

# COMMENTS

## Pacific Northwest Indian Treaty Fishing Rights

### I. INTRODUCTION

In 1854 and 1855 the United States entered into a series of treaties with the Western Washington Indians to insure peace and prosperity for the growing population of settlers.<sup>1</sup> The Indians exchanged vast tracts of land<sup>2</sup> for monetary payments<sup>3</sup> and other minimal guarantees<sup>4</sup> while reserving certain smaller parcels for their exclusive use.<sup>5</sup> In each treaty, the signatory

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1. Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 (1855) (the signatory tribes included the Muckleshoot, Nisqually, and Squaxim); Treaty of Olympia, July 1, 1855, Jan. 25, 1856, 12 Stat. 971 (1859) (the signatory tribes included the Hoh, Quileute, and Quinault); Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939 (1859) (signed by the Makah Tribe); Treaty of Point Elliot, Jan. 22, 1855, 12 Stat. 927 (1859) (the signatory tribes included the Lummi, Muckleshoot, Upper Skagit, Duwamish, and Suquamish); Treaty with the Yakimas, June 9, 1855, 12 Stat. 951 (1859) (signed by the Yakima Nation); Treaty of Point no Point, Jan. 26, 1855, 12 Stat. 933 (1859) (signed by the Skokomish Tribe). Although the parties negotiated and signed the treaties in 1854 and 1855, Congress refused to ratify any but the Treaty of Medicine Creek prior to 1859 due to continuing hostilities between the settlers and certain tribes. AMERICAN FRIENDS SERVICES COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 36 (1970) [hereinafter cited as UNCOMMON CONTROVERSY].

2. *E.g.*, Treaty of Medicine Creek art. II, Dec. 26, 1854, 10 Stat. 1132 (1855). The ceded land included the "case area" involved in this litigation:

[T]hat portion of the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area, and includes the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas.

United States v. Washington, 384 F. Supp. 312, 328 (W.D. Wash. 1974).

3. These payments totalled \$207,500. Washington v. Washington Fishing Vessel Ass'n, 443 U.S. 658, 677 (1979).

4. The United States also agreed to establish free agricultural and industrial schools on the reservations, to provide smith and carpenter shops with tools, to employ a blacksmith, carpenter, and farmer to instruct the Indians in these occupations, and to supply a physician to care for the treaty Indians. *E.g.*, Treaty of Medicine Creek art. X, Dec. 26, 1854, 10 Stat. 1132, 1134 (1855).

5. *See, e.g.*, Treaty of Medicine Creek art. II, Dec. 26, 1854, 10 Stat. 1132, 1134 (1855):

There is, however, reserved for the present use and occupation of the said

tribes expressly reserved the right to fish at "all usual and accustomed grounds and stations . . . *in common with* citizens of the territory."<sup>6</sup> Throughout the twentieth century, state and federal courts have labored over a workable delineation of the extent and meaning of those rights. Representative of the judiciary's failure to adequately resolve the conflict is a series of seven United States Supreme Court decisions, from 1905 to the present, interpreting the key treaty phrase "in common with."<sup>7</sup> Despite these decisions, the conflict and litigation among treaty fishermen, non-treaty fishermen, and the State of Washington continues.<sup>8</sup>

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tribes and bands, the following tracts of land . . . all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent.

6. *E.g., id.*, art. III:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands. *Provided, however*, that they shall not take shell-fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.

The right to fish "in common with" other citizens refers to off-reservation fishing. On-reservation fishing was supposedly one of the exclusive uses to which the Indians could put their reservations. *United States v. Washington*, 384 F. Supp. 312, 332 n.12 (W.D. Wash. 1974). In recent years, however, state control over on-reservation fishing has increased. In *Puyallup Tribe v. Washington Game Dep't*, 433 U.S. 165 (1977), the United States Supreme Court sanctioned regulation of on-reservation fishing. In *Washington v. Washington Fishing Vessel Ass'n*, 443 U.S. 658 (1979), the Court then concluded that fish caught on the reservation should be counted as part of the tribe's allocable share. The Court reasoned that the place fish are caught is irrelevant to the question of whether they are counted in the share.

7. *Washington v. Washington Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Puyallup Tribe v. Washington Game Dep't*, 443 U.S. 165 (1977); *Washington Game Dep't v. Puyallup Tribe*, 414 U.S. 44 (1973); *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968); *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. v. United States*, 249 U.S. 194 (1919); *United States v. Winans*, 198 U.S. 371 (1905).

8. Although Congress has not been actively involved in this controversy, judicial activism may trigger legislative restrictions in the form of treaty abrogation. Abrogation refers to legislative modification of an existing treaty. Congress can unilaterally abrogate any treaty; the "power to abrogate is based on the notion that a treaty represents the political policy of the nation at the time it was made. If there is a change of circumstances and the national interest accordingly 'demands' modification of its terms, then Congress may abrogate a treaty in whole or in part." *Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation*, 63 CALIF. L. REV. 601, 604 (1975) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)).

The abrogation of a treaty, is a complicated and difficult procedure beyond the scope of this comment. Nonetheless, judges should realize that their decisions could ulti-

This Comment analyzes and discusses this ongoing controversy, focusing on the treaty Indians' history,<sup>9</sup> the background of the treaty negotiations and signings,<sup>10</sup> the principles of construction governing the interpretation of Indian treaties,<sup>11</sup> and the relevant legal precedents.<sup>12</sup> It attempts to construct a coherent approach to the Washington fishing rights controversy emphasizing that the Washington Indians' paramount purpose in these treaties was maintaining the right to fish. Two lower court cases that successfully took account of the Indians' purpose and meaningfully effectuated that purpose in relation to twentieth century developments are Judge Boldt's decision in *United States v. Washington (Boldt)*<sup>13</sup> and Judge Orrick's opinion in *United States v. Washington (Phase II)*.<sup>14</sup> This Comment

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mately result in congressional modification of those same treaty rights. Abrogation is a feasible means of limiting judicial treaty construction.

Senator Gorton (Wash.) and Representative Bonker (Wash.) recently introduced legislation to modify the Pacific Northwest Indian treaties. Steelhead Trout Protection Act, S. 874, 97th Cong., 1st Sess. (1981); H.R. 2978, 97th Cong., 1st Sess. (1981). The bill would explicitly override any Federal Court decision allowing Indians to commercially harvest steelhead. *Id.* § 3. As of this writing the bill has been referred to the Senate Select Committee on Indian Affairs and the House Committees on Interior and Insular Affairs and Merchant Marine and Fisheries.

In an area of law closely related to the *Phase II* decision, one commentator has suggested that Congress partially abrogate the implied-reservation-of-water doctrine because Indians have a potential monopoly over water rights in the western United States. See note 192 *infra* and accompanying text.

9. See text accompanying notes 21-31 *infra*.

10. See text accompanying notes 17-21 *infra*.

11. See text accompanying notes 65-69 *infra*.

12. See text accompanying notes 32-64 *infra*.

13. 384 F. Supp. 312 (W.D. Wash. 1974).

14. 506 F. Supp. 187 (W.D. Wash. 1980), *appeal docketed*, No. 81-3111 (9th Cir. Feb. 23, 1981). The case is a direct continuation of the *Boldt* litigation. The litigation started when the United States filed suit in 1970, on its own behalf as a trustee for seven Indian tribes. The initial party plaintiff tribes were the Hoh, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, and Skokomish. Subsequently, the following fourteen tribes intervened as plaintiffs on their own behalf: The Duwamish, Jamestown Band of Clallam, Lower Elwha Samish, Sauk-Suiattle, Snohomish, Snoqualmie, Tulalip, Upper Skagit River, the Yakima Nation, Lummi, Quinault, Squaxin Island and Stillaguamish. The defendants included the State of Washington, the State Departments of Fisheries and Game, the directors of these agencies, and the Washington Reef Net Owners Association. Additional organizations and agencies participated as *amici curiae* in various courts. *Boldt*, 384 F. Supp. at 327.

The complex procedural history of this litigation involves several opinions and various appeals; an initial outline of cases and their procedural history is helpful. *United States v. Washington (Boldt)*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wash. 1974-78), *various appeals dismissed*, 573 F.2d 1121 (9th Cir. 1978), decisions at 459 F. Supp. 1020, 1097-1118 (W.D. Wash. 1977-78), *aff'd sub nom.*

endorses the innovative approach of those two decisions.

## II. BACKGROUND

Before the white population of the Northwest began to grow in the 1840's, the area's Indians roamed freely, fishing and hunting where they pleased.<sup>15</sup> With the arrival of the white man, however, the Indian culture changed drastically. The pioneers demanded that the federal government negotiate treaties with the Indians to free the land for unimpeded settlement.<sup>16</sup> Consistent with its policy of taking Indian lands by consent rather than by conquest,<sup>17</sup> the United States appointed Isaac I. Stevens the first governor of Washington and superintendent of Indian affairs;<sup>18</sup> his primary responsibility was negotiating treaties with the Indians.<sup>19</sup> Stevens initially proposed to centralize the Northwest tribes on one or two large tracts of land, thus avoiding further conflict with the settlers and facilitating federal control over the Indians.<sup>20</sup> The government hoped this move would also convert the Indians to an agrarian culture.<sup>21</sup> What Stevens had not considered was the Indians' refusal to give up the right to

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Puget Sound Gillnetters Ass'n v. United States District Court for the Western District of Washington, 573 F.2d 1123 (9th Cir. 1978), *aff'd in part, vacated in part, and remanded sub nom.* Washington v. Washington Fishing Vessels Ass'n (Phase I), 443 U.S. 658 (1979).

15. *Boldt*, 384 F. Supp. at 350-53.

16. Comment, *State Power And The Indian Treaty Right To Fish*, 59 CALIF. L. REV. 485, 485-86, (1971).

17. "[T]he policy of the Congress, [which] continued throughout our history, [was] to extinguish Indian title through negotiation rather than by force . . ." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 273 (1955), *quoted in* Department of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 249, 422 P.2d 754, 757 (1967). *Accord*, Comment, *Indian Treaty Analysis And Off-Reservation Fishing Rights: A Case Study*, 51 WASH. L. REV. 61, 70 (1975).

18. UNCOMMON CONTROVERSY, *supra* note 1, at 18-25. The authors describe Stevens as a dynamo of energy who saw his job in Washington as an opportunity to win notice in the East. In less than a year he negotiated treaties with over seventeen thousand Indians, extinguishing their title to sixty-four million acres of land.

19. *Id.* at 18. The United States also assigned Stevens the task of surveying the Northwest for possible railway routes.

20. *Id.* at 20-21.

21. Commentators have referred to this as the "Vanishing Indian" theory; the continuing demand for modern day recognition of 19th century treaty rights points out just how faulty that theory is. As early as 1864, Henry A. Webster, a perceptive Makah Indian agent, wrote: "I have been of the opinion for a long time that one of the most practical methods of directly benefiting these Indians is by aiding them in their fisheries . . ." The government ignored Webster's suggestions. UNCOMMON CONTROVERSY, *supra* note 1 at 41 (citing H. WEBSTER, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 250 (1865)).

fish.

Fish have always played a very important role in the Pacific Northwest Indians' economy and culture; the right to continue fishing dominated treaty negotiations. The Western Washington Indians were traditionally known as "fish-eaters" because their diets, social customs, and religious practices centered around the fish.<sup>22</sup> Tribes traded fish among themselves and with the white man.<sup>23</sup> The tribes also performed religious rites to insure the return of salmon each year.<sup>24</sup> A special dignitary, the salmon chief, supervised these religious services, the actual fishing, and the ultimate distribution of the catch throughout the village.<sup>25</sup> The common cultural link between all the signatory tribes was their dependence on fish.<sup>26</sup>

The Indians' obvious dependence on fish and their desire to maintain the freedom to fish apparently impressed Stevens because each of the treaties includes a phrase assuring the Indians the right to fish "in common with" all citizens of the territory.<sup>27</sup> Retention of this right was the one indispensable requirement to any treaty with the Northwest Indians.<sup>28</sup> As Stevens himself acknowledged: "it was . . . thought necessary to allow them to fish at all accustomed places."<sup>29</sup>

It is important to note that the Indians reserved these rights. "In other words the treaty was not a grant of rights to the Indians but a grant of rights from them . . . a reservation of

22. *United States v. Washington*, 520 F.2d 676, 682 (9th Cir. 1975). Judge Boldt characterized the Indians as hunters and gatherers.

From the earliest known times, up to and beyond the time of the Stevens' treaties, the Indians comprising each of the treating tribes and bands were primarily a fishing, hunting and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture. They were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers. Anadromous fish was the great staple of their diet and livelihood. They cured and dried large quantities for year around use, both for themselves and for others through sale, trade, barter and employment.

*Boldt*, 384 F. Supp. at 406.

23. *Phase I*, 443 U.S. at 665 nn. 6 & 7.

24. *Id.*

25. R. SPENCER & J. JENNINGS, *THE NATIVE AMERICANS*, 219-20, 222 (1965), *quoted in Comment*, *supra* note 16, at 485 n.4.

26. *See* note 17 *supra*.

27. *See, e.g.*, Treaty of Medicine Creek art. III, Dec. 26, 1854, 10 Stat. 1132, 1134 (1855).

28. UNCOMMON CONTROVERSY, *supra* note 1, at 21.

29. *Id.*

those not granted.”<sup>30</sup> Felix Cohen, a noted expert, has called this the most basic principle of Indian law.<sup>31</sup> Fundamentally, the treaty Indians intended to and did keep the right to fish. Any superior fishing right they may have results from that reservation and not from special government treatment.

### III. PRECEDENT

The first United States Supreme Court case interpreting these treaties, *United States v. Winans*,<sup>32</sup> set the tone for future litigation. In *Winans* the Court upheld the Indians' right to fish at all usual and accustomed places, concluding a private landowner could neither exclude treaty fishermen from his land nor set up fish wheels<sup>33</sup> which could destroy an entire fish run. Although the Court recognized that the treaty accorded Indians a special status and construction of treaty language must give effect to the central purpose of the treaty,<sup>34</sup> the Court, in unsupported dictum, also recognized state regulation of treaty rights. In reference to the retained fishing right, Justice McKenna, speaking for the court said: “Nor does it restrain the state unreasonably, if at all, in the regulation of the right.”<sup>35</sup> This dictum narrowed and confused the ultimate holding.

In the years following *Winans*, Washington courts, relying on this dictum, upheld state power to regulate the treaty fishermen and routinely sustained treaty Indians' convictions for failure to comply with regulations imposed equally on all fishermen.<sup>36</sup> In 1942, however, the United States Supreme Court decided *Tulee v. Washington*,<sup>37</sup> and held that the state could not require treaty fishermen to purchase licenses. The Court reasoned that it was anomalous to charge the treaty fishermen for exercising the very right their ancestors had expressly

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

31. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (U.N.M. ed. 1972). For an analysis of reserved rights see notes 70-89 *infra* and accompanying text.

32. 198 U.S. 371 (1905).

33. A fish wheel is a very destructive device that can catch salmon by the ton rapidly decreasing the available supply until the entire run is destroyed. *Id.* at 372 (argument of the Solicitor General).

34. *Id.* at 380-81.

35. *Id.* at 384.

36. *State v. Wallahee*, 143 Wash. 117, 255 P. 94 (1927); *State v. Menniok*, 115 Wash. 528, 197 P. 641 (1921); *State v. Alexis*, 89 Wash. 492, 154 P. 810 (1916); *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916).

37. 315 U.S. 681 (1942).

reserved.<sup>38</sup> Nonetheless, the Court upheld the state power to regulate as long as those regulations were "necessary for conservation of the fish."<sup>39</sup> The Court concluded that license fees were not necessary for conservation.<sup>40</sup> Unfortunately, *Tulee* failed to give the lower courts any guidance in applying the new conservation standard.<sup>41</sup>

After *Tulee*, the lower federal courts and state courts wrestled with the inadequately framed "necessary for conservation" standard. Some courts attempted to give meaningful content to the phrase,<sup>42</sup> while others refused to recognize any state power over federal treaty rights.<sup>43</sup> The accommodation of these competing interests continued in *Puyallup Tribe v. Department of Game (Puyallup I)*.<sup>44</sup> That case began when the Washington State Departments of Fisheries and Game brought suit against the Puyallup Tribe seeking declaratory judgment that the tribe was not immune from state regulation of net fishing. In an attempt to refine the *Tulee* standard, the majority enumerated a vague three-part test for acceptable state regulation: the regulation must be necessary for conservation, must meet "appropriate standards," and must not discriminate against the Indians.<sup>45</sup>

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38. *Id.* at 684-85.

39. *Id.* at 684. The Court cited two cases: *Kennedy v. Becker*, 241 U.S. 556 (1916), and *United States v. Winans* 198 U.S. 371 (1905). *Kennedy* can be distinguished because it involved a *privilege* rather than a *reserved right*. *Boldt*, 384 F. Supp. at 336-37. The dictum in *Winans* on state regulation is unpersuasive. See notes 43 & 44 *infra* and accompanying text. *Kennedy* relied in part on *Winans* and on *Ward v. Race Horse*, 163 U.S. 504 (1896). 241 U.S. at 564. *Ward*, however, involved exhausted rather than continuing treaty rights. *Boldt*, 384 F. Supp. at 335-36. Critics have discredited the *Ward* Court's linguistic and legalistic approach. See, e.g., *State v. Arthur*, 74 Idaho 251, 257-61, 261 P.2d 135, 138-40 (1953), *cert. denied*, 347 U.S. 937 (1954).

40. *Tulee v. Washington*, 315 U.S. 681, 685 (1942).

41. *Winans* and *Tulee* signalled the beginning of the conflicting federal and state interpretations of "in common with," with state courts holding it guaranteed only equal protection and federal courts finding greater implied rights. Ironically, in the earliest cases interpreting these treaties the court holdings reflected exactly the opposite viewpoints. See *United States v. Taylor*, 3 Wash. Terr. 88, 50 P. 333 (1887) (Indians had a right to cross the land of a bona fide purchaser for value to get to a usual fishing spot). *But cf.* *United States v. Swan*, 50 F. 108 (D. Wash. 1892) (treaties only secured equality of rights not privileges).

42. *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963).

43. See e.g., *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953); see also *State v. Saticum*, 50 Wash. 2d 513, 314 P.2d 400 (1957).

44. 391 U.S. 392 (1968). For a more complete discussion of *Puyallup I* see Hobbs, *Indian Hunting and Fishing Rights II*, 37 Geo. WASH. L. REV. 1251 (1969).

45. 391 U.S. at 399.

Like the *Winans* dictum on the state's right to regulate,<sup>46</sup> however, the *Puyallup I* standards were too vague to have any practical significance. Although the Court authorized application of a different standard for measuring the validity of regulations when applied to treaty fishermen, it did not spell out the elements of that standard. On remand, the Washington courts upheld the ban on net fishing under the *Puyallup I* test,<sup>47</sup> but in a pivotal decision the United States Supreme Court reversed.

In *Washington Game Department v. Puyallup Tribe (Puyallup II)*<sup>48</sup> Justice Douglas' majority opinion held that the state's regulations discriminated against treaty fishermen because the state allowed non-treaty sports fishermen to catch steelhead and thus had effectively preempted the Indian fishery.<sup>49</sup> More importantly, the *Puyallup II* Court determined that acceptable regulations must apportion the number of harvestable fish between treaty and non-treaty fishermen.<sup>50</sup> The Court construed the "in common with" treaty language as requiring that Indians receive a proportionate share of the fish,<sup>51</sup> but Douglas refused to devise an apportionment formula because of the many variables involved.<sup>52</sup>

While state reconsideration of the apportionment was pending in the Washington courts, Judge Boldt, a Federal District Judge in Western Washington, decided *United States v. Washington*.<sup>53</sup> The case began in 1970 when the United States and seven Indian tribes initiated an action against the State of Washington for declaratory and injunctive relief concerning off-reservation treaty fishing.<sup>54</sup> Although *Boldt* succeeded in giving meaning and content to several of the vague phrases courts had dealt with throughout the fishing rights controversy, such as "in

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46. 198 U.S. at 384-85.

47. The Washington Supreme Court had held that the total ban on net fishing was justifiable, provided new fishing regulations were made annually for the tribes. *Department of Game v. Puyallup Tribe*, 80 Wash. 2d 561, 571, 575, 497 P.2d 171, 177, 180 (1970).

48. 414 U.S. 44 (1973).

49. *Id.* at 48.

50. "The aim is to accommodate the rights of the Indians under the Treaty and the rights of other people." *Id.* at 48-49.

51. *Id.* at 48 (citing *Puyallup I*, 391 U.S. at 398-99).

52. *Id.*

53. 384 F. Supp. at 312.

54. The Ninth Circuit Court of Appeals and the United States Supreme Court reviewed and substantially affirmed this decision. For the complete procedural history of the case see note 14 *supra*.

common with" and "necessary for conservation," the decision did not gain universal acceptance. The most controversial aspect of the opinion was Judge Boldt's decision that treaty Indians are entitled to fifty percent of each harvestable fish run. In rendering his decision Judge Boldt relied on the treaties, their historical context, the Indian's cultural dependence on fish, and legal precedent. The opinion is a significant contribution to the legal interpretation of Indian treaty fishing rights and is in many ways the "touchstone" for future analysis in the area.<sup>55</sup>

In 1977, the United States Supreme Court decided the final case in the *Puyallup* trilogy, *Puyallup Tribe v. Department of Game (Puyallup III)*,<sup>56</sup> and *sub silentio* ratified the apportionment formula in *Boldt*. In *Puyallup III* the Court affirmed the Washington Supreme Court's determination that treaty fishermen were entitled to forty-five percent of each steelhead trout run, but the state courts' recalcitrance continued. Following the *Boldt* decision, nontreaty fishermen challenged regulations promulgated to implement the district court's mandate. In *Washington State Commercial Fishing Vessel Association v. Tollefson*<sup>57</sup> and *Puget Sound Gillnetters Association v. Moos*<sup>58</sup> the Washington courts refused to follow *Boldt* and struck down the regulations. State recalcitrance, termed the "most concerted official and private effort to frustrate a decree of a federal court in this century,"<sup>59</sup> eventually led to increased supervision by the *Boldt* court. Amidst this atmosphere of judicial conflict and state defiance, the United States Supreme Court handed down

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55. Judge Boldt's opinion is generally regarded as a landmark decision. One commentator described the difficulty of Boldt's task:

These conflicts [among Indians, non-Indians, and the state] resulted in a history of state seizures of Indian fishing nets and equipment, or their destruction by sportsmen, culminating in a series of armed confrontations in the 1960's. The parties struck militant positions. Against this backdrop, Judge Boldt was asked to apply the dry aesthetics of legal principle. Lacking the guidance of clear and precise doctrine, Judge Boldt was forced to wind his way through 200 years of judicial uncertainty and misstatement.

Comment, *supra* note 17, at 63-64.

56. 433 U.S. 165 (1977). For a more comprehensive discussion of *Puyallup III* see Comment, *State Regulation of Indian Treaty Fishing Rights: Putting Puyallup III into Perspective*, 13 GONZ. L. REV. 140 (1977).

57. 89 Wash. 2d 276, 571 P.2d 1373 (1977).

58. 88 Wash. 2d 677, 565 P.2d 1151 (1977).

59. *Phase I*, 443 U.S. at 696 n.36 (citing *Puget Sound Gillnetters Ass'n v. United States District Court*, 573 F.2d 1123, 1126 (9th Cir. 1978)). In *Puget Sound Gillnetters Ass'n*, the court upheld continued district court control until the state followed the decree.

its most definitive fishing rights decision to date.<sup>60</sup>

*Washington v. Washington State Commercial Passenger Fishing Vessel Association (Phase I)* was the seventh United States Supreme Court decision construing the treaty phrase "in common with." Justice Stevens' opinion expressly affirmed the logic and reasoning of *Boldt's* percentage allocation method, although there were significant modifications. *Boldt* concluded that each user group had a right to take up to fifty percent of the fish runs at all usual and accustomed places.<sup>61</sup> Under *Phase I*, however, the Indian's fifty percent share represents a strict maximum figure subject to future downward adjustments.<sup>62</sup> According to the Court the treaties only guaranteed the Indians enough fish to ensure a "moderate living" subject to the fifty percent ceiling. Several issues raised but left unresolved in *Phase I* included: whether the treaty Indians' allocated share should include hatchery fish;<sup>63</sup> and whether there is an implied right to have the fish protected from environmental degradation.<sup>64</sup>

#### IV. TREATY INTERPRETATION

In each of these fishing rights cases the central issue is treaty interpretation. As in all legal interpretation, principles of construction govern the analysis of treaty terms; in addition, special rules govern construction of Indian treaties.<sup>65</sup> The most oft-cited of these principles is that courts construe treaty terms in the way the Indians most probably understood them, not in a

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60. *Phase I*, 443 U.S. 658 (1979).

61. *Boldt*, 384 F. Supp. at 343.

62. *Phase I*, 443 U.S. at 685-86.

63. *Phase II*, 506 F. Supp. at 190.

64. *Id.*

65. These special rules govern because the Indians were supposedly looking to the United States for protection; therefore, the United States had a duty not to overreach. This duty is grounded in the notion that the United States presumptively had superior negotiating skills and knowledge of the language. For the cases setting out these rules see *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Jones v. Meehan*, 175 U.S. 1 (1899); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *United States v. Kagama*, 118 U.S. 375, 383 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Chief Justice Marshall once characterized the relationship between the United States and the Indians as one between guardian and ward. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17 (McLean, J., concurring). *Contra*, *Department of Game v. Puyallup Tribe*, 86 Wash. 2d 664, 673-74, 548 P.2d 1058, 1066 (1976) (citing *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975), wherein the Court said that canons of construction are not licenses to disregard clear expressions).

technical or legal sense.<sup>66</sup> This principle reflects judicial recognition that there were extraordinary communication and translation problems between the Indians and settlers.<sup>67</sup> It is particularly apposite here because not only are the treaties written in English but, at Governor Steven's insistence, the parties negotiated in a 300 word trade medium known as Chinook jargon.<sup>68</sup> This medium could not adequately express the technical meaning of many key phrases, including "in common with."<sup>69</sup>

Under these circumstances it is inappropriate to rely on a purely linguistic approach. Instead the courts should attempt to construe these treaties in the manner in which the Indians most

66. These canons of interpretation embody a judicial perception that the United States offered to protect the Indians and that the Indians relied upon the offer. The United States Supreme Court has consistently protected the intentions and assumptions of the Indian negotiators.

The United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. 'The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'

*Phase II*, 506 F. Supp. at 195 (quoting *Phase I*, 443 U.S. at 675-76 (quoting in part from *Jones v. Meehan*, 175 U.S. 1, 11 (1899))). Because of this presumption of superior skills and knowledge the courts have held the United States to an affirmative duty not to take advantage of the Indians. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). *Accord*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Seufert Bros. v. United States*, 249 U.S. 194, 195 (1919); *Starr v. Long Jim*, 257 U.S. 613, 622-23 (1913). Commentators have stressed the unique nature of the trust relationship between the United States and the Indians, stating: "Judicial interpretation of Indian Treaties has resulted in a legal relationship and a body of law which are truly *sui generis*." *Wilkinson & Volkman*, *supra* note 8, at 614 (citing *Morton v. Mancari*, 417 U.S. 535, 553-55 (1974); *United States v. Sandoval*, 231 U.S. 28, 39 (1913); *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322 (Ct. Cl. 1966)). Moreover, the authors note that this duty is singularly applicable to Indians. *Id.* (citing *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *Choctaw Nation v. United States*, 119 U.S. 1, 27 (1886); *United States v. Kagama*, 118 U.S. 375, 384 (1886)). For another analysis of this trust relationship see *Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 *STAN. L. REV.* 1213 (1975).

67. *Wilkinson & Volkman*, *supra* note 8, at 610. "The Indian treaties were written only in English making it a certainty that semantic and interpretational problems would arise." *Id.* See *Whitefoot v. United States*, 293 F.2d 658, 667 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962). See, e.g., *Duwamish Indians v. United States*, 79 Ct. Cl. 530 (1934).

68. *UNCOMMON CONTROVERSY*, *supra* note 1, at 21-23. "Owen Bush, one of Stevens' staff present at the negotiations, stated: 'I could talk the Indian languages, but Stevens did not seem to want anyone to interpret in their own tongue and had that done in Chinook.'" E. MEEKER, *PIONEER REMINISCENCES* 208 (1905). In his book Meeker also stated that Stevens was intoxicated and unfit for business at the treaty negotiations. *Id.* at 258.

69. *Boldt*, 384 F. Supp. at 356.

probably understood them. To do so the courts must undertake a vigorous examination of the social, cultural, and economic perspectives of the signatory tribes in order to accurately attribute meaning to treaty terms. Courts must look beyond the language used, especially when the meaning of that language could not be conveyed through the negotiation medium. The courts' consistent failure to take account of the non-literal factors noted above has resulted in conflicting resolution of legal issues.

### A. *Striving to Define "In Common With"*

#### 1. *The Equal Opportunity Theory*

One proposed solution to the state regulation/treaty rights problem that non-treaty fishermen promulgated and the Washington courts<sup>70</sup> accepted at one point, is that "in common with" only assures the treaty fishermen equal protection of the law, thus they only have the same rights as anyone else.<sup>71</sup> Although this may appeal to the American ideal of judging each person individually,<sup>72</sup> it ignores the fact that these are reserved treaty rights, not favorable treatment being accorded to a certain group. Bearing this in mind, the federal courts have implicitly and explicitly rejected this equal opportunity approach. In *Winans*, the Court implicitly recognized that the treaty tribes had special rights, holding that a private land owner could not exclude treaty fishermen from usual and accustomed fishing places on his land. In *Tulee*, the Court again held that treaty fishermen had greater rights than non-treaty fishermen, limiting state regulation of treaty fishing to those regulations necessary for conservation.<sup>73</sup> Under the due process clause of the fourteenth amendment, state regulation of nonfundamental rights will survive judicial scrutiny if it is rationally related to permissible state objectives.<sup>74</sup> As long as the relationship of means to

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70. See, e.g., *Washington State Commercial Fishing Vessel Ass'n v. Tollefson*, 89 Wash. 2d 276, 571 P. 2d 1373 (1977); *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wash. 2d 677, 565 P.2d 1151 (1977).

71. *Washington State Commercial Fishing Vessel Ass'n v. Tollefson*, 89 Wash. 2d at 281, 571 P.2d at 1376.

72. See also Kaplan, *Equal Justice In An Unequal World: Equality For The Negro—The Problem of Special Treatment*, 61 Nw. U.L. REV. 363, 380 (1966). The author states: "[A] man is entitled to be judged on his own individual merits alone . . . ."

73. 341 U.S. at 685.

74. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

ends is not arbitrary or capricious, the law will stand.<sup>75</sup> In regulation of Indian fishing rights, however, the Court requires that state acts be necessary for conservation, a stricter standard than mere rationality. The Court imposed this standard because it recognized the special treaty right.<sup>76</sup>

Judge Boldt noted in *United States v. Washington*,<sup>77</sup> that the primary flaw with the equal opportunity argument is its failure to focus on the fact that the Indians expressly reserved these rights. The fishing rights are not derived from United States or Washington State citizenship, but come from the Indians' ancestors' express reservation in a federal treaty. Prior to the treaties, there was not the "shadow of impediment"<sup>78</sup> to the exercise of these rights. The right to fish was part of the totality of rights Indians enjoyed before the arrival of the American pioneer.<sup>79</sup> When they signed the Stevens' treaties, the Indians gave up many of those rights, but *not* the right to fish. If forfeiture of the fishing right had been a condition of the treaties, the tribes would not have signed.<sup>80</sup>

Indeed, *Phase I* explicitly rejected the equal opportunity argument<sup>81</sup> and should have ended litigation on the subject. Justice Stevens, noting that prior to the treaties the Indians had freely exercised their rights to meet any and all of their needs by taking fish,<sup>82</sup> stated that it would be unlikely the signatory Chiefs perceived a reservation of the fishing right as "merely the chance, shared with millions of other citizens, occasionally to dip their nets . . . ."<sup>83</sup> Stevens emphasized the Indians' perception of these reserved rights and relied on maxims of construction

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75. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960). The Court stated: "[T]he Due Process Clause can be thought to impose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

76. *Tulee v. Washington*, 315 U.S. at 684. The Court stated that the treaty Indians had "continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' . . . ."

77. 384 F. Supp. 312 (W.D. Wash. 1974).

78. *United States v. Winans*, 198 U.S. at 381. Justice McKenna noted that fishing rights were almost as necessary to the treaty tribes as the air they breathed. He also stated that construing these treaties solely to insure an equal opportunity is an "impotent outcome to negotiations and a convention which seemed to . . . give the word of the Nation for more." *Id.* at 380.

79. *Id.* at 381.

80. UNCOMMON CONTROVERSY, *supra* note 1, at 21.

81. *Phase I*, 443 U.S. at 679-80.

82. *Id.* at 665-69.

83. *Id.* at 679.

that mandate consideration of the Indian viewpoint.<sup>84</sup> Stevens also pointed out that the phrasing of the treaties did not place Indians and pioneers on an equal footing.<sup>85</sup> The phrase "said Indians"<sup>86</sup> who would share the right with all citizens refers to the tribes listed in the opening section of each treaty,<sup>87</sup> not to individual Indians. Consequently, the right is a class right rather than an individual right. Additionally, Stevens said that all treaties are essentially contracts and, like contracts, need consideration.<sup>88</sup> In this case the Indians were paid \$207,500 for their land. According to Stevens that figure coupled with a mere equal opportunity to fish is inadequate consideration for the vast tracts of land the signatory tribes ceded to the United States.<sup>89</sup>

## 2. *The Easement Theory*<sup>90</sup>

A second definition of "in common with" does assure the treaty Indians greater rights but, like the equal opportunity argument, fails to adequately effectuate the treaties. According to the easement, or access, theory the treaty Indians have property rights rather than fishing rights. They are given access to their usual and accustomed fishing spots,<sup>91</sup> but once they reach the water they are subject to state regulation to the same extent as the non-treaty fishermen.

Although the easement theory has its roots in *Winans*, it is not without modern day supporters. In *Phase I*, Justice Powell's dissent<sup>92</sup> reiterated the logical framework of the argument. Powell contended that the compelling inference to be drawn from the treaty negotiations is that the treaty Indians only retained the right to go to their usual fishing places and fish there equally with non-treaty fishermen.<sup>93</sup> Powell points out that while the ultimate purpose of the treaties was the peaceful resolution of Indian/pioneer tension, the negotiators feared that restriction of

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84. See notes 65-69 *supra* and accompanying text.

85. *Phase I*, 443 U.S. at 679.

86. *E.g.*, Treaty of Medicine Creek art. III, Dec. 26, 1854, 10 Stat. 1130 (1855).

87. *E.g.*, *id.*, preamble.

88. *Phase I*, 443 U.S. at 675-77 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)).

89. 443 U.S. at 676-77.

90. *United States v. Winans*, 198 U.S. at 384. The Supreme Court said: "[I]t [the treaty] only fixes in the land such easements as enables the right to be exercised."

91. *Phase I*, 443 U.S. at 697-98 (Powell, J., dissenting; Stewart and Rehnquist, JJ., joining the dissent).

92. 443 U.S. at 699-708.

93. *Id.* at 697-98.

the Indians "might interfere with their securing food."<sup>94</sup> Indians needed "liberty of motion,"<sup>95</sup> to acquire food, and to assure free movement to fishing places the Indians needed rights of ingress and egress.<sup>96</sup> Under this interpretation, the treaty right is the equivalent of an easement.

The problem with Powell's historical viewpoint is that it focuses on the white man's purpose, *not* the Indians'. For Governor Stevens, the ultimate purpose may have been resolution of tension, but the Indians' paramount objective was retaining the right to fish.<sup>97</sup> Courts must construe these treaties as the Indians probably understood them.<sup>98</sup> Because the concept of land ownership was foreign to the Indian culture,<sup>99</sup> it is questionable that they understood the treaties only assured them easements. The Indians' signature on the treaty documents is evidence of their belief that the treaties assured them a continuing and meaningful right to fish.<sup>100</sup> In 1854, or even 1905, it may have been true that an easement was adequate to allow the Indians to meet their fishing needs. That does not mean, however, that the treaty tribes only intended to reserve an easement or that an easement is the extent of their rights in 1981. Today a right of access, alone, is meaningless if once the fisherman reaches the water he is subject to the same regulations as the non-treaty fishermen.

Although application of the governing maxims of construction discredits the easement argument, one need not go that far. According to the treaty language the signatory tribes retained the "right of *taking* fish."<sup>101</sup> A right to *take* fish, by definition, implies more than a right to go to the water and "dip one's net." The phrase is particularly significant in the context of this litigation because salmon are anadromous fish.<sup>102</sup> They hatch in

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94. *Id.* at 699.

95. *Id.* at 700.

96. *Id.*

97. *Id.* at 667. Not only was protecting the right vital but the white negotiators invited and allowed the Indians to rely on the United States to protect that right. *Id.* n.11.

98. See text accompanying notes 65-69 *supra*.

99. UNCOMMON CONTROVERSY, *supra* note 1, at 21. To the white man land was something to be owned and fenced in; to the Indians it was part of their religious heritage, not an article of trade.

100. *Id.*

101. *E.g.*, Treaty of Medicine Creek art. III, Dec. 26, 1854, 10 Stat. 1130 (1855).

102. *Phase I*, 443 U.S. at 662. Different species have different life cycles: some return to spawn only once, while others return several times. The relative predictability

fresh water, swim out to sea, where they live out most of their adult lives, and then return to their birthplace to spawn.<sup>103</sup> Due to the cyclic nature of their lives, their runs are very predictable; thus salmon are quite easy to catch. Therefore the right to *take* fish is analogous to harvesting crops and implicitly guarantees more than the right to get to the place where one usually takes fish.

### 3. *The Meaningful Content of "Necessary for Conservation."*

By far the modern courts' most common approach to the fishing rights controversy has been to try to give some meaningful content to the *Tulee* "necessary for conservation" standard, attempting to balance and preserve both the treaty rights and the state's right to regulate. Following *Tulee* the United States Supreme Court did not decide a case arising under a Stevens' treaty until *Puyallup I* in 1968. There the United States Supreme Court upheld and refined *Tulee's* "necessary for conservation" standard. Justice Douglas stated that in order to pass judicial scrutiny the regulations must be necessary for conservation, must meet appropriate standards, and must not discriminate.<sup>104</sup> In *United States v. Washington*, Judge Boldt defined and delineated the vague *Puyallup I* guidelines so that they were susceptible of practical application. In order to be necessary for conservation the regulation must be designed to preserve the resource and carry out the treaties' purpose.<sup>105</sup> Meeting appropriate standards required a full and fair public consideration of proposed regulations.<sup>106</sup> Finally, a regulation would be nondiscriminatory if it provided treaty fishermen a

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of the runs make salmon quite easy to catch. By treaty time Indians fished throughout western Washington using a variety of methods, in both marine and fresh water areas. It is estimated that the annual harvest before non-Indian commercial fishing began was 18,000,000. J. CRAIG & R. HACKER, *THE HISTORY AND DEVELOPMENT OF THE FISHERIES OF THE COLUMBIA RIVER* 141-42 (U.S. Bureau of Fisheries Bull. No. 32, 1940), *cited in* Comment, *supra* note 16, at 485 n.2.

103. *Boldt*, 384 F. Supp. at 405.

104. 391 U.S. at 401-03. *See also* *Antoine v. Washington*, 420 U.S. 194, 207 (1975). In *Antoine*, the United States Supreme Court reinterpreted its own *Puyallup I* guidelines. Justice Douglas, concurring, noted: "a state may exact a license when it comes to non-Indians or to Indians with no federal hunting rights . . . . But Indians with federal hunting 'rights' are quite different." *Id.* at 212 (Douglas, J., concurring).

105. *Boldt*, 384 F. Supp. at 402.

106. *Id.* Regulations that affect treaty fishing must receive a full, fair, and public consideration and determination in accordance with the Washington Administrative Procedures Act.

fifty percent share of each fish run.<sup>107</sup> This fifty percent limitation was by far the most controversial portion of the *Boldt* opinion.

#### 4. A Percentage Allocation

Judge Boldt's conclusion that treaty fishermen are entitled to a fifty percent portion of each fish run was based on an equitable belief that "in common with" means sharing equally.<sup>108</sup> Although this portion of his decision appears radical on its face, *Puyallup II* had hinted at such a result<sup>109</sup> and subsequent decisions reaffirmed the *Boldt* allocation, both implicitly<sup>110</sup> and explicitly.<sup>111</sup>

In *Puyallup II*,<sup>112</sup> although the Court refused to devise an apportionment formula, it stated that the "number of steelhead now caught by non-treaty fishermen must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing . . . ."<sup>113</sup> If *Puyallup II* did not authorize the *Boldt* solution, then clearly the *Puyallup III*<sup>114</sup> Court's affirmation of Washington's percentage allocation did. In that case the Court was faced with the Washington steelhead controversy for the third and final time.<sup>115</sup> The Washington Supreme Court, despite expansive dictum extolling the equal opportunity approach,<sup>116</sup> had concluded that a forty-five percent of the harvestable steelhead trout run should be allocated to the Puyal-

107. *Id.* at 342-43, 402-03.

108. *Id.* at 343.

109. See *Puyallup II*, 414 U.S. 44 (1973). For further discussion see text accompanying notes 114-15 *infra*.

110. See *Puyallup III*, 433 U.S. 165 (1977). For further discussion see text accompanying notes 114-17 *infra*.

111. *Phase I*, 443 U.S. at 685.

112. The Supreme Court remanded *Puyallup I* to determine if a total ban on net fishing was necessary for conservation. *Puyallup I*, 391 U.S. at 401-03. *Puyallup II* was an appeal from this remand.

113. 414 U.S. at 48 (1973) (emphasis added).

114. This case was the appeal from the remand of *Puyallup II*.

115. These cases were litigated in state court and must be differentiated from *Boldt*, which was a federal court case.

116. *Puyallup Tribe v. Washington Game Dep't*, 86 Wash. 2d 664, 664-81, 548 P.2d 1058, 1063-70 (1976). The court ultimately affirmed the lower court's percentage allocation because it was consistent with the Supreme Court's appropriation order. *Puyallup II*, 414 U.S. at 48-49. The Washington Supreme Court withheld the portion of their opinion dealing with the equal opportunity theory, pending the ultimate treaty interpretation by the United States Supreme Court. 86 Wash. 2d at 688, 548 P.2d at 1074.

lups.<sup>117</sup> The Supreme Court's ratification of this approach would logically seem to extend to *Boldt's* allocation formula; the Washington courts, however, refused to make that reasonable extension.

Following *Boldt*, the state issued regulations to implement the decision.<sup>118</sup> Nontreaty fishermen, reacting immediately, brought lawsuits questioning the treaty interpretation in *Boldt* and the District Court's authority to order state departments to regulate for reasons other than conservation (*i.e.*—allocation to treaty fishermen).<sup>119</sup> On review, the Washington Supreme Court concluded that the treaties had only insured equal opportunity and that the *Boldt* decree required state agencies to act beyond the scope of their authority.<sup>120</sup>

### 5. Phase I

As a result of the state's continued adherence to the equal opportunity theory the United States Supreme Court heard arguments concerning the definition of "in common with" for the seventh time.<sup>121</sup> In *Phase I* the Court accepted the *Boldt* court's percentage allocation formula. Not only did Justice Stevens note two United States fishing treaties with Great Britain which used the phrase "in common with" to mean sharing equally,<sup>122</sup> but he relied on other treaty phrases as well<sup>123</sup> to support the computation formula. He concluded that the "right of taking fish"<sup>124</sup> is important not only to refute the easement/access theory but also to affirm a percentage allocation. Analo-

117. 86 Wash. 2d at 688, 548 P.2d at 1074.

118. *Phase I*, 443 U.S. at 672.

119. *Washington State Commercial Fishing Vessel Ass'n v. Tollefson*, 89 Wash. 2d 276, 571 P.2d 677, 571 P.2d 1373 (1977).

120. *Id.* The United States Supreme Court expressly rejected both arguments. First, the Court stated that the treaties did assure special rights, *Phase I*, 443 U.S. at 676-79, and that such special rights did not violate the Equal Protection Clause, U.S. CONST. amend. XIV, § 1. The Court noted that prior discussions have consistently recognized special Indian benefits because of the tribes' peculiar semi-sovereign nature. 443 U.S. at 673 n.20. One might also argue that the protected rights stem from treaties rather than from a legislative, judicial, or administrative classification. Second, the Court noted that the district court did have the power to order the state agencies, as parties to the litigation, to prepare rules that would implement the decision. *Id.* at 695. Additionally, if the state chose to ignore the court orders, the court could displace local enforcement and substitute its own rules. *Id.* at 695-96.

121. See note 6 *supra*.

122. *Phase I*, 443 U.S. at 677-78 n.23.

123. *Id.* at 678.

124. *E.g.*, Treaty of Medicine Creek art. III, Dec. 26, 1854, 10 Stat. 1132 (1855).

gizing the taking of anadromous fish to harvesting crops,<sup>125</sup> allocation by mathematical formula is quite reasonable. As the Court also pointed out, the results of *Puyallup II* and *Puyallup III* support a percentage allocation and, Stevens argued, so does *Winans*. In *Winans* the landowner had constructed fish wheels, capable of destroying an entire fish run.<sup>126</sup> The Supreme Court ordered a remand of that case with explicit instructions to devise "some adjustment and accommodation"<sup>127</sup> to protect the treaty Indians from total exclusion from the fishery. Stevens pointed out that although the Court's accommodation language is subject to interpretation, it definitely included a removal of some of the fish wheels in order to make some fish available to treaty fishermen.<sup>128</sup> According to Stevens, the case "assured the Indians a share of the fish."<sup>129</sup>

Although a fifty percent allocation of each harvestable fish run may seem inequitable and unjust to some, re-examination of the treaty purpose coupled with subsequent developments in Washington's fisheries highlight and support *Boldt's* equitable remedy. In analyzing these treaties it cannot be over-emphasized that the Indians' sole purpose was the retention of a meaningful right to take fish.<sup>130</sup> The Indians' acceptance of Governor Stevens' treaties was conditioned on retaining that fishing right and Indian treaties are to be construed as the Indians probably understood them.<sup>131</sup> If the Indian acceptance was conditional, then their signature on the treaty documents indicates an understanding that they retained meaningful off-reservation fishing rights. It is true that at the time the treaties were signed an equal opportunity to catch fish was sufficient because there were many more Indians than whites.<sup>132</sup> As the white population grew and the treaty Indian's access to "usual and accustomed" fishing places became restricted an easement was sufficient to insure the

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125. Stevens noted that harvesting anadromous fish is akin to harvesting crops: the harvest is stable and highly predictable, subject to sudden changes in climate. *Phase I*, 443 U.S. at 663.

126. 198 U.S. at 372.

127. *Id.* at 384.

128. *Phase I*, 443 U.S. at 681.

129. *Id.*

130. See text accompanying notes 22-29 *supra*.

131. See text accompanying notes 65-69 *supra*.

132. When the treaties were signed it is estimated that three quarters of the territory's 10,000 inhabitants were Indians. *Phase I*, 443 U.S. at 664.

treaty rights.<sup>133</sup> In the years that followed, the white man discovered canning and processing and the non-Indian commercial fishery boomed.<sup>134</sup> The result of this economic windfall was non-Indian domination and discriminatory state regulation which tended to exclude the federally protected treaty fishermen.<sup>135</sup> None of these developments, however, altered the Indians' perception of their treaty rights. Although allocation of what once must have seemed an inexhaustible resource was neither discussed nor contemplated at the treaty negotiations, today allocation is the only way to secure treaty Indians the meaningful fishing right their ancestors expressly reserved. Although *Phase I* does support the logic and reason of *Boldt's* percentage allocation, significant modifications may dilute treaty rights, and will definitely lead to further litigation.

## 6. The "Moderate Living" Standard

In *United States v. Washington*, Judge Boldt concluded that each user group had a right to take up to fifty percent of each harvestable fishing run.<sup>136</sup> Under *Phase I* the treaty Indians' fifty percent is only a maximum or ceiling.<sup>137</sup> The Court, relying on *Arizona v. California*,<sup>138</sup> concluded that the treaty Indians were only entitled to enough fish to insure them a "moderate living."<sup>139</sup> The Court stated that the fifty percent share could be adjusted downward in response to changing circumstances. Two such circumstances were a tribe's dwindling to just a few members or finding another means of support.<sup>140</sup> The phrase "moderate living" is inappropriate and confusing. A court cannot measure a "moderate living" or how many fish will ensure that the Indians maintain that vaguely defined standard of living. The moderate living standard could lead to unnecessary government intrusion into the Indian culture because it

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133. Indeed the basis of Justice Powell's dissent in *Phase I* is the compelling inference that since all the Indians needed to fish was access, that would be all they got. *Id.* at 697-99 (Powell, J., dissenting).

134. Large-scale non-treaty fishing commenced in the 1890's and brought about the need for state regulation. *Boldt*, 384 F. Supp. at 352.

135. *Id.* at 394, 404, 407. These destructive state practices included seizure, damage, destruction, disposition, and unreasonably long detention of Indian fishing gear.

136. *Id.* at 342-43.

137. *Phase I*, 443 U.S. at 686 & n.27.

138. 373 U.S. 546 (1963).

139. *Phase I*, 443 U.S. at 686-87.

140. *Id.*

would require continuous monitoring of the Indians' economic conditions. The language about a tribe's dwindling or finding another means of support should be limited and read as only referring to Indian abrogation of the treaties.

Moreover, the Court's reliance on *Arizona* is misplaced. In *Arizona* one of the issues the Court discussed was whether an Indian reservation had implied water rights in an adjacent river and how those rights were to be measured.<sup>141</sup> According to Stevens, *Arizona* stands for the proposition that the Indians have rights to a certain amount of the resource "but not more than is necessary to provide . . . a livelihood."<sup>142</sup> In *Arizona*, however, the Court specifically stated that they would *not* measure the reserved water rights by the Indians' "reasonably foreseeable needs" because those needs depended on the tribe's future numbers which could only be guessed at.<sup>143</sup> Instead, the Court concluded that the number of irrigable acres should be the measuring rod of the water rights.<sup>144</sup> The Court examined what the Indians retained in the treaty negotiations—a certain number of acres—and then made those acres useful. The focus was on the number of acres reserved at treaty time and *not* on the number of Indians.<sup>145</sup> In this controversy, the Indians reserved a right to fish. Applying the *Arizona* logic, the courts should try to effectuate that right without reference to the Indian population size.

The Court's focus on the treaty Indians' reasonably foreseeable needs is also misplaced because it is based on an economic analysis. As mentioned at the outset of this Comment Indians have more than a mere economic relationship with the fish. Fish have always played an important part in the Northwest Indians' culture and religion.<sup>146</sup> Placing principal analytic reliance on a "moderate living" standard ignores this cultural dependency, which was certainly one of the Indians' motivating factors in the negotiations. Instead, the Court's focus should be on effectuating

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141. *Arizona v. California*, 373 U.S. at 595-601.

142. *Phase I*, 443 U.S. at 686.

143. *Arizona v. California*, 373 U.S. at 600-01. The *Arizona* Court relied on *Winters v. United States*, 207 U.S. 564 (1908), to find implied water rights. In *Winters* the Court concluded that the United States had intended to deal fairly with the Indians, and that such fair dealing included implied water rights. Without these rights the Indians would receive an arid, useless piece of land, lacking the essential resource to make it productive and habitable. *Id.* at 574-76.

144. *Arizona v. California*, 373 U.S. at 600-01.

145. *Id.*

146. See text accompanying notes 22-29 *supra*.

the treaty Indians' right to fish. Implementation of that right more than one hundred years after the treaties were signed obviously presents difficult and controversial issues many of which the *Phase I* case left unresolved.

## V. PHASE II

In *Phase II*<sup>147</sup> of the litigation Judge Orrick confronted two issues the United States Supreme Court had declined to decide. The State of Washington contended the Indians' allocable share of fish should not include hatchery fish.<sup>148</sup> Also at issue was whether the treaty right to fish included an implicit right to have the fish protected from environmental degradation.<sup>149</sup> Both issues are products or by-products of twentieth century technology. Improved fishing industry technology allowed non-treaty fishermen to significantly deplete the supply of natural fish. At the same time, increased industrialization in the case area led to pollution of the fishery habitat.

In some of the most difficult treaty interpretation questions yet presented, Judge Orrick had to evaluate hundred-year-old treaty language in light of the complex technology of modern society. This task was particularly difficult because the treaty interpretation was not based upon express treaty language but instead upon a more attenuated implication of treaty rights. Thus, the court's analysis goes a step beyond equating "in common with" to mean an equal share. Orrick resolved the issues by using rules of treaty construction, the purposes and historical context of the treaties, and legal precedent. His novel resolution warrants close analysis as a defensible approach to an Indian treaty rights question.

### A. Hatchery Fish

In a holding designed to effectuate both the intent of the signatory parties and the purposes of the fishing clause, Judge Orrick ruled that the treaty Indians' allocable share of fish includes hatchery bred fish.<sup>150</sup> In part, the holding is based upon

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147. *Phase II*, 506 F. Supp. 187 (W.D. Wash. 1980).

148. *Id.* at 195. The Court uses the terms "hatchery-bred" and "artificially propagated" interchangeably. This Comment uses the term "hatchery fish" to encompass both.

149. *Id.* at 190.

150. *Id.* at 197. The hatchery issue is a relatively recent development in this litigation, apparently the result of the concurring opinion in *Puyallup II*, where Justice White

a recognition that hatchery fish are the primary source of available supply.<sup>151</sup> The crux of the issue is the limited supply of fish in the case area.<sup>152</sup> Of the available fish, there is a mix of hatchery fish and natural fish.<sup>153</sup> That mix has evolved from predominantly natural fish to predominantly hatchery fish in most species. Hatchery fish constitute a significant portion of the resource in the case area,<sup>154</sup> those released into state waters during one recent season, 1978-79, included approximately 371,000,000 salmon and 8,755,000 steelhead.<sup>155</sup> In contrast, the percentage of natural fish is declining.<sup>156</sup> The marked decrease of natural fish is partly attributable to the commercialization and improved technology of the fishing industry and partly attributable to the general degradation of the fishery habitat.<sup>157</sup> If these trends continue, the relative proportion of natural fish would be minimal and therefore, as a practical matter, to limit the treaty fishing to natural fish would abrogate the treaty.

Judge Orrick accurately characterized the issue in terms of protecting the supply of fish in order to protect treaty rights when he stated the "inescapable conclusion that the exclusion of hatchery fish jeopardizes Indian treaty fishing rights."<sup>158</sup> This characterization reflects the *Phase I* Court's view that the treaties were designed to guarantee the tribes an adequate supply of fish.<sup>159</sup> The only judicially recognized limitations on the treaty guarantees the Indians' right to harvest the fish "in common

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suggested, "the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." 414 U.S. 44, 50 (1973). The characterization of hatchery fish as a "subsidy", however, does not adequately address the issue.

151. *Phase II*, 506 F. Supp. at 198.

152. *Phase I*, 443 U.S. at 668-69; *Boldt*, 384 F. Supp. at 334, 353.

153. See *Phase II*, 506 F. Supp. at 198 (quoting affidavit of Jack Ayerst, chief of the Washington Game Department's Fisheries Management Division).

154. *Phase II*, 506 F. Supp. at 197. Hatchery fish constitute 60% of the steelhead and 17% of the salmon in the case area. The Washington Fisheries and Game Departments have managed hatchery programs since 1895. Each department has steadily expanded its hatchery operations. When the *Phase II* opinion was written, the state operated 19 steelhead trout and 16 salmon hatcheries in the case area. *Id.* at 196-97. State-run facilities are funded by state, local, and federal sources. Other hatcheries in the case area are operated by the United States government, various tribal governments, and cooperative ventures, some including private parties.

155. *Id.*

156. *Id.* at 198.

157. *Phase I*, 443 U.S. at 668-69. Judge Orrick suggests the state used the hatchery programs to mitigate this trend. *Phase II*, 506 F. Supp. at 198.

158. *Phase II*, 506 F. Supp. at 198-99.

159. *Phase I*, 443 U.S. at 666.

with" non-Indians, the Indians' moderate living needs, the state's conservation powers, and the physical availability of fish.<sup>160</sup> These limitations do not explicitly encompass hatchery fish, and therefore the treaties' general purpose of securing an adequate supply of fish should prevail. Accordingly, the *Phase II* court held that "hatchery fish are 'fish' within the meaning of the treaties fishing clause."<sup>161</sup>

For further support, Judge Orrick examined the intent of the treaty signatories.<sup>162</sup> Relying on the *Phase I* Court's analysis, he concluded that regardless of whether the negotiators anticipated hatchery-bred fish, the signatories intended that the Indians continue to fish.<sup>163</sup> Precedent, identifying the right to continue fishing as the treaties' paramount purpose, buttressed the intent of the parties.<sup>164</sup> These factors support a broad interpretation of treaty language as a means of balancing reserved Indian treaty rights with the demands of modern society. A more literal reading would allow non-treaty fishermen to ultimately "crowd the Indians out of any meaningful use of their accustomed places to fish."<sup>165</sup>

The *Phase II* court was not persuaded that the state had greater regulatory powers over hatchery fish than over natural fish. The state argued that because it provides funding for a portion of the hatchery programs, the "necessary for conservation" standard should not limit its regulatory powers. The court did not accept this distinction and instead held that the state's authority to regulate fishing, including both hatchery and natural fish, "extends no further than the imposition of non-discriminatory, necessary conservation measures."<sup>166</sup> The court's application of the *Puyallup II* conservation guidelines reiterates the propriety of consistently applying fundamental standards. The "necessary for conservation" standard is an important guideline that ensures a reasonable balance between state and federal powers. Finally, the state inappropriately used the term

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160. *Phase II*, 506 F. Supp. at 198.

161. *Id.* at 202.

162. *Id.* at 199-202.

163. *Id.* at 198-99. In light of the rules of treaty interpretation, there is a strong presumption favoring the Indians' subjective intent. See *Antoine v. Washington*, 420 U.S. 194 (1975). See notes 65-69 *supra* and accompanying text.

164. *Phase II*, 506 F. Supp. at 199.

165. *Id.* at 199, (quoting *Phase I*, 443 U.S. at 676-77).

166. *Phase II*, 506 F. Supp. at 200 (citing *Boldt*, 384 F. Supp. at 333, 342, 345-47, 401-03).

“regulate” because it alleged more of an ownership interest and did not seek to control the time, manner, location, or extent of hatchery-fish fishing.<sup>167</sup>

The Supremacy Clause requires the state to adhere to the federal court’s allocation pursuant to the treaty.<sup>168</sup> Accordingly, state regulations may not impinge upon treaty fishing rights unless the state establishes that including the hatchery fish in the Indians’ allocable share interferes with conservation. The *Phase II* court’s hatchery decision, like its environmental prohibitions, attempts to effectuate the treaty right to continued fishing by preserving a viable share of the fish resource.

### B. Environmental Protection of the Fisheries

Addressing the environmental issues, the court held that: “implicitly incorporated in the treaties’ fishing clause is the right to have the fishery habitat protected from man-made despoliation.”<sup>169</sup> Judge Orrick relied on three principal factors: the right to continue fishing “in perpetuity”<sup>170</sup> was the Indians’ fundamental reason for signing the treaties, the existence of fish is fundamental to the exercise of the right,<sup>171</sup> and an implied environmental right analogous to the implied reservation of water doctrine.<sup>172</sup> The environmental holding will be controversial because it is not based upon express treaty language but upon more attenuated implied treaty rights.<sup>173</sup>

Judge Orrick identified the existence of fish as “the most fundamental prerequisite to the right to take fish.”<sup>174</sup> This elementary assumption cuts through several arguments and focuses on the substance rather than the form of the treaty rights. The court considered the gradual deterioration of the fishery

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167. *Phase II*, 506 F. Supp. at 201.

168. *Id.*

169. *Id.* at 203.

170. *Id.* See notes 161-64 *supra* and accompanying text.

171. 506 F. Supp. at 203. See notes 174-81 *infra* and accompanying text.

172. 506 F. Supp. at 203. See notes 190-99 *infra* and accompanying text.

173. The decision also established a cause of action to enforce environmental standards. The Nisqually Indian tribe has sued the cities of Tacoma and Centralia, *Nisqually Indian Tribe v. City of Centralia & City of Tacoma*, No. 75-31 (W.D. Wash., amended complaint filed April 3, 1981), alleging violations of the *Phase II* standards. The allegations are based upon environmental damage attributed to hydroelectric projects that the cities built and maintain. The tribe is seeking monetary damages and declaratory and injunctive relief.

174. 506 F. Supp. at 205.

resources an unanticipated and destructive encroachment upon the Indians' right to fish.<sup>175</sup> Urbanization and extensive settlement of the case area, and rapid development of water power, logging, irrigation, and general water pollution<sup>176</sup> have caused so much environmental damage that, if the trend continues, "the right to take fish would eventually be reduced to the right to dip one's net into the water and bring it out empty."<sup>177</sup>

Several landmark decisions support this fish preservation concept, requiring that neither Indians nor non-Indians unduly impair the other's fishing rights. According to Orrick, the *Phase I* decision reaffirmed the principle that treaty fishing rights are perpetual.<sup>178</sup> It follows that neither the treaty parties nor their successors in interest may act to destroy the fishery resource.<sup>179</sup> It is noteworthy that this standard is reciprocal and applies equally to the Indian tribes and the state. The court cites *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*<sup>180</sup> as an instance where the potential adverse effects upon

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175. See *Boldt*, 384 F. Supp. at 334, 355-57. Judge Orrick also used this factor to refute the state's argument that the Indians bargained for both the costs and benefits of economic development. "To the contrary, it is well established that the treaty negotiators specifically assured the tribes that they could continue to fish notwithstanding the changes that the impending western expansion would certainly entail." *Phase II*, 506 F. Supp. at 204.

Justice Stevens, in *Phase I*, also reasoned that the Indians reasonably relied on the representation of the United States negotiators: "Contemporaneous documents make it clear that these people (Governor Stevens and advisors) recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries." 443 U.S. at 666 (citing *Boldt*, 384 F. Supp. at 329-30).

While negotiating the Treaty of Point Elliot, Governor Stevens made a typical representation: "We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries." *Id.*

176. *Phase II*, 506 F. Supp. at 203 (quoting UNITED STATES FISH AND WILDLIFE SERVICE, WASHINGTON DEPARTMENT OF FISHERIES AND WASHINGTON DEPARTMENT OF GAME, JOINT STATEMENT REGARDING THE BIOLOGY, STATUS, MANAGEMENT, AND HARVEST OF THE SALMON AND STEELHEAD RESOURCES OF THE PUGET SOUND AND OLYMPIC PENINSULAR DRAINAGE AREAS OF WESTERN WASHINGTON 20, 78 (1973)). These uses represent some of the most important and powerful industries and interest groups in the case area. An effective resolution requires an extraordinarily complicated, and inevitably controversial, balancing of interests and priorities among users.

177. *Phase II*, 506 F. Supp. at 203.

178. *Id.*

179. *United States v. Washington*, 520 F.2d at 685; *Boldt*, 384 F. Supp. at 401-02; *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977). *Accord*, *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).

180. 440 F. Supp. 553 (D. Or. 1977).

Indian treaty fishing rights barred state actions. That case involved the construction of a dam that upon completion, would have eliminated a steelhead run and flooded traditional Indian fishing stations. The court similarly cites *Puyallup III* for the proposition that the state may regulate Indian fishing when the preservation of the species is at stake. There the Court upheld state regulation of on-reservation fishing when those regulations were necessary for conservation.<sup>181</sup> Preservation of the fishery resource is therefore the fundamental principle applicable to both parties.

Precedent supposedly shows that preservation of the species, as a reciprocal burden, is a consistent principle applied in different ways in different cases. Judge Orrick distinguishes the *Phase II* case based on the novel correlation between preservation and environmental protections.<sup>182</sup> The problem with this assertion is that the reciprocal burden in practice applies only to non-treaty fishermen and the cases cited detail the various prohibitions which protect treaty fishing.<sup>183</sup> In *Winans*, the Court held that a non-treaty fish-wheel illegally interfered with Indian fishing rights.<sup>184</sup> In *Puyallup II*, the Court prohibited discriminatory regulations banning Indian net fishing while allowing hook-and-line sport fishing.<sup>185</sup> Finally, in *Boldt* the court struck down state regulations applied discriminatorily against the Indian treaty fishermen.<sup>186</sup> Aside from the *Puyallup III* decision affirming state regulation of on-reservation fishing,<sup>187</sup> the cases cited are examples of regulation of non-treaty fishermen. Although the principle of preservation of the fisheries may underlie the decisions, it is not a "neutral" principle which is applied reciprocally. The preservation idea, couched in terms of "reciprocal" and "neutral," implies an equally shared burden. Precedent, however, indicates that the treaty Indians have a superior fishing right vis-a-vis non-treaty fishermen, and it muddles the issue to introduce purported equitable burdens. A more accurate statement is that the treaty Indians will not be allowed to harvest fish if the species would be endangered.

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181. 433 U.S. at 176-77.

182. *Phase II*, 506 F. Supp. at 204.

183. *See id.*

184. *See notes 32-35 supra* and accompanying text.

185. *See notes 48-52 supra* and accompanying text.

186. *See notes 53-55 supra* and accompanying text.

187. 433 U.S. 165 (1977). *See notes 56-60 supra* and accompanying text.

The purported neutrality is even less persuasive in light of the argument that the state has no right to regulate Indian treaty rights.<sup>188</sup> State police power is the basis for any regulation of Indian treaty rights, but that power is limited in some instances by federalism. Moreover, case law has established that the state police power is explicitly limited if it impinges upon federal treaty rights.<sup>189</sup> Despite the reasonableness of preservation of the species, the court's reliance on the controversial and unsettled area of state-versus-federal rights weakens the persuasiveness of the opinion.

The court analogized the fishing rights cases to the "implied-reservation-of-water" doctrine first articulated in *Winters v. United States*<sup>190</sup> and used in the construction of other Indian treaties. The basic precept of the doctrine is that when the federal government reserved or withdrew land for Indian reservations, national parks, or forests, it also impliedly reserved sufficient water to fulfill the purpose of the reservation.<sup>191</sup> Several tenets of the doctrine make it a very powerful tool.<sup>192</sup> The amount of water reserved includes quantities for future as well as present needs. The reserved water right cannot be defeated by general equitable rules of law such as adverse possession, laches, or estoppel.<sup>193</sup> It is not dependent upon any beneficial use nor is it forfeited by nonuse.<sup>194</sup> The right also has a priority

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188. See *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953). If there is no state power to regulate Indian treaty rights then the principle does not seem neutral because regulations cut only one way.

189. *Missouri v. Holland*, 252 U.S. 416 (1920).

190. *Winters v. United States*, 207 U.S. 564 (1908). The *Winters* Court first articulated the doctrine. See also *United States v. New Mexico*, 438 U.S. 696 (1978); *Arizona v. California*, 373 U.S. 546 (1963).

191. For a comprehensive review of the doctrine and its history see Ranquist, *The Winters Doctrine and How it Grew: Federal Reservation of Right to the Use of Water*, 1 B.Y.U.L. REV. 639 (1975).

192. Some say that the *Winters* doctrine is too powerful a tool. For a discussion of the implications of *Winters* on water rights in the western United States see Comment, *Paleface, Redskin, and the Great White Chiefs in Washington: Drawing the Battle Lines Over Western Water Rights*, 17 SAN DIEGO L. REV. 449 (1980). The author suggests that the application of the *Winters* doctrine has resulted in the Indians wielding control over a disproportionate share of water. Moreover, she advocates congressional abrogation of treaty rights as a means of modifying the *Winters* doctrine to conform with the states' administration and distribution of water. She tempers this suggestion by proposing that the treaty rights be limited to the original purposes of the reservation. *Id.* at 456.

193. *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956).

194. Similarly, state action through statute or condemnation cannot affect the right. See Ranquist, *supra* note 191, at 655.

date of the creation of the reservation and is junior only to private appropriations dated prior to that creation.

The common element between environmental protections and the reservation of water is the need to analyze the original purpose for creating the reservation and to protect that purpose through implied treaty rights.<sup>196</sup> In each instance, a court must analyze an implied, rather than an express, treaty right. Understandably, courts construe implied treaty rights narrowly and an implied right must be closely related to the original purposes of the treaty.<sup>196</sup> Therefore, a court must make a realistic and defensible determination of why the reservation was created in order to draw further implications. In *Winters*, the United States Supreme Court held that the treaty signatories impliedly reserved enough water for irrigation when they created an Indian reservation. The Court reasoned that the purpose of the reservation was to convert the Indians to a pastoral lifestyle, but that without water their desert lands would be useless for farming and the purpose of the treaty would be defeated.<sup>197</sup> The Court explicitly relied on special rules of treaty construction to resolve ambiguities in the Indians' favor.<sup>198</sup> The resulting injunction prohibited the construction of dams, reservoirs, or other obstructions that "in any manner" prevent the flow of water through the Milk River adjacent to the Fort Belknap reservation.<sup>199</sup>

By analogy to the *Winters* analysis, in *Phase II* the purpose of the treaty was to secure the continued right to fish,<sup>200</sup> the existence of fish is necessary to exercise that right, and the signatories impliedly reserved protection of the fisheries. The bulk of the *Phase II* opinion established that the paramount purpose of the treaties was to secure the right to continue fishing as a way of life.<sup>201</sup> A fundamental prerequisite is the continued exis-

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195. *Winters v. United States*, 207 U.S. at 576; *accord*, *Arizona v. California*, 373 U.S. 546 (1978).

196. See notes 205-06 *infra* and accompanying text.

197. 207 U.S. 564 (1908). The reserved water rights doctrine, however, is not confined to Indian treaties but also applies to forest reserves, national parks, and national monuments. *United States v. New Mexico*, 438 U.S. 696 (1978).

198. 207 U.S. at 577.

199. *Id.* at 576-77.

200. *Id.* at 564-65.

201. "Virtually every case construing this fishing clause has recognized it to be the cornerstone of the treaties and has emphasized its overriding importance to the tribes." *Phase II*, 506 F. Supp. at 203.

tence of fish which depends upon an "environmentally acceptable habitat."<sup>202</sup> Consequently, the court concluded it was necessary to imply an environmental standard to fulfill the purposes of the fishing clause.<sup>203</sup> Although the analogy seems appropriate, if somewhat sketchy, the reasoning is not entirely persuasive because of basic differences between the implied elements, *i.e.*, water versus an environmental standard. It is feasible that the signatories contemplated the use of water to support the reservations whereas the implication of an environmental standard is considerably more attenuated.

Another potential problem with the analysis is that courts strictly examine implied water rights claims,<sup>204</sup> some courts considering the preservation of wildlife an insufficient reason to imply the right.<sup>205</sup> The courts generally look to two limiting factors: the need for water must fulfill the very purpose for which the reservation was created, and the amount of water reserved must not exceed the amount necessary to fulfill the purpose of the reservation.<sup>206</sup>

The recognition of implied water rights to preserve fish is not, however, a unique proposition. In *Cappaert v. United States*,<sup>207</sup> the United States Supreme Court held that a Presidential Proclamation declaring Devils Hole a national monument also reserved an implied water right in appurtenant waters. Included in the national monument was an underground pool with a rare species of desert fish expressly identified as warranting "special protection."<sup>208</sup> The Supreme Court reasoned that preservation of the species was one of the purposes behind creating the reservation and that the extent of the implied water right should include an amount necessary to preserve the rare fish.<sup>209</sup> Therefore, the adjoining landowners were permanently enjoined from depleting the water supply below that minimum amount. Judge Orrick accurately distinguishes the *Cappaert* case as a question of "quantity" of water, but reasoned that the

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202. *Id.* at 205.

203. *Id.*

204. *Id.*

205. "This careful examination is required both because the reservation is implied rather than expressed . . ." *United States v. New Mexico*, 438 U.S. 696, 701 (1978).

206. *Id.* at 715, 718.

207. 426 U.S. 128 (1976).

208. *Id.* at 132.

209. *Id.* at 141.

same principles apply to the quality of water in this litigation.<sup>210</sup>

On balance, the analogy to implied water rights is persuasive because it provides a coherent analytical means of isolating a treaty right in its historical setting and meaningfully effectuating that right in the context of modern society. By isolating the original purpose for creating the reservation, the Court provided a tangible and consistent link between the original commitments of the signatory parties and the current factors impacting the treaty right.

## VI. CONCLUSION

This comment attempted to demonstrate a workable approach to Indian treaty rights issues in the context of the Pacific Northwest fishing controversy. The authors derived their approach from two well reasoned federal district court opinions, *Boldt* and *Phase II*. In each case, the court undertook a rigorous examination of the origin of the treaty rights, the historical context within which the parties negotiated the treaties, and the importance of fish to the Indian culture, concluding that the Indians understood the treaties to guarantee a continuing right to fish. By identifying the Indians' understanding as the central principle, courts can successfully negotiate the maze of federal and state court decisions, ambiguous treaty language, statutes, and historical documents. More importantly, by identifying and applying consistent principles the courts may establish a coherent analytical framework in a confusing and controversial area of law.

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210. *Phase II*, 506 F. Supp. at 205.

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