domestic requirements of both nations.

These proposals represent only some of the possible solutions. There are undoubtedly many others that would be consistent with conservation principles and the domestic legal constraints of each nation. Renegotiation would provide the flexibility to consider many solutions, thereby making consensus possible.

## VI. CONCLUSION

The Fraser River salmon fishery is a vitally important food and economic resource whose future depends on sound management. The international nature of the salmon migrations makes such management dependent upon future cooperation between the United States and Canada. This cooperation has been and may continue to be threatened by the steadfast assertion of their differing policies with respect to their native Indians.<sup>203</sup> Neither nation should be allowed to dictate the other's policy, yet the differing policies cannot be allowed to threaten the resource management.

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201. The Commission would be much better qualified than the courts to quantify the share of fish to which the treaty Indians are guaranteed access by Judge Boldt's decision. The Commission staff would be able to identify what particular migrations of fish pass through traditional Indian fishing sites. This would allow for a more refined definition of the Indian treaty rights. *See* note 56 *supra*.

202. This would provide the Commission with control over the Canadian Indian subsistence fishery, *see* note 192 *supra*, and the large amounts of illegal fishing that occur along the hundreds of miles of Fraser River. This direct control over two of the sources of management problems would facilitate sound management. *See generally* [1977] INT'L PAC. SALMON FISHERIES COMM'N ANN. REP. 15-20 (1978).

203. The policies of Canada with respect to its native people are briefly discussed in note 192 *supra*.

To find a solution to this highly volatile problem, the beneficiaries of this resource, the two nations and their citizens, must look beyond the judicial process. The courts are incapable of providing a viable solution. They are limited jurisdictionally, technically, and by the "political question" doctrine. Their voice is confined to an echo of the branch of government charged with maintaining foreign relations and international cooperation.

The Indian treaty rights do exist. They have not been abrogated by Congress and are unlikely to meet such fate. However, their implementation in this international fishery must not be hastened at the expense of Canadian alienation. Unlike the judicial expediency sought in the school desegregation cases after *Brown v. Board of Education*,<sup>204</sup> the prompt implementation of these heretofore unrecognized treaty fishing rights in a manner consistent with sound resource management depends upon international as well as domestic action. The governments must cooperate in taking the necessary steps to arrive at a solution that will guarantee the future of this resource without compromising the independence of their respective Indian policies. The solutions proposed in this comment may not be definitive, but they do indicate the range of possibilities wherein an acceptable solution can be found.

*Kenneth E. Petty*

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204. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). After issuing this substantive decision, the Court heard arguments on the proper remedy to implement the unpopular decision and decided that the district courts' equitable powers were appropriate to the local nature of each school district's problems. *Brown v. Board of Educ.*, 349 U.S. 294 (1955). The Court instructed the lower courts to "make a prompt and reasonable start toward full compliance" with the decision. *Id.* at 300. The Court contemplated district court action "with all deliberate speed" to admit the students who had previously been denied admission on the basis of race. *Id.* at 301.