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COMMENT

TREATY FISHING RIGHTS AND INDIAN PARTICIPATION IN INTERNATIONAL FISHERIES MANAGEMENT

For centuries before the Europeans came upon North America, the rivers met the needs of the salmon and the salmon met the needs of the Indian. The tribes and the salmon had benefited from this partnership, secure in their adaptation to the environment and to each other. The Indians knew they had to protect the quality of the rivers. Under conditions of abundance, their religious and technological precautions ensured perpetuation of the fish.¹

INTRODUCTION

From 1854 to 1855 the territorial Governor of Washington, Isaac Stevens,² negotiated a series of treaties ("The Stevens Treaties" or "Treaties") with the Indians then inhabiting the Pacific Northwest region west of the Cascade Mountains and north of the Columbia River.³ The Stevens Treaties cleared the way for white settlement of the area. Stevens and the Indians negotiated these Treaties at arms length, not as between a conqueror and the conquered.⁴ Both sides specified prerequisites for agreement. The Indians demanded guaranteed, undiminished access to the salmon; Stevens required land for white settlement. Stevens understood well the fishing needs of the Indians, and the language of the

4. See Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) [hereinafter Fishing Vessel]; see also Wilkinson, supra note 2, at 436-39 (describing the negotiating skill of the Nez Perce and the strong arm tactics of Governor Stevens). Initially, the United States negotiated all Indian treaties at arms length, and each treaty truly represented the wishes of the parties. But, after the war of 1812, the United States began to exert its superior military force to the detriment of the Indians. Treaties made during this period more closely resemble adhesion contracts than arms length negotiations. Chief Justice John Marshall wrote three decisions that formed the basis of Indian treaty interpretation, and helped bring the treaty result, but not the process, back to even keel. See Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Later Supreme Court decisions further supported Chief Justice Marshall's vision of "domestic dependent nations." See, e.g., United States v. Kagama, 118 U.S. 375, 384 (1886) (stating that the Indian tribes are communities dependent on the United States); Tulee v. Washington, 315 U.S. 681, 684-85 (1942) (noting that it is the United States' responsibility "to protect the interests of a dependent people").
Treaties clearly reflected that understanding. In the Treaties, Stevens gained vast quantities of Indian land for white settlement in exchange for the Indians' continued access to tribal fishing grounds, small tracks of retained land, and occasionally money.

Each of the Stevens Treaties used essentially identical language to memorialize off-reservation Indian fishing rights: "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." The fishing communities in the Pacific Northwest, composed of both Indians and non-Indians have debated the meaning of these words since the early 1900's. At various times, the United States Supreme Court has attempted to quell the debate. The Supreme Court's decisions provided that a reviewing court has a duty to interpret the Treaty language, specifically the phrases "usual and accustomed" and "in common with the citizens," to effectuate the parties' intent at the moment of treaty formation. Arguably those instructions have simply added uncertainty, as little evidence exists regarding the parties' intent at the time of treaty formation.

In effect, the Supreme Court determined the parties' intent by considering the parties' reasonable expectations. Plainly read, the Treaties' language guarantees to the Indians access to their historic fishing grounds, and fish sufficient to sustain their subsistence and commercial needs. By their nature, the Treaties immediately fulfilled the United States' rights, but not the Indians. The United States frustrated the Indians reasonable expectations of continued access to fish by actively contributing to the decline of salmon populations. As salmon stocks have declined the Indians have been forced to forgo their treaty-based expectations and share in the consequences of white settlement.

Recent interpretations of the Treaties justify, if not demand, Indian participation in a host of salmon planning and conservation activities, including habitat preservation and international fisheries management. Yet, these decisions do not comport with the reasonable expectations of either the United States

5. See Fishing Vessel, 443 U.S. at 676.
6. See id. at 676-77.
7. Treaty of Medicine Creek, supra note 2, art. III.
9. The phrase 'reasonable expectations' is a term of art borrowed from the law of close corporations. See David C. Crago, Fiduciary Duties and Reasonable Expectations: Cash-Out Mergers in Close Corporations, 49 OK. L. REV. 1, 1 (1996). Due to the nature of close corporations (e.g., only a few shareholders who generally derive their income from their participation in running the corporation), the majority shareholders may not act to frustrate the "reasonable expectations" of the minority shareholders. "Reasonable expectations" typically include a voice in management of the corporation and a reasonable return on investment. See id. The comparison is particularly close here, as the Indians reasonable treaty expectations included continued access to the fish, and now Indians enjoy a voice in management of the salmon fisheries. See infra Part III.
10. Immediately prior to the Supreme Court's decision in Fishing Vessel, the Indian's take of salmon represented approximately two percent of the total harvest. See Fishing Vessel, 443 U.S. at 677 n.22.
or the Indians. When Stevens negotiated the treaties, neither party anticipated
the need to manage the salmon, as the fish abundantly populated the North-
west's rivers. The courts now attempt to safeguard the Indians' reasonable ex-
pectations of continued access to fish by mandating division of harvestable fish,
and, at least in part, Indian participation in fisheries management decisions.

This Comment considers the United States' attempts to manage pacific
salmon in light of its statutory requirements and the Indians' fishing rights. Part
I briefly describes the nature of the relationship between the United States and
the Northwest Indians. Part II outlines Indian fishing rights in the Northwest as
decided by the Supreme Court and two federal district courts. Part III outlines
pertinent United States' domestic and international obligations, and considers
Indian participation in international fisheries management. Part IV discusses
Indian participation in fisheries management decisions in the context of the
mechanisms discussed in Parts II and III. It continues with a brief discussion of
why Indian involvement may rest on a discretionary foundation. Finally, Part V
concludes that continued Indian participation in fisheries management decisions
benefits the overall salmon population.

I. THE DEVELOPMENT OF THE RELATIONSHIP BETWEEN THE FEDERAL
GOVERNMENT AND THE INDIANS IN THE PACIFIC NORTHWEST

Salmon are anadromous fish. As such fish, they hatch in the clear, clean
headwaters of mountain streams, migrate to the ocean to grow to adults, and
then return to their hatching location to spawn and die. Salmon require five
things to perpetuate the species: access to and from the ocean; fresh water of a
certain quality and quantity; clean gravel beds for spawning and hatching; food;
and protective cover. Taking too many salmon from one returning run means
that fewer salmon will reach their hatching grounds to spawn, and consequently
fewer of the offspring will return.

The Northwest Indians require salmon for survival today, just as they did in
1854 and 1855 when Stevens negotiated the Treaties. When the Indians fished
the Northwest's rivers alone, they harvested only the salmon they needed for
subsistence and trading. In fact, salmon and Indian life in the Pacific Northwest
continue to be inseparable. The Indians rely now as they did in the 1800s on
salmon for subsistence, commercial livelihood, and religious rituals. Because of

12. See Fishing Vessel, 443 U.S. at 692 n.31 (noting that the International Pacific Salmon
Fisheries Commission may promulgate special Indian regulations).
13. See id. at 669.
14. See COHEN, supra note 1, at 20.
15. There are five species of salmon (the Chinook, Coho, Chum, Pink, and Sockeye) and the
steelhead. The steelhead is actually an ocean trout. See COHEN, supra note 1, at 25. Unlike the
salmon that return to their native stream once to spawn and die, the steelhead may return to spawn
two or three times before death. See COHEN, supra note 1, at 20.
16. See COHEN, supra note 1, at 28.
17. See COHEN, supra note 1, at 24.
312, 350 (D.C. Cir. 1974) ("One common cultural characteristic among all of the Indians was the
almost universal dependence upon the products of an aquatic community.").
19. See COHEN, supra note 1, at 20-25; see also Fishing Vessel, 443 U.S. at 665-66;
their dependence, the Indians take great care not to pollute the rivers and to fish responsibly. In the past, the Indians often opened traps and nets to release back the salmon they caught, and "once the Indians had met their needs, they stopped fishing." Each season, Indians performed elaborate religious ceremonies intended to ensure the salmon would return.

White settlement in the Pacific Northwest during the late nineteenth century contributed to a drastic decline in salmon populations for several reasons. First, the population infusion simply meant more fishermen chased an essentially fixed number of fish. Second, technological advances in fishing allowed fishermen to more efficiently remove salmon from the rivers and ocean. Third, the recently perfected canning process expanded the salmon market beyond the immediate vicinity of the Columbia River Basin. Finally, environmental factors, such as timber harvesting and dam building, depleted the habitat available for salmon spawning.

President Pierce empowered Governor Stevens to negotiate treaties with the Indians, and by 1854, the United States Supreme Court had judicially legitimized federal control over the Indians through the Commerce Clause and the theory of "discovery and conquest." The courts have traditionally recognized four sources of federal power over Indian tribes, two based in the Constitution and two developed through the common law. The Commerce and Treaty Clauses form the Constitutional power, while the discovery and trust responsibility doctrines form the common law power. The Supremacy Clause also plays a significant role, but is not a direct source of federal power over Indian tribes. Instead, it gives treaties and other federal legislation effect. Today, the Federal Government exercises power over Indian tribes primarily through the Commerce Clause and trust responsibility doctrine.

The Commerce Clause states, "Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supreme Court has interpreted the Commerce Clause to

20. See COHEN, supra note 1, at 24.
21. COHEN, supra note 1, at 25.
22. COHEN, supra note 1, at 24
25. See COHEN, supra note 1, at 45-48.
30. The discovery doctrine was first outlined by Chief Justice Marshall in M'Intosh, when he stated that "Conquest gives a title the courts of the conqueror cannot deny ... ." Johnson, 21 U.S. (8 Wheat) at 588.
32. U.S. CONST. art. VI.
33. U.S. CONST. art. I, § 8, cl. 3.
help define the unique relationship between Indians and the United States, and to deny foreign nation status to the Indians.\(^\text{34}\) Chief Justice Marshall in *Cherokee Nation v. Georgia* declared that the Commerce Clause “clearly contradistinguished [Indians] ... to themselves ... .”\(^\text{35}\) The Commerce Clause grants Congress plenary power over Indians.\(^\text{36}\)

*Cherokee Nation v. Georgia* recognized the legal relationship between the United States and the Indian tribes. It described Indian tribes as “denominated domestic dependent nations ... [whose] relation to the United States resembles that of a ward to his guardian.”\(^\text{37}\) The Commerce and Supremacy Clause’s combined effect denies the power of state law in Indian country.\(^\text{38}\)

The nature of the “domestic dependent” relationship and formal promises made by the United States gave rise to the trust responsibility doctrine.\(^\text{39}\) The Supreme Court characterized the trust responsibility relationship as a fiduciary duty, a special duty of protection, and a moral obligation.\(^\text{40}\) Formal promises in treaties and other official United States actions made the trust responsibility doctrine a moral imperative.\(^\text{41}\) For instance, the Stevens Treaties promised the Indians a perpetual home and access to the salmon in exchange for vast amounts of land. These promises created a trust relationship.\(^\text{42}\) In practice, the trust relationship makes the United States act to enforce its treaty obligations against the states, and serves as a check on federal mismanagement of tribal assets or bad faith with regard to other federal authority.\(^\text{43}\)

The United States formalized its early relationship with Indians using treaties, as the federal government envisioned Indian tribes as independent, sovereign nations.\(^\text{44}\) Like other treaties, these “essentially [formed] a contract between

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34. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 1 (1831).
36. See *Worcester*, 31 U.S. (6 Pet.) at 559; *United States v. Kagama*, 118 U.S. 375, 378 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); see also *Felix Cohen*, supra note 31, at 217 (explaining that “[p]lenary does not mean ‘absolute’ in the sense that it may be exercised free of constitutional limits or judicial review”).
37. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.
42. See *Pevar*, supra note 39, at 26; See also Wilkinson & Volkman, supra note 41, at 614.
44. U.S. CONST. art. II, § 2, grants the President power to make treaties with the advice and consent of two-thirds of the Senate. However, in 1871 Congress passed a law prohibiting further treaty making with the Indian Tribes. See 25 U.S.C. § 71 (1995).
two sovereign nations." Governor Stevens efficiently negotiated these treaties with the Pacific Northwest Indian tribes. In his first year, Stevens secured millions of acres of land for white settlement. In exchange for Indian land, Stevens' treaties promised perpetual, undisturbed rights to reserved portions of land (the Indian reservations), and "[t]he right [to take] fish at [the] usual . . . grounds . . . in common with all the citizens of the [t]erritory . . . and of erecting temporary houses for the purpose of curing [the fish] . . . ." Stevens knew the tribes would not agree to a treaty without specific guarantees of fishing rights, and he intended to give those rights to them.48

The Supreme Court established the so-called "cannons of treaty interpretation" out of the trust responsibility relationship. These canons guide judicial interpretation of treaty language, essentially demanding that ambiguity be resolved liberally for the Indians,49 in terms favorable to the Indians,50 and in a manner understood by the Indians.51 Still, the Supreme Court held that Congress may use its plenary power over the Indians to abrogate treaty promises when they clearly evince such an intention.52 The courts, however, will not lightly assume that Congress acted to abrogated Indian treaty rights.53

Using the cannons of treaty interpretation, the Supreme Court determined that Indian treaties actually granted rights from the Indians to the United States, and not from the United States to the Indians.54 The rights forfeited in treaties simply derived from a larger, pre-existing body of inherent Indian rights.55 So, treaties reserved to the Indians those rights not explicitly described or limited by treaty.56

II. NORTHWEST INDIAN TREATY FISHING RIGHTS AS DEVELOPED THROUGH THE COURTS

A series of six Supreme Court decisions decided between 1905 and 1979 interpreted the measure and scope of Indian fishing rights encompassed in the language of the Stevens Treaties.57 Through an examination of these decisions

45. See Fishing Vessel, 443 U.S. at 675 (citing Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)).
46. See Fishing Vessel, 443 U.S. at 666.
47. Treaty of Medicine Creek, supra note 3, art. III.
48. See Fishing Vessel, 443 U.S. at 666 n.9.
49. See FELIX COHEN, supra note 31, at 221.
54. See FELIX COHEN, supra note 31, at 222-23; Fishing Vessel, 443 U.S. at 690.
55. See Winans, 198 U.S. at 381.
56. See generally id.
and a few additional, this section describes the rights retained by the Indians after the Stevens Treaties. Those rights allow Indians to cross and temporarily use private property to exercise the federally protected off-reservation fishing rights, which they share with the citizens of the Pacific Northwest states. A state may only limit the Indian rights through reasonable regulations, specifically necessary, and targeted for conservation.

Indian participation in fisheries management decisions became necessary, because the last of the decisions discussed herein entitled the Indians to a significant portion of the harvestable salmon. Indian participation became necessary to meet Indians’ reasonable expectations secured by treaty, to ensure the salmon’s survival, and to recognize private fishing interests. The cases not only established the breadth of Indian fishing rights with respect to state regulation and private property rights, but as set out below, they also provided the foundation and rationale for Indian participation in fisheries management decisions at all levels.

A. From Winans to Puyallup III

The United States Supreme Court first construed the Stevens Treaty language in United States v. Winans. There, the United States sought to enjoin Winans, a white settler, from excluding Yakima Indians from his property. The United States asserted that the Winans’ land bordered one of the Indians “usual and accustomed” fishing grounds as provided by treaty, and as such, Winans could not prevent the Indians from fishing in the area. Winans had erected a fishing wheel in the Columbia River adjacent to his property under a license issued by the State of Washington. The wheel so efficiently caught fish that it effectively prevented the Indians from exercising their treaty rights. Winans asserted that the treaty language, “the right of taking fish at all usual and accustomed places in common with the citizens of the territory[,]” conferred no greater rights than those enjoyed by any other citizen whose land bordered the river.

The Supreme Court disagreed, and held that the treaty language preserved for the Indians a non-exclusive, off-reservation fishing right, which held greater significance than that asserted by Winans. The Court explained that an Indian fishing right reserved in the Stevens Treaty was tantamount to an easement. It


59. 198 U.S. 371 (1905).
60. See Winans, 198 U.S. at 380.
61. A fishing wheel resembles a Ferris wheel. It removes fish from a stream with great efficiency. See CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 189 (1992). It may be mounted either to the side of the river or on a floating platform. See id. It has a series of buckets mounted about is circumference, and the river’s current keeps it spinning. See id. If mounted in a fortuitous location, it can scoop out great quantities of salmon. See id. One fishing wheel in 1906 was reported to remove 417,000 tons of salmon in one year. See id.

62. See Winans, 198 U.S. at 379.
63. See id. at 381.
64. See id. at 381, 384.
reserved to the Indians the right to cross and occupy private land to the extent the Indians needed access for fishing and erecting temporary shelters to cure their catch. The Indians could assert this right against the United States and subsequent grantees.

Unfortunately for the Yakimas and other Northwest Indians, the Winans decision was flawed in a manner not immediately apparent. In the dicta following the denial of Winans’ claim, the court professed an unsupported and therefore unsubstantiated grant of power to the states to regulate the Indians’ off-reservation treaty fishing rights.

In Tulee v. Washington, the Supreme Court did little more than solidify its dicta announcement in Winans by holding that a state could regulate Indian fishing rights for conservation purposes. The state of Washington charged and convicted a Yakima Indian of netting salmon without a fishing license. Washington asserted that its power to conserve fish and game permitted it to require a license of the Indian plaintiff. The State of Washington argued that the license requirements were not inapposite to the Yakima’s treaty rights, since the requirements were not discriminatory. The Court decided Washington could regulate the “time and manner of fishing outside the reservation as . . . necessary for the conservation of fish,” but it may not charge a license fee. The court found the license fee, as applied, was “not indispensable to the effectiveness of a state conservation program,” but impermissibly limited a federal right.

In a series of three Puyallup decisions dating from 1968 to 1977, the Court further honed its interpretation of Stevens Treaty language. In Puyallup I, Washington contested the Indian’s refusal to adhere to off-reservation, state-fishing regulations. The regulation at issue prescribed fishing for steelhead trout only recreationally with hooks and not commercially with nets. The Indians

65. Winans is distinguished from Seufert Bros. Co. v. United States, 249 U.S. 194 (1919), the subsequent Supreme Court case to interpret Stevens’ treaty language, by the character of the land involved. In both cases the Yakima Indians asserted their fishing rights. See Seufert, 249 U.S. at 195-96; Winans, 198 U.S. at 377. Winans’ land was previously ceded to the United States by treaty with the Yakimas. See Winans, 198 U.S. at 377. The land in Seufert belonged to another tribe. See Seufert, 249 U.S. at 197. In Seufert, the Court held the Stevens’ treaty language also retained for the Yakimas the right to fish. Id. at 199.

66. See Winans, 198 U.S. at 381.

67. See id. at 381-82.

68. See id. at 384 (stating: “Nor does it restrain the state unreasonably, if at all, in the regulation of the right” to regulate Indian fishing).

69. 315 U.S. 681 (1942).

70. See Tulee, 315 U.S. at 682.

71. See id. at 683.

72. See id. at 683-84.

73. Id. at 684.

74. Id. at 685.


76. The Department of Game regulates the steelhead fishery, while the Department of Fisheries regulates the salmon fishing. See Puyallup II, 414 U.S. at 46.

77. See Puyallup I, 391 U.S. at 396.
targeted by the State of Washington used nets for commercial fishing from before the date of the treaty to the time of the suit. The Court reiterated the Winans dicta ratified by Tulee, and held that the state’s police power allowed non-discriminatory regulation of off-reservation Indian treaty fishing rights to the extent necessary for conservation, provided the regulations met appropriate standards. The court’s holding foreclosed the state’s ability to charge treaty Indians a fee to exercise their treaty fishing right. The Court declined to decide whether the state may properly prohibit Indian net fishing in the name of conservation, as the lower state court had not collected sufficient evidence to decide whether the net prohibition was a “‘reasonable and necessary’ conservation measure . . .”

The Court, however, concluded that any final determination of the conservation question must be shaped to give meaning to the phrase “in common with” as used in the Treaties. In other words, the Court limited state regulatory powers over off-reservation Indian fishing to those actions that do not completely frustrate off-reservation Indian fishing rights in the name of conservation. Impliedly, the Court would find any state conservation regulation that completely eliminated net fishing for salmon improper.

In Puyallup II, the Court again considered the permissibility of Washington’s regulation of off-reservation Indian fishing in the context of a prohibition on using nets for steelhead fishing. The Court considered whether the blanket prohibition on nets discriminatorily affected Indians, as the regulation seemingly apportioned the entire steelhead run to sport fishermen as Indians did not fish by hook. Based on Washington’s allocation of some, albeit limited, fish to sport fishermen, the Court found Washington’s regulations discriminatory. In other words, because Washington permitted limited fishing, some fish were available, and the Indians must be given their share. The Court declined to definitively divide the take between sport and net fishermen, as that exercise involved impermissible fact-finding. Therefore, it remanded the case to the trial court for an expert apportionment between Indian-net and sport-hook fishermen. The Court’s holding recognized sufficient state police power to apportion the fish and to prevent the fish’s extinction by net fishing. The Court stated that the

78. See id.
79. See id. at 398-99 (indicating that the state may not “qualify” the Indians’ right to fish, “[b]ut the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated . . . in the interest of conservation”).
80. See id. at 399.
81. Id. at 401 (citing Department of Game v. Puyallup Tribe, Inc., 422 P.2d 754, 764 (Wash. 1967)).
82. Id. at 403 (reiterating the Stevens treaty language “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”) (emphasis added).
83. See Puyallup II, 414 U.S. at 46.
84. See id. at 46-47.
85. See id.
86. Id.
87. See id. at 48-49.
treaty did not “give the Indians a federal right to pursue the last living steelhead until it enters their nets.”

On remand of *Puyallup II*, the Washington State Supreme Court heard expert testimony and issued an order that apportioned the steelhead between the Indians and the sport fishermen. This state court order set the stage for the last of the Puyallup decisions, *Puyallup III*. After struggling with sovereign immunity issues, the Court, in *Puyallup III*, narrowed the question to whether the state could regulate on-reservation Indian fishing rights for conservation purposes. This differs from the previous cases, as the other cases involved state regulation of off-reservation fishing rights. The Court examined the nature of Indian reservations in light of the treaty language and the allotment program, and decided that on-reservation state regulation was necessary to give effect to Washington’s overall steelhead conservation program. Therefore, where the Indian’s on-reservation actions could completely frustrate statewide conservation programs, the Court permitted state regulation.

B. *Sohappy v. Smith*

In *Sohappy*, the Indian plaintiffs filed suit in federal district court against the State of Oregon Fish and Game Commission, seeking a decree to define “their
treaty right ‘of taking fish at the usual and accustomed places’ on the Columbia River” within the context of existing state regulations.” Citing with approval Puyallup I, the court reasoned that state regulation of off-reservation Indian fishing rights must fulfill three requirements. The regulations must: (1) be necessary for conservation; (2) not discriminate against Indians; and (3) meet “appropriate standards.” The court distinguished state regulation of non-Indian fishermen from treaty Indian fishermen by holding that: “The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent . . . [practices] . . . that . . . imperil the continued existence of the fish resource.”

This restricted regulatory authority is distinct from the power a state wields over non-Indian fishing rights, which is limited only by the state’s organic legislation and the reasonableness standards of the Fourteenth Amendment.” In effect, Sohappy made Oregon consider the Indian fishing community as a regulated body outside the previously existing sport and commercial fisheries. Sohappy is particularly instructive here, because it interpreted the Stevens treaty language to ensure the Indians a “fair share” of salmon.

C. United States v. Washington

In United States v. Washington, the United States brought suit for declaratory and injunctive relief to settle the Indians’ off-reservation treaty fishing rights. By joining all interested parties and seeking jurisdiction to decide all related claims, Senior District Judge Boldt intended to resolve the Indian fishing question once and for all.” From extremely comprehensive historical evidence supported by expert testimony and pertinent constitutional, statutory, and common law, Judge Boldt interpreted the Stevens treaty language” with all possible deference to the Indians.”

99. Id. (quoting the Stevens treaty language).
100. Id. at 907.
101. Id. at 908.
102. See id.
103. See id. at 911.
104. 384 F. Supp. 312 (W.D. Wash. 1974). This case properly fits in chronological order between Puyallup II and III. It is discussed here to give unity to the Puyallup decisions and to better lead into the discussion of the subsequent and final Supreme Court ruling on the Stevens treaty language.
105. At this point, the Supreme Court had not yet ruled favorably for state regulation of on-reservation fishing as necessary for conservation. See supra notes 89-96, and accompanying text.
106. See supra, notes 39-43, and accompanying text. The Treaty of Medicine Creek is typical of the language in all 11 treaties under consideration in Fishing Vessel.
107. In fact, Judge Boldt desired to go even further, but was restrained by precedent. The decision analyzed a state’s right to regulate off-reservation fishing consistent with the police power used to regulate non-Indian fishing. See Washington, 384 F. Supp. at 334. Judge Boldt concluded the state’s authority to regulate off-reservation Indian fishing was derived from dicta first appearing in Ward v. Race Horse, 163 U.S. 504 (1896). See Washington, 384 F. Supp. at 335. Apparently the Supreme Court carried that dicta through subsequent decisions without constitutional or statutory justification. Judge Boldt expressed concern regarding a state’s ability to control a federal right without express delegation of such power. See id. at 337. Despite these concerns, precedent demanded that Judge Boldt hold that a state may regulate Indian off-reservation fishing where such regulation is strictly limited to measures “reasonable and necessary to prevent demonstrable harm to the actual conservation of fish.” Id. at 342. The court further defined reasonable and necessary
difference between pre-existing, inherent Indian right, and a privilege regulated by the state pursuant to its police power. Practically, the decision fulfilled the Indian’s reasonable expectations they held when they signed the treaty. It granted the Indians unobstructed access to salmon and a specific quantity of salmon. Further, by specifically granting Indians half of the available fish and not just an ambiguous right to fish, the decision mandated that Indians be granted a voice in fisheries management. The only way that non-Indians could now increase the size of their catch was to increase the overall number of salmon available. Since Indians now controlled half of the fish, their participation was essential.

In the context of history and the law, the decision systematically described the meaning of the treaty phrase, “[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 . . . .” Judge Boldt decided the phrase guaranteed the Indians off-reservation fishing essentially everywhere. The right was subject to only very narrow state regulation, and its measure amounted to the opportunity to take up to fifty percent of the “harvestable fish.” This fifty percent dedicated to the tribe did not include fish required for personal subsistence or ceremonial purposes, as those purposes were “special” and “distinct” from commercial purposes. Also, the Indians’ harvestable portion did not in-
clude the fish taken by Indians on the reservation. Finally, Judge Bolt’s decision mandated that Washington use its position on the International Pacific Salmon Fisheries Commission to promote Indian fishing rights. As discussed below, Ninth Circuit’s and Supreme Court’s indirect review left Judge Boldt’s decision substantially intact.

D. Washington v. Washington Commercial Passenger Fishing Vessel Association

In Fishing Vessel, the Supreme Court indirectly reviewed Judge Boldt’s decision, and largely vindicated tribal fishing rights. This most recent Supreme Court review of Stevens’ treaty language, holds that the language “the right of taking fish” intended to secure in the Indians not merely equal access to fishing, but a specific share of the harvestable fish that pass through tribal fishing areas. The Court interpreted the right as a specific share, because of the predictable quantities of fish associated with anadromous fish runs. This case succinctly summarized the parties’ intentions under the Stevens Treaties as follows:

Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other “citizens of the territory.” Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

The court concluded that the harvestable portion of the fish should be equally divided between treaty and non-treaty fishermen, and that the half allocated to the Indians represented a maximum. If less than half sufficiently provided the Indians with a “moderate living,” then that amount constituted their take.

necessary to sustain a moderate living, and that the balance of the harvestable portion would be available for non-treaty fishermen).

116. See id. This requirement is necessary to ensure the harvestable fish include all those destined for the Indians’ “usual and accustomed grounds and stations.” See id. at 343.
117. The Ninth Circuit’s review modified Judge Boldt’s holding in one respect. It indicated any “equitable adjustment” made to the Indians’ share of the harvestable portion of fish should not consider those fish taken by fishermen outside Washington’s jurisdictional reach. See United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975).
119. See Fishing Vessel, 443 U.S. at 679.
120. See id. at 678 & 663. The Court equated management of anadromous fisheries to farming because of the predictable harvest associated with both endeavors. See id at 663.
121. Id. at 684-85.
122. See id. at 685-86.
123. The Supreme Court based this moderate living concept on one of its previous cases where an Indian treaty was interpreted to reserve sufficient water for the Indians to make a moderate living. See Arizona v. California, 460 U.S. 605 (1983).
124. See Fishing Vessel, 443 U.S. at 685.
The Court's decision differed from Judge Boldt's in two respects, and both reduced the Indian's take. First, the Court did not exclude from the Indians' treaty share those fish caught on the reservation. In so holding, the Court alluded to *Puyallup III*, where it allowed on-reservation state regulation where necessary to prevent frustration of a statewide conservation plan. Second, the Court ruled that fish caught for subsistence or ceremonial purposes counted against the tribes' allocation in the same manner as fish caught for commercial purposes.

With the exception of state regulation over Indian fishing both on and off the reservation, the Court's interpretation of the Stevens treaty language preserved the tribe's reasonable expectations at the treaty's inception. Fundamentally, the Indians' reasonably expected access to usual and accustomed fishing grounds and an opportunity to catch a specific portion of the fish. In 1854, neither party envisioned the current decline in the salmon population. Further, because the Court allocated to the Indians a significant portion of the salmon run year in and year out, the decision cemented the necessity for Indian participation in fisheries management decisions. With the treaty obligations of each party outlined, the next section presents the mechanisms for Indian participation in fisheries management and comments on the continuing nature of their participation.

III. LEGISLATIVE AND EXECUTIVE EFFORTS TO INCLUDE INDIANS IN FISHERIES MANAGEMENT DECISIONS

The Indians occupy important decision-making positions in both domestic and international fisheries management. Domestically, Congress first formally included Indians in fisheries management decisions when it passed two pieces of important legislation, the Fishery Conservation and Management Act of 1976 and the Pacific Northwest Electric Power Planning and Conservation Act. Internationally, the United States recognized Indian interests in multilateral and bilateral agreements, including the Law of the Sea, and its Straddling Stock and Highly Migratory Fish agreement, and the Pacific Salmon treaties with Canada. This section briefly outlines pertinent sections these acts and agreements and comments on Indian participation in fisheries management decisions related to each.

A. The Fishery Conservation and Management Act of 1976

Congress took its first step to revitalize the diminishing salmon stocks by enacting the Fishery Conservation and Management Act (FCMA) or Magnuson Act.
Act. The FCMA, a controversial piece of legislation, established a "fishery conservation zone" extending 200 nautical miles "from the baseline from which the territorial sea is measured." Prior to 1976, the United States asserted jurisdiction over fishing only within the limits of the territorial sea. The FMCA granted the United States exclusive management authority over all fish within this extended "fishery conservation zone," and regulated salmon even beyond the limits of the "fishery conservation zone."  

In recognition of the anadromous nature of salmon, Congress opted to regulate their entire migratory range. Accordingly, through the FCMA, Congress gave the United States exclusive management authority over all anadromous fish originating in the United States and throughout their migratory range. This comprehensive management scheme effectively prevented foreign fishing vessels from taking salmon just outside the "fishery conservation zone," which frustrated domestic conservation measures. By asserting management authority throughout the salmon's entire migratory range, Congress acted outside the existing boundaries of international law. Congress restrained its vigor authority, however, by not extending jurisdiction under the FMCA into "any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent... recognized by the United States."  

The FCMA established eight regional fisheries councils under the supervision of the federal government. FMCA provisions tasked each council with preparing management plans, which regulated fisheries under each council's control, consistent with the FMCA's national standards. These plans were adopted in a manner similar to federal agency rulemaking procedures, and included notice, public Comment, and publication in the federal register. The FCMA guaranteed Indian participation in fisheries management decisions through an Indian position on the appropriate councils.


132. The United States does not have management authority over "highly migratory species of tuna." 16 U.S.C. § 1812.

133. See id.

134. See id.

135. See id.

136. See Wilkinson & Conner, supra note 129, at 51.

137. See Wilkinson & Conner, Supra note 129, at 51.


140. See 16 U.S.C. § 1852 (g)-(h).

141. See id. §§ 1852(h)(3) & 1855(c)(3)(A).

142. See id. § 1852(b).
B. Pacific Northwest Electric Power Planning and Conservation Act

In 1980, Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act (the Act). Through the Act, Congress melded the hydroelectric power generation reality of the Columbia River Basin with the conservation goals for anadromous fish. The Act intended to “protect, mitigate, and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish... which are dependent on suitable environmental conditions substantially obtainable from management... of the Federal Columbia River Power System...” Prior to passage of the Act, the Federal Columbia River Power System did not bear the destructive cost of the salmon fishery wrought by federal dam building, nor was it passed to the power consumers. Instead, the federal government externalized the cost. The Act internalized this cost by providing, among other things, water-releases to meet fish preservation and mitigation needs.

Significant to the discussion here, the Act created the Northwest Power Planning Council. The Northwest Power Planning Council effectively removed fisheries management decisions from those with significant interests in the power industry. Eight members, two each from Washington, Oregon, Idaho, and Montana composed the Council. The Act charged the Council with developing and implementing a comprehensive fish plan, consistent with the purposes of the Act. The Act ensured Indian participation in the rulemaking process through explicit designation of notice and Comment by Indian tribes prior to rule adoption.

144. Id. § 839(6).
145. See Wilkinson & Conner, supra note 129, at 55. Cost externalization is a common pool problem described by Hardin in his article on the tragedy of the commons. See Garrett Hardin, The Tragedy of the Commons, 168 SCIENCE 1243, 1244 (1968). A tragedy of the commons occurs where a common resource is open to all. In this case, fishing is open to all. The ability of the resource (fish) to sustain itself is limited by its capacity for reproduction. Each fisherman wants to maximize his profit. To do this, each must take as many fish as possible. There is no incentive to decrease the fishing take, because a fish lost to one fisherman is one gained by another. Eventually the number of fish taken exceeds the fish’s capacity to reproduce. When this occurs, the entire resource declines, and may eventually be lost.
146. See Wilkinson & Conner, supra note 129, at 55. See also 16 U.S.C. § 839b(h)(6)(E)(ii). Releasing water from behind the Columbia River dams has at least two significant effects. First, it provides additional water flow to ease the salmon’s upstream spawning run, and second, it forgoes the electric power generation potential of the water, thereby externalizing the cost of power generation.
150. See id. § 839b(h)(11)(A).
151. See id. § 839b(h)(4)(A).
In 1982, the United Nations adopted the Convention on the Law of the Sea (UNCLOS). Articles 55 through 75 of the UNCLOS describe the rights and duties of states (countries) with regard to the Exclusive Economic Zone (EEZ). UNCLOS defines the EEZ as extending "200 nautical miles from the baselines from which the breadth of the territorial sea is measured." Within the EEZ, the coastal state enjoys exclusive rights to explore, exploit, conserve, and manage the living and non-living natural resources within the seabed and superjacent water. The coastal state determines the allowable fish catch within the EEZ, and promotes optimum utilization of the resource. Articles 63 and 64 provide for coordination among states where fish stocks occur within, or migrate through the EEZ of more than one state.

The UNCLOS gives special consideration to anadromous fish species. Article 66 grants primary responsibility for anadromous fish species to their country of origin. The UNCLOS requires states of origin to conserve and to regulate anadromous fish in the area landward of the outer limit of its EEZ. The UNCLOS encourages coordination between interested states in their regulation of the overall catch of anadromous fish, even where the fish occurred outside a state's EEZ. The UNCLOS also asks the states where anadromous fish originate and other interested states to implement fisheries regulations through regional organization. The UNCLOS does not provide an enforcement mechanism to ensure compliance with the state of origins' regulations, but instead it advocates for coordination between affected states.

In 1993, the U.N. Conference on Straddling Stocks and Highly Migratory Fish Stocks met to consider current conservation and management provisions outlined in the UNCLOS. The Conference intended to improve cooperation and communication between states that managing straddling and highly migratory fish stocks. The Conference produced the Fish Stock Agreement, a binding treaty.
The Fish Stock Treaty accomplished its objectives through existing or newly created regional management organizations. The treaty required all "real interest" states to become members of the appropriate regional organization, lest they be banned from fishing the regulated stocks in the subject region. The treaty tasked regional organizations with identifying stocks within their region and adopting regulations after considering the specific characteristics of the region. State members of the regional organizations were granted power to enforce regulations on the high seas within their region against non-members. Enforcement mechanisms included powers to board, to inspect, and possibly to order offending vessels to the nearest port. The Fish Stock Treaty intended to develop and enforce high-seas fishing regulations. Indians participate in international fisheries management decisions under the Law of the Sea and its associated treaties through their participation on the council established under the FMCA.

D. Pacific Salmon Treaty

In 1985, the United States and Canada reached an agreement to jointly manage the pacific salmon originating within their rivers. This treaty was recently amended in 1999. The treaty provided guidelines for managing six fisheries, some by the fish's area of origination, others by species of fish. Two governing principles gave the treaty form—the conservation and equity principles. The conservation principle demanded that "each party shall 'prevent overfishing and provide for the optimum production' of salmon." The equity principle gave each country "benefits equivalent to the production of salmon originating in its waters."
Indian tribes played a significant role throughout the Pacific Salmon treaty negotiations. The tribes filed suit against the Secretary of the Interior, and the states of Alaska, Washington, and Oregon as the parties negotiated the treaty. The Indians claimed that the federal government and the state governments improperly allocated salmon resources as provided under the treaties negotiated by Governor Stevens. Specifically, the tribes demanded that the United States consider Alaska’s take when it determined the harvestable portion of fish. That ongoing lawsuit essentially stalled the treaty negotiations. Neither the United States nor Canada was willing to enter into a binding treaty before the status of the tribes’ take was reconciled with Alaska.

The legislation enacted by Congress to implement the Pacific Salmon Treaty reserved Indian participation in fisheries management. The implementing legislation established a four-member Commission to represent the United States in fisheries management decisions. The legislation provided that one member of the Commission come from a list of candidates created by the treaty Indian tribes.

IV. CONTINUED INDIAN PARTICIPATION IN FISHERIES MANAGEMENT

Judge Boldt’s 1974 decision sparked Indian inclusion in fisheries management from that point forward. That decision, essentially affirmed two years later by the United States Supreme Court, effectively apportioned half of the harvestable salmon population to the Indians. Due to the large quantity of fish now controlled by the Indians, Federal and state governments could no longer ignore their rights.

In 1976, shortly after Judge Boldt’s decision, Congress passed the Magnuson Act, which officially included Indians in federal fisheries management decisions. One of the Magnuson Act’s eight regional fisheries management, the Pacific Fisheries Management Council, developed fisheries management plans for salmon originating in from California, Washington, Idaho and Oregon. Congress ensured Indian participation in salmon management by guaranteeing that one member of the Council was an Indian.

177. The Columbia River Inter-Tribal Fish Commission (CRITFC), a group composed of four Columbia River tribes, helped bring the parties together for the treaty negotiations. See Brown, supra note 159, at 621.
179. See id.
181. See Brown, supra note 159, at 621. The lawsuit was settled by stipulation. It allocated salmon migrating off the coast of Alaska between the tribes and other interested parties. See Yakima Indian Nation, 605 F.Supp. at 834. The stipulation forecloses future lawsuits by the tribes in exchange for veto power over salmon allocations. Id. at 835-36.
183. See id. § 3632(a).
184. See id. The chairmanship of the Commission rotates annually among all the members. Id.
In 1980 and 1985 the federal government again sought to include Indians in fisheries management decisions. In 1980 Congress passed the Pacific Northwest Electric Power Planning and Conservation Act. Then, in 1985, the United States and Canada agreed to the Pacific Salmon Treaty. Both instruments had mechanisms to include Indians in fisheries management decisions. The Pacific Northwest Electric Power Planning and Conservation Act promoted Indian involvement by specifically providing Indian with authority to comment on proposed rules fisheries conservation rules prior to their adoption. The Pacific Salmon Treaty gave Indians a voice in fisheries management by mandating that one member of the enacting Commission be selected from a list provided by the Indians. So, the federal government involved Indians in fisheries management decisions on both national and international levels.

Continued Indian participation in fisheries management decisions could erode as quickly as it arose. Felix Cohen described the change in the federal government's relationship with Indian tribes using the following words: "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith..." In 1953, through Public Law 280, Congress granted certain states criminal and some civil jurisdiction over Indian and Indian reservations. In this manner, Congress exercised plenary power over the Indian tribes and abrogated treaty rights. In a similar fashion, Congress could grant the entire share of salmon to commercial fishermen.

In 1996, David Getches described the end of the Modern Era and the coming of the new subjectivism in Indian jurisprudence. Central to Getches' thesis that the value of precedent in Indian law was disappearing was a quote attributed to Justice Antonin Scalia, made as the Justice considered a case involving tribal criminal jurisdiction over non-member Indians. Justice Scalia indicated that in evaluating an Indian law issue, the judiciary decides "what the current state of affairs ought to be by taking into account all legislation, and the

189. See Pevar, supra note 39, at 113-18.
190. See supra Part I.
191. David Getches is the Raphael J. Moses Professor of Law, University of Colorado School of Law.
193. See Getches, supra note 43, at 1574.
194. See Getches, supra note 43, at 1575.
196. Non-member Indians are Indians present on the reservation of a tribe to which they are not a part.
congressional 'expectations[]' "'legislation is not essential."' Justice Scalia's statement effectively amounts to a sharing of plenary power" over Indian affairs between Congress and the judiciary.

Early Supreme Court decisions gave meaning to the Stevens' treaty language by attempting to effectuate the parties' intent on the date of treaty formation. This line of reasoning reached its zenith with Judge Boldt's 1979 decision in United States v. Washington, where the court decided that the Indians' reasonable expectations at the time of treaty formation amounted to a reserved, federally protected right to fifty percent of the harvestable salmon, taken essentially anywhere. Judge Boldt's decision recognized that since Indians retained a right to such a large portion of the salmon, their interests in fisheries management decisions must be represented. And so, the decision mandated that Washington use its position on an international fisheries counsel to promote Indian fishing interests. That mandate culminated in the current realities of Indian participation in fisheries management decisions at all levels. Because the Indians' interests in the salmon transcend economic concerns, and reside in a religious place where conservation plays a central role, their involvement in fisheries management decisions can bring nothing but hope to salmon's future.

V. CONCLUSION

Salmon constitutes big business in the Pacific Northwest. Commercial fishermen from the United States, Canada, and distant nations, take salmon from the Northwest to worldwide markets. International and domestic agreements recognize the United States' obligation to the Indians, and divide the total take between Indians and non-Indians at roughly fifty-percent. Non-Indian, commercial fishermen in the United States recognize that their livelihood depends on the total number of available salmon. The most obvious method to increase the harvestable portion of salmon is to increase their overall population. Since the Indians control half of the harvestable portion of salmon, they occupy an essential place at the negotiation table.

The nature of salmon migration patterns demands a holistic approach to fisheries management, and such coordination is difficult given the many jurisdictional boundaries a single migrating salmon passes through."" Through domestic and international avenues, the United States attempts to manage the salmon population. The Supreme Court interpreted the Stevens Treaties to grant fifty-percent of the salmon take to Indian fishermen, and the state may regulate Indian fishing only to the extent necessary for conservation purposes. Through Congress and the courts, Indians assert authority over decisions that affect the entire salmon population. These efforts continue to bolster salmon recovery and bring salmon management strategies more in line with Indian values. Judge

197. See Getches, supra note 43, at 1575.
198. See supra notes 28-32, and accompanying text.
199. Wilkinson calculated that a chinook salmon from the Lochsa River in Idaho must pass through 17 different jurisdictions in its lifetime. See Wilkinson & Conner, supra note 129, at 22.

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Boldt’s decision in 1974 not only solidified Indian fishing rights, but also produced a victory for salmon mitigation and conservation efforts.

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