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ARTICLES

THE STATES VERSUS INDIAN OFF-RESERVATION FISHING: A UNITED STATES SUPREME COURT ERROR†

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Pacific Northwest Indian tribes signed treaties with the United States in the mid-1850's which guaranteed them the permanent right to fish at their usual and accustomed fishing sites off the reservations. The Indians believe these treaties mean that those states which did not exist in 1855 have no power to regulate Indian off-reservation fishing under any circumstances. State officials, on the other hand, have consistently argued that Indian off-reservation fishing is subject to the same state regulation as non-Indian fishing. The United States Supreme Court has basically accepted the states' position, holding that states can regulate off-reservation fishing when "necessary for conservation." In 1896, 1905 and again in 1942 the Court, in dictum, adopted that proposition.[1] The error was compounded in 1968 in *Puyallup Tribe v. Department of Game*.[2] The question of whether the states have power to regulate off-reservation fishing was relevant in

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1. Ward v. Race Horse, 163 U.S. 504 (1896); United States v. Winans, 198 U.S. 371 (1905); Tulee v. Washington, 315 U.S. 681 (1942).

2. 391 U.S. 392 (1968).

Puyallup, but the Court, as in previous cases, simply reiterated its earlier assumption without analysis of why the states have such power.[3]

No valid basis for the existence of such state power can be found. The Constitution of the United States provides that treaties are the "supreme law of the land." Because agreements with the Indians are treaties,[4] the Indians are not subject to state regulation unless the treaty so provides or unless Congress so legislates. The treaties with the Indians do not provide for state regulation and Congress has never authorized such regulation. Therefore, the Supreme Court should clearly hold that the states have no power to regulate Indian off-reservation fishing unless and until Congress expressly delegates the power to do so. This problem will be examined in detail.

If the Court nevertheless continues to hold that the states have the power to regulate off-reservation fishing, it will have started down a precarious and trouble-strewn path which must be followed to its end. The Court must create standards to guide the states in the exercise of their power. Some constraints have already been imposed by the courts. However, these standards are notoriously vague,[5] and the states have capitalized on this vagueness to create regulatory patterns for salmon fishing which consistently deny the Indians substantial fishing opportunities. Moreover, the vagueness of the case law standards portends a continuing series of clashes between the Indians and

3. In State v. Moses, 79 Wn.2d 104, 483 P.2d 832 (1971), the Washington Supreme Court was confronted again with off-reservation fishing rights and noted the lack of judicial analysis of the critical "in common" phrase in the treaties. *Id.* at 108, 483 P.2d at 834. The "in common" language is discussed in text accompanying notes 22-29, *infra.*

4. That the agreements with the Indians are treaties is too well supported by Supreme Court decisions to be questioned. It is sometimes said, however, that these agreements are over 100 years old and are now so ancient they can legitimately be ignored. If this is true one might argue for the discarding of the United States Constitution, the Oregon Treaty of 1846 (setting the boundary between the United States and Canada) or the land grants to the railroads in the mid-1800's.

5. Vagueness poses difficult problems for Indian fishermen who are, under our legal system, presumed to know the law. That is an awesome task, as will be demonstrated below. It is attested to by Washington Governor Daniel J. Evans' support of H.B. 1004, 1st Sess. [Wash. 1971] and H.B. 1005, 1st Sess. [Wash. 1971]. These bills were designed to stop further arrests of Indians and confiscation of fishing gear where the fisherman contends, in good faith, that he is fishing under a treaty right. A moratorium would have been declared, presumably until such time as the courts or Congress clarified the law. The bills died in committee.

In State v. Moses, 79 Wn.2d 104, 483 P.2d 832 (1971), Justice Hale, writing for the majority, noted the legal confusion concerning Indian treaties, especially concerning fishing rights:

> Evanescent as the morning mists on the shimmering waters of Puget Sound is the law of Indian treaties. One moment it is there, soon to vanish in a swirl of conflict-

the states, each seeking to carve out the broadest possible claim in this legal thicket. But the creation of adequate standards will not be an easy task. It is not too late for the Court to correct its earlier errors and remove itself from a field better left to Congress.

Before examining the treaties, the relevant treaty law, the states' power to regulate, and the lack of adequate regulatory standards, it is important to understand the factual background of the problem. The origin of the Indians' right to fish off the reservation does not rest in the treaties. Its basis is the Indian practice, running from time immemorial, of fishing in these locations as a means of livelihood. As "manifest destiny" brought waves of white settlers westward, the Indians were forced to give up much of the land they had formerly occupied, hunted, and fished. In the late 1850's the United States signed treaties with the tribes of the Pacific Northwest in order to define the rights of this country and its citizens and the rights of the Indians. These treaties were "not a grant of right to the Indians, but a grant of a right from them—a reservation of those not granted."[6] One oft-forgotten aspect of these treaties is that they define the rights and obligations of the United States and its citizens vis-à-vis the Indians, as well as the rights of the Indians themselves.

Indians, insisting on recognition of their rights, have been challenging present interpretations of the treaties.[7] Until the late 1950's,

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ing, diverging and incomprehensible precedents. Decisions intended to declare the meaning and to describe the effect and operation of Indian treaties tend in time to generate a system of judicial vapor trails which obscure more often than elucidate the treaties under consideration. This is another Indian fishing case that leaves unanswered more questions than it resolves.

Id. at 104, 483 P.2d at 832. Justice Finley, although dissenting, agreed that "the law of Indian treaties has suffered from a most disjointed and enigmatic development in published opinions of the courts." *Id.* at 119, 483 P.2d at 840.

6. United States v. Winans, 198 U.S. 371, 381 (1905).

7. It is true that much has happened in the field of Indian related law in the years since Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Therein Chief Justice Marshall described the Indian tribes as "domestic dependent nations." *Id.* at 17. Some of the highlights of this history provide an important background to the fishing rights issues.

In 1835 President Jackson ordered the Indians to move to the West because he felt that they could not survive living near non-Indians. In ordering them west, he said:

> A country west of Missouri and Arkansas has been assigned to them, into which the white settlements are not to be pushed. No political communities can be formed in that extensive region, except those which are established by the Indians themselves or by the United States for them and with their concurrence. A barrier has thus been raised for their protection against the encroachment of our citizens, and guarding the Indians as far as possible from those evils which have brought them to their present condition. . . .

H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 260-61 (7th ed. 1963). In 1871 Con-

Indians tried only occasionally to fish at their off-reservation treaty fishing sites, since the personal and financial costs of arrest, trial, confiscation of fishing gear, and jail confinement were too high. However, in recent years their insistence on both cultural and legal independence has resulted in a series of demonstrations and lawsuits designed to put an end to the gradual erosion of their way of life. One consequence is that Indians are now fishing in a variety of renewed, off-reservation locations where they had not fished since the last century, and the states, after reexamining the treaties, are consenting to, or acquiescing in, this action.

Perhaps one cause of the trouble can be attributed to the many years of relative acceptance by the Indians of state regulation of their off-reservation fishing rights. During this time the states, rightly or wrongly, have developed an integrated system of fishery management which must now be modified if the Indians' claims are to be accommodated. But defenses of laches and estoppel are not very persuasive in light of the economic plight of the Indians and the cost of competent legal counsel to protect Indian rights.

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gress provided that no more treaties should be signed with Indian tribes. Then, in 1881, President Arthur formally announced a termination policy by proposing the General Allotment Act (Dawes Act), 25 U.S.C. § 331-32, 348 (1970), by which Indian reservations would be divided up and deeded to individual Indians, so they "would be persuaded to sever their tribal relations and engage at once in agricultural pursuits." *See* H. COMMAGER, *supra* at 556. The Allotment Act system, enacted in 1887, failed miserably. *See* Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 WASH. L. REV. 709 (1971). The Indians were not instructed in agriculture and were not interested in farming. Indian landholdings were reduced from 138,000,000 acres in 1887 to 48,000,000 by 1934. *Hearings on S. 2755 Before the Senate Committee on Indian Affairs*, 73d Cong., 2d Sess., Ser. 2, pt. 1, at 17 (1934). The Indian Reorganization Act of 1934 recognized this failure and stopped further allotments; it also provided for Indian self-government by empowering tribes, if they wished, to form corporate self-governments to deal with the white man's banks, corporations and state and local governments. This Act resulted in a partial revival of Indian sovereignty and independence. Then in 1953 House Concurrent Resolution 108 was adopted by Congress, again formally declaring a termination policy. The Resolution was followed in the same year by Public Law 280, 18 U.S.C. § 1162; 28 U.S.C. § 1360 (1970). Public Law 280 authorized various states to assume jurisdiction over certain reservations. The Klamath and Menominee reservations were terminated within the next few years and various other reservations are still being considered for dissolution. The termination policy came under increasing criticism in the 1960's. Federal policy again changed in the late 1960's, culminating in the formal announcement by President Nixon in July, 1970, opposing the termination policy, and the introduction in Congress by Senator Jackson and others of Senate Concurrent Resolution 26 designed to expressly repeal the 1953 termination resolution. In the meantime Congress enacted, in 1968, the Indian Civil Rights Act, 25 U.S.C.A. § 1302-03 (1970), which attempted to extend the protections of the Bill of Rights to Indians in their tribal affairs. The 1968 Act also authorizes the states and the Indian tribes to agree on "retrocession," *i.e.*, the removing of state jurisdiction over Indian reservations. Many reservations are now negotiating with the states for retrocession.

Accommodating the states' fishery management programs with Indian claims will be especially difficult due to the changes in conditions affecting the fisheries which have taken place during the 120 years since the treaties were signed. Dams have been built, rivers have been polluted, and the number of commercial and sports fishermen has drastically increased.[8] These activities have substantially reduced, and in some cases have destroyed, the salmon runs which the Indians earlier had fished. Moreover, the number of salmon today is considerably less than it was 120 years ago,[9] although precise comparative data is unavailable since no one kept accurate records in 1855. At present Indians only catch approximately five percent of the salmon harvested in Oregon and Washington.[10] The non-Indian harvest in 1855 probably did not exceed three to five percent of the harvestable fish.

Even more important than size is the location of today's non-Indian fishery. Both commercial and sports fishing occurs in the ocean, the Straits of Juan de Fuca, and Puget Sound, *before* the fish get to the traditional Indian fishing sites on their way to their spawning grounds. When the salmon arrive at the Indian fishing locations along the streams and rivers, few are left, and they are needed for spawning. Claims that the Indians can go elsewhere and fish with non-Indians fail to recognize that the Indians' economic plight denies them the technological capacity to compete with non-Indian fishermen at other locations.

Against this general background, it is now necessary to examine the treaties guaranteeing Indian fishing rights and the way in which those treaties have been interpreted by the courts.

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8. In 1855 no records were kept of the number of fishermen. General history records suggest that the number of non-Indian fishermen was no more than a few dozen. Recent data shows the following increase in commercial fishing licenses in Washington and the Puget Sound area:

Type of Fishing Gear	*1935*	*1969*
Purse Seine	215	384
Reef Net	20	63
Gill Net	1014	1466

WASHINGTON DEPARTMENT OF FISHERIES, 1969 FISHERIES STATISTICAL REPORT 87 (1969). The sports fishery was also insignificant in 1855. Between 1946 and 1969 the sports fishing harvest of Chinook salmon increased from 84,400 fish to 267,100 fish. The harvest of Coho (Silver) salmon increased from 109,700 to 497,500. *Id.* at 91.

9. The Washington canned salmon pack for the period 1900 to 1915 averaged close to 1,000,000 forty-eight pound cans. For the period 1955 through 1969, the average was approximately 300,000 cans. *Id.* at 13.

10. *Id.* at 13, 22, 71.

I. THE TREATIES

The validity of the Indians' claims of exemption from state regulation depends initially on the interpretation of the language of the fishing rights treaties. Do these treaties, by their own terms, provide for eventual state regulation of off-reservation fishing? The answer can be found only through a careful examination of the treaties themselves and the circumstances surrounding their signing.

The basic question concerns what the signers of the treaty meant when they wrote: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory."[11] This language appeared in the Medicine Creek Treaty,[12] ceding to the United States the territory of the Nisquallys and Puyallups. Virtually identical language was included in the Treaty of Point Elliot,[13] the Yakima Treaty,[14] and other 1855 treaties.[15] The critical phrase is "in common with all citizens of the territory." It is remarkable that, as important as this language is to the Indians' claim, no legal scholar has yet attempted to explain the Indians' position.

The "in common" language is often cited as the source of the states' right to regulate Indian fishing. One popular version is that it guaranteed to the Indians a right to fish which they otherwise would not have had; that is, it somehow raised them to a status of equality with the settlers, giving them the same rights as the settlers had and no more.[16] Unfortunately the "in common" language has never been given the

11. Treaty with the Nisquallys (Medicine Creek Treaty), December 26, 1854, art. III, 10 Stat. 1132 (1855).

12. *Id.*

13. Treaty with the Duwamish Indians, January 22, 1855, art. V, 12 Stat. 927 (1863). The Indians now living on the Muckleshoot Reservation were also party to these treaties and are entitled to the fishing rights defined in them, although the Muckleshoot Reservation was created by Executive Order rather than Treaty.

14. Treaty with the Yakimas, June 9, 1855, art. III, para. 2, 12 Stat. 951 (1863).

15. Treaty with Tribes of the Middle Oregon, June 25, 1855, art. I, 12 Stat. 963 (1863); Treaty with the Walla Walla, June 9, 1855, art. I, 12 Stat. 945 (1855); Treaty with the Nez Perces, June 11, 1855, art. III, 12 Stat. 957 (1863).

16. In United States v. Oregon (SoHappy v. Smith), 302 F. Supp. 899 (D. Ore. 1969), the state of Oregon contended that this language meant that the state must deny the Indians the right to fish at a given location unless it also allowed non-Indians to fish there with the same gear, on the ground that the equal protection clause of the Constitution prohibited special treatment for Indians. The trial court rejected the theory as "fantastic." *Id.* (oral opinion of Judge Belloni). The court said that the treaties clearly permitted the Indians to fish at different locations and with different gear than the non-Indians, and that such provisions are clearly constitutional. In other words, the

careful consideration by the courts that it deserves.[17] It cannot be rationally interpreted merely to put Indians on an equal basis with settlers.

It must be remembered that these treaties were not grants from the United States to the Indians. They were mutual agreements between two parties, in which the Indians granted certain rights to the settlers and the settlers guaranteed certain rights to the Indians. Read in this light, and in light of the circumstances of the time, the meaning of the "in common" language becomes clear. By this phrase the Indians granted to the non-Indians the right to fish with them at the traditional sites. Therefore, "in common with" means "as well as to." Although this language does not prevent non-Indians through their own government from prohibiting themselves from fishing at the traditional sites,[18] it does prohibit the Indians from thereafter denying non-Indians the right to fish there. As the Washington Supreme Court said in *State v. Satiacum:* "[W]e believe that the phrase 'in common with [all] citizens to the Territory' merely granted the white settlers and their heirs and/or grantees a right to fish at these places with the Indians."[19]

This construction is reinforced by recalling the situation that existed in 1855 when the treaties were signed. At that time it was thought that timber, fish, clean water, and even land existed in such abundance that no one need be concerned about eventual depletion. The salmon runs were so large, and the number of fishermen so small, that only a small fraction of the harvestable fish were taken by anyone —Indians or otherwise. The state of Washington was not created until 1889. The creation of a state, and the ensuing population explosion,

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states have power to regulate non-Indians differently than Indians because non-Indians have no treaty rights vis-à-vis their own government. The constitutionality of such special regulations is carefully analyzed in Comment, *State Power and the Indian Treaty Right to Fish,* 59 CALIF. L. REV. 485, 498 (1971).

17. The Washington Supreme Court in State v. Moses, 79 Wn.2d 104, 108, 483 P.2d 832, 834 (1971), still felt constrained to say: "Surprisingly little judicial attention ... has been given to this rather standard treaty language."

18. Non-Indians sometimes argue that if the Indians can rely on the treaties to avoid state regulation then so can the non-Indians, because the United States signed the treaties on their behalf. *See* note 16, *supra.* But this does not follow. The non-Indians have empowered their governments to regulate their fishing, and those governments are restrained in that regulation only by their own constitutions and laws. A state regulation prohibiting non-Indian fishing at a given location, whether an Indian fishing site or not, does not violate the treaty rights of the non-Indians. It has nothing to do with those treaty rights.

19. 50 Wn.2d 513, 523, 314 P.2d 400, 406 (1957).

technological development, dam construction, river pollution, and extensive non-Indian fishing requiring comprehensive salmon management were certainly not foreseen. Hydroelectric power had not been conceived of. No salmon canning occurred anywhere on the West Coast in 1855 or for many years thereafter.[20] As the Washington court said in *Satiacum,* there is no reason to believe the Indians "anticipated the future sovereign to limit them."[21]

These circumstances have an obvious bearing upon the construction of the treaty language. They also aid in an understanding of the purpose of the treaties, and in *Winters v. United States*[22] and *Arizona v. California*[23] the Court made it clear that Indian treaties should be construed to effect the purposes for which they were signed. *Winters* arose out of an Indian claim to water rights on a reservation in Montana, where the treaty establishing the reservation *made no mention of water at all.* When the Indians agreed to settle on a specific arid desert tract and give up their roaming, hunting, and foraging, they understandably assumed that water would be available for irrigation. If they got only desert land without water then the treaty was a fraud. The Court held that the Indians were entitled to all the water necessary to irrigate the reservation, state laws and state-created water rights to the contrary notwithstanding. Such a right was construed to be an implied term of the treaty. This doctrine was affirmed in *Arizona v. California,* where the Court held that the Indians were entitled to an amount of water measured not by the number of Indians living on the reservation, but by the amount of irrigable reservation land.

What, then, was the purpose of the 1855 treaties? Both Indians and settlers realized that the Indians' freedom to move about across the land was coming to an end. The pressures of "civilization" from the immigrating settlers and from the Anglo-Saxon system of land ownership required that the Indians live on specific tracts of land. The Indians knew this. Both sides realized, too, that in order to provide the Indians with a continuing means of livelihood—clearly one of the main purposes of the treaties—the land reserved to the Indians had to be so located that they could continue their principal means of liveli-

20. R. VAN CLEVE & R. JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHEASTERN PACIFIC 15 (1963).
21. *Satiacum,* 50 Wn.2d 513, 522, 314 P.2d 400, 405 (1957).
22. 207 U.S. 564 (1908).
23. 373 U.S. 546 (1963).

hood, fishing. The United States Supreme Court, at a time much closer to the treaty date than the present, recognized that "[t]he right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."[24] Because the reservations set aside were not large enough to include all of the Indians' traditional fishing sites, the treaties guaranteed the Indians the right to continue taking fish off their newly established reservations.

Winters requires that this purpose of providing the Indians a continuing means of livelihood by guaranteeing their off-reservation fishing rights must be given effect in the construction of the treaties. The case for the Indians is even stronger here than in *Winters* because the Indian fishing rights, unlike the water rights, were explicitly preserved in the treaties. It is unrealistic to argue that these off-reservation sites were somehow to be less secure than the on-reservation sites, the latter being concededly beyond state regulation. The treaties neither stated nor implied such a rule.[25]

Under this construction of the treaties, a clear conflict exists between the states' regulatory schemes and the Indians' treaty rights. The Constitution requires the state regulations to yield.

II. TREATY LAW

Under the United States Constitution the states should have no power to regulate Indian off-reservation, treaty-protected fishing. That document provides that the "Constitution . . . of the United States . . . and all Treaties . . . made, under the Authority of the

24. United States v. Winans, 198 U.S. 371, 381 (1905).

25. It is important to remember that the treaties with the Pacific Northwest Indians were written in the English language, a language unfamiliar to the Indians. The treaties were explained to the Indians in the Chinook jargon, a limited trade language of some 300 words which in no sense could be considered adequate to explain the precise meaning of the agreements to the Indians. Thus the Indians had to rely upon the good faith of the white treaty drafters to write into the treaties the rights the Indians were told, and assumed, they were getting. The courts have often recognized the need to construe treaties with the Indians as the Indians fairly understood them. *See* AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 23 (1970); United States v. Winans, 198 U.S. 371, 380-81 (1905), Menominee Tribe v. United States, 391 U.S. 404, 406 (1968).

United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."[26] A state has no power to amend the United States Constitution, nor can it amend or abrogate a treaty entered into between this nation and some other nation,[27] or with an Indian tribe.[28] Where state law comes into conflict with a treaty, the state law must give way.[29] The treaties establishing Indian off-reservation fishing rights are self-executing, requiring no implementation by federal legislation.[30] Treaties can be renegotiated by the original parties.[31] Also, Congress may unilaterally abrogate either part or all of a treaty without the consent of the other party.[32] Congress has not done so, however, with regard to Indian off-reservation fishing rights.

The basic doctrine with respect to the conflict between state laws and treaties was established in *Missouri v. Holland*.[33] In 1916 the United States entered into a treaty with Great Britain[34] for the protection and management of migratory waterfowl. The State of Missouri challenged a federal statute designed to implement that treaty. The Supreme Court rejected the state's challenge, saying that the treaty overrode state law: "Valid treaties of course are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States."[35] Underlying the Court's rationale was the premise that: "To allow the legislation of the subordinate political entities [states] to negate treaties would contra-

26. U.S. CONST. art. VI.
27. Missouri v. Holland, 252 U.S. 416 (1920).
28. In Worcester v. Georgia, 31 U.S. 515 (1832) the Supreme Court declared void a Georgia statute that attempted to change a treaty right of the Cherokee Nation. Chief Justice Marshall held that the state was powerless to enact laws affecting the treaty-created reservation, saying: "The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States." *Id.* at 560-61.
29. Missouri v. Holland, 252 U.S. 416 (1920).
30. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).
31. *See* Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
32. It is generally conceded that the United States has plenary power to abrogate Indian treaties. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). But this says no more than is true of treaties with France, Great Britain, or any other nation. The Supreme Court has, however, recognized the important status of treaties and has said that if Congress wishes to abrogate one it must do so explicitly; a treaty right will not be affected by implication. Menominee v. United States, 391 U.S. 404 (1968).
33. 252 U.S. 416 (1920).
34. Convention with Great Britain, August 16, 1916, 39 Stat. 1702, T. S. No. 628.
35. *Missouri v. Holland*, 252 U.S. at 434 (1920).

dict the idea of national sovereignty expressive of the purposes of union."[36]

In *Menominee v. United States*,[37] the Menominee Indians sued in the Court of Claims for the loss of their hunting and fishing rights, which the Wisconsin Supreme Court, in an earlier case,[38] had held had been abrogated by the Menominee Termination Act of 1954.[39] The Termination Act had not mentioned these rights. Public Law 280, of 1953, which the Wisconsin court said should be read *in pari materia* with the Termination Act, had provided that: "Nothing in this . . . [Act] shall deprive any Indian or Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."[40] The Court rejected the rationale of the Wisconsin Supreme Court decision: "We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate these rights exists . . . 'the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.' "[41] If the Court meant what it said, then neither Oregon nor Washington can regulate Indian fishing rights unless Congress clearly empowers them to do so. It has not done that. In fact, the principal statement by Congress on the question of fishing rights, Public Law 280, has just the opposite effect.[42]

The recent Michigan Supreme Court decision in *People v. Jondreau*[43] affirms this principle. The court held that Michigan fishing regulations do not apply to a Chippewa Indian fishing in Keweenaw Bay on Lake Superior and that it was immaterial whether the waters

36. W. GOULD, AN INTRODUCTION TO INTERNATIONAL LAW 331 (1957).
37. 391 U.S. 404 (1968).
38. State v. Sanapaw, 21 Wis.2d 377, 124 N.W.2d 41 (1963). Wisconsin prosecuted three Menominees for violating state fishing regulations and the Wisconsin Supreme Court held that the State regulations were valid, as the hunting and fishing rights had been abrogated by the Menominee Termination Act.
39. 25 U.S.C. §§ 891-902 (1970).
40. 18 U.S.C. § 1162 (1970).
41. *Menominee*, 391 U.S. at 412-13, *citing* Pigeon River v. Cox, 291 U.S. 138, 160 (1934).
42. The Senate also considered the question of off-reservation fishing rights in 1964, in S.J. Res. 170, 88th Cong., 2d Sess. (1964). That resolution would have explicitly recognized the existence of such rights and made them subject to state regulation. S.J. Res. 171, 88th Cong., 2d Sess. (1964), introduced at the same time, would have extinguished those rights by purchase. After hearings, both resolutions died in Committee.
43. 384 Mich. 539, 185 N.W.2d 375 (1971).

in question were on the reservation or off. The right to fish was expressly reserved in the Chippewa treaty. The court rejected the argument that state regulation was justified because of the necessity of managing the fishery, quoting with approval from an Idaho opinion:[44]

> We are not here concerned with the wisdom of the provisions of the treaty under present conditions nor with the advisability of imposing upon the Indians certain regulatory obligations in the interest of conserving wild life; that is for the Federal Government, the affected tribe, and perhaps the State of Idaho to resolve under appropriate negotiations; our concern here is only with reference to protecting the rights of the Indians which they reserved under the Treaty of 1855 to hunt upon open and unclaimed land without limitation, restriction or burden.

The Washington Supreme Court came to the same conclusion in *State v. Satiacum,* saying that the off-reservation fishing right of the Indians was not subject to "state regulation, so long as the right shall not have been abrogated by the United States."[45]

Under these well-established rules, the view of the United States Supreme Court that states can regulate Indian off-reservation fishing because of the necessity for conservation is not tenable. First, the treaties cannot be rationally interpreted to contain such an exception. But even if such an exception is held to exist, state regulation is *not* necessary for conservation. The argument to the contrary rests upon the fallacy that if the states cannot regulate the Indians then no one can, and the salmon will be overfished and wiped out. The fact is that if Indian fishing does pose a real threat to the salmon then Congress has authority to regulate this fishing. Federal legislation could establish appropriate standards and encourage cooperation between the Indians and the states. The National Marine Fisheries Service is a federal agency with sufficient expertise in the field of salmon management to implement any federal legislation. The Bureau of Indian Affairs might also assist in such an enterprise. This solution not only would be consistent with the treaties and the law of the land but also would have an important practical advantage. One can reasonably assume that both the states and the Indians would like some clear

44. *Jondreau,* 185 N.W.2d at 380, *citing* State v. Arthur, 74 Idaho 251, 264, 261 P.2d 135, 142 (1953).
45. 50 Wn.2d 513, 524, 314 P.2d 400, 406 (1957).

definition of their rights in this area. Rational negotiations between the groups are not feasible now because of the uncertainty of the rights involved and the fear of conceding too much. Once these rights are known more productive negotiation should be possible.

Nevertheless, the Court has permitted the states to regulate off-reservation fishing when "necessary for conservation." The next part of this article traces the development of this doctrine.

III. HOW TO CREATE A BODY OF LAW BY ACCIDENT

The legal relation of off-reservation Indian fishing rights to state regulation is contained in four United States Supreme Court cases,[46] two Ninth Circuit decisions,[47] one federal district court case,[48] and five state supreme court decisions.[49] The four Supreme Court cases present a tragic tale of a court that has accidentally, while deciding other issues, created a body of law authorizing state regulation of Indian fishing rights. None of the opinions has ever explored the basis or implications of this dicta-based rule. Contributing to this state of affairs is the fact that the United States, as guardian and trustee of the Indians' rights, conceded the Indians' best position without argument in the one recent case where the issue might have been directly presented.[50] The discussion of these cases is organized chronologically to demonstrate the accidental approach by which the Court has arrived at a rule that the states could regulate Indian off-reservation fishing rights, a rule which has generated confusion among lower federal and state courts.

The earliest case is *Ward v. Race Horse*.[51] Race Horse, a Bannock Indian living on a reservation in Idaho, sought a writ of habeas corpus in a federal court after his arrest in Wyoming for killing seven elk in that

46. Ward v. Race Horse, 163 U.S. 504 (1896); United States v. Winans, 198 U.S. 371 (1905); Tulee v. Washington, 315 U.S. 681 (1942); and Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

47. Makah Tribe v. Schoettler, 192 F.2d 224 (9th Cir. 1951); and Maison v. Confederated Tribes, 314 F.2d 169 (9th Cir. 1963).

48. United States v. Oregon (SoHappy v. Smith), 302 F.Supp. 899 (D. Ore. 1969).

49. State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953); State v. Satiacum, 50 Wn.2d 513, 314 P.2d 400 (1957); State v. McCoy, 63 Wn.2d 421, 387 P.2d 942 (1963); People v. Jondreau, 384 Mich. 539, 185 N.W.2d 375 (1971); State v. Moses, 79 Wn.2d 104, 483 P.2d 832 (1971).

50. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968). *See* notes 76-78 and accompanying text, *infra*.

51. 163 U.S. 504 (1896).

state in violation of Wyoming game laws. He claimed he was hunting under an 1869 treaty which provided that "[the Indians] shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the Whites and Indians on the borders of the hunting districts."[52] Wyoming was admitted to the Union in 1890. The Court reversed a lower court decision that had granted habeas corpus, on the ground that the treaty right had expired and that Race Horse was subject to the Wyoming game laws. The Court stated that the treaty clause was intended, by its own terms, to create only a temporary right, existing only so long as hunting districts were maintained on unoccupied federal lands. The hunting districts were terminated when Wyoming became a state, and this automatically ended the treaty right.

The *Race Horse* case is often cited for the proposition that state game laws apply to treaty-based off-reservation Indian hunting and fishing rights. It does not stand for that principle, however, because according to the Court, the treaty hunting right terminated upon statehood. Since it no longer existed, the state was not regulating a treaty right and the Indians were subject to the same state regulations as others.

United States v. Winans[53] was a suit by the United States on behalf of certain Yakima Indians, and by the Indians themselves, to enjoin Winans and other white landowners from obstructing Indians fishing at their usual and accustomed fishing sites. Defendants claimed that the Indians' right continued only so long as the land was owned by the federal government. This argument was rejected. The Court held the Indians had an easement, even over land patented earlier by the United States to private owners, if this land included the Indians' usual and accustomed fishing site. State regulation of Indian fishing was not involved in the case. It was, however, mentioned somewhat casually where the court said:[54]

> [S]urely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State

52. Treaty with the Shoshonees and Bannocks, July 3, 1868, art. IV, 15 Stat. 673 (1868).
53. 198 U.S. 371 (1905).
54. *Id.* at 384.

> unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

Since *Winans* did not involve an attempt by the state to regulate Indian fishing rights, no question of the effect of a treaty on the states' regulatory power was presented. The solitary sentence alluding to the state's "regulation of the right" was made without benefit of argument and without any indication that the Court had considered the implications of such a rule.

In *Tulee v. Washington*[55] the Court held that the state could not require an Indian exercising his off-reservation treaty fishing rights to purchase a license. In dicta, the Court volunteered:[56]

> [W]hile the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.

The states have argued that this controversial language put the Indians under state regulation on an equal basis with other citizens. Indians have argued that the language was dicta at best, that the Court held the state licensing requirement invalid as to the Indians, and that a careful reading of the entire opinion suggests the conclusion that the Indians cannot be regulated as other citizens. The *Tulee* decision, the Indians argue, must be limited to its facts. The Idaho Supreme Court in 1953 took this position in concluding that Idaho could not regulate the Indian fishing right.[57] Four of eight justices of the Washington Supreme Court interpreted *Tulee* the same way in 1957.[58]

One thing is clear. The statement in *Tulee* that Indian fishing can be regulated by the state "as . . . necessary for the conservation of fish" was dictum. Furthermore, this statement was not founded upon a careful examination of the law governing treaty interpretation, nor upon an analysis of the meaning of the "in common" language.[59] Al-

55. 315 U.S. 681 (1942).
56. *Id.* at 684.
57. State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953). *See* notes 63-67 and accompanying text, *infra*.
58. State v. Satiacum, 50 Wn.2d 513, 314 P.2d 400 (1957). *See* notes 68-69 and accompanying text, *infra*.
59. *See* notes 27-29 and accompanying text, *supra*.

though the language cannot be lightly dismissed, it cannot be said to be determinative of the issue.

Between *Tulee,* in 1942, and *Puyallup Tribe v. Department of Game,* in 1968,[60] the Court did not address itself to the question of off-reservation Indian fishing rights. Other courts did. The Idaho Supreme Court, in *State v. Arthur,*[61] carefully analyzed the law and held that an Indian who hunted under an off-reservation treaty right was not subject to Idaho hunting laws. The court said the hunting right could not be abrogated except by "the consent of . . . [the] Indians or by positive act on the part of the federal government extinguishing the right. . . ."[62] It noted that under *Tulee* the State of Washington could not charge the Indians a license fee for the exercise of off-reservation fishing rights and stated that a $2.00 license fee would be "less onerous upon the affected Indian tribes than the enactment of legislation under the claimed police power limiting the killing of game or prohibiting fishing in certain areas or doing either during certain times of the year."[63] To allow the state to exercise such power "would mean that at certain times of the year his otherwise ancient right recognized by the treaty and never extinguished would for all practical purposes be extinguished. If the position of the State is sustained the assurance given by Governor Stevens . . . is no right at all. . . . This was never intended under the broad, fair, and liberal construction of the treaty."[64]

In *State v. Satiacum*[65] four justices of the Washington Supreme Court accepted the reasoning of the *Arthur* court and held that the criminal charges of fishing in violation of state law which had been filed against Robert Satiacum, a Puyallup Indian, were properly dismissed because the Treaty of Medicine Creek of 1855 is the supreme law of the land and cannot be modified or abrogated by state law. The court held that the treaty rights can only be changed by act of Congress or by voluntary abandonment by the Puyallup Indians.[66]

60. 391 U.S. 392 (1968).
61. State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953).
62. *Id.,* 261 P.2d at 142.
63. *Id.*
64. *Id.,* 261 P.2d at 143.
65. 50 Wn.2d 513, 314 P.2d 400 (1957).
66. The court discussed at length prior decisions such as *Tulee, Winans,* and *Arthur,* and noted that the state's argument to the effect that the "in common" phrase made the Indians subject to state regulations like other citizens had been "rejected by the courts." *Satiacum,* 50 Wn.2d at 522, 314 P.2d at 405.

Justice Donworth, in three opinions, consistently argued against the power of the state

The Court of Appeals for the Ninth Circuit has twice dealt with the question of Indian off-reservation fishing rights. In *Makah Tribe v. Schoettler,*[67] the Makah tribe brought suit to enjoin the Director of the Washington State Department of Fisheries from enforcing regulations against the Makahs which would prevent fishing at their accustomed grounds on the Hoko River. The Court of Appeals reversed a federal district court decision dismissing the suit. Citing *Tulee,* the court held that the state could regulate the Indian fishery as necessary for conservation, but that the state had not sustained its burden of proving that the regulations in question were necessary for conservation.[68] In *Maison v. Confederated Tribes,*[69] the Indians brought suit against the Oregon Game Commission and state law enforcement officials seeking an injunction and a declaratory judgment that Oregon laws regulating salmon and steelhead fishing violated their treaty rights. The Court of Appeals affirmed a trial court decision which had issued the injunction after the state failed to carry the burden of proving that its regulations were necessary for conservation. The court said that such regulations had to be "indispensable" and not merely "reasonable" for conservation, pointing out that although reasonableness was all that was required when the state established regulations for non-Indians the test for regulating Indians was more stringent.[70] Neither *Schoettler* nor *Maison* gave any consideration to whether the Indians' treaty right was completely beyond state regulation.

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to regulate Indian fishing, maintaining that under the federal constitution, the treaty was the supreme law of the land and would continue to be "until: (1) the treaty is modified or abrogated by Congress, or (2) the treaty is voluntarily abandoned by the Puyallup tribe, or (3) the supreme court of the United States reverses or modifies our decision in this case." State v. Satiacum, 50 Wn.2d 513, 529, 314 P.2d 400, 410 (1957) (with the majority); State v. McCoy, 63 Wn.2d 421, 441, 387 P.2d 942, 954 (1963) (dissenting); and Department of Game v. Puyallup Tribe, Inc., 70 Wn.2d 245, 263, 422 P.2d 754, 765 (1967) (dissenting).

Four additional justices concurred in the dismissal in *Satiacum* on the ground that although the state could regulate Indian off-reservation fishing as "necessary for conservation" it had failed to demonstrate such necessity. 50 Wn.2d at 530, 314 P.2d at 410.

67. 192 F.2d 224 (9th Cir. 1951).

68. The state's argument that "because the state of Washington has the regulatory power to close the Hoko to citizens of the United States having no treaty rights to fish there, it has the same power to close the stream to the Makahs having such a treaty" was explicitly rejected. *Id.* at 226. *See* notes 16-18 and accompanying text, *supra.* The court noted that "[t]he Supreme Court has repeatedly held that the Indian treaty fishing provisions accord to them rights against state interference which do not exist for other citizens." *Id.*

69. 314 F.2d 169 (9th Cir. 1963).

70. *Id.* at 174. This "indispensable" test was later rejected by the United States Supreme Court in Puyallup Tribe v. Department of Game, 391 U.S. 392, 401 (1968).

In *State v. McCoy*,[71] five justices of the Washington Supreme Court held that a Swinomish Indian, fishing at a usual and accustomed fishing ground, was subject to state regulations. The trial court had applied the *Arthur* rule, saying that such Indian fishing was not subject to state regulation. In reversing the trial court, the majority, in an opinion astonishing for its misconceptions about treaty law, Indians, and history, said that the treaty with the Indians was simply a "real estate transaction"[72] where "[t]he United States was buying and the Indians were selling the aboriginal right of use and occupancy to the Washington Territory,"[73] and that all the Indians reserved with respect to off-reservation fishing rights was an easement to and from their traditional sites. Because Washington was admitted to the Union on "equal footing"[74] with the original states, the court said the state had the same inherent sovereign power as the original states to regulate fish and game harvesting unless there was a "clear and unequivocal expression of Congressional will by Congress," otherwise.[75]

Puyallup Tribe v. Department of Game[76] was decided by the United States Supreme Court in 1968.[77] The Washington Department of Game brought suit for declaratory relief and for an injunction against Puyallup and Nisqually Indians to prevent them from fishing in the Nisqually and Puyallup rivers in violation of state regulations. Although many briefs were filed raising the question of the right of the

71. 63 Wn.2d 421, 387 P.2d 942 (1963).
72. *Id.* at 435, 387 P.2d at 951.
73. *Id.* at 436, 387 P.2d at 951.
74. The "equal footing" doctrine played a small part in the Court's reasoning in Ward v. Race Horse, 163 U.S. 504 (1896). It has been rejected by the Court in subsequent cases regarding Indians and is now considered a dead doctrine. *See* United States v. Winans, 198 U.S. 371 (1905); Johnson v. Geralds, 234 U.S. 442 (1914); Donnelly v. United States, 228 U.S. 243 (1913); Coyle v. Smith, 211 U.S. 559 (1911).
75. Two Justices, Hill and Ott, concurred separately on the ground that the Indian fishing right extended only to the use of traditional fishing gear and the defendant had used a modern 660-foot nylon gill net on the Skagit River. Otherwise these two justices did not believe the Indian fishing right could be regulated by the state.
Judge Donworth dissented on the ground that the state could not regulate the treaty right at all and that if regulation was needed "the solution of the problem lies with the Congress." *McCoy*, 63 Wn.2d at 456, 387 P.2d at 964 (dissenting opinion). Judge Donworth debunked the majority's reliance on Metlakatla Community v. Egan, 369 U.S. 45 (1962), and Village of Kake v. Egan, 369 U.S. 60 (1962), both of which involved Indian challenges to state fishing laws. Judge Donworth pointed out that no treaty was involved in either case and that the issues there revolved around the construction of federal statutes.
76. 391 U.S. 392 (1968).
77. *See* text accompanying note 30, *supra*.

state to regulate the Indians, they were for the most part concerned with the degree rather than the right of regulation.[78] In particular, the brief of the Department of Justice, signed by the Solicitor General, the Assistant Attorney General, and others,[79] flatly rejected the position that Indian off-reservation fishing is not subject to state regulation and urged adoption of the *Schoettler-Maison* rule that state regulations are proper where necessary for conservation.[80] This brief is especially significant because it expressed the position of the United States as trustee for the Indians, a position that was reflected directly in the opinion of the court. It presumably demonstrates the judgment of the United States in its fiduciary capacity as trustee for the Indians on the question of Indian fishing rights. But no serious attention is given in the brief or in the opinion to the argument that the Indian fishing right is outside state regulation unless Congress explicitly so provides. The brief simply assumed that the Indians can be regulated by the states. The reason given was that making "accommodations" with the Indians' rights is "burdensome for some of the states involved." To assist in carrying this burden the United States argued that the[81]

> Secretary of Interior, by recent regulations, has undertaken to assume a large part of the burden. Thus, it is contemplated that the Secretary, in cooperation with the relevant State authorities and the tribal government, will promulgate appropriate restrictions on off-reservation fishing by Indians and will furnish identification to those entitled to exercise treaty rights.

It is unfortunate, indeed, that the United States, in this all important brief conceded one of the Indians' most important points without argument and misled the Court into thinking the Department of Interior would soon assume the "burden" of regulating Indian fishing when very shortly thereafter that department dropped its proposed regulations.

78. Briefs were filed not only by attorneys for the parties, but also by the states of Oregon and Idaho (in support of the Washington Game Department position), and by the Association on American Indian Affairs, the National Congress of American Indians, the Department of Justice of the United States, and the Confederated Bands and Tribes of the Yakima Nation.

79. Brief for the United States as Amicus Curiae, Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

80. *Id.* at 18. *See* notes 71-75 and accompanying text, *supra.*

81. *Id.* at 10.

On the basis of these representations and arguments the Court affirmed the Washington Supreme Court decision holding that the states could regulate the Indians, and sent the case back to the trial court to determine the reasonableness of the particular regulations. The opinion is short; the key paragraph is set out here:[82]

> The treaty right is in terms the right to fish "at all usual and accustomed places. We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places" *in the "usual and accustomed" manner.* But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, as superseded by §201(b) of the Nationality Act of 1940, 8 U.S.C. § 1401(a)(2). But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

In the above passage, as in the balance of the opinion, the Court gives only passing notice to the argument that the Indian treaty right is beyond state regulation. In effect it backed into the opposite position by asserting that it "saw no reason" why the states could not regulate the Indians. But "no reason" is given for this view.

The decision in *Puyallup* nonetheless stands as a direct holding that Indian off-reservation fishing is subject to state regulation. The necessity for either a reversal of this holding or the creation of adequate standards to guide the states in the exercise of their power is made clear by the controversies which have arisen since *Puyallup*.

82. *Puyallup Tribe*, 391 U.S. at 398.

IV. RECENT CASES AND THE JUDICIAL QUAGMIRE

What has happened since the *Puyallup* decision is not surprising. Confusion and anger among state officials and the Indians are the rule of the day. The Court's decisions have put both sides in an impossible position. The states are told that while they cannot charge Indians license fees for fishing at their usual and accustomed fishing sites they can otherwise regulate the Indians, but only when "necessary for conservation," and only if the regulations meet appropriate standards and do "not discriminate against the Indians."[83] Neither the "appropriate standards" nor the guides for non-discrimination are revealed. Nor is the phrase "necessary for conservation" defined. The Indians, on the other hand, believe they should not be regulated at all by the states and, with the states, are equally confused by the other conflicting and ambiguous rulings handed down by the courts. It is understandable that the Indians and the states still fight. Neither side is sure of its legal status. Neither wishes to give any ground under these circumstances.

United States v. Oregon (SoHappy v. Smith)[84] is indicative of the continuing confusion over Indian fishing rights. In separate actions, the United States sued on behalf of several Indian tribes and several individual Indians to enjoin enforcement of Oregon fishing laws which allegedly violated Indian treaty rights on the Columbia River. The complaints alleged that state regulations denied the Indians an effective fishery at their usual and accustomed fishing grounds and that, although the regulations permitted non-Indians to make substantial catches of salmon downstream, they denied the Indians a fair share of the fish at their traditional upriver fishing sites.

The state of Oregon contended that Indian fishing rights were not entitled to separate recognition or protection under state law and that under the *Puyallup* decision the state could not, even if it wanted to, allow Indians to fish at different times and places than non-Indians.[85]

83. If this standard were applied literally then virtually all non-Indian commercial and sports fishing would be stopped in Puget Sound and the Straits of Juan de Fuca. The goal of "conservation" could best be achieved by harvesting salmon at or near the mouths of their spawning streams—where they are all sorted out. *See* notes 112-113 and accompanying text, *infra*.

84. 302 F.Supp. 899 (D. Ore. 1969).

85. *Id.* at 907.

Judge Belloni rejected these contentions, holding that three limitations constrained state regulation of Indian fishing: (1) the regulations must be "necessary for the conservation of the fish,"[86] (2) the state must "not discriminate against the Indians,"[87] and (3) the regulations must meet appropriate standards.[88]

Judge Belloni noted that many state regulations were designed to achieve goals other than conservation. He observed that while such other goals were permissible under state and federal constitutional law,[89] when the state is "regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them."[90] The *only* state objective that can be used as a basis for regulating the Indians' right is that concerned with "conservation," *i.e.,* the "continued existence of the fish resource."[91] This limitation on state power applies to the gear used by the Indians, as well as to the times when and places where they can fish. Judge Belloni also rejected the state's contention that the Indians could not fish at different times and with different gear than non-Indians, noting that the source of the Indians' right was different than that of the non-Indians.[92]

The Judge held that Oregon could no longer "discriminate against the treaty Indians as it [had] been doing."[93] He noted the institutional discrimination in the state of Oregon, pointing out that:[94]

> Oregon recognizes sports fishermen and commercial fishermen and seems to attempt to make an equitable division between the two. But the state seems to have ignored the rights of the Indians who acquired a treaty right to fish at their historic off-reservation fishing stations. If Oregon intends to maintain a separate status of commercial and sports fisheries it is obvious a third must be added, the Indian fishery.

86. *Id.* at 908.
87. *Id.* at 910.
88. The court held that the state had failed to give the Indians adequate notice of proposed state regulations under the Administrative Procedures Act and thus they had no real opportunity to comment on those regulations.
89. *SoHappy,* 302 F.Supp. at 908.
90. *Id.*
91. *Id.* "It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource."
92. *Id.* at 911-12.
93. *Id.* at 910.
94. *Id.* at 910-11.

He also noted the "catch" discrimination that resulted from the Oregon regulations, saying that in the future the Indians should be entitled to a "fair share of the fish produced by the Columbia River system." Under the *Puyallup* decision "the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located."[95] Judge Belloni did not believe his rulings would result in fewer fish reaching their spawning grounds. Rather, he said: "The only effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago."[96]

The aftermath of *SoHappy* demonstrates the difficulty engendered by the standards stated therein. The parties have been back in court on numerous occasions since the decision, under the court's continuing jurisdiction, arguing over virtually each new set of regulations for Columbia River fishing and over the methods and procedures by which Oregon handles the fishing rights issue. One of the critical points of disagreement concerns the meaning of a "fair share" of the fish, to which the Indians are said to be entitled.[97]

Two recent state court decisions on Indian fishing rights further demonstrate the judicial quagmire created by the United State Supreme Court decisions. In *People v. Jondreau,*[98] the defendant, a full-blooded Chippewa Indian living on the L'Anse Indian Reservation, was arrested in Michigan for illegal possession of four lake trout taken from the Keweenaw Bay on Lake Superior. His conviction in the Baraga Village Justice Court was affirmed by the court of appeals.[99] The Supreme Court of Michigan reversed. The Chippewa Treaty of 1854 provided for the cession to the United States of certain territory occupied by the Indians, and then provided that the Indians residing on this territory "shall have the right to hunt and fish therein, until otherwise ordered by the President."[100] The court held that the Indians

95. *Id.* at 911.
96. *Id.*
97. The court file shows an order entered April 28, 1970, denying plaintiff's motion for an injunction against enforcement of certain 1970 fishing regulations. A further motion for a preliminary injunction was filed in July, 1970, on which an order was issued on August 18, 1970. United States v. Oregon, Civil No. 68-409 (D. Ore.). The author is informed by the attorneys that further proceedings are underway.
98. 384 Mich. 539, 185 N.W.2d 375 (1971).
99. People v. Jondreau, 15 Mich. App. 169, 166 N.W.2d 293 (1968).
100. Treaty with the Chippewas, Sept. 30, 1854, art. XI, 10 Stat. 1109 (1854).

had a right to fish in Keweenaw Bay, although the bed of the bay was not specifically included within the described ceded area, on the ground that the Indians understood they retained such a right and the treaty should therefore be so construed. The court discussed earlier cases, especially *People v. Chosa,*[101] (a Michigan case where the court said the Indians were subject to the same regulations as non-Indians), *Race Horse, Tulee, Schoettler,* and *Puyallup,* and concluded that the decision of the Idaho Supreme Court in *State v. Arthur* stated the correct rule. Recognizing that Indian fishing might deplete the state's fishery resources, the court pointed to the treaty clause which said that "the President may issue an order limiting or extinguishing the hunting and fishing rights,"[102] and concluded that the President would take action if necessary.

The other 1971 case, *State v. Moses,* arose in Washington.[103] Moses and other Muckleshoot Indians caught eight steelhead trout, gamefish under Washington law, in gill nets on the Green River. They were arrested by State Game Protectors and convicted of illegally fishing for steelhead with gill nets contrary to RCW 77.16.060, which provides that "It shall be unlawful for any person to lay, set, use . . . any . . . nets . . . in any of the waters of this state with intent thereby to catch . . . any game fish. . . ."[104] The justice court conviction was appealed de novo to superior court where defendants were again convicted. The Washington Supreme Court affirmed in a five to three decision on the ground that the regulation was shown to be "reasonably necessary for the preservation of the state's fisheries in that river."[105] The majority did not decide whether the Treaty existed, whether defendants were beneficiaries of the Treaty, what was meant by the "in common" language, the effect of Indian citizenship under 1924 federal legislation,[106] whether treaty fishing rights inure to the benefit of individual members of the Muckleshoot tribe or only to the tribe as a

101. 252 Mich. 154, 233 N.W. 205 (1930).
102. *Jondreau,* 185 N.W.2d at 381.
103. 79 Wn.2d 104, 483 P.2d 832 (1971).
104. WASH. REV. CODE § 77.16.060 (1962).
105. *Moses,* 79 Wn.2d at 115, 483 P.2d at 838.
106. Act of June 2, 1924, 43 Stat. 253. *See* 8 U.S.C. § 1401 (1970) which now declares:
(a) The following shall be nationals and citizens of the United States at birth: . . .
(2) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe. . . .

unit, or whether easements over private property exist for the exercise of those fishing rights. The majority answered only a single question:[107] "Did the state have the power to prohibit totally net fishing for steelhead trout in the Green River regardless of the Treaty of Point Elliott of 1855?"[108] That is, were the regulations in question reasonably necessary for conservation? The court said "Yes."

Justice Finley, joined by Justices Neill and Stafford, dissented on the ground that the state had failed to sustain the burden of proof of the reasonableness and necessity for the statute in question. He pointed out that the question of whether the regulations were "reasonably necessary" should not be decided in a "judicial vacuum," as the majority seemed to do. He noted that many of Washington's so-called con-

107. In *Moses,* the court did rely upon one other proposition which is patently wrong, at least in the context of a discussion of a treaty right concerning anadromous fish. The court said that the "fish, while in a state of freedom, are the property of the sovereign power in whose waters they may be. In the United States it is the state and not the United States which is the sovereign power in whose waters the fish are, and the state owns the fish in its sovereign capacity as the representative of and for the benefit of all people in common." *Moses,* 79 Wn. 2d at 113, 483 P.2d at 837. The court quotes from WASH. REV. CODE § 77.12.010 (1959), which declares that wild animals and wild birds and game fish are the "property of the state," and says this statute is merely declaratory of the already existing law. The opinion relies on Geer v. Connecticut, 161 U.S. 519 (1896), for support of these propositions.

That this ownership theory is wrong, especially when applied to fish that spend most of their lives outside Washington's jurisdiction and when considered in relation to a treaty right, has been made abundantly clear by the United States Supreme Court. The language in Geer v. Connecticut which is supportive of the Washington Supreme Court statement above was soundly debunked in Toomer v. Witsell, 334 U.S. 385, 400 (1947). In Missouri v. Holland, 252 U.S. 416, 434 (1920), the Court said:

> The state as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.

As to the fish that spend only part of their time in a state's waters, the Court noted in *Toomer* that some authorities have argued that:

> [F]ish and game are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this "ownership" for the benefit of all citizens. In the case of fish, it has also been considered that each government "owned" both the beds of its lakes, streams, and tidewaters and the waters themselves; hence it must also "own" the fish within these waters. . . . The whole ownership theory in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.

Toomer, 334 U.S. at 399-400, 402. The Court then held that state regulation of such fishery resources must bow to the higher authority of the Constitution. So too, they must bow to the higher authority of treaty provisions.

108. *Moses,* 79 Wn.2d at 113, 483 P.2d at 837.

servation laws were aimed at allocating the resource among various user groups rather than at conservation. He then argued that the state had failed to carry the burden of proof that these regulations were necessary for conservation.[109]

Two critical points become clear from the above analysis of the cases. First, neither the United States Supreme Court nor any federal court has ever faced squarely, or analyzed carefully, the most critical issue in the conflict; that is, whether the states have any power whatsoever to regulate Indian fishing rights. Second, the standards pronounced to date by the federal and state courts to guide state regulation of Indian fishing rights are woefully confused, uncertain, and inadequate.

V. FUNDAMENTAL DEFECTS IN EXISTING STATE REGULATION

If the courts persist in holding that the states have power to regulate Indian off-reservation fishing then they should be prepared to take the next step and establish meaningful standards by which the states and the Indians can determine their respective rights. This is a complex and difficult task, and one that would be better left to Congress. It is, however, imperative if accommodation is to be reached between the parties. Certain fundamental issues deserve comment here because of the way the courts have distorted or ignored them in the past.

One of the most widely misunderstood issues concerns the choice of goals of the state salmon management programs and the impact that this choice has on Indian fishery. The popular view, often used to support state control of the Indians, is that state laws are designed for the conservation of salmon. The United States Supreme Court seems to have accepted this view, going so far as to say that the Indian off-reservation fishery can be regulated by the states only "as . . . necessary for conservation."[110] We need not be too concerned at this point with whether "conservation" seeks maximum sustainable physical yield or maximum economic yield, for in either case the state

109. *Id.* at 120, 483 P.2d at 840 (Finley, J., dissenting opinion).

110. *See* Tulee v. Washington, 315 U.S. 681, 684 (1942). This language was quoted with approval in Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968). The Court in *Puyallup* also said that the states can regulate "in the interest of conservation." 391 U.S. at 398.

programs are sorely deficient. They are actually designed to achieve three goals, only one of which is conservation. The others are to spread the catch among a large number of fishermen, and to allocate the fish among various user groups (purse seiners, trollers, gill netters, sportsmen and Indians).[111] If state management programs were designed primarily to achieve conservation goals the Indians' treaty rights could easily be accommodated within them. But because of the other-than-conservation goals discussed below, the rights of the Indians are difficult if not impossible to accommodate.

It is a widely known "secret" among fishery biologists (and it was known to the Indians in the 1850's) that the most efficient method of catching salmon, both economically and biologically, is to take them by traps and weirs placed at or near the mouths of spawning streams. Economically, the fish are best caught at that point because the fish are tightly schooled up, are at maximum size, and are in prime condition. Fishing for salmon in the open water is more difficult and more costly.[112]

For fishery management purposes the fish are best caught at or near the mouths of spawning streams, because at that point the runs are sorted out and the biologists know which fish are headed for which river and can tell precisely how many fish should be caught from each run. River by river management is important because one run may be so small that *all* fish should escape for spawning whereas another run may be so large that 85 percent or more can safely be harvested.[113] When the fish are in the open waters of the ocean, the Straits of

111. For comments on these different goals see W. ROYCE, D. BEVAN, J. CRUTCHFIELD, G. PAULIK, & R. FLETCHER, SALMON GEAR LIMITATION IN NORTHERN WASHINGTON WATERS (1963); Johnson, *Regulation of Commercial Salmon Fishermen, A Case of Confused Objectives,* 55 PACIFIC NORTHWEST QUARTERLY 141 (1964). Judge Belloni, in United States v. Oregon (SoHappy v. Smith), 302 F.Supp. 899 (D. Ore. 1969), said "Oregon's conservation policies are concerned with allocation and use of the state's fish resource as well as with their perpetuation." *Id.* at 909. In State v. Moses, 79 Wn. 2d 104, 483 P. 2d 832 (1971), Justice Finley pointed out that the distribution of a scarce resource among competing users "must necessarily be achieved by some system of allocation" and that "[s]tate conservation laws are fundamentally laws of *allocation* as well as *preservation.*" *Id.* at 127, 483 P.2d at 844.

112. Interestingly, the super-efficient traps and weirs are banned by law, as are sonar, monofilament gillnets, and spotter aircraft. And fishermen are frequently allowed to fish only one or two days per week. The reason for such rules is to spread the catch among a larger number of fishermen. WASH. ADMIN. CODE §§ 220-20-015 (1), 232-12-150(1) (1970); WASH. REV. CODE § 75.12.280 (1959).

113. *See* R. VAN CLEVE & R. JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHEASTERN PACIFIC 17 (1963).

Juan de Fuca, or Puget Sound, the various runs are mixed together. A commercial fisherman who drops his nets in the Straits does not know if he is catching salmon headed toward the Fraser River in Canada, the Puyallup, Nisqually, Skagit, or some other river in Washington. If enough boats happen onto a school of fish they can easily overfish it, taking too many of the run headed for the Nisqually, for example, and missing entirely the run headed for the Skagit. It is virtually impossible to distinguish the salmon of one run from another, even if the fisherman wanted to. On the other hand, when the fish have arrived at the mouths of their spawning streams they are all sorted out. The biologist, or the fisherman, knows that fish caught there are headed for spawning grounds in that stream.

If salmon were harvested only at the mouths of their spawning streams then the state could easily assure that a certain, substantial percent were allowed to proceed up the river to the Indians' fishing sites.

State programs are also designed to allocate the salmon among various user groups. There are two principal means of accomplishing this: by a "zoning" system under which the state determines where fishing can take place, and by regulations determining the type of fishing gear that can be used. As for the zoning system, unfortunately the Indians find themselves in the worst possible zone. Under the zone system, generally only sports fishermen and commercial trollers are permitted to fish at sea, beyond the three-mile territorial limit. Gill netters, reefnetters, and purse seiners are permitted in the Straits of Juan de Fuca. Sportsmen and gill netters can fish in Puget Sound, with each type of fisherman excluded from certain areas and all fishermen excluded from waters near the river mouths.[114] Most of the Indians' usual and accustomed fishing sites are on or very near the rivers. As the fish move toward the river each of the non-Indian groups takes part of the run. The zoning system permits the non-Indian commercial and sports fishermen to get the first crack at the fish. By the time the fish enter the rivers and move toward the Indian fishing sites, there are few left to catch; those remaining are needed for spawning.

114. This describes the general type of regulation, although the actual regulations are much more detailed and contain a variety of complex exceptions. *See* WASHINGTON DEP'T. OF FISHERIES, SUMMARY OF REGULATIONS PERTAINING TO ALL PUGET SOUND SALMON NET FISHERIES (1971).

These factors are especially significant in view of the Court's pronouncement that the Indian fishery can be regulated only "as . . . necessary for conservation." If the Supreme Court means what it says then substantial revamping of state regulatory programs may have to occur to give proper recognition to Indian fishing rights. The courts have, unfortunately, refused to accept the fact that fishery management programs serve other than conservation goals. So long as the courts refuse to recognize the real objectives of these programs, their decisions will remain on the perimeter of the problem and will not effect meaningful standards or remedies.

One last aspect of state regulation must be noted. This concerns the relative political power of the three principal user groups of salmon: commercial fishermen, sports fishermen, and Indians. Washington has long recognized the first two groups through the creation of a Fisheries Department[115] and a Game Department,[116] as has Oregon by its creation of the Fish Commission[117] and the Game Commission.[118] The political strength of these groups and their supporting coalitions is well known. Indians do not have such strength, as evidenced by the absence of state departments of Indian fisheries or any other state governmental entities charged with the protection of the Indians' interests. Nor is it reasonable to argue that the fisheries and game departments adequately meet this responsibility. By training they are biologists and by education, professional contact, and peer group association they reflect the views, attitudes and interests of the commercial and sports fishermen. The record of their policies has consistently been adverse to the Indians.[119]

CONCLUSION

Without reason or analysis, the United States Supreme Court has held that the states have the power to regulate Indian off-reservation

115. *See* WASH. REV. CODE §§ 75.08.080, 75.04.040 (1962); WASH. ADMIN. CODE § 200-12-010 (1969).
116. *See* WASH. REV. CODE §§ 77.08.020, 79.12.040 (1962).
117. *See* ORE. REV. STAT. § 506.036.040 (1969).
118. *Id.* § 496.160 (1969).
119. *See* AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 125 (1970).

fishing when necessary for conservation. The result has been the continuation of state regulatory systems which consistently deny the Indians the opportunity on which their livelihood depends, the right to fish at the usual and accustomed places off the reservation as guaranteed by treaty. There are two solutions to the problem.

First, the Court should apply well-established principles of constitutional law and hold that off-reservation Indian fishing is not subject to state control until Congress expressly delegates such power to the states. When that rule is established, the states and the Indians should negotiate a management program that will provide a fair distribution of the catch among the various user groups. If a management program cannot be established by cooperation between the states and the Indians, Congress should create one, after full and careful consultation with Indians, sportsmen and commercial fishermen.

Second, if the Court persists in upholding state regulation, it should take the next step and define rational and fair standards for the recognition of the Indians' rights. This can only be accomplished by recognizing that conservation is only one of three goals now served by state management systems, that the conservation goal is not the principal impediment to recognition of Indian rights, and that the main difficulty comes from laws designed to spread the salmon among a large number of fishermen and to allocate the catch among various user groups. When the Court recognizes these facts, and only then, will it be able to move toward a meaningful accommodation of the rights of the parties.