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Who's In Charge of Fishing?

For thousands of years before 1854, Indian peoples whose ancestral lands lie within what Americans call the Pacific Northwest depended on fishing, gathering, trading, and hunting for their livelihood. Groups migrated between summer camps on mountain slopes, where they gathered wild plants, and winter villages along rivers and shores. Fish, especially salmon, sustained them. Large fisheries developed where the salmon had to overcome obstacles in their upstream migrations, such as at Celilo and Kettle Falls on the Columbia River. Indian people today retain that deep connection to the landscape and the foods it produces.[1]

In 1854–1855, as they negotiated treaties with Isaac Stevens and Joel Palmer, Indians in Washington and Oregon insisted that they be allowed to continue traditional food-gathering practices outside the reservations. Each of the ten treaties of cession that Stevens and Palmer concluded contains a provision substantially similar to this paragraph from the Treaty with the Yakamas:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.[2]

The Stevens-Palmer Treaties are federal laws that preempt any state laws that might be in conflict. Yet, under our federal system the states, not the federal government, have the primary authority to protect, preserve, and regulate the use of fish and wildlife. The treaties say nothing about states. Did the treaty-makers expect the "right of taking fish" to affect future states'

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The Yakama Tribal Council meets with officials from the United States Army Corps of Engineers in 1954 to discuss payment to the tribe for the flooding of tribal usual and accustomed fishing places at Celilo Falls anticipated from the construction of The Dalles Dam.

authority over fish and wildlife? What did the treaties' "right of taking fish" mean for the Indian tribes and their relationships with future states?

Today, the U.S. government recognizes twenty-five tribes as parties to the Stevens-Palmer Treaties. Their ancient fishing places include the Columbia River Gorge and rivers in northeastern Oregon as well as places in Washington, Idaho, and Montana and in the ocean off the Washington coast. Twenty-four tribes have usual and accustomed fishing places within the boundaries of the present-day state of Washington. So it is not surprising that questions about who is in charge of fishing under the treaties should have the greatest urgency in Washington.[3]

United States v. Winans

After the treaties were executed, Indians continued to fish at their usual and accustomed fishing places. As settlers moved in, many of the old fishing places came to be on lands owned by non-Indians, some of whom desired to exclude the Indians from their private property. Conflict arose, leading to litigation by the mid-1880s. The courts ruled that the treaties had something to say about the relationship between settlers and Indians

ON THE RIGHT TO SUBSISTENCE

Ten of the treaties negotiated by Isaac Stevens and Joel Palmer included a provision retaining Indians' right to utilize places outside of the reservation for food gathering and preparation. There are small differences in language among the treaties and some larger distinctions indicating the variety of foodways practiced among Indians of what is now Oregon and Washington.

Article 3: 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.

—Treaty with the Nisquallys, Etc., 1854

[The right to pasture animals was also included in treaties with the WallaWalla, Cayuse, Etc.; Nisquallys, Etc.; Nez Percés; Tribes of Middle Oregon; Quinaielt, Etc.; Yakima; and Flatheads, Etc. This same or a similar shellfish provision was also included in the treaties with the Dwamish, Suquamish, Etc.; S'Klallam; Makah; and Quinaielt, Etc. A similar stipulation regarding stallions was also included in the treaty with the Quinaielt, Etc.]

Article 4: . . . and of whaling or sealing . . .

—Treaty with the Makah, 1855

Article 1: . . . *Provided, also,* That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians . . . . the privilege of . . . pasturing their stock on unclaimed lands in common with citizens, is also secured to them.

—Treaty with the WallaWalla, Cayuse, Etc., 1855

[Similar language regarding streams running through or bordering reservations was included in treaties with the Yakima; Nez Percés; Tribes of Middle Oregon; and Flatheads, Etc.]

Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, vol. 2 (Washington, D.C.: GPO, 1904), 662, 670–1, 682, 694–5, 699, 720.

at the old fishing places. The Washington Territorial Supreme Court and later the U.S. Supreme Court said the treaty right of taking fish "at all usual and accustomed places" gives Indians an easement allowing them to continue taking fish even if the land is privately owned.[4]

These were disputes about treaty rights and private property rights, not the sovereign powers of governments. No state or territorial government was involved. In the *Winans* decision of 1905, however, the U.S. Supreme Court said of the treaty language: "Nor does it restrain the State unreasonably, if at all, in the regulation of the right."[5] What did that mean?

The attorney general of Washington thought it meant the state was in charge of regulating fishing by everyone, including treaty Indians. In 1897, Attorney General Patrick Henry Winston reasoned that "no Indian treaty interferes with the right of the state to protect game or fish of any kind." The Supreme Court's remark in *Winans* confirmed that view. It became the basis for Washington state policy for decades to come.[6]

Early State Conservation Efforts

When the Stevens-Palmer Treaties were executed, Indians did most of the fishing in the Pacific Northwest. With the emergence of the canning industry in the 1860s, the non-Indian commercial fishing industry exploded. Entrepreneurs set up canneries, fish traps, and fish wheels in the Columbia River, catching and canning enormous quantities of fish. Commercial fishing developed in Puget Sound as well.[7]

As fishing intensified, state and territorial legislatures made attempts to control it. By the late 1870s, the legislatures of Oregon and Washington Territory had enacted conservation regulations. Early state and territorial laws prohibited fishing gear that obstructed the upstream passage of migrating salmon and established seasonal closures so that salmon could pass to spawning grounds. In the 1890s, Washington state began requiring people who operated commercial fishing gear to obtain a state license. The licenses generated revenue and created a record of how much gear was out there. Closures and fishing gear restrictions gradually increased in the early twentieth century.[8]

Questions about the role of Indians were already being raised. In 1897, the Washington Legislature banned weirs and other "fixed appliance[s] for the purpose of catching salmon" in the rivers flowing into Puget Sound. Indians customarily fished in rivers with weirs. Did state fishing laws apply to Indians? The Washington attorney general said they did. When it next

convened, the Washington Legislature declared that Indians taking fish for subsistence would be exempt from state gear and season restrictions. Some non-Indians resented what they saw as special treatment and argued that the Indian exemption was unconstitutional. In 1906, three non-Indians forced the issue by putting out nets in Steamboat Slough, a part of the Snohomish River estuary near Everett. When they were prosecuted, the Washington State Supreme Court upheld the Indian exemption, but the legislature extended it to "any person" in 1909.[9]

State v. Towessnute and *State v. Alexis*

By 1913, it was becoming apparent that overfishing was damaging some salmon stocks in Puget Sound. Columbia River stocks were already declining. In that year, Leslie Darwin was appointed Washington state fish commissioner. He has been described as a "conservationist fisheries commissioner" whose aggressive personality antagonized many in the commercial fishing and hydropower industries. His vigorous enforcement policies made him unwelcome in Indian country, too.[10]

In 1915, during Darwin's tenure, the Washington Legislature adopted a comprehensive new fisheries code that tightened fishing restrictions. Under the new law, anyone fishing with gear other than hook and line had to obtain a state license. The 1915 law made it unlawful to catch salmon within one mile below any dam and to shoot, gaff, snag or snare salmon. There was a special provision for Indian subsistence fishing, but it was narrower than the 1899 Indian exemption had been. Indians fishing off-reservation could do so without a state license only if they fished within five miles of Indian reservation boundaries. All other time, place, and manner regulations were supposed to apply to Indians.[11]

Six weeks after the 1915 Fisheries Code went into effect, its application to Indians was tested in court. The context was the 1915 spring Chinook salmon run in the Yakima River, a tributary to the Columbia. Alec Towessnute, a Yakama Indian, was fishing for salmon with a traditional Indian gaff hook at Top-tut, or Prosser Falls, a usual and accustomed Yakama fishing place. Prosser Falls is more than five miles from any Indian reservation, and Towessnute had no state license. A dam has been there since the late nineteenth century. Towessnute was charged with violating several provisions of the 1915 Fisheries Code. After Benton County Judge Bert Linn ruled that he had a treaty right to fish without state regulation, the state appealed to the Washington State Supreme Court.[12]

Another test case arrived at the court at the same time, this one involving commercial fishing. John Alexis, a Lummi tribal elder, was prosecuted after he fished at a Lummi usual and accustomed station with a reef net during a state closure and without a state license. At his trial, Whatcom County Judge Ed E. Hardin listened with great interest as Lummi elders testified through an interpreter. They had attended the Point Elliott Treaty Council as children and testified about what they remembered. Judge Hardin concluded that Alexis was subject to the state law anyway, but he imposed only the minimum fine.[13]

In the Washington Supreme Court, the litigants allowed the justices no room for compromise. As their briefs characterized the issue, either the treaties secured to the Indians "a right to fish at all usual and accustomed places free from state regulation and control," or the Indians were subject to the State's full regulatory power. All sides recognized that the cases were important and precedent-setting.[14]

The state argued that the treaty right of taking fish at usual and accustomed places was about private relationships between individual Indians and individual land-owning settlers, not about relationships between tribes and the future sovereign state. The treaties simply preserved the Indians' ability to use the settlers' private lands for fishing, leaving the state in charge of regulating it. That was what *Winans* had been about.[15]

A five-justice Department of the Washington Supreme Court heard both cases together. Four justices were persuaded that Indians could thwart state conservation efforts if they were exempt from state fishing regulations. They adopted the attorney general's arguments in February 1916.[16]

The U.S. attorney, who had represented Alec Towessnute, considered seeking review by the U.S. Supreme Court. In June 1916, however, the Supreme Court, citing *Winans*, held that Seneca Indians exercising off-reservation treaty fishing rights were subject to New York state law. It seemed that the law was settled. The state was in charge. Said Darwin, "It is hoped that this ends one of the most vexatious questions which has confronted this department."[17]

The *Towessnute* and *Alexis* decisions were only the beginning of a sixty-year struggle. The transcript from the trial of John Alexis reveals a bitterness that still has not fully dissipated. Lummi elder Henry Kwina testified that "Governor Stevens never stated anything about there should be a fish commissioner to put Indians in trouble or put them in jail over their fishing grounds." Later in the trial, Darwin shot back about the Indians' "complete defiance of state laws." Their words echoed for decades.[18]

After 1916, some treaty Indians continued to fish in ways not permitted by state law. According to Darwin, "certain officers of the state" were encouraging them. Yakamas kept fishing at Prosser Falls. In 1920, George Meninock and four other Yakama Indians were convicted for fishing there in violation of state law. They went to the full eight-member Washington Supreme Court and asked it to overrule *Towessnute*. Five justices stood by the *Towessnute* decision, and the convictions were affirmed.[19]

The Washington Legislature had beaten the court to it, however. Many non-Indians, including some state legislators, sympathized with the Indians, and the Yakamas had sought legislative as well as judicial relief. While George Meninock's court case was pending, Yakama tribal members appeared before the 1921 Washington Legislature—in "tribal costume," according to Darwin—urging the lawmakers to change the law so they could fish at Prosser Falls legally. The legislature did so over Governor Louis Hart's veto, passing a bill that allowed Yakama Indians to fish for subsistence at Prosser Falls "by any reasonable means, at any time."[20]

State v. Tulee

Ambiguity and ambivalence concerning the relationship between Washington state and Indians continued in the 1920s and 1930s. Conservation-minded state fisheries officials contended that it was necessary to regulate Indian fishing. As they saw it, all salmon fishing had to be controlled and monitored so that enough salmon would return to the spawning grounds to perpetuate the runs. Treaty Indians contended they had a right to fish at usual and accustomed fishing grounds free from state regulation. The federal government waffled but generally agreed with the state. Some Indians continued to fish at times and places closed under state law and without state licenses, and state officers sometimes arrested them. Though the state disclaimed jurisdiction within Indian reservations, uncertainties about where the boundaries were added to the friction.[21]

The Columbia River spring Chinook salmon run provided the context for more court action. On May 6, 1939, Sampson Tulee, a Yakama Indian, was arrested while using a traditional Indian dip net to catch salmon at Celilo Falls on the Columbia River. A Klickitat County jury found him guilty of fishing commercially without a state license. On appeal, Tulee urged the Washington State Supreme Court to overrule *Towessnute*. A 5-3 majority of the court stood by *Towessnute*, holding once again that Indians exercising treaty fishing rights were subject to state fishing laws.[22]

Meanwhile, other litigation was occurring in federal court. The Makah Tribe sought to prohibit enforcement of state restrictions on fishing gear in the Hoko River, which enters the Strait of Juan de Fuca near Sekiu, Washington. Shortly after the Washington Supreme Court said Sampson Tulee was subject to state law, the U.S. District Court for the Western District of Washington said the Makahs were not. Judge John Bowen held that the Makah Treaty preempted state law, and he disallowed the gear restrictions.[23] Tulee sought review in the U.S. Supreme Court, and Washington state appealed the *Makah* decision to the U.S. Court of Appeals for the Ninth Circuit.

In the *Tulee* case, the U.S. Supreme Court "split the baby," as courts often do. The court said the state dip net license fee could not be enforced against Yakama Indians because "it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." The court could have stopped there and simply reversed Tulee's conviction. Instead, it went on to say that "the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." That statement, not necessary to the outcome of the case, had far greater impact than the holding about license fees.[24]

The *Tulee* decision had an immediate effect on the Makah Tribe's Hoko River case, then pending in the Ninth Circuit. Relying on *Tulee*, the court reversed Judge Bowen's order, characterizing the state gear law as an enforceable "state regulation for the conservation of fish."[25]

Though Sampson Tulee had won his case, the *Tulee* opinion was seen as a major victory for Washington state — and a loss for Indians — because the state now had the blessing of the nation's highest court to regulate off-reservation fishing by Stevens-Palmer Treaty Indians where "necessary for the conservation of fish." As state fisheries officials saw it, every state fishing regulation except for license fees was "necessary for the conservation of fish." The Ninth Circuit decision in the *Makah* Hoko River case seemed to confirm that. Were not all state regulations adopted under the legislative mandate that fish be "preserved, protected and perpetuated"? So it was that the Washington Department of Fisheries adopted a policy that "a treaty Indian fishing off the reservation was subject to all our laws and regulations with the exception that he needs no license to fish either on or off his reservation."[26]

The law was settled and certain. As Washington Attorney General Smith Troy put it, the court had finally "clarified" what had "been a bone of contention for many years."[27]

In 1949, the Washington Legislature enacted a comprehensive revision of the Fisheries Code. It repealed all provisions relating to Indians, including the 1921 law allowing Yakama subsistence fishing at Prosser Falls. The Washington attorney general had said that, because all Indians were by then U.S. citizens, special laws for Indian fishing might be unconstitutional. All Americans were equal under the law, and from that time forward, everyone would fish "in common" with each other under the same regulations—state regulations.[28]

To treaty Indians, the idea of the state's telling them how to manage their ancient fisheries was repugnant. In addition, whatever the U.S. Supreme Court might have said in *Tulee*, the Makah Tribe's Hoko River case had shown that courts might find a way to get the state off the Indians' backs under the right circumstances.

Makah v. Schoettler and *Umatilla v. Maison*

The Makah Tribe tried again, filing a new Hoko River lawsuit. State law allowed only hook-and-line gear there. The Makah Tribe contended that coho salmon would not take a hook in the river, so the regulation effectively prohibited tribal members from exercising their treaty fishing right on the fall coho run. Surely that went beyond what might be "necessary for the conservation of fish." The tribe lost in federal district court but won a reversal in the Ninth Circuit. In 1951, that court held in *Makah Indian Tribe v. Schoettler* that the state must prove that a regulation is "necessary for the conservation of fish" before enforcing it against Indians exercising treaty rights.[29]

The decision in *Makah v. Schoettler* must have been a surprise to state officials. Afterward, Washington Attorney General Don Eastvold advised them that "a failure to establish conservation as the basis of such enforcement [of state regulations against treaty Indians] will probably result in failures to convict when the cases are presented to the courts, and very possibly the effectiveness of the Supreme Court's decision in the *Tulee* case would be diminished substantially by the lack of such a basis for enforcement."[30]

The *Makah v. Schoettler* rule quickly surfaced elsewhere. In November 1954, Puyallup tribal members Robert Satiacum and James Young openly fished with a net in Tacoma during a state closure. The county court dismissed the prosecution, ruling that the state had not proven the closure necessary for conservation. The state's appeal gave the Washington State

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Umatilla tribal representatives sign the tribe's 1952 agreement with the federal government regarding Celilo Falls. The United States awarded the Umatilla Tribes $4 million in compensation when The Dalles Dam flooded tribal usual and accustomed fishing places.

Supreme Court its first opportunity to apply the *Tulee* decision. The court affirmed the county court decision, but a majority could not agree on a rationale. Four justices adopted the rule of *Makah v. Schoettler,* but four justices said that treaty Indians taking fish at usual and accustomed places should not be subject to state regulation at all. This outcome merely invited further litigation.[31]

The rules became even murkier with two decisions issued in 1963, one from the U.S. Court of Appeals for the Ninth Circuit and the other from the Washington State Supreme Court.[32]

In 1958, the Oregon State Game Commission closed the John Day, Walla Walla, Grande Ronde, and Imnaha river systems to protect spring Chinook salmon nearing spawning grounds in the Blue Mountains. After

several Umatilla tribal members were arrested while subsistence fishing during the closure, the Umatilla Tribes and seven tribal members, led by Elias J. Quaempts, sued Oregon officials in federal court. Chief Judge Gus J. Solomon disallowed the closure under the *Makah v. Schoettler* rule. When Oregon appealed, the Ninth Circuit narrowed state authority even more, holding that the state had to prove that a regulation was "indispensable to the effectiveness of a state conservation program," not merely "necessary" for conservation, before it could be enforced against treaty Indians.[33]

In July 1960, Joe McCoy, a Swinomish tribal member, was fishing for salmon with a commercial drift gillnet in the Skagit River in Washington. The Washington Department of Fisheries had temporarily closed the area to protect migrating Chinook salmon, and McCoy was charged with fishing in a closed area. The Washington State Supreme Court was again sharply divided, but this time a majority of the justices agreed on how to decide the case. Five of the nine justices followed the *Makah v. Schoettler* rule—if the state proved that a fishing regulation "was reasonably necessary to conserve" a particular salmon run, it could enforce the regulation against treaty Indians. Under this analysis, McCoy was subject to the state closure.[34]

How much was the state in charge now? Did it have to prove that a regulation was "necessary" for conservation, as in *McCoy* and *Makah v. Schoettler*, or "indispensable" for conservation, as in *Umatilla v. Maison*? And what was "conservation"? Wise use of an abundant species? Snatching a scarce one from the brink of extinction?

The *Puyallup I* Decision

The civil rights activism of the 1960s came to the rivers of Puget Sound. Puyallup Indians were fishing with nets in the Puyallup River, Nisqually Indians were fishing with nets in the Nisqually River, and Muckleshoot Indians were fishing with nets in the Green River. Non-Indian supporters sometimes participated, including Marlon Brando and other celebrities. None of this was permitted by state law. Encounters between Indian fishing rights activists and state law enforcement authorities were getting public attention.

Against this background of legal uncertainty and on-the-water confrontations, the state of Washington filed three test cases in state courts in 1963. The defendants were members of the Puyallup, Nisqually, and

Muckleshoot Tribes. The state hoped to establish once and for all the legal principle that the state was fully in charge of treaty fishing.[35]

Tribal leaders, including Ramona Bennett of Puyallup and Nugent Kautz of Nisqually, rose to the challenge. They planned careful legal strategies to get the state to stop interfering with fishing by treaty Indians. They attracted intellectual talent and financial and political support. They drew public attention with "fish-ins" and demonstrations. Equally passionate as advocates of equal rights and responsibilities for all citizens were lawyers in the Washington attorney general's office, supported by Attorneys General John J. O'Connell and Slade Gorton. The struggle lasted nearly twenty years.[36]

In all three test cases, the trial courts forbade the Indian defendants from fishing in any manner contrary to state law. The Indians appealed to the Washington State Supreme Court.

Positions had hardened. The State Supreme Court described the Indians' and state's stances as "extreme and adamant." It was *Tulee* all over again. The state and its allies argued that the Indians were subject to state law the same as everyone else. The Indians and their allies argued that the state had no authority to regulate treaty fishing. By a 5-4 vote, the Washington Supreme Court chose the middle ground and adhered to its decision in the McCoy case: *Tulee*, as modified by the Ninth Circuit in *Makah Indian Tribe v. Schoettler*, was still the law. The state could limit Indian treaty fishing if it proved its regulations were "reasonable and necessary to conserve the fishery."[37]

The U.S. Supreme Court agreed to review the Puyallup and Nisqually cases. Finally, there would be a definitive determination of what the treaty "right of taking fish" meant for the sovereign state and its relationship with treaty Indians.

The Indians, supported by the U.S. government and other allies, tried to get the Supreme Court to take back what it had said about state authority in *Tulee*, which had not been necessary to the decision in that case anyway. They urged that the state had no authority to regulate treaty Indian fishing and that the "reasonable and necessary" test was vague and unworkable. The state of Washington, supported by Oregon and Idaho, argued that the "reasonable and necessary" test was an appropriate balance between the treaty right and the needs of fish.[38]

Justice William O. Douglas, writing for a unanimous Supreme Court, affirmed the Washington State Supreme Court. The court had meant what it said in *Tulee*: the state could regulate treaty fishing "in the interest of

conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." The court sent the case back to the state courts to determine whether prohibiting nets in the Puyallup River met that test.[39]

The decision, which became known as *Puyallup I,* was a great victory for the state. It was disappointing and troubling to tribal advocates.[40]

The state was in charge. That was the law. At least, that is what state officials thought, but that is what state and federal officials had thought after *Towessnute* in 1916 and after *Tulee* in 1942.

The Belloni Decision

The state could regulate treaty fishing "in the interest of conservation," but *Umatilla v. Maison* had revealed that conservation was not always purely about the needs of fish. Sometimes, it was about the needs of fishers.

With declining natural fish populations and a burgeoning human population, the demand for salmon had outstripped supply by the late 1960s. As boats and gear had improved, non-Indian commercial fishing had moved farther away from salmon spawning grounds and into marine areas. Tribal fisheries were at a disadvantage because of their location, usually in-river and upstream of non-Indian fisheries. Non-Indian fisheries intercepted many of the migrating salmon before the fish got to tribal fishing places. State regulators often sought to restrict tribal fishing in order to allow enough fish to reach the spawning grounds.[41]

That was what happened in the *Umatilla* case. Oregon fisheries officials closed Columbia River tributaries in the Blue Mountains to protect spring Chinook salmon approaching the spawning grounds while they permitted non-Indian fishing of the same fish downstream, in the lower Columbia River. State officials decided that the salmon that reached the tributaries were needed for spawning and prohibited further fishing. The Ninth Circuit criticized Oregon for denying the Indians a chance to take a few fish to feed their families in order "to satisfy the needs of the rest of society."[42]

The *Umatilla* case was about subsistence fishing, but treaty Indians also fished commercially, primarily in the Columbia River upstream of Bonneville Dam. Celilo Falls, where Sampson Tulee had fished with a dip net in 1939, was now Lake Celilo thanks to The Dalles Dam, but Indians were adapting their fishing methods to the slackwater pools behind the dams. A Washington Department of Fisheries biologist described their

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Kiutus Jim signs the Yakama Nation's 1954 Celilo Falls agreement with the federal government as Col. J.U. Moorhead of the U.S. Army Corps of Engineers watches. The United States awarded the Yakama Nation more than $15 million in compensation when The Dalles Dam flooded tribal usual and accustomed fishing places. Today, a remnant of the Celilo fishery remains, where tribal members fish from rocks and fishing platforms just downstream of the dam.

activity as an "uncontrolled Indian set net fishery," and state officers stepped up enforcement efforts in the 1960s. Meanwhile, the non-Indian

commercial drift gillnet fishery operated in the lower Columbia River, primarily downstream of the dams.[43]

In 1968, the Columbia River sockeye and fall Chinook fisheries provided an opportunity for tribal advocates to counteract the U.S. Supreme Court's decision in *Puyallup I*. Two months after *Puyallup I*, Richard Sohappy, along with thirteen other Yakamas from an Indian fishing community in the Columbia River Gorge, sued Oregon and Washington officials in the federal court in Portland. A few weeks later, the United States filed its own lawsuit against Oregon (but not Washington) on behalf of the Yakama, Umatilla, Nez Perce, and Warm Springs Tribes. Led by George D. Dysart of the Department of the Interior, long an advocate of Indian rights, the United States contended that the treaties required Oregon to allow a "fair and equitable share" of the Columbia River salmon runs to pass upstream to tribal fisheries. Both cases were assigned to Judge Robert C. Belloni.[44]

In July 1969, Judge Belloni declared that the treaties require Oregon to manage all its fisheries so as to pass a "fair and equitable share" of fish to the usual and accustomed fishing places of the tribes. Oregon could still regulate treaty fishing in the interest of conservation, but a regulatory scheme that failed to provide a fair share of fish to the treaty fisheries was discriminatory and not conservation based. Judge Belloni left it to the parties to work out what a "fair share" might be and retained jurisdiction so they could have access to the court if they ran into problems. Still reeling from its *Umatilla* experience, Oregon elected not to appeal. *United States v. Oregon* remains an active case today.[45]

In Washington state, reactions to the Belloni decision were mixed. Governor Dan Evans declared the Belloni decision to be state policy. The Washington Department of Fisheries, which managed salmon fisheries, was under the governor's control. It altered its management practices so as to increase the volume of fish available to treaty Indian fisheries and to allow Indian nets in some rivers. The Department of Game, which managed steelhead fisheries, was under the control of a citizens' commission. It decided to continue its existing management practices.[46]

The Boldt Decision

Unrest continued in Washington state. In the summer of 1970, armed Indian protesters established an encampment on the Puyallup River where Indians were engaging in "fish-ins." Police raided the camp in September 1970 in front of news cameras. Again led by George Dysart, the United

States filed *United States v. Washington* in the federal court in Tacoma on September 18, 1970. The case was assigned to Judge George H. Boldt, a conservative Eisenhower appointee who had ruled against the Skokomish Tribe in another case.[47]

The United States' legal theory was the same as it had been in *United States v. Oregon*—the state could regulate treaty Indian fishing in the interest of conservation, but regulations that failed to provide the tribes with an opportunity to take a fair and equitable share of fish were not in the interest of conservation. The scale of *United States v. Washington* was much bigger, however. *United States v. Oregon* had focused only on a portion of the Columbia River, while *United States v. Washington* involved the entire Puget Sound region, much of the Washington coast, adjacent ocean waters, and all the rivers that flow into them. Four tribes were involved in *United States v. Oregon,* while seven were initially involved in *United States v. Washington*. By the time of trial in 1973, fourteen tribes had intervened as plaintiffs.[48]

While the parties were preparing for trial in *United States v. Washington*, the *Puyallup* case was proceeding simultaneously in the Washington state courts, on remand from the U.S. Supreme Court. The United States had filed its *United States v. Washington* complaint on a Friday. The *Puyallup* trial began the following Monday in Pierce County Superior Court in Tacoma, a few blocks from the federal courthouse.

Puyallup soon came back to the Washington State Supreme Court. According to the Game Department, non-Indian recreational anglers were taking so many steelhead in the Puyallup River that all remaining fish had to be allowed to spawn. There was no room in the numbers for an Indian net fishery. The Game Department said it had to prohibit net fishing in the Puyallup River to protect naturally spawning steelhead. The Washington Supreme Court agreed that the closure was "in the interest of conservation," as the U.S. Supreme Court had required in *Puyallup I*. There was no "fair sharing" in this version of "conservation." The state Supreme Court did not cite the Belloni decision. On March 19, 1973, the U.S. Supreme Court agreed to review the *Puyallup* case for a second time.[49]

This happened as *United States v. Washington* was careening toward trial. The law might have seemed settled in 1916 and 1942, but it did not look settled now. Entered August 24, 1973, the final pretrial order, which sets out the parties' contentions and the plan for trial, was 189 pages long. In it, the parties offered at least five different interpretations of the treaties.

Courtesy Greene family

The United States contended that the state could regulate treaty fishing "to the extent necessary to protect the fishery resource" and that the treaties entitled the tribes to a "fair" or "equitable" share of fish. The tribes contended that the state could regulate treaty fishing only as a last resort. The Yakama Nation contended that the state lacked even that power. The tribes also contended that the treaties entitled them to take as many fish as they needed "for a subsistence and livelihood." The Washington Department of Fisheries took a position similar to that of the United States. The Washington Department of Game took the traditional approach—the state could regulate for conservation purposes, defined broadly, and the treaties did not require sharing.[50]

Trial before Judge Boldt began on Monday, August 27, 1973, and lasted just over three weeks. When it was over, forty-nine witnesses had testified and hundreds of documents had been admitted. Judge Boldt hoped

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Encounters between state enforcement officers and Indian fishers were frequent on the Columbia River during the 1960s and 1970s. Most were respectful contacts in which each person believed he or she was doing the right thing. (Far left, left to right): As Mickey McCormack of the Nez Perce Tribe watches, Pvt. Tom Ashmore, Pvt. Dale R. Badger (in boat), and Sgt. Walter S. Hershey of the Oregon State Police seize a fishing net from Nez Perce tribal member Ipsusnute V (Jesse Greene) in 1968. (Left): OSP Pvt. Tom Ashmore cites Ipsusnute V for an illegal fall salmon catch in the early 1970s. Well known on the Columbia River, Ipsusnute V lived his life as an Indian fishing rights advocate and was involved in treaty fishing rights litigation. In 2005, the Columbia River Intertribal Fish Commission Spirit of the Salmon Fund posthumously named Ipsusnute V to its hall of fame. Lt. Ashmore (OSP ret.) remains involved in public service and natural resources conservation.

"that out of all this effort and expense that we will be able to come up with something that will at least be a beginning in resolving once and for all these grievous problems that have plagued the people of this area for many, many years."[51]

A few weeks later, the U.S. Supreme Court heard argument in *Puyallup* for the second time. In November 1973, it reversed the Washington Supreme Court. Justice Douglas reaffirmed the court's earlier decision that the state could regulate treaty Indian fishing in the interest of conservation but that regulation could not discriminate against the Indians. "There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is allowed." The court again sent the case back to the state courts, directing that the steelhead in the Puyallup River be "fairly apportioned" between the treaty Indian net fishery and the non-Indian sport fishery. The U.S. Supreme Court had all

but endorsed the "fair share" interpretation of the treaties.[52] The state was still in charge, but its choices had become much more limited.

Judge Boldt issued his much-anticipated decision on February 12, 1974, and an injunction implementing it six weeks later. The law he laid down was not radical. The state could regulate fishing by treaty Indians, but only if the regulations were "reasonable and necessary for conservation" and nondiscriminatory. State regulations were nondiscriminatory only if they provided treaty Indians with an opportunity to take a share of fish not needed for spawning. That was not new. The U.S. Supreme Court had just said it in *Puyallup II*. Judge Belloni had said it in *United States v. Oregon*. Judge Boldt also said the state was not the only sovereign with power to regulate fishing by treaty Indians. Treaty tribes could regulate fishing by their own members. That was not a radical idea, either. Prior court decisions had suggested as much, and the Ninth Circuit confirmed it in another case a few months later.[53]

It was the remedy Judge Boldt ordered — his directive for how the law was to be implemented — that was hugely significant. The tribes' share was to be half of the salmon and steelhead not needed for spawning. By some estimates, that was a ten-fold increase from what the tribes had been taking. A fifty-fifty allocation would require drastic cuts in non-Indian fishing.[54]

Judge Boldt also ordered big changes in the process for regulating fisheries. Though he recognized state authority to regulate Indian fishing, he permitted the state to exercise it only to a limited extent. The tribes would regulate their own fisheries. In most circumstances, the state could not regulate treaty Indian fishing without first seeking tribal consent or court approval. Fishing by tribes that qualified for self-regulating status would not be regulated at all by the state.[55]

The state and tribes were to share their data and their proposed regulations. There would be coordination. All fishing would be regulated and controlled by somebody. There would be no more "fish-ins."[56]

Knowing that problems were likely to arise as his sweeping decision was implemented, Judge Boldt retained jurisdiction to help the parties resolve them. *United States v. Washington* remains an active case today.[57]

Problems there were. Non-Indians whose livelihoods were threatened staged their own "fish-ins." For several years, they fished in defiance of the Boldt decision. Some Indians took advantage of the situation and fished illegally, too. Some non-Indians even tried to sue Judge Boldt. Fishers directed their wrath at the bureaucrats, however, not at each other. At

the Shilshole Bay Marina in Seattle, for example, Indian and non-Indian commercial fishing boats tied up side by side.[58]

The Boldt decision had immediate effects for the Columbia River. Judge Boldt had ruled that the Yakama Nation was self-regulating and forbade the state from regulating Yakama treaty fishing at usual and accustomed fishing places in the Puget Sound region. When the 1974 spring Chinook salmon run arrived in the Columbia River Basin, the Yakama Nation opened a commercial fishery without state approval. Washington and Oregon asked Judge Belloni for an emergency injunction. Judge Belloni ultimately denied it, but he scolded the Yakama Nation for acting unilaterally. In the Columbia River, the states could still regulate fishing by treaty Indian tribes.[59]

Judge Belloni did adopt part of the Boldt remedy, though. In 1969, he had ruled that the Columbia River Treaty Tribes were entitled to a fair share of fish not needed for spawning. He had hoped the parties would work out what a fair share might be. That had not happened, so Judge Belloni adopted Judge Boldt's version of fair sharing. From now on, he ordered, the Columbia River spring Chinook fisheries would be managed for a fifty-fifty allocation between the States and the treaty tribes.[60]

Implementing the Boldt decision proved extraordinarily difficult. In Puget Sound and ocean waters off the Washington coast, the Washington Department of Fisheries began adopting regulations that reduced fishing by non-Indians. By mid-1974, several non-Indian commercial fishing groups had filed lawsuits in Thurston County Superior Court in Olympia. They argued that the Fisheries Department had no authority, under state law, to adopt regulations conforming to the Boldt decision. The court agreed and prohibited enforcement of the regulations.

The United States and the tribes were immediately in Judge Boldt's courtroom asking for their own injunction against the state court. At first, Judge Boldt took a conservative approach. He enjoined only one of the state court orders. As time went on and the pattern kept repeating itself, however, his patience wore thin.[61]

In June 1975, the U.S. Court of Appeals for the Ninth Circuit affirmed the Boldt decision in all respects. Would the U.S. Supreme Court take it and bring some order?[62]

Disorder was the norm. Events escalated as the 1975 salmon fishing seasons got underway. Sockeye salmon were entering the straits of Juan de Fuca and Georgia on their way to spawning grounds in the Fraser River system in Canada. Some treaty tribes have usual and accustomed fishing

grounds along the migration path. On July 16, Judge Boldt ruled that his 1974 decision applied to Fraser River fish as well as fish that spawn in the United States. On July 23, the Thurston County court enjoined the Washington Department of Fisheries from complying with the Boldt ruling. On August 6, Judge Boldt enjoined the state court, ordering the Fisheries Department to comply with his order instead.[63]

In the Columbia River and adjacent ocean waters, fall Chinook fisheries were also getting underway. Oregon and Washington took the position that no court order required them to allocate 50 percent of the harvestable Columbia River fall Chinook to treaty Indian fisheries. Judge Belloni issued such an order on August 20.[64]

On January 26, 1976, the U.S. Supreme Court denied review of the Boldt decision. That did not end the controversy, however.

The *Puyallup* case was back in the state courts for the fair apportionment that the U.S. Supreme Court had ordered in *Puyallup II*. In April 1976, the Washington Supreme Court held that 45 percent of the natural steelhead not needed for spawning in the Puyallup River was a fair apportionment to the Puyallup Tribe. The U.S. Supreme Court agreed to review the *Puyallup* case for a third time. Maybe the high court would say something about the Boldt decision. But the court's *Puyallup III* decision, issued in June 1977, was inconclusive.[65]

A decision with a much larger effect on the fisheries had come from the Washington Supreme Court two weeks earlier. The state court ruled that the Washington director of fisheries had no authority under state law to adopt regulations whose purpose was to allocate fish to tribal fisheries in accordance with the Boldt decision. As salmon-fishing season got underway in the summer of 1977 , the Washington Department of Fisheries adopted regulations that did not comply with the Boldt decision. Judge Boldt enjoined them on August 10. The department adopted new regulations. The Thurston County Superior Court enjoined those on August 24.[66]

Finally, Judge Boldt gave up on the state fisheries agencies. On August 31, 1977, he assumed direct control of the fisheries. For the next two years, fisheries in Puget Sound and Washington coastal waters were managed and policed through federal court orders and federal marshals. Fishermen who violated the orders found themselves facing criminal contempt citations.[67]

The 1977 turmoil affected the Columbia River, too, where the states and tribes had recently completed an agreement on how to manage the

fisheries. Non-Indian gillnetters fished in protest. Like their Puget Sound counterparts, they faced criminal contempt citations.[68]

In October 1978, the U.S. Supreme Court agreed to review four state and federal court decisions from the turbulent 1977 fishing season. At last there would be some guidance about what the treaties meant and some chance of restoring order.[69]

The U.S. Supreme Court issued its ruling on July 2, 1979. By a 6-3 vote, the court upheld much of the Boldt decision. The court said the treaties allow Indian tribes and non-Indian governments, as sovereigns, an opportunity to take a fair share of available fish. The court said Judge Boldt was right to start from fifty-fifty in creating fair shares, but it made some adjustments in what gets counted. The court also recognized that a fifty-fifty division might be unfair to non-Indians if the tribes needed less for a "moderate living," and it left the door open for future adjustments. Otherwise, the court said Judge Boldt had done the right thing. Judge Boldt, who had retired earlier that year, was elated.[70]

Five months later, the Washington Supreme Court overruled its prior decisions and held that the Washington Departments of Fisheries and Game had authority to adopt regulations that conformed to the Boldt decision. The state was back in charge of non-treaty-Indian fisheries, at least.[71] Peace did not come easily, however.

Cooperative Fisheries Management

After the U.S. Supreme Court upheld the Boldt decision in 1979, some people began to wonder whether the litigation approach made sense. Among them was Curt Smitch, president of the Northwest Steelhead and Salmon Council of Trout Unlimited, a sports fishers' organization. He decided to take a step in a different direction. He approached Billy Frank, Jr., a tribal leader, wondering whether cooperation between the state and tribes might be a better approach than continued fighting.[72]

Some officials in state government were having similar thoughts. Until then, Washington state officials had perceived it to be in the state's interest to assert and preserve state authority to the maximum extent. By the early 1980s, state officials began to perceive that cooperative relationships with tribal governments might be an important state interest.[73]

The time was right. Federal legislation in the 1930s had recognized Indian tribes as being capable of self-government. By the 1980s, people were accepting the idea of tribes as sovereigns who could engage with other sover-

eigns in government-to-government relationships. Judge Boldt had trusted the tribes to regulate their own fisheries. The Boldt and Belloni decisions had brought the tribes the money and scientific expertise needed for effective fisheries management. The Western Washington Treaty Tribes had created the Northwest Indian Fisheries Commission. The Columbia River Treaty Tribes had created the Columbia River Intertribal Fish Commission. Having been forced to work together under the supervision of the court, state and tribal biologists were starting to get used to each other—maybe even to like each other. By 1983, the tribes and the state were ready to be partners in managing fisheries.[74]

Governor John Spellman appointed Bill Wilkerson director of the Washington Department of Fisheries in 1982. Wilkerson made it a priority to implement state-tribal cooperation in fisheries management, and so did tribal leader Billy Frank, Jr. In 1983, they brought state and tribal representatives together for two days at Port Ludlow. They agreed that they all wanted effective fisheries management that would conserve the fish and provide fair fishing opportunities for everyone. They agreed to set aside differences about legal principles and work toward practical solutions as partners.

It took awhile to implement the new policy within state government. Staffing changes were made in the attorney general's office. New people were hired, including me in 1989. Resistance came from some state legislators. In 1984, State Senator Jack Metcalf sponsored and Washington voters approved a ballot initiative that purported to block the new policy by declaring that the state was in charge of all fishing and that treaty Indians had the same rights as everyone else. Resistance also came from within the Game Department, then controlled by a citizens' commission. In 1987, Governor Booth Gardner secured legislation that changed the name and emphasis of the Game Department to Wildlife and put it directly under the control of the governor. Governor Gardner appointed Curt Smitch as the first (and only) director of the Washington Department of Wildlife. Smitch set about implementing the new policies and soon became the target of a lawsuit filed by people opposed to the policies. Other lawsuits aimed at the Washington Department of Fisheries as it carried out the new policies and at the federal government for acceding to them.[75]

Pragmatism has prevailed, however. Since 1981, every Washington governor has endorsed the concept of cooperative state-tribal fisheries management, and so have tribal leaders. Today, the Washington Department of Fish and Wildlife, under the leadership of Dr. Jeff Koenings,

has in its mission statement a commitment to "work with tribal governments to ensure fish and wildlife management objectives are achieved." The states and the tribes know they need each other if anyone's fisheries are to survive. Though some disputes have been litigated, the states of Washington, Oregon, and Idaho and the treaty Indian tribes have worked out many cooperative fishery management agreements and have settled many disputes without court intervention during the past twenty years. Together, they have focused on the needs of the fish, collaborating to undo past damage. They have even found themselves on the same side of the courtroom.[76]

The tribes and the states cooperate in deciding how many fish are needed for spawning and how many can be caught. In the Columbia River, a Technical Advisory Committee of tribal, state, and federal scientists jointly develops the biological information needed for effective fisheries management. In consultation with fishers, the tribes and states cooperate to work out in advance the details of when, where, and by whom fishing will occur. Allocation need not be fifty-fifty if another arrangement fits the parties' needs better. In the Columbia River, for example, non-treaty fisheries target more of the tule race of fall Chinook salmon and treaty fisheries target more of the upriver bright race. The tribes adopt and enforce regulations for their members. The states adopt and enforce regulations for non-Indians.[77]

This is cooperative fisheries management. It is embodied in the 1985 Puget Sound Salmon Management Plan and the 1986 Hood Canal Management Plan, both still in effect. It has been embodied in a series of agreements for Columbia River fisheries and associated hatchery measures. State-tribal agreements laid the foundation for the 1985 Pacific Salmon Treaty between the United States and Canada and its implementing legislation in the United States.[78]

In the Puget Sound and Washington coast regions, the state has refrained from regulating tribal fisheries since the mid-1980s, in effect recognizing all the *United States v. Washington* tribes as self-regulating. In the Columbia River, the tribes and states adopt parallel regulations for treaty Indian fishing, enforceable by either tribal or state law enforcement officers, though the tribes have primary enforcement responsibility.[79]

Some issues remain unresolved. A question that has troubled state-tribal relationships in recent years, for example, is whether the Stevens-Palmer treaties have anything to say about who is in charge of land management decisions that affect fish habitat. Regardless of whether future decisions are

based on pragmatism or principles, it is certain that the Stevens-Palmer Treaties and the Stevens-Palmer Treaty Tribes will continue to play a large role in the political, legal, cultural, and natural landscape of the state of Washington and the Pacific Northwest.[80]

Notes

The opinions expressed herein are those of the author alone and are not necessarily shared by any state, tribal, or federal agency or official.

1. See Eugene S. Hunn, *Nch'i-Wána, "The Big River": Mid-Columbia Indians and Their Land* (Seattle: University of Washington Press, 1990); Columbia River Inter-Tribal Fish Commission, *1997 Annual Report*; Columbia River Inter-Tribal Fish Commission, *Wana Chinook Tymoo* (Summer 2004): 38.

2. Treaty with the Yakamas, art. III, para. 2, 12 Stat. 951, 953 (June 9, 1855). See Treaty with Nisquallys (Treaty of Medicine Creek), art. III, 10 Stat. 1132, 1133 (December 26, 1854); Treaty with the Dwámish Indians (Treaty of Point Elliott), art. V, 12 Stat. 927, 928 (January 22, 1855); Treaty with the S'Klallams (Treaty of Point No Point), art. IV, 12 Stat. 933, 934 (January 26, 1855); Treaty with the Makah Tribe (Treaty of Neah Bay), art. IV, 12 Stat. 939, 940 (January 31, 1855); Treaty with the Walla-Wallas, art. I, 12 Stat. 945, 946 (June 9, 1855); Treaty with the Nez Percés, art. III, para. 2, 12 Stat. 957, 958 (June 11, 1855); Treaty with the Tribes of Middle Oregon, art. I, para. 3, 12 Stat. 963, 964 (June 25, 1855); Treaty with the Qui-Nai-Elts (Treaty of Olympia), art. III, 12 Stat. 971, 972 (July 1, 1855); Treaty with the Flatheads (Treaty of Hell Gate), art. III, para. 2, 12 Stat. 975, 976 (July 16, 1855). An eleventh Stevens treaty, Treaty with the Blackfoot Indians, 11 Stat. 657 (October 17, 1855) was not a treaty of cession. See Kent D. Richards, *Isaac I. Stevens: Young Man in a Hurry* (Pullman: Washington State University Press, 1993), chaps. 8, 9; Kent D. Richards, "Historical Antecedents to the Boldt Decision," *Western Legal History* 4:69 (1991).

3. The twenty-five tribes and the treaty each signed are: Hoh (Olympia), Jamestown S'Klallam (Point No Point), Lower Elwha Klallam (Point No Point), Lummi (Point Elliott), Makah (Neah Bay), Muckleshoot (Medicine Creek and Point Elliott), Nez Perce (Nez Perce), Nisqually (Medicine Creek), Nooksack (Point Elliott), Port Gamble S'Klallam (Point No Point), Puyallup (Medicine Creek), Quileute (Olympia), Quinault (Olympia), Salish-Kootenai (Hell Gate), Sauk-Suiattle (Point Elliott), Skokomish (Point No Point), Squaxin Island (Medicine Creek), Stillaguamish (Point Elliott), Suquamish (Point Elliott), Swinomish (Point Elliott), Tulalip (Point Elliott), Umatilla (Walla Walla), Upper Skagit (Point Elliott), Warm Springs (Middle Oregon), and Yakama (Yakama). A twenty-sixth tribe, the Samish Indian Nation of Washington, is currently seeking Point Elliott Treaty Tribe status. See *United States v. Washington*, 394 F.3d 1152 (9th Cir. 2005). The Snoqualmie Tribe of Washington is expected to seek Point Elliott Treaty Tribe status as well.

On usual and accustomed fishing places, see Edward G. Swindell Jr., *Report on Source, Nature, and Extent of the Fishing, Hunting and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon* (Los Angeles: U.S. Department of the Interior, 1942); George W. Gordon, "Report upon the Subject of the Fishing Privileges etc. Guaranteed by Treaties to Indians in the Northwest, with Recommendations in Regard Thereto," January 19, 1889 (Bureau of Indian Affairs transcription, 1986). Oregon and Washington regulations recognize the Columbia River reservoirs from Bonneville Dam upstream to the Yakima River confluence as areas where the Yakama, Warm Springs, Umatilla, and Nez Perce Tribes are entitled to exercise treaty fishing rights. See Or. Admin. R. §§ 635 041 0005, 635 041 0015; Wash. Admin. Code §§ 220 32 050(2)(a), 220 32 055. The stretch between Bonneville and McNary dams is sometimes called "Zone 6." Many important ancient fishing sites along the Columbia have been inundated by federal dams. As the photographs accompanying this article show, the federal government has compensated the tribes for the loss of some historic fishing places. The federal government has also

set aside specific "in-lieu" treaty fishing sites along the reservoirs to substitute for traditional Indian fishing sites inundated by the dams. See 25 C.F.R. Parts 247, 248.

4. See Kent D. Richards, "The Yakima Indians, Off-Reservation Fishing Rights and the *Winans* Case of 1905" (unpublished manuscript, 1992), copy in author's possession; *United States v. Taylor*, 3 Wash. Terr. 88, 13 P. 333 (1887); *United States v. Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co.*, 249 U.S. 194; *United States v. McGowan*, 62 F.2d 955 (9th Cir.), *aff'd mem.*, 290 U.S. 592 (1933); *United States v. Brookfield Fisheries*, 24 F. Supp. 712 (D. Or. 1938).

5. *Winans*, 198 U.S. 371, 384; see also *Seufert v. Olney*, 193 F. 200, 204 (E.D. Wash. 1911); *United States v. Alaska Packers' Ass'n*, 79 F.152 (C.C.D. Wash. 1897); *The James G. Swan*, 50 F. 108, 111–12 (C.C.D. Wash. 1892).

6. 1897–98 Wash. Att'y Gen. Biennial Rep. 189. See also 1901–2 Wash. Att'y Gen. Biennial Rep. 60.

7. Courtland L. Smith, *Salmon Fishers of the Columbia* (Corvallis: Oregon State University Press 1979), chap. 3; Irene Martin, *Beach of Heaven: A History of Wahkiakum County* (Pullman: Washington State University Press, 1997), chap. 6; Robert J. Browning, *Fisheries of the North Pacific,* revised ed. (Edmonds, Wash.: Alaska Northwest Publishing, 1980), 52.

8. 1881 Code of Washington chap. 94, §§ 1172-1207; Henry O. Wendler, "Regulation of Commercial Fishing Gear and Seasons on the Columbia River from 1859 to 1963," *Fisheries Research Papers of the Washington Department of Fisheries* 2, No. 4 (1966); 1889–90 Wash. Laws pp. 106–7, §§ 3, 4, 6; 1905 Wash. Laws chap. 170, § 4; 1907 Wash. Laws chap. 247, §§ 2, 3; 1897 Wash. Laws chap. 83, § 4; James A. Crutchfield and Giuluio Pontecorvo, *The Pacific Salmon Fisheries: A Study of Irrational Conservation* (Baltimore: Johns Hopkins Press, 1969), 130–2.

9. 1897 Wash. Laws chap. 82, § 1; 1897–98 Wash. Att'y Gen. Biennial Rep. 189; 1899 Wash. Laws chap. 117, § 1. *State v. Lewis*, 45 Wash. 475, 88 P. 940 (1907); 1909 Wash. Laws chap. 77, § 1. In 1913, the legislature prohibited the use of nets in fresh water for the taking of "game fish," though not salmon, for any purpose. 1913 Wash. Laws chap. 120, § 46. See also 1913–14 Wash. Att'y Gen. Report 219–20; *State v. Allen*, 80 Wash. 83, 141 P. 292 (1914).

10. Crutchfield, *Pacific Salmon Fisheries*, 126; Smith, *Salmon Fishers of the Columbia*, chap. 3; Jeff Crane, "The Elwha Dam: Economic Gain Wins over Saving Salmon Runs," *Columbia* 17:3 (Fall 2003): 14. See also *State ex rel. Pacific American Fisheries v. Darwin*, 81 Wash. 1, 142 P. 441 (1914).

11. 1915 Wash. Laws chap. 31. Non-Indian commercial fishing interests challenged the new law as unconstitutional, but they were unsuccessful. *Barker v. State Fish Comm'n*, 88 Wash. 73, 152 P. 537 (1915); *State v. Hals*, 90 Wash. 540, 156 P. 395 (1916); *State v. Van Vlack*, 101 Wash. 503, 172 P. 563 (1918); 1915 Wash. Laws chap. 31, §§ 41, 42, 71, 72; 1949 Wash. Laws chap. 112; 1937–38 Wash. Att'y Gen. Biennial Rep. 16-19.

12. Edward G. Swindell Jr., *Report on Source, Nature, and Extent of the Fishing, Hunting and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon* (Los Angeles: U.S. Department of the Interior, 1942), 275–8; *State v. Towessnute*, Wash. S. Ct. No. 13083, Brief of Appellant at 4–5 (September 20, 1915).

13. *State v. Alexis*, Wash. S. Ct. No. 13084, Defendant's Proposed Statement of Facts at 5, 8–30, 35–41, 44 (August 28, 1915); *State v. Alexis*, Whatcom Cy. Super. Ct. No. 1720, Opinion (August 17, 1915).

14. *Towessnute*, Wash. S. Ct. No. 13083, Brief of Appellant at 9 (September 20, 1915); see also *Alexis*, Wash. S. Ct. No. 13084, Brief of Appellant at 9 (September 20, 1915).

15. *Towessnute*, Wash. S. Ct. No. 13083, Brief of Appellant at 14 (September 20, 1915); *Alexis*, Wash. S. Ct. No. 13084, Brief of Respondent (October 7, 1915).

16. In 1916, eight justices sat on the Washington State Supreme Court. Most cases were heard by a five-member Department of the Court, and some were heard by the full eight-member court sitting "en banc." A litigant dissatisfied with the decision of a department could petition to have the case reheard "en banc." *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916); *State v. Alexis*, 89 Wash. 492, 154 P. 810, 155 P. 1041 (1916).

17. *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); Thirtieth and Thirty-First Annual Reports of the Washington State Fish Commissioner (1921), 33.

18. *Alexis*, Wash. S. Ct. No. 13084, Defendant's Proposed Statement of Facts at 23, 62 (August 28, 1915). See also Twenty-Fourth and Twenty-Fifth Annual Reports of the Washington State Fish Commissioner (1916), 42.

19. Thirtieth and Thirty-First Annual

Reports of the Washington State Fish Commissioner (1921), 28; *State v. Meninock*, 115 Wash. 528, 197 P. 641 (1921) (en banc).

20. Thirtieth and Thirty-First Annual Reports of the Washington State Fish Commissioner (1921), 28; 1921 Wash. Laws, chap. 58. The Prosser Falls law was repealed when the next comprehensive revision of the Fisheries Code occurred in 1949. 1949 Wash. Laws, chap. 112.

21. Swindell, *Report on Source*, 77; "Fishing Rights—Yakima Tribes," 54 *Interior Dec.* 418 (M-27631) (April 5, 1934). See also *McCauley v. Makah Indian Tribe*, 128 F.2d 867 (9th Cir. 1942); Fay G. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (Seattle: University of Washington Press, 1986), 58–60; Boxberger, *To Fish in Common*, 104; *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557 (1930); *Taylor v. United States*, 44 F.2d 531 (9th Cir. 1930) (Quileute), *cert. denied*, 283 U.S. 820 (1931); *United States v. Stotts*, 49 F.2d 619 (W.D. Wash. 1930) (Lummi); *State v. Edwards*, 188 Wash. 467, 62 P.2d 1094 (1936) (Swinomish); *Kalama v. Brennan*, No. 598, Order of Nov. 3, 1937 (W.D. Wash.) (Nisqually); *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946) (Quileute), *cert. denied*, 330 U.S. 827 (1946).

22. *State v. Tulee*, 7 Wash.2d 124, 109 P.2d 280 (1941) (en banc).

23. *Makah Indian Tribe v. McCauly*, 39 F. Supp. 75 (W.D. Wash. 1941).

24. *Tulee v. Washington,* 315 U.S. 681, 685 (1942). See also *State v. McConville*, 65 Idaho 46, 139 P.2d 485 (1943).

25. *McCauley*, 128 F.2d 867, 870.

26. See Twenty-Sixth Biennial Report of the Attorney General of Washington (1941–42), vii–viii; Swindell, *Report on Source*, 73–5, 78; Moore, *Annotated Laws*, 114–15; Ulrich, *Empty Nets*, 49; 1921 Wash. Laws chap. 7, § 108; Charles Wilkinson, *Messages from Frank's Landing: A Story of Salmon, Treaties, and the Indian Way* (Seattle: University of Washington Press, 2000), 3–4.

27. Twenty-Sixth Biennial Report of the Attorney General of Washington (1941–42), vii.

28. 1949 Wash. Laws chap. 112; 1937–38 Wash. Att'y Gen. Biennial Rep. 16–19. In 1924, Congress declared all Indians born in the United States to be citizens. Act of June 2, 1924, 42 Stat. 253 (current version at 8 U.S.C. § 1401(b)). Under the Fourteenth Amendment to the U.S. Constitution, U.S. citizens are also citizens of the state in which they reside.

29. *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951).

30. Don Eastvold & Richard F. Broz, *A Report Compiled for the Department of Game and the Department of Fisheries of the State of Washington on Legal Problems Concerning Indians and Their Rights under Federal and State Law* (Seattle: Washington State Attorney General's Office, 1954), 15.

31. See Cohen, *Treaties on Trial*, 67–8; *State v. Satiacum*, 50 Wash.2d 513, 314 P.2d 400 (1957).

32. See American Friends Service Committee, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians* (Seattle: University of Washington Press, 1970), 87–92.

33. *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, 186 F. Supp. 519, 520 (D. Or. 1960); *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169, 173 (9th Cir.), *cert. denied*, 375 U.S. 829 (1963).

34. *State v. McCoy*, 63 Wash.2d 421, 430, 387 P.2d 942 (1963).

35. *Department of Game v. Puyallup Tribe, Inc.*, No. 158069 (Pierce Cy. Super. Ct., filed November 4, 1963); *Department of Game v. Kautz*, No. 158824 (Pierce Cy. Super. Ct.); *State v. Moses*, No. 609180 (King Cy. Super. Ct.). See also American Friends Service Committee, *Uncommon Controversy*, 94–5, 104, 108–9.

36. Northwest Indian Fisheries Commission, *NWIFC News* (Summer 2004), 3; Wilkinson, *Messages from Frank's Landing*, 44–62; Cohen, *Treaties on Trial*, 69, 73–5.

37. *Department of Game v. Puyallup Tribe, Inc.*, 70 Wash.2d 245, 248, 422 P.2d 754, 756 (1967); *Department of Game v. Kautz*, 70 Wash.2d 275, 279, 422 P.2d 771, 774 (1967). See also *State v. James*, 72 Wash.2d 746, 752-53, 435 P.2d 521, 525 (1967). In the Muckleshoot case, the court said the defendants had not shown that the Muckleshoot Tribe was a party to any treaty. Lacking treaty rights, Muckleshoot Indians were subject to state law the same as everyone else when fishing off-reservation. *State v. Moses*, 70 Wash.2d 282, 286, 422 P.2d 775, 778, *cert. denied*, 389 U.S. 428 (1967). The Boldt decision recognized Muckleshoot as a Treaty Tribe, and it is so recognized today. *United States v. Washington*, 520 F.2d 676, 692 (9th Cir. 1975).

38. *Puyallup Tribe v. Department of Game*, Briefs and Appearances of Counsel, 20 L.Ed.2d 1588-90 (1968).

39. *Puyallup Tribe v. Washington Dep't of Game*, 391 U.S. 392, 398 (1968). See also *Antoine v. Washington*, 420 U.S. 194, 207 (1975).

40. Wilkinson, *Messages from Frank's Landing*, 44; Ralph W. Johnson, "The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error," 47 *Wash. L. Rev.* 207 (1972).

41. Washington Department of Fisheries, U.S. Fish and Wildlife Service, 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" (May 14, 1973) (*United States v. Washington*, No C70-9213 (W.D. Wash.) admitted as Joint Exhibit 2a, August 24, 1973), 15. See also Boxberger, *To Fish in Common*, 133.

42. *Confederated Tribes of the Umatilla Indian Reservation*, 186 F. Supp. 519, 520, *aff'd*, 314 F.2d 169 (9th Cir.), *cert. denied*, 375 U.S. 829 (1963); Ulrich, *Empty Nets*, 120; *Maison*, 314 F.2d 169, 173 (9th Cir.), *cert. denied*, 375 U.S. 829.

43. See Cain Allen, "Replacing Salmon: Columbia River Indian Fishing Rights and the Geography of Fisheries Mitigation," *Oregon Historical Quarterly* 104:2 (Summer 2003): 196; Wendler, "Regulation of Commercial Fishing Gear," 24; Ulrich, *Empty Nets*, 129–30; *James*, 72 Wash.2d 746, 435 P.2d 521; *State v. Gowdy*, 1 Or. App. 424, 462 P.2d 461 (1969); Irene Martin, *Legacy and Testament: The Story of Columbia River Gillnetters* (Pullman: Washington State University Press, 1994).

44. See Wilkinson, *Messages from Frank's Landing*, 49; Cohen, *Treaties on Trial*, 77–8; *Sohappy*, Civil No. 68-409, Transcript of Proceedings at 31; *United States v. Oregon*, Civil No. 68-513, Complaint at 3, 8 (D. Or. Sept. 13, 1968); *United States/Sohappy*, Civil Nos. 68-513/68-409, Pretrial Order at 20 (D. Or. Feb. 24, 1969).

45. *Sohappy v. Smith*, 302 F. Supp. 899, 911 (D. Or. 1969); *Sohappy/United States*, Civil Nos. 68-409/68-513, Judgment para. 1(c) (D. Or. Oct. 10. 1969). See also Laura Berg, "Let Them Do As They Have Promised," 3 *Hastings W.-Nw. J. Envtl L. & Pol'y* 7 (1995); John C. Gartland, "*Sohappy v. Smith*: Eight Years of Litigation Over Indian Fishing Rights," 56 *Or L. Rev.* 680 (1977). *United States v. Oregon* is currently assigned to Judge Garr M. King. The state of Washington intervened in the case in 1974 and remains a full participant. *United States*, Civil No. 68-513, Order Granting Leave to Intervene (D. Or. April 29, 1974). The court terminated continuing jurisdiction over *Sohappy v. Smith* in 1978.

46. American Friends Service Committee, *Uncommon Controversy*, 200; *United States*, No. C70-9213, Final Pretrial Order §§ 3-577, 3-578, 3-579, 3-584, 3-598, 3-399, 3-613, pp. 81–3, 87, 90; State of Washington, *"Are You Listening Neighbor?" Report of the Indian Affairs Task Force* (Olympia, Wash., 1971), 27. See also *Department of Game v. Puyallup Tribe*, 80 Wash.2d 561, 566–7, 497 P.2d 171 (1972); 1929 Wash. Laws chap. 137, § 1; Wash. Rev. Code § 77.08.020 (2004); 1933 Wash. Laws chap. 3.

47. State of Washington, *"Are You Listening Neighbor?"* 27. See also *State v. Satiacum*, 80 Wash.2d 492, 495 P.2d 1035 (1972), *vacated & remanded*, 414 U.S. 1 (1973). *United States*, No. C70-9213, Complaint, Sept. 18, 1970 (Docket #1). *Skokomish Indian Tribe v. France*, No. 1183, Memorandum Decision (W.D. Wash. Jan. 22, 1962), *aff'd*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964).

48. *United States*, No. C70-9213, Complaint pp. 3–5, 11–12, Sept. 18, 1970 (Docket #1). Today, twenty-two Tribes are parties in *United States v. Washington*: Hoh, Jamestown S'Klallam, Lower Elwha Klallam, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble S'Klallam, Puyallup, Quileute, Quinault, Samish, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Suquamish, Swinomish, Tulalip, Upper Skagit, and Yakama.

49. *Puyallup Tribe, Inc.*, 80 Wash.2d 561, 572–3, 497 P.2d 171, 178–9. See also *State v. Moses*, 79 Wash.2d 104, 119, 483 P.2d 832, 840 (1971), *cert. denied*, 406 U.S. 910 (1972).

50. *United States*, No. C70-9213, Final Pretrial Order §§ 6-3, 6-4, 6-8, pp. 98–9, 101–2. *United States*, No. C70-9213, Final Pretrial Order § 6-14, p. 105 (Docket # 353). See also *United States*, No. C70-9213, [Muckleshoot, Squaxin Island, Suak-Suiattle, Skokomish, and Stillaguamish Tribes'] Complaint for Declaratory and Injunctive Relief, p. 6.

51. See Wilkinson, *Messages from Frank's Landing*, 55; *United States*, No. C70-9213, Transcript of Proceedings at 4240–4241.

52. *Washington Game Dep't v. Puyallup Tribe*, 414 U.S. 44 (1973). Professor Charles Wilkinson has suggested that there could have been behind-the-scenes contact between tribal advocates and Cathy Douglas, wife of the justice. Wilkinson, *Messages from Frank's Landing*, 55.

53. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). *Whitefoot v. United States*, 293 F.2d 658, 663 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962); *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974); see *Settler v. Yakima Tribal Court*, 419 F.2d 486, 488 (9th Cir. 1969); *Gowdy*, 1 Or. App. 424, 462 P.2d 461. See also *Sohappy v. Smith*, 302 F. Supp. 899, 912 (D. Or. 1969).

54. *United States*, 384 F. Supp. 312, 343-44; State of Washington, *"Are You Listening Neighbor?,"* 26; Cohen, *Treaties on Trial*, 155–6. See also Jack Richards, "The Economic Impact of the Judge Boldt Decision" (March 3, 1974), in United States Commission on Civil Rights, *American Indian Issues in the State of Washington, Hearing Held in Seattle, Washington, October 19–20, 1977,* vol. 2, *Exhibits*, 95th Cong. (Washington, D.C.: U.S. Government Printing Office, 1977), 460–93.

55. *United States*, 384 F. Supp. 312, 417, 420. Judge Boldt found that two Tribes — Quinault and Yakama — qualified for self-regulating status. In 1998, the Washington Department of Fish and Wildlife recognized the Quileute Tribe as a self-regulating Tribe in settlement of *United States v. Washington* Subproceeding 94-1. 1/29/1998 letter from Philip Anderson to Mel Moon.

56. *United States*, 384 F. Supp. 312, 420.

57. *United States*, 384 F. Supp. 312, 405, 408. *United States v. Washington* is currently assigned to Judge Ricardo S. Martinez.

58. See *United States v. Raub*, 637 F.2d 1205 (9th Cir. 1980); *State v. Reed*, 92 Wash.2d 271, 595 P.2d 916 (1979); *Bergh v. Washington*, No. C74-524 S, Memorandum Order of Dismissal (W.D. Wash. Nov. 6, 1974), *aff'd*, 535 F.2d 505 (9th Cir.), *cert. denied*, 429 U.S. 921 (1976). Alan Stay, personal communication, January 31, 2005. Stay, an attorney, represented several western Washington Tribes during the late 1970s and currently represents the Muckleshoot Indian Tribe.

59. See transcript of joint hearing before the Oregon Fish Commission and the Washington Department of Fisheries, April 17, 1974; *United States*, Civil No. 68-513, Order Dissolving Temporary Restraining Order, p. 4.

60. *Sohappy*, 302 F. Supp. 899, 911; *United States*, Civil No. 68-513, Order Dissolving Temporary Restraining Order, p. 3.

61. *United States v. Washington*, 459 F. Supp. 1020, 1028–35 (W.D. Wash. 1974).

62. *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975).

63. *United States*, 459 F. Supp. 1020, 1050–6; *Purse Seine Vessel Owners Association v. Moos*, No. 52881 (Thurston Cy. Super. Ct.).

64. *United States*, Civil No. 68-513, Order of August 20, 1975.

65. *Department of Game v. Puyallup Tribe, Inc.*, 86 Wash.2d 664, 548 P.2d 1058 (1976); *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165 (1977).

66. *Puget Sound Gillnetters Association v. Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977). United States Commission on Civil Rights, *American Indian Issues*, 2.

67. *United States*, 459 F. Supp. 1020, 1097–1107, *aff'd sub. nom Puget Sound Gillnetters Association*, 573 F.2d 1123. *United States v. Baker*, 641 F.2d 1311 (9th Cir. 1981); *United States v. Olander*, 584 F.2d 876 (9th Cir. 1978), *vacated & remanded*, 443 U.S. 914 (1979).

68. *United States*, Civil No. 68-513, Order Adopting a Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries above Bonneville Dam; *United States v. Crookshanks*, 441 F. Supp. 268 (D. Or. 1977).

69. *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977), *cert. granted*, 439 U.S. 909 (1978); *Puget Sound Gillnetters Ass'n*, 88 Wash.2d 677, 565 P.2d 1151, *cert. granted*, 439 U.S. 909 (1978); *United States*, 573 F.2d 1118, *cert. granted*, 439 U.S. 909; *Puget Sound Gillnetters Ass'n v. United States Dist. Ct.*, 573 F.2d 1123 (9th Cir. 1978), *cert. granted*, 439 U.S. 909 (1978); Cohen, *Treaties on Trial*, 107–11.

70. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). See also David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," 84 *Cal. L. Rev.* 1573, 1637–9 (1996); Cohen, *Treaties on Trial*, 117.

71. *Puget Sound Gillnetters Association v. Moos*, 92 Wash.2d 939, 603 P.2d 819 (1979).

72. Curt Smitch, personal communication, December 30, 2004.

73. See Attorney General of Washington, *Indian Tribes and Washington State* (Olympia: 1985), 1.

74. Felix S. Cohen, *Handbook of Federal Indian Law* (1941; U.S. Government Printing Office, Washington, D.C., 4th printing 1945), 84–7; Boxberger, *To Fish In Common*, 108; *Anderson v. O'Brien*, 84 Wash.2d 64, 524 P.2d 390 (1974); Wilkinson, *Messages From Frank's Landing*, 93–4. Cohen, *Treaties on Trial*, 84–6. Columbia

River Intertribal Fish Commission, "Silver Anniversary," *Wana Chinook Tymoo* (Winter 2003); Ulrich, *Empty Nets*, 154–6.

75. 1985 Wash. Laws chap. 1 (codified at RCW chap. 77.110). See also Cohen, *Treaties on Trial*, 184–6; *Purse Seine Vessel Owners Ass'n v. State*, 92 Wash. App. 381, 386, 966 P.2d 928, 931 (1998), *review denied*, 137 Wash.2d 1030, 980 P.2d 1284 (1999); 1987 Wash. Laws chap. 506. In 1993, the legislature merged the Departments of Fisheries and Wildlife into a single Washington Department of Fish and Wildlife. 1993 Wash. Laws 1st sp. sess. chap. 2. Two years later, Washington voters passed a referendum putting control of the department back into the hands of a citizens' commission. See 1996 Wash. Laws chap. 267. Since then, however, the Washington Department of Fish and Wildlife has continued the policy of cooperation with Indian Tribes. See Washington Department of Fish and Wildlife, *Biennial Report 1999–2001*, vi. See also *S/SPAWN v. State*, No. 88-2-01806-2 (Thurston Cy. Super. Ct.); *Salmon for All v. Department of Fisheries*, 118 Wash.2d 270, 821 P.2d 1211 (1992); *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438 (9th Cir. 1991).

76. See Columbia River Inter-Tribal Fish Commission, *Wana Chinook Tymoo* 1 (1994): 2–3; *Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington*, August 4, 1989; Washington Department of Fish and Wildlife, *Biennial Report 1999–2001*, vi; *Confederated Tribes and Bands of the Yakama Indian Nation v. Baldrige*, 898 F. Supp. 1477 (W.D. Wash. 1995), *aff'd*, 91 F.3d 1366 (9th Cir. 1996).

77. See, for example, "A Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries above Bonneville Dam," p. 3, adopted in *United States*, No. 68-513, Order of Feb. 28, 1977; Columbia River Fish Management Plan at 48–51, adopted in *United States v. Oregon*, 699 F. Supp. 1456 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990); 2005–7 Interim Management Agreement for Upriver Chinook, Sockeye, Steelhead, Coho and White Sturgeon, p. 3, adopted in *United States v. Oregon*, No. C68-513-KI, Order of May 12, 2005 (D. Or.) (Docket #2407). See also Washington Department of Fish and Wildlife, *Biennial Report 1999–2001*, 9–10, 18–20; Columbia River Fish Management Plan, p. 30, adopted in *United States*, 699 F. Supp. 1456 (D. Or. 1988), *aff'd*, 913 F.2d 576; Act of April 8, 1918, chap. 47, 40 Stat. 515; 1915 Or. Laws chap. 188, § 20 (codified at ORS 507.010); 1915 Wash. Laws chap. 31, § 116 (codified at RCW 77.75.010).

78. *United States v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985) (Order Adopting Puget Sound Salmon Management Plan); *United States*, No. C70-9213, Order Re Hood Canal Management Plan. *E.g.*, 2005–7 Interim Management Agreement for Upriver Chinook, Sockeye, Steelhead, Coho and White Sturgeon, adopted in *United States*, No. C68-513-KI; Treaty between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, March 18, 1985, *Treaties and Other International Acts Series* No. 11091; Pacific Salmon Treaty Act, Pub. L. No. 99-5 (1985) (codified as amended at 16 U.S.C. §§ 3631–3644).

79. See, for example, Columbia River Fish Management Plan, Part IV.E, adopted in *United States*, 699 F. Supp. 1456, *aff'd*, 913 F.2d 576 (9th Cir. 1990); 2005–07 Interim Management Agreement for Upriver Chinook, Sockeye, Steelhead, Coho and White Sturgeon, adopted in *United States*, No. C68-513-KI; Wash. St. Reg. 05-03-061.

80. See *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985) (en banc); O. Yale Lewis III, "Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties," 27 *Am. Indian L. Rev.* 281 (2003).