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Anadromous Fish Law Memo

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INDIAN TREATY FISHING RIGHTS AND PROTECTION OF THE ENVIRONMENT

I. Introduction

One hundred and twenty-five years ago, certain Indian tribes of the Pacific Northwest agreed to relinquish claims to land in the vicinity of the Cascade Mountains by signing treaties in which the tribes reserved, among other things, the right of taking fish. As the non-Indian population of the area grew and the abundant levels of salmon and steelhead that existed at the time of the treaties declined, attempts by the tribes to exercise their fishing rights met increasing resistance. Litigation over the nature and scope of treaty fishing rights — spurred by state and private attempts to restrict Indian fishing — intensified in the 1960s and reached a climax in 1979 with the United States Supreme Court's basic affirmance of the 1974 decision of Judge Boldt in United States v. Washington.

Rather than heralding an end to treaty fishing rights litigation, however, the Supreme Court's recent decision provided a strong basis for a new wave of litigation. This new litigation will focus on the consistency of many commonplace activities that may damage salmon and steelhead habitat (or otherwise reduce the number of fish available) with the treaty-secured fishing rights of the tribes. Unlike the previous litigation over Indian fishing rights, the new legal battles will directly affect people who neither fish for sport nor fish for a livelihood. Loggers, farmers, and others may find that they must drastically modify or even cease certain of their activities in order to avoid infringing upon the tribes' fishing rights.

This issue of the Anadromous Fish Law Memo explores the background and potentially far-reaching implications of United States District Judge William Orrick's decision in Phase II of United States v. Washington. The issue begins by setting forth the historical setting for the treaty negotiations. From this background it is possible to determine what the Indians probably understood they were securing when they signed the treaties. Divining the understanding or intent of parties to 125-year-old contracts is difficult at best, and it is inconceivable that either party to the treaties could have envisioned the tremendous development (and associated harm to the fisheries resource) that has occurred in this region. However, the Supreme Court has repeatedly stated that Indian treaties must be interpreted as they would have been understood by the Indians at the time. This principle of treaty construction, along with others developed over the years, is discussed in section III. The following section provides an overview of the extensive history of litigation over Pacific Northwest Indian fishing rights, with emphasis on the application of principles established in that litigation to the legal issues involved in Phase II. Section V analyzes in detail the Phase II decision itself, including both the question of the tribes' right to environmental protection for the resource and their entitlement to hatchery fish. Section VI concludes with a brief examination of litigation that the Phase II decision has precipitated thus far.

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II. The Treaty Negotiations

In 1850, Congress authorized the negotiation of treaties with certain Indian tribes of Oregon and Washington in order to extingiush Indian claims to lands west of the Cascade Mountain Range.[1] Charged with the duty of obtaining the Indians' assent to the treaties was Isaac Stevens, the first appointed Governor of the Washington Territory and Superintendent of Indian Affairs.[2] Stevens recognized the critical importance of anadromous fisheries in Indian culture, as evidenced by a letter from him to the Commissioner of Indian Affairs dated September 16, 1854:

> The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of Congress that Indians should. be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing. It is therefore desirable that this question should be set at rest by law.[3]

Governor Stevens then set about, with the aid of George Gibbs, a lawyer and ethnologist, to assemble the various bands and tribes of Indians together at various locations throughout the Northwest to negotiate the treaties.[4] Stevens named numerous chiefs and subchiefs to existing tribes as well as to tribes he himself created for the purpose of delegating responsibilities and facilitating the signing of the treaties.[5]

The Indians with whom Stevens dealt shared an "almost universal and generally paramount dependence" upon anadromous fish.[6] The fish were central to the Indian diet,[7] religious

1. Act of June 5, 1880, 9 Stat. 437.

2. See United States v. Washington, 384 F. Supp. 312, 354 (W.D. Wash. 1974).

3. See Joint Appendix at 327, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979) (the major parties to the Fishing Vessel Ass'n case assembled a joint appendix to their briefs containing selected portions of the record below. This appendix is available for examination at most libraries containing microfiche copies of Supreme Court records and briefs). For a general discussion of the relationship between federal legislation and Indian treaty rights, see Coggins & Modrcin, Native American Indians and Federal Wildlife Law, 31 Stan. L. Rev. 375 (1979).

4. See United States v. Washington, 384 F. Supp. 312, 354 (W.D. Wash. 1974). Gibbs set forth the following observation on the matter of Indian fisheries in an extensive report on the tribes of Washington: "The subject of the right of fishery, in its present form, is believed to be one concerning which difficulties may arise." Joint Appendix at 326, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979).

5. United States v. Washington, 384 F. Supp. 312, 354-55 (W.D. Wash. 1974).

> Generally, Indian signatories were individuals who had some sort of friendly contact with non-Indians. A few spoke Chinook jargon and probably most were men of importance in their communities, although they were not necessarily the most important men. The "head chiefs" were chosen by Simmons and Stevens. The "sub-chiefs" and "leading men" were selected by Simmons and Stevens, sometimes with the aid of the "head chiefs." The basis for choice were friendliness to Americans, real or apparent status in their communities, and ability to communicate in Chinook jargon . . .. Various "bands" and "fragments of tribes" were arbitrarily assigned a subordinate status to other "tribes," each of which had been assigned a "head chief." The latter were taken to represent not only the group to which they belonged, but all other groups which had been declared subordinate to it. The signatories, in the U.S. view, had the capacity to alienate land belonging to such groups. On the Indian side, there was no precedent for signing legal documents, nor was there any culturally sanctioned method of formally alienating land.
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> B. Lane, Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century 28 (1973).

6. 384 F. Supp. at 350.

7. Throughout most of [Western Washington] salmon (including steelhead where available) was the staple food and the most important single food resource available to the native population. This is a matter of record, attested to by historic and ethnographic evidence as well as by observations recorded in the years immediately preceeding and following the 1854-55 treaties.

B. Lane, note 5 above at 6.

life,[8] and economy.[9] Not surprisingly, therefore, the Indians expressed to Stevens and his associates an overriding concern that they would continue to be able to carry on their fishing activities.[10] For example, during the negotiations preceeding the signing of the Treaty of Neah Bay,[11] the following exchange took place between one of the Indians and Governor Stevens:

> Kalchote Neah Bay . . . thought he ought to have the right to fish and to take whales and get food where he liked. He was afraid that if he could not take halibut where he wanted, he would become poor.
>
> . . .
>
> Gov. Stevens informed them that . . . far from wishing to stop their fisheries, he wished to send them oil kettles, and fishing apparatus.
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> . . .
>
> Gov. Stevens replied that "he wanted them to fish but that the whites should fish also."[12]

Accordingly, Stevens included a clause substantially identical to the following in each of the treaties:

> 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 executed by citizens.[13]

Interestingly, there is no record of the phrase "the right of taking fish . . . in common with all citizens" being discussed during the treaty negotiations.[14] The negotiations were carried out in a trade medium known as "Chinook jargon," which was imperfectly understood (or not understood at all) by many of expressed similar concerns at other treaty negotiations (see id.), including those for the Treaty of Point-No-Point, 12 Stat. 933 (1859):

> I wish to speak my mind as to selling the land -- Great Chief. What shall we eat if we do so? Our only food is berries, deer and salmon. Where then shall we find these? I don't want to sign away all my land. Take half of it and let us keep the rest. I am afraid that I shall become destitute and perish for want of food.
>
> . . .
>
> Mr. Simmons, the agent, explained that if they kept half their country, they would have to live on it, and would not be allowed to go anywhere else they pleased. That where a small tract alone was left, the privilege was given of going wherever else they pleased to fish and work for the whites. If you can cultivate more land than this, you can have it.

8. See id. at 9:

> The first-salmon ceremony, which was general through most of the area, differed in detail and was celebrated over different species from community to community. This was essentially a religious rite to ensure the continued return of salmon to the area. The symbolic acts, attitudes of respect, and concern for the well-being of the salmon reflected a wider conception of the interdependence and relatedness of all living things which was a dominant feature of native world view. Such attitudes and rites insured that salmon were never wantonly wasted and that water contamination was not permitted.

9. "In late December 1854, one territorial official wrote the Commissioner of Indian Affairs that '[t]he Indians on Puget Sound . . . form a very considerable portion of the trade of the Sound . . .. They catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it.'" Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 666 n.8 (1979). The tribes also traded fish among themselves, and responded to the influx of non-Indians into the area in the decade immediately preceeding the treaties by increasing their fishing activities to meet the needs of the non-Indians for this food source. Id. at 665 n.7.

10. Id. at 667-68.

11. 12 Stat. 939 (1859).

12. Joint Appendix at 331, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979). The Indians

13. Treaty of Medicine Creek, art. III, 10 Stat. 1133 (1855).

14. United States v. Washington, 384 F. Supp. 312, 356 (W.D. Wash. 1974).

the Indians and consisted of "a simple 300-word commercial vocabulary that did not include words corresponding to many of the treaty terms."[15] Significantly, however, the jargon contained "no words or expressions that would describe any limiting interpretation on the right of taking fish."[16]

While the Chinook jargon itself may not have been adequate to convey the exact meaning of the fishing rights provision of the treaties to the Indians, Governor Stevens did endeavor to explain to them, during the negotiations that preceeded the signing of the treaties, the general effect that the documents would have. For example, in negotiating the Treaty of Point-No-Point,[17] Governor Stevens stated:

> Are you not my children and also children of the Great Father? What will I not do for my children and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you mechanics and a doctor to teach and cure you. Is not that fatherly? This **paper secures your fish.** Does not a father give food to his children?[18]

This statement, and others like it, led the U.S. Supreme Court, in its 1979 Washington v. Fishing Vessel Ass'n decision, to make the following conclusion with respect to the circumstances surrounding the signing of the treaties:

> It is perfectly clear . . . that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places . . . and that they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right.[19]

Because of the relative abundance of fish[20] and the relative scarcity of non-Indian settlers[21] in the territory at the time of the treaties, however, the Supreme Court concluded that none of the parties to the treaties realized or intended that the agreements would someday

15. Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 667 n. 10 (1979). See also United States v. Washington, 384 F. Supp. 312, 356 (W.D. Wash. 1974): "Chinook jargon . . . was inadequate to express precisely the legal effects of the treaties, although the general meaning of the treaty language could be explained." Cf. B. Lane, note 7 above at 25: "In my opinion, it would have been possible to convey the meaning of the [fishing rights] language adequately through the medium of Chinook jargon."

16. United States v. Washington, 384 F. Supp. 312, 356 (W.D. Wash. 1974). See also Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 668 n. 12 (1979) (quoting the district court opinion, 384 F. Supp. at 347):

> There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians.

17. 12 Stat. 933 (1855).

18. Joint Appendix, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979). See also note 12 above and accompanying text.

19. 443 U.S. 658, 667 (1979). See also id. at 676:

> Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent . . .. It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries," . . . and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.

20. See, e.g., Joint Appendix, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979) (quoting an 1854 report of Agent M.T. Simmons to Superintendent of Indian Affairs Geary):

> The salmon that run up the Qui-nai-elt river, in great numbers, are considered the fattest and best flavored of any taken on this coast, and the Indians should be encouraged to open a trade in them. I think they can be more profitably employed at present in this way than in agricultural pursuits, as it will be a more congenial employment for them.

21. When the treaties were executed, the population of Western Washington consisted of approximately 7,500 Indians and 2,500 non-Indians. Id. at 664.

serve as a basis for determining how the fisheries would be allocated between the Indians and non-Indians.[22] Conditions have changed dramatically, of course, and it was the widespread settlement and development of the Pacific Northwest in the decades following the treaties that in part gave rise to the Phase II litigation. The nature and extent of these changes, insofar as they affect anadromous fish, are discussed in section VI below.

III. Principles Governing Construction of Indian Treaties

It should be clear from the foregoing discussion that it is not a simple task to reconstruct the circumstances surrounding the treaty negotiations and decipher the Indians' understanding of the bargain they struck nearly a century-and-a-half ago by signing the treaties. But all treaties executed by the United States are, under our Constitution, the supreme law of the land; the rights and obligations of many people are determined largely by the manner in which the treaties are interpreted by the courts.[23] It is important, then, to understand certain rules, and the reasoning behind them, that courts follow when construing Indian treaties.

In Jones v. Meehan, the Supreme Court explained why special care must be taken in cases where Indian treaties are involved:

> In construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreters employed by the United States; and that 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.[24]

In response to these considerations, the courts have formulated three basic canons of treaty construction. First, treaties should always be construed as the Indians themselves would have understood them.[25] Second, ambiguous

22. See id. at 669:

> In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.

23. U.S. CONST., art. VI:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

24. 175 U.S. 1, 10-11 (1899) [citations omitted]. In United States v. Winans, 198 U.S. 371, 380 (1905), the Court expressly relied on this principle of construction in interpreting the Stevens treaties:

> And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules."

See generally Decker, The Construction of Indian Treaties, Agreements, and Statutes, 5 Am. Indian L. Rev. 299 (1977).

25. See Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Comment, Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest, 10 Envt'l L. 413, 424-25 (1980).

expressions must always be resolved in favor of the Indians.[26] Third, treaties should generally never be construed to the Indians' prejudice.[27] It is in light of these canons of construction, then, that the history of litigation over the fishing rights provision of the Stevens treaties must be considered.

IV. Major Judicial Interpretations of Treaty Fishing Rights

The United States Supreme Court first dealt with the fishing rights provision of the Stevens treaties in United States v. Winans.[28] In Winans, non-Indian settlers who had acquired title to property bordering the Columbia River asserted the right to prevent Indians from using the propery to fish at their "usual and accustomed places."[29] The non-Indians had erected "fish wheels" at various points along the river, which were capable of seriously depleting the fish runs.[30] In addition, the very location of the wheels made it difficult or impossible for the Indians to use their traditional fishing sites.[31]

The landowners in Winans argued that the treaty secured to the Indians only such rights as non-Indians could enjoy under state laws governing land ownership and fishing.[32] The Supreme Court responded to this argument as follows:

> [I]t was decided [below] that the Indians acquired no rights but what any inhabitant of the territory would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of a nation for more.[33]

The Supreme Court added that the rights of the Indians, including the right to use their customary fishing sites, "were not much less necessary to the Indians than the atmosphere they breathed."[34] The Court explained that, by signing the treaties, the tribes granted to the non-Indians a portion of the rights previously held exclusively by the Indians.[35] Thus, "the treaty was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted."[36]

As to relief, the Court ordered "an adjustment and accommodation" of the respective rights of the Indians and the landowners.[37] Unfortunately, the lower court's response to this mandate is not reported, but "it clearly included removal of enough of the fishing wheels to enable some fish to escape and be available to Indian fishermen upstream."[38]

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26. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).

27. Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

28. 198 U.S. 371 (1905).

29. Id. at 379.

30. See Brief of Petitioner United States, United States v. Winans, 198 U.S. 371 (1905), reprinted in Brief of Petitioner State of Washington at 85-86, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979):

> It seems quite clear that the fish wheels are very destructive of the fish, and therefore are improvident and unconscionable devices. It certainly seems that four wheels in the space of a mile and a half are inordinate. If they are to be maintained at all, there should be some restriction as to their number and method and daily hours of operation, in order to give the fish and the Indians a chance. Certainly the wheels should not be permitted to create and maintain a monopoly until all the fish are gone.

31. See id.:

> One at least of these wheels has been placed at a particular spot which was obviously a most advantageous place for the Indians to fish, because there was a great rock there from which their platform or staging projected, so that they could use their dip nets for the longest possible time without being driven back up the bank or bluff by rising water. There were other favorite spots where they ran trestles out over the water for the same purpose.

32. 198 U.S. at 379.

33. Id. at 380.

34. Id. at 381.

35. Id. See also Department of Game v. Puyallup Tribe, 433 U.S. 165, 176 n. 16 (1977), where the Court noted that the fishing rights clause of the treaties "effects a reservation of a previously exclusive right."

36. 198 U.S. at 381.

37. Id. at 384.

38. Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 681 (1979).

As state control over fishing activities grew more pervasive, a trend developed to eliminate or curtail the comparatively efficient methods of taking fish used by the tribes[39] in favor of the use of such inefficient methods as troll (hook and line) fishing.[40] In pursuit of this policy, the Washington legislature in 1937 passed a law requiring a license for the use of any fishing method other than hook and line.[41] An attempt by state fisheries officers to enforce this law against Sampson Tulee, a Yakima Indian, set the stage for another Supreme Court opinion -- Tulee v. Washington -- on the meaning of the Stevens treaties' guarantee of "the right of taking fish."

Appealing his conviction for using a net to fish at a Yakima usual and accustomed fishing ground without a license, Tulee argued that the state was without power to impose any restrictions whatever on the exercise of his fishing rights.[42] The state asserted the right, under "its broad powers to conserve game and fish within its borders,"[43] to regulate Indian off-reservation fishing to the same extent as non-Indian fishing.[44] Rejecting both arguments, the Supreme Court stated in dictum that the state could "impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as necessary for the conservation of fish . . ."[45] However, the Court concluded that the licensing requirement was not "indispensable to the effectiveness of a state conservation program" and accordingly prohibited its enforcement against treaty Indians.[46]

Apparently undaunted by the holding in Tulee v. Washington, the State of Washington later entirely banned the use of nets in fresh water (i.e., rivers and mouths of rivers).[47] Attempts to enforce this ban against Indians intensified during the 1960s, leading the Washington Department of Game to seek an injunction in state court prohibiting Puyallup and Nisqually Indians from fishing with nets in rivers.[48] The attempt resulted in another U.S. Supreme Court decision, Puyallup Tribe v. Department of Game.[49] However, the decision only reiterated the dictum of Tulee v. Washington concerning state power over Indian fishing, and left it to the state courts to determine whether the ban on the use of nets was a "reasonable and necessary" conservation measure.[50]

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39. See 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: Prepared for Use in United States v. Washington 108-13 (1973) [hereinafter referred to as Joint Statement]. These methods included the employment of gill nets, which were strung across all or part of a stream; fish traps, into which fish were attracted by the current of the stream; and weirs, which were capable of entirely blocking fish migration at given points of a stream. Id.

40. See Brief of Respondent Indian Tribes at 26-41, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979).

41. See Tulee v. Washington, 315 U.S. 681, 682 n. 1 (1942).

42. Id. at 684.

43. Id. at 683 (citing Geer v. Connecticut, 161 U.S. 519 (1896), overruled, Hughes v. Oklahoma, __ U.S. __, 99 S. Ct. 1727 (1979); Ward v. Race Horse, 163 U.S. 504 (1896), and others).

44. Id. at 683-84.

45. Id. at 684. This dictum contributed to subsequent Supreme Court holdings sanctioning state regulation of both on and off reservation fishing. Because state regulatory power over Indian fishing is of no particular significance with respect to the environmental issues raised in Phase II of United States v. Washington, the subject is not addressed here. Readers interested in this subject should see United States v. Washington, 384 F. Supp. 312, 334-348 (W.D. Wash. 1974); Comment, note 25 above; Dein, State Jurisdiction and On-Reservation Affairs: Puyallup Tribe v. Dep't of Game, 6 Env. Aff. 535 (1978); Comment, State Regulation of Indian Treaty Fishing Rights: Putting Puyallup III Into Perspective, 13 Gonzaga L. Rev. 140 (1977); Johnson, The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error, 47 Wash. L. Rev. 207 (1972).

46. 315 U.S. at 685.

47. See Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 400 (1968) (Puyallup I).

48. Id. at 394.

49. 391 U.S. 392 (1968).

50. Id. at 401.

On remand, the Washington Supreme Court held the net ban reasonable and necessary for conservation because non-Indian sport fishermen caught all of the harvestable portion of the Puyallup River steelhead run before the run reached the Indians' fishing grounds.[51] The Supreme Court rejected this ruling for the reason that the state could not, under the treaty, permit non-Indians to entirely preempt the fishery.[52] Rather than articulating how the harvestable fish should be shared between the Indians and non-Indians, however, the Supreme Court again deferred to the Washington courts:

> If hook and line fishermen now catch all the steelhead which can be caught within the limits needed for escapement then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose.[53]

In response to this mandate, the Washington courts allocated 45% of the harvestable steelhead to Indians, and the remainder to the non-Indian sportsmen.[54]

Judge Belloni also left it to the state to decide exactly how the fish should be shared:

> Another Indian misconception, it seems to me, [is] that my Decree, my original Decree, necessarily required the State to allow more fish to be taken upriver than before the Decree. You can't find anything in the Decree that says that. And also, I think it's a misconception that the Indians are to be guaranteed any certain percentage of fish. As a Judge, I couldn't possibly suggest any certain percentage of the fish to be taken by the Indians.
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> . . .
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> We're talking about the downriver take, and a figure of 80 per cent of the take was mentioned . . .. Certainly, there are areas where it would be clearly unfair. If only one per cent got upriver, obviously, that would not be a fair harvest. Twenty per cent? I don't know. Question mark. Fifty per cent would probably be clearly okay by anybody's standard. Who knows? The State is in the best position to decide that. And it wouldn't be disturbed either unless it was arbitrary and unreasonable, it seems to me. What I am saying is it's not up to the Court at any time, at least without a lot more evidence, to set a fixed percentage of fish to be taken by the Indians.

Tr. of Proceedings, United States v. Oregon, Civ. No. 68-513 (Aug. 13, 1970). The state, of course, failed to adopt an allocation formula, and Judge Belloni eventually adopted the 50-50 sharing scheme devised by Judge Boldt. See Sohappy v. Smith, 529 F.2d 570, 572 (9th Cir. 1976).

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51. Department of Game v. Puyallup Tribe, 80 Wash.2d 561, 497 P.2d 171 (1972). The tribes were not given an opportunity to participate in the determination of the reasonableness and necessity of the ban. See United States v. Washington, 384 F. Supp. 312, 404 (W.D. Wash. 1974):

> In its consideration on October 2, 1972 and August 20, 1973, of whether an Indian net fishery would be inconsistent with the necessary conservation of the steelhead fishery, the Department of Game and the Game Commission did not accord the Puyallup Tribe or other treaty tribes a hearing in conformity with the due process of law or the Washington Administrative Procedure Act, RCW Chapter 34.04, and applicable provisions of the Washington Administrative Code.

52. Department of Game v. Puyallup Tribe, 414 U.S. 44, 48 (1973) (Puyallup II).

53. Id. U.S. District Judge Robert Belloni of Oregon presaged this holding in Sohappy v. Smith, 302 F. Supp. 809, 813 (D. Ore. 1969):

> The treaty Indians . . . are entitled to a fair share of the fish produced by the Columbia River system.
>
> The Supreme Court has said that the right to fish at all usual and accustomed places may not be qualified by the state [citing Puyallup I]. I interpret this to mean that the state cannot so manage the fishery that little or no harvestable portion of the run reaches the upper portions of the stream where the historic Indian places are mostly located.
>
> . . .
>
> The only effect [of this ruling] will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago.

54. See Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979). In Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165 (1977) (Puyallup III), the Supreme Court upheld the power of the Washington courts to implement an allocation of 45% of the annual natural steelhead run to the Puyallups (noting that is was "precisely what we mandated in Puyallup II"), even though the tribe, under the doctrine of sovereign immunity, was not subject to the jurisdiction of the state courts and the individual tribal members were arguably exempt from state regulation because they fished almost exclusively within the Puyallup reservation. See generally Dein, note 45 above.

The extensive Puyallup litigation addressed only the issue of the Puyallup Tribe's right to a share of steelhead runs fished on entirely in fresh water. The litigation did not address the problem of restricting non-Indian fisheries in marine areas[55] so as to permit a fair share of the fish to reach the traditional Indian fishing grounds throughout most of Western Washington, which are primarily located on freshwater streams. The parties to the Stevens treaties brought that problem before Judge Boldt with the filing of United States v. Washington.[56] The extensive history of this litigation has been fully discussed elsewhere and will not be recounted here.[57] What is important to note for the present discussion is that the plaintiffs to United States v. Washington included claims for relief concerning environmental degradation in their original complaint.[58] The court separated these claims for trial in what was to become labeled as "Phase II" of the litigation.[59]

In addition, Judge Boldt ruled in Phase I of United States v. Washington that the treaty-reserved right of taking fish "exists in part to provide a volume of fish which is sufficient to [meet] the fair needs of the tribes."[60] The court based this conclusion largely on the holdings of the U.S. Supreme Court in Winters v. United States[61] and Arizona v. California.[62]

In Winters the Supreme Court held that when the United States and the Gros Ventre and Assiniboine Indians of Montana entered into an agreement[63] whereby the Indians conveyed to the government a large area of land in exchange for a reservation set aside for the Indians' exclusive use,[64] they impliedly reserved the right to withdraw water from a river bordering the reservation for use in irrigating the reservation lands.[65] In reaching this holding, the court noted that the government created the reservation in order to transform the Indians from a "nomadic and uncivilized" to a "pastoral and civilized" people.[66] Reasoning that 'civilized communities could not be established'[67] on the reserva-

55. See Tr. of Oral Argument at 17-19, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979):

> JUSTICE STEWART: Those cases involved -- at least Puyallup I and II -- sport fishing for steelhead. And this case involves, primarily at least, commercial fishing for salmon.
>
> MR. GORTON: That's exactly right. And there is, in addition, a major distinction between those two. Steelhead can only be caught in fresh water . . ..
>
> . . .
>
> So conservation in a marine area, in the commercial field, has got to include something else than pure escapement for spawning . . ..
>
> Every one of your cases in which you have used the word "conservation," six straight cases, from Winans to Puyallup III, have all dealt with fresh water fisheries. This is the first time you are dealing with a marine salt water fishery.

56. United States v. Washington, 384 F. Supp. 312, 385 (W.D. Wash. 1974): "Among the plaintiff Indian tribes only a few today are active in marine fisheries." See also id. at 344: "It is uncontroverted in the evidence that substantial numbers of fish, many of which might otherwise reach the usual and accustomed fishing places of the treaty tribes, are caught in marine areas closely adjacent to and within the state of Washington, primarily by non-treaty right fishermen."

57. See Comment, note 25 above.

58. "Plaintiffs also assert claims for relief concerning alleged destruction or impairment of treaty right fishing due to state authorization of, or failure to prevent, logging and other industrial pollution and obstruction of treaty right fishing streams." 384 F. Supp. at 328.

59. Id. "Separation of those claims for pretrial and trial after trial of the issues determined in this decision was stipulated and approved by the court."

60. Id. at 401.

61. 207 U.S. 564 (1908).

62. 373 U.S. 546 (1963).

63. 25 Stat. 124 (1888).

64. 373 U.S. 564, 576 (1908).

65. Id. at 577.

66. Id. at 576.

67. Id:

> The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and "civilized communities could not be estabilised thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters -- command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization.

tion without irrigation water, the Supreme Court held that the Indians were entitled to such water.[68]

Arizona v. California involved a claim to the right to withdraw enough water from the Colorado River to irrigate the irrigable portions of five Indian reservations in Arizona, California, and Nevada.[69] The Court held that the Indians were entitled to whatever water was necessary to satisfy their present and future needs, which the Court translated into enough water to irrigate all of the irrigable acreage of the reservations:

> It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind -- hot, scorching sands -- and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.[70]

In reaching this holding, the Supreme Court rejected the State of Arizona's argument that the doctrine of "equitable apportionment" -- a method used by the Court in resolving water rights disputes between states -- should be employed to divide the available water between the reservations and those with water claims perfected under state appropriation systems.[71] The Court also rejected Arizona's contention that the Indians were entitled only to enough water to meet their 'reasonably forseeable needs.'[72] This method of quantification, according to the Court, would depend upon the number of Indians on the reservation: "How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[73]

In Cappaert v. United States,[74] the Supreme Court summarized the principles established in Winters and Arizona as follows: (1) When the government withdraws land from the public domain -- whether to establish an Indian reservation or any other federal enclave -- it impliedly reserves water then unappropriated in a quantity sufficient to accomplish the purpose of the reservation;[75] (2) An intent to reserve water will be attributed to the government if the water is necessary to accomplish the purposes for which the reservation was created;[76] (3) Whether water is

68. Id. at 577. In its "statement of the case," the Court noted that the government alleged that "it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quality" in order to effectuate the purposes of the reservation. Id. at 567. See generally Pelcyger, The Winters Doctrine and the Greening of the Reservations, 4 J. Contemp. L. Rev. 19 (1977); Ranquist, The Winters Doctrine and How it Grew: Federal Reservation of the Rights to the Use of Water, 1975 Brig. Y. Univ. L. Rev. 639.

69. 373 U.S. 546, 595-96 (1963).

70. Id. at 600.

71. Id. at 597:

> The doctrine of equitable apportionment . . . was created by this Court in the exercise of its original jurisdiction over controversies in which States are parties . . .. An Indian Reservation is not a State . . .. [E]ven were we to treat an Indian Reservation like a State, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations.

72. Id. at 600.

73. Id. at 601. See generally Comment, Federal Reserved Rights in Water: The Problem of Quantification, 9 Tex. Tech. L. Rev. 89 (1977); Note, A Proposal for the Quantification of Reserved Indian Water Rights, 74 Colum. L. Rev. 1299 (1974).

74. 426 U.S. 128 (1976).

75. Id. at 138.

76. Id. at 139. In United States v. New Mexico, 438 U.S. 696 (1978), the Supreme Court, in an opinion by Justice Rehnquist, emphasized that, at least where federal land is reserved for use other than as an Indian reservation (New Mexico involved the National Forests), an implied reservation of water will be found only if the purposes of the reservation would be entirely defeated without the water. Cf. Fairfax & Tarlock, No Water for the Woods: A Critical Analysis of United States v. New Mexico, 15 Idaho L. Rev. 509, 528 (1979), where the authors contend that the Supreme Court has never viewed frustration of purpose as the sole basis for implying intent to reserve water. Winters, according to the article, was based on the government's duty to deal fairly with the Indians; it did not state a general theory of frustration of purpose.

impliedly reserved does not turn on a "balancing of competing interests";[77] and (4) The doctrine "reserves only that amount of water necessary to fulfill the purposes of the reservation, no more."[78]

Judge Boldt, in United States v. Washington, observed that the holding of Arizona v. California — namely, "that irrigation water rights reserved by implication in an Indian treaty [can] only be limited in amount to the total reasonably required by . . . the tribe as determined indefinitely from time to time in the future"[79] — is indistinguishable "in principle or application from the fishing rights specifically reserved by the plaintiff tribes . . .."[80] As noted above, Judge Boldt based his conclusion that the tribes are entitled to a volume of fish sufficient to meet their fair needs on this rationale.[81]

It was the Winans and Puyallup line of Supreme Court decisions, however, on which Judge Boldt largely rested his conclusion that the treaty tribes are entitled to the opportunity to take as much as 50% of the harvestable fish destined for or passing through their usual and accustomed fishing grounds.[82] These cases can also be read to entitle the Indians to a "volume of fish." Both Winans and Puyallup II struck down state-authorized activities that prevented all or a large part of the harvestable portions of fish runs from reaching Indian fishing grounds. The Winters doctrine also supports this conclusion, but Judge Boldt did not address the means, if any, by which the tribes could enforce their entitlement to that "volume of fish" if the fish runs became so depleted that they could no longer support Indian fisheries. This and related issues were separated for trial in "Phase II" of the litigation.[83] It is to a discussion of this issues litigated in Phase II to which this issue of the **Memo** now turns.

77. Id. at 138-39:

> Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in Winters v. United States, supra, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water . . .. [T]he upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest.

78. Id. at 141 (citing Arizona). For a general discussion of the quantification problem, see authorities cited at note 73 above.

79. 384 F. Supp. 312, 342-43 (W.D. Wash. 1974).

80. Id. at 343.

81. Id.:

> Arizona was concerned with the amount of water impliedly reserved for the use of the treaty tribe and it was held that they were entitled to the full amount required to serve their needs. In the present case a basic question is the amount of fish the plaintiff tribes may take in off reservation fishing under the express reservation of fishing rights recorded in their treaties. The evidence shows beyond doubt that at treaty time the opportunity to take fish for personal subsistence and religious ceremonies . . . was the single matter of utmost concern to all treaty tribes and their members. The extent of taking fish by tribal members for these purposes is now less than in former times but for a substantial number of tribal members at or near poverty level their need in these particulars is little, if any, less than it was for their ancestors. For these reasons the court finds that the taking of fish for ceremonial and subsistence purposes has a special treaty significance distinct from and superior to the taking of fish for commercial purposes . . ..

82. Id. at 343-44. In other words, the sharing formula is not based on an implied reservation of rights theory -- as is Winters and its progeny -- but rather is based on an interpretation of the express treaty language by which the fishing rights were reserved. (The treaty language is set out in text accompanying note 13 above.) It is the "in common with" language of the treaty that gives rise to the 50-50 allocation formula. See Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 686 n.27 (1979):

> The logic of the 50% ceiling is manifest. For an equal division — especially between parties who presumptively treated with each other as equals — is suggested, if not necessarily dictated, by the word "common" as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances.

The Supreme Court did state, however, that the apportionment ordered by Judge Boldt was consistent with Winters and Arizona in that Boldt's formula provided for the Indians' "reasonable livelihood needs" but "realized that some ceiling should be placed on the Indians' apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty right of 'all [other] citizens of the Territory.' " Id. at 685-86.

83. See note 59 above and accompanying text.

V. The Phase II Decision

The decision in Phase II, authored by U.S. District Judge William Orrick, addresses two major issues. The first is whether the tribes are entitled, under the treaties, to a 50-50 share of fish produced artificially by state funded or operated hatcheries. The second major issue is whether the tribes' treaty rights entitle them to have the fishery resource and related habitat protected from adverse actions or inactions of the State of Washington. The second issue is discussed at length in part (C) of this section.

With respect to the hatchery issue, Judge Orrick concluded simply that "hatchery fish are 'fish' within the meaning of the treaties' fishing [rights] clause and consequently are subject to allocation thereunder."[84] The court based this holding largely on the rationale that the State of Washington's hatchery programs exist primarily to replace fish lost as a result of environmental changes and that, since hatchery fish constitute an ever-increasing proportion of the total fish population in the case area, the Indians would eventually be "crowded out" of any meaningful use of their usual and accustomed places — as they were in Winans — if hatchery fish were excluded from the Indian allocation.[85] Before examining in greater detail the court's rulings on the hatchery fish question, it is necessary to set forth the circumstances under which the matter was brought before the court for resolution.

A. A Brief History of the Hatchery Fish Litigation

The question whether hatchery fish should be excluded from the Indian allocation first arose in the context of the Puyallup litigation. At oral argument before the U.S. Supreme Court in Department of Game v. Puyallup Tribe (Puyallup II),[86] the Washington State Attorney General proposed that, so far as Indian fishing rights are concerned, hatchery-produced steelhead should be distinguished from those occurring naturally. Justice Douglas's opinion for the Court expressed doubt whether the issue would arise in the litigation as a basis for allocating the steelhead runs, but mentioned the matter "only to reserve decision on it."[87] Three of the Justices, however, were not content to reserve judgment. According to them, "the treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen."[88]

On remand, the Washington superior court, in which the litigation had commenced ten years earlier,[89] ruled that Indian treaty rights do not extend to artificially-propagated steelhead.[90] The court reached this result without the benefit of evidence relating to (1) the extent to which Western Washington hatchery facilities are federally funded; (2) environmental degradation of the Puyallup watershed and its consequent adverse effects on the spawning and rearing of naturally-produced steelhead; and (3) competition for survival between natural and hatchery steelhead.[91] Attorneys for the Puyallup Tribe offered such evidence, but the court excluded it on objections of the Washington Department of Game and certain sportsmens' groups that had been permitted to intervene in the litigation.[92]

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84. United States v. Washington, No. 9213-II, slip op. at 20 (W.D. Wash., Sept. 26, 1980).

85. Id. at 17.

86. 414 U.S. 44 (1973).

87. Id. at 48.

88. Id. at 49 (White, J., with Burger, C.J., and Stewart, J., concurring).

89. See Memorandum Decision and Order Granting Preliminary Injunction Re Hatchery Propagated Fish, United States v. Washington, 459 F. Supp. 1072, 1076 (W.D. Wash. 1978) [hereinafter cited as Hatchery Fish Injunction]:

> On or about November 4, 1963, the Washington Departments of Fisheries and Game instituted a civil suit in the Superior Court of the State of Washington in and for Pierce County . . . against the Puyallup Indian Tribe and certain of its members for the purpose of seeking a declaratory judgment and injunctive relief with respect to the nature and scope of any off-reservation fishing rights or immunities of the tribe and its members derived from the Treaty of Medicine Creek.

90. See Department of Game v. Puyallup Tribe, 86 Wash.2d 664, 667 (1976). Abiding by the U.S. Supreme Court's holding in Puyallup II that the state cannot prohibit the Indians from using nets to catch steelhead while at the same time permitting non-Indian sport fishing to preempt the Indian fishery, the state trial court allocated 45% of the harvestable catch of natural steelhead run to the Puyallups.

91. See Hatchery Fish Injunction, note 90 above at 1077.

92. Id. That the non-Indian fishing organizations were permitted to participate as parties to the state-court litigation, yet were denied intervention in the federal litigation under procedural rules identical to those followed by the Washington state courts, illustrates the remarkably sympathetic attitude toward non-Indian fishermen that the state courts have adopted and adhered to. For decisions explaining why non-Indian fishing groups are not entitled, under

In a lengthy opinion, the Washington Supreme Court affirmed.[93] To the plurality,[94] it was apparent that the majority of the U.S. Supreme Court in Puyallup II, rather than expressly reserving judgment on the hatchery issue, "made no comment at all on the issue . . .."[95] This did not mean, however, that the matter had not been disposed of, because "[i]n a concurring opinion, three Justices noted that the majority opinion applied only to the natural run of steelhead."[96]

Nevertheless, the state supreme court plurality offered a number of reasons why the Indians should not be entitled to hatchery fish. First, a proviso of the treaty specifically denied the Indians any rights to shellfish occurring in beds cultivated or staked by non-Indians.[97] This "plain language," in the opinion of the plurality, made it "inconceivable" that the treaty was intended to encompass artificially-produced fish.[98] Apparently unconcerned with whether the Indians or treaty negotiators regarded property rights to sedentary resources as distinct from property rights to migratory resources (which they did), the plurality reasoned that to recognize Indian rights to hatchery fish would require the court "to literally rewrite the terms of the treaty and this we cannot do."[99] Moreover, with respect to the Puyallup Tribe's argument that the steelhead hatchery programs were compensatory in nature, the opinion noted that the tribe "failed to introduce" evidence concerning depletion of natural steelhead runs as a result of non-Indian activities and held that "[c]onsequently, their argument must fail."[100] What the opinion did not mention, however, was that such evidence was **offered**: it was not **introduced** because the trial court excluded it.[101]

Following the Washington Supreme Court's decision in Puyallup III, the Washington Department of Fisheries announced that it would treat salmon artificially produced for "pure enhancement" as exempt from the Boldt decision.[102] The Department stated that it would adhere to this position "unless it is otherwise determined by an appropriate court."[103] Yet, Judge Boldt had already determined, both in his original decision[104] and in subsequent remedial orders,[105] that his court did not recognize a distinction between natural and artificially-produced fish for purposes of determining the scope of treaty fishing rights.[106] Accordingly, on motion of the United States and the tribes, Boldt enjoined the Department of Fisheries from basing its salmon allocation decisions "on anything other than the total estimated runs of free-swimming fish, including those resulting from hatchery . . . programs . . .."[107] Nevertheless, Judge Boldt

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the Federal Rules, to party status in treaty fishing rights litigation to which the state in which they reside is a party, see, e.g., United States v. Michigan, F. Supp. (E.D. Mich. 1979); see also Findings of Fact, Conclusions of Law and Preliminary Injunction Re: Enforcement of 1977 Fisheries Orders, United States v. Washington, 459 F. Supp. 1113, 1114 (1978): "The interests of nontreaty fishermen continue to be adequately, ably, and vigorously represented by the State of Washington, its Department of Fisheries and its attorneys."

93. 85 Wash.2d 664 (1976).

94. Washington Supreme Court Justice Hunter authored an opinion in which two other justices joined. Chief Justice Stafford wrote a concurring opinion in which three justices joined, and Justice Rosellini authored a separate concurring opinion in which one justice joined.

95. 86 Wash.2d at 682.

96. Id. at 667. The State of Washington later echoed this view during proceedings in United States v. Washington. See **Hatchery Fish Injunction**, note 90 above at 1077. Boldt answered with a basic axiom:

> The language quoted in defendants' Proposed Finding of Fact # 1-20 [quoting the concurring opinion of Justice White in Puyallup II] suggests it is a ruling of the United States Supreme Court. The quoted language was joined in by only three Justices and not by the other six Justices. Accordingly the quotation is merely a commentary by three of the nine Justices of the Court and therefore not authoritative as a majority ruling. Id.

97. 86 Wash.2d at 682.

98. Id. For a discussion of the federal court's response to this argument, see notes 124 to 128 , below and accompanying text.

99. 86 Wash.2d at 682.

100. Id. at 683.

101. See note 93 above and accompanying text.

102. **Hatchery Fish Injunction**, note 90 above at 1075.

103. Id.

104. 384 F. Supp. at 405.

105. See **Hatchery Fish Injunction**, note 90 above at 1074-75.

106. Id. at 1075. Apparently, the Washington Department of Fisheries did not consider the tribunal over which Judge Boldt presided to be an "appropriate court."

107. Id. at 1075. Earlier, in January 1975, Judge Boldt found it necessary to issue a similar injunction against the Washington Department of Game after the department "unilaterally attempted to extend the Pierce County Superior Court's holding in Puyallup III . . . to other rivers in the case area and to other tribes . . .." Id. at 1074-75.

was later convinced that a more comprehensive injunction was necessary after finding that the state was continuing to exclude hatchery fish from the Indian share and that it had "not given the court any assurances that it [would] comply with Final Decision #1 [Boldt's original reported decision] and refrain from applying Puyallup III to all tribes in this case pending further resolution of this matter by the court."[108] It was only in this manner that the status quo could be preserved until final adjudication of the hatchery fish issue in Phase II.

For a number of reasons, resolution of the issues involved in Phase II was to prove difficult. Largely because of state and private efforts to frustrate implementation of Judge Boldt's original decree, Phase I matters consumed most of the court's time.[109] In fact, the state went so far as to file a motion to disqualify Judge Boldt from further participation in the litigation because of certain inspection trips made by him (after notice to all parties) in anticipation of the trial of Phase II.[110] Judge Boldt denied this motion, but nevertheless arranged, eventually, for the Phase II litigation to be reassigned. Later, after the Supreme Court had granted certiorari petitions that were to lead to a basic affirmance of his controversial decision,[111] Judge Boldt withdrew from the litigation entirely, citing his health as one of the reasons.[112]

B. Rulings on the Hatchery Fish Aspect of Phase II

Although the environmental issues involved in Phase II were raised in the original complaint in United States v. Washington, it was not until 1976 that the plaintiffs to the litigation formally commenced the action by filing amended and supplemental complaints.[113] In

108. Id. at 1083.

109. "The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . ., the district court has faced the most concerted offical and private efforts to frustrate a decree of a federal court witnessed in this century." Puget Sound Gillnetters v. U.S. District Court, 573 F.2d 1123, 1126 (9th Cir. 1978). See also Letter from Hon. George H. Boldt to All Counsel, United States v. Washington, No. 9213-I (filed Feb. 7, 1979):

> Five years have passed since Final Decision #1 was rendered by this court . . .. During that time, this court has actively sought the full implementation of that decision without compromising the full protection of the salmon resources of Puget Sound. This litigation has been vigorously contested by very able counsel since its inception. Countless hearings and hundreds of orders have been required, many on an emergency basis geared to the frequently unforseeable changes in the fish runs. Clearly, this litigation has been one of the most difficult of my judicial career.

For a review of the state's actions following the 1974 decision, see Brief of Respondent Indian Tribes at 60-72, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979).

110. The state argued that Judge Boldt gained "personal knowledge of disputed evidentiary facts" during six inspection trips in which he participated. See Memorandum Decision Denying Disqualification, United States v. Washington, 459 F. Supp. 1093, 1094 (W.D. Wash. 1978). The judge's response:

> By distorting the true nature of the official site visitations and the events associated with them, the state can undoubtedly fan the emotions of those who have opposed my prior rulings in this case.
>
> . . .
>
> This is an extensive and long-continuing litigation involving numerous problems and difficult decisions which may continue for an extended period into the future. It would be easy to escape those onerous duties by granting the motions for my disqualification. No matter how difficult or disagreeable, I have never in my entire judicial career, avoided or abandoned what I consider to be my judicial duty and I do not intend to do so now.

111. See Washington v. Fishing Vessel Ass'n, 443 U.S. 659 (1979).

112. See Letter from Hon. George H. Boldt to All Counsel, United States v. Washington, No. 9213-I (filed Feb. 7, 1979). In spite of the unfortunate history of the litigation, Judge Boldt remained optimistic about the future: "I am convinced that by working together, means can be found to provide enough salmon for all." Id.

113. United States v. Washington, No. 9213-II, slip op. at 6 (W.D. Wash. Sept. 26, 1980) [hereinafter cited as Phase II, slip op.].

late 1979, the plaintiffs asked the court to summarily rule in their favor on the question whether the federal treaty fishing right includes 'all, some, or no artificially-reared fish released into public waters.'[114] The state filed a similar motion, asking the court to exclude from the population of allocable fish the "first generation" of hatchery-produced salmon and steelhead.[115]

Both sides filed extensive briefs and factual material in support of their respective positions. This documentation established that there are nineteen steelhead and sixteen salmon hatcheries operated by the state in the case area,[116] and that these hatcheries are supported not only by state monies, but by federal and local funds as well.[117] In addition, federal, tribal, and cooperative state-tribal hatcheries augment those operated solely by the state.[118] Fully sixty percent of the steelhead available for harvest in tribal fishing areas are artificially produced, while seventeen percent of the salmon originate from hatcheries.[119] However, hatcheries operated exclusively by the state produce only thirty-nine percent of the hatchery steelhead, and approximately fourteen percent of the salmon.[120] The percentage of hatchery fish in the total population available for harvest has steadily increased since 1950.[121] This trend is expected to continue indefinitely.[122] The state's hatchery program was developed and exists in order to replace fish lost as a result of "degradation of the fishing habitat caused primarily by non-Indian activity in the case area."[123]

The state argued to Judge Orrick that, since the parties to the treaties could not have forseen the development of hatchery programs, the Indians would not have understood that they were securing the right to take state-produced fish when they agreed to the treaties. In support of this argument, the state pointed to the "shellfish proviso" of the treaties' fishing rights clause, which denied the Indians the right to take shellfish from beds staked by non-Indians.[124] However, Orrick ruled that the proviso "imposed no limitation on the Indians' then-existing activities," but rather enabled non-Indians to establish exclusive ownership of shellfish beds that might otherwise have belonged to the tribes.[125] The court added that, since the Indians did not recognize exclusive ownership interests in migratory resources such as anadromous fish,[126] their agreement to the shellfish proviso, which "carved an exception into the Indians' rule that a tribe had exclusive use of sedentary resources within its territory,"[127] did not constitute an "adoption of the conceptually-distinct rule . . . that one who cultivates a resource thereby gains an exclusive ownership interest in it."[128]

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114. Id. at 7.

115. Id. at 11. The state did not seek to entirely prohibit Indians from taking hatchery fish. Rather, instead of using the 50/50 basis for allocating the fish, the state wished to provide the Indians only with an "equal opportunity" to take them. Id. at n.53.

116. Id. at 10.

117. The exact percentage of federal and local funding was not established. Id. at n.31.

118. Id. at 10.

119. Id. at 11.

120. Id. at 20.

121. Id. at 13: "Whereas hatchery-bred steelhead trout accounted for 10 percent of all steelhead trout in 1950, their representation rose to 20 percent in 1960, 40 percent in 1970, and 60 percent in 1980."

122. Id. (quoting Affidavit of Jack Ayerst, Chief of Fishery Management, Washington Dep't of Game):

> "Hatchery-reared winter-run steelhead make up a high percentage of the catch of steelhead in the state with some of the heavily planted rivers showing hatchery returns contributing up to 90% of the catch . . .. Overall it appears likely that hatchery steelhead will continue to contribute significantly to the harvests, while the numbers of wild fish will most likely decline."

(Emphasis in original.)

123. Id. at 14.

124. Id. at 14. See text accompanying note 13 above for the language of the shellfish proviso.

125. Id.

126. Id. at 13.

127. Id. at 14.

128. Id.

The state also cited United States v. Winans[129] for the proposition that, since the treaties reserved to the Indians pre-existing rights, the Indians cannot assert rights to hatchery fish, which did not exist at the time of the treaties.[130] The court responded that, because Winans, in effect, "assured the Indians a share of the fish,"[131] and since hatchery fish comprise a steadily-increasing percentage of the fish available for harvest, the Indians must be entitled to share in the hatchery runs lest they be dispossessed of their fishing rights entirely.[132] According to the court, permitting non-Indians to rely on "modern devices" such as hatchery programs to justify preemption of Indian fishing rights would be directly at odds with Winans, which struck down an attempt by non-Indians to 'use a device which gives them exclusive possession of the fishing places.'[133]

The state also asserted that, because it funds (at least in part) hatchery programs, its regulatory authority over Indian harvest of artificially-produced fish is broader than its authority over the taking of other fish by Indians.[134] Observing that the Puyallup cases and their predecessors[135] "firmly established that the State's authority to regulate treaty fishing extends no further than the imposition of non-discriminatory, necessary conservation measures," the court held that the state could not control Indian harvest of hatchery fish absent a claim that such regulation is necessary to preserve the resource.[136] In short, Judge Orrick rejected the state's argument that, by funding hatchery programs, it "bought its way out of the obligation to respect the tribes' treaty rights."[137]

Ultimately, the state based its asserted right to control the harvest of hatchery fish by Indians on the theory that the state owns the fish.[138] The court answered this argument by noting that the Supreme Court has abandoned the 19th-Century fiction that a state "owns" the fish and wildlife resources within its borders,[139] and concluded simply that "[t]his argument must fail as a matter of law."[140] Curiously, the state acknowledged that private hatchery owners have no ownership interest in fish released into public waters, but nevertheless asked Judge Orrick to limit the principle that a state does not own the fish and wildlife within its borders to naturally-produced fish.[141] The court explained that, even if it were to recognize state ownership interests in free-swimming hatchery fish, such interests would be diluted considerably by the federal, local, tribal, and private funds that contribute to the construction and operation of the state-run hatcheries.[142] "It would be inequitable and contrary to the spirit and intent of the treaties," the court concluded, "were the State-produced hatchery fish to be exempt from the treaties' 'in common with' sharing requirement while hatchery fish supported by tribal and federal funds would be divided equally between the tribes and all other State citizens."[143]

C. Rulings on the Environmental Issues

Clearly the most significant aspect of the Phase II decision is the legal principle it established concerning the relationship between treaty fishing rights and protection of fish habitat. The court held, first, that the treaties "implicitly reserve to the Tribes the right to a sufficient quantity of fish to provide a moderate living subject to a maximum of 50 percent of the harvestable anadromous fish."[144] Second, the court decreed that the tribes "have an implicitly incorporated right under the fishing clauses of the Stevens Treaties not to have the fishery habitat degraded . . . resulting in such a reduction of available harvestable fish that the moderate living standard . . . cannot be met."[145] The historical and legal basis for these conclusions is set forth in the section that follows.

129. 198 U.S. 371 (1905). See notes 28-38 above and accompanying text.

130. Phase II, slip op. at 15.

131. Id. at 16 (citing Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 681 (1979)).

132. Id.

133. Id. (citing Winans, 198 U.S. at 382).

134. Id. at 17.

135. See notes 28-54 above and accompanying text.

136. Phase II, slip op. at 17: "The State has not claimed that it seeks to regulate the allocation of hatchery fish in order to conserve the resource."

137. Id. at 17.

138. Id.

139. "A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals." Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977). See also Hughes v. Oklahoma, overruling Geer v. Connecticut, 161 U.S. 519 (1896).

140. Phase II, slip op. at 17.

141. Id.

142. Id. at 19.

143. Id. at 20.

144. United States v. Washington, No. 9213--II, Amended Judgment 2 at 2 (W.D. Wash. Jan. 16, 1981).

145. Id. at 3.

Because the language of the treaties is silent on the question whether the tribes should be entitled to have the fish habitat protected from environmental degradation, the canons of treaty construction discussed in section III above are of particular importance. Perhaps the most fundamental rule of treaty construction is that the treaties must be read so as to effectuate the Indians' understanding of what they were securing by signing them.[146] In order to determine the nature of the Indians' understanding, it is necessary to understand the circumstances surrounding the negotiation and execution of the treaties. From the material covering this subject in section II above, it may fairly be concluded that "[t]he Indians understood, and were led by Governor Stevens to believe, that the treaties entitled them to continue fishing in perpetuity and that the settlers would not qualify, restrict, or interfere with their right to take fish."[147] Indeed, each of the major U.S. Supreme Court decisions interpreting the fishing rights clause of the treaties is consistent with this conclusion.

In Winans,[148] for example, the Supreme Court held that the Indians were not only entitled to access to their fishing places, but were entitled to access to the fish. If the fish wheels operated by non-Indians downriver from the Indian fishing places prevented enough fish from reaching the Indians, then removal of some of the fish wheels — so as to effect an allocation of the runs — was clearly required. The Court dispelled any doubt that Winans established the principle that the treaties entitle the Indians to a fair share of the fish in the Puyallup trilogy — particularly Puyallup II.[149] In Puyallup II, the Court ruled that the state cannot permit a non-Indian activity -- in that case, sport fishing — to preempt the Indian fishery. Consistent with the principle articulated in Puyallup II, the Phase II court concluded that if a non-Indian activity other than fishing — such as logging or dam building -- reduces the number of fish available to Indians, then that activity must give way to the superior treaty-secured rights of the tribes.[150]

Neither the Winans decision nor the Puyallup trilogy dealt with preemptive non-Indian activities other than fishing. Washington v. Fishing Vessel Ass'n[151] provided a strong basis for extending the rationale of those cases to other types of activities that have the effect of reducing the number of fish available to the Indians.[152]

In his original decision, Judge Boldt ruled that "[n]either the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.[153] The Supreme Court, in Fishing Vessel Ass'n, agreed with this principle, and explicitly pointed out that it is not limited in application to fishing practices: "The purport of our cases is clear. Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or

146. See note 25 above and accompanying text.

147. Phase II, slip op. at 21. See note 19 above and accompanying text.

148. See notes 28-38 above and accompanying text.

149. See Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 681-82 (1979):

> In the most recent litigation over this treaty language between the Puyallup Tribe and the Washington Department of Game, the Court in the context of a dispute over rights to the run of steelhead trout on the Puyallup River reaffirmed both of the holdings that may be drawn from Winans -- the treaty guarantees the Indians more than simply the "equal opportunity" along with all of the citizens of the State to catch fish, and it in fact assures them some portion of each relevant run.

See also notes 49-54 above and accompanying text.

150. Cf. Tr. of Oral Argument at 89, United States v. Washington, No. 9213-II (W.D. Wash. Jan. 16, 1981):

> MR. STAY: It may very well be -- and we believe it is -- that we can have our fish and our industry, too. That there is -- there are ways, and they can be devined [sic]. And they have been devised; the state statutes which deal with them, which allow for both.
>
> I guess the hard question comes down to: what if . . . this industry is getting away with the fish? What gives way?
>
> And I say to this court, Your Honor -- I know it's a difficult thing to say, and it's a hard statement; but I think it's the law — that the fish do not give way.

151. 443 U.S. 658 (1979).

152. Judge Orrick heard oral argument on the environmental aspect of Phase II on May 11, 1979. The Supreme Court issued its decision in Fishing Vessel Ass'n about two months later. The parties filed supplemental briefs covering the significance of that decision to the environmental issue. Phase II, slip op. at 7.

153. United States v. Washington, 384 F. Supp. 312, 401 (W.D. Wash. 1974).

general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area."[154]

The Supreme Court also agreed with Judge Boldt's conclusion that the treaties secure to the tribes a volume of fish sufficient to meet their fair needs. Judge Boldt's allocation formula, noted the Court, "is consistent with our earlier decisions concerning Indian treaty rights to scarce natural resources."[155] In both Winters v. United States[156] and Arizona v. California,[157] the Court observed, the resource involved (water) was necessary to the Indians welfare, and "the Court typically ordered a trial judge or special master, in his discretion, to devise some apportionment that assured that the Indians' reasonable livelihood needs would be met."[158] Boldt's formula was designed in accordance with Winters and Arizona, according to the Fishing Vessel Ass'n opinion, except that Boldt "realized that some ceiling should be placed on the Indians' apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty right of 'all [other] citizens of the Territory.'"[159]

Judge Boldt's opinion, may also be read as recognizing a distinction between the Winters and Winans lines of cases. While the Winters doctrine of reserved water rights would entitle the tribes to enough fish to meet their fair needs if there had been an implied reservation of the right of taking fish, Winans and the Puyallup decisions — which dealt with the treaty language which expressly reserved fishing rights — mandate an allocation of fish, but do not address the needs of the tribes.[160] In Fishing Vessel Ass'n, the Supreme Court merged the Winters doctrine with the allocation formula developed in response to Winans and the Puyallup litigation. The paragraph of the Court's opinion which sets forth this merger is reprinted in full here because it is central to Judge Orrick's holding in Phase II:

> It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation. As in Arizona v. California and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures [sic] so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an

154. 443 U.S. at 684. See also United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1976): "[N]either the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed."

155. 443 U.S. at 685.

156. 207 U.S. 564 (1908). See notes 63 to 68 above and accompanying text.

157. 373 U.S. 546 (1963). See notes 69 to 73 above and accompanying text.

158. 443 U.S. at 685.

159. Id. at 686. The Court apparently meant to suggest by this remark that Judge Boldt imposed the 50% ceiling in order to prevent the Indians from exhausting the entire **harvestable** portion of the fishery resource. Clearly, the Indians could not, under the standards announced in the Puyallup cases, exercise their fishing rights in a manner detrimental to the resource. See, e.g., Washington Department of Game v. Puyallup Tribe, 414 U.S. 44, 49 (1973):

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

160. 384 F. Supp. at 342-44. Cf. Brief of Respondent Indian Tribes at 151, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979):

> [T]here are only two alternatives which can be sustained consistent with the evidence and with the legal rules enunciated by this Court. Either the District Court was correct and the import of the Stevens treaties is that the tribes and the non-treaty citizens share equally the fish passing through the usual and accustomed fishing places of the tribes, or the treaties secure to the tribes sufficient fish to meet their fair needs. The second alternative, a more generous one to the tribes, was the one suggested to the District Court by the tribes at trial. It is based on the precedents of this Court dealing with reserved water rights.

[Citations omitted, emphasis in original.]

> entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.[161]

Three basic observations can be drawn from the above language. First, the treaties secure to the Indians more than a right to half of whatever fish may be available for harvest if the resource is further depleted in the future, since the purpose is to provide the tribes with enough fish to provide them with a livelihood. Second, the "moderate living" needs of the Indians must be measured in terms of tribal, rather than individual, requirements. Third, economic considerations are not of paramount concern in determining whether the Indians' needs are being met. Each of these propositions is explored below.

Entitlement to a Volume of Fish -- As stated above, it is possible to view the entitlement to half of the harvestable fish secured by the express reservation of fishing rights in the treaties independently from the implied reservation of a volume of fish under the reasoning of the Winters doctrine.[162] Of course, the Indians may well have understood that they were securing, in the treaties, a volume of fish sufficient to meet their fair needs.[163] Had the Court simply affirmed the 50-50 allocation formula that derives from the "in common with" language of the treaties without commenting on Judge Boldt's conclusion that the treaties secure to the tribes a volume of fish, it would have been possible to argue that treaty fishing rights exist only so long as there are fish available to share.[164] The Supreme

161. 443 U.S. at 685-86. This characterization of the 50% allocation as a maximum, and the fair needs test as a minimum, is directly at odds with how the tribes viewed the matter:

> The District Court's allocation order gives recognition to a portion of the "fair needs" of the tribes and allows them to harvest fish in their traditional ways at their traditional places, while reserving to the non-treaty fishermen not only an equally fair share of those runs, but essentially full freedom to harvest the plentiful salmon runs bound for places other than Puget Sound. The court's allocation resulted in a total tribal catch constituting only 18% of the total Washington catch in 1977; the District Court's allocation principle of equal sharing of the runs passing through the usual and accustomed places of the tribes, is the minimal logical accommodation of Indian needs with the tribal agreement to share the resource with the citizens of the Territory.

Brief of Respondent Indian Tribes, note 160 above at 162 (emphasis in original). See also Brief for the United States at 72, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979):

> Arguably, a larger share for the tribes would be appropriate. Perhaps their agreement to share fisheries limits the treaty Indians to 50%, even if a greater need were demonstrated. But they cannot be required to take less on a record that fully justifies an apportionment of at least half the fishery to the tribes.

162. See note 160 above and accompanying text.

163. Cf. Brief of Respondent Indian Tribes, note 160 above at 158:

> The implied reservations of water rights construed in Arizona v. California guaranteed the Indians sufficient water to irrigate all of the reservation's practicably irrigable acreage. Surely the construction of the express guarantee of the Steven Treaties cannot be less generous. Especially in the context of the historical evidence concerning Indian commercial fishing, Winters and Arizona v. California strongly support the conclusion that the tribes are entitled to an opportunity to catch sufficient fish to enable them to earn a livelihood as well as satisfy their subsistence and ceremonial requirements.

See Phase II, slip op. at 21-23.

164. Curiously, the State of Washington advanced such an argument even after the decision in Fishing Vessel Ass'n. See Defendant's Supplemental Brief on Motion for Partial Summary Judgment at 5, United States v. Washington, No. 9213-II (W.D. Wash. Jan. 16, 1981):

> [T]he defendants' position [is] that all fishermen, both treaty Indians and non-treaty fishermen, obtain the benefits derived from the increased population in the area; i.e., the enhanced economic value of ther resource, and both share in the detriments that occur to the resource by virtue of the development of the area to support that population.

Court foreclosed such an argument by expressly ruling that the Indians are entitled to enough fish to supply them with a moderate living.[165]

It could also be stated, however, that the Supreme Court injected the "moderate living" standard into the allocation formula not in contemplation of a scenario where a fifty percent allocation to the Indians would be inadequate, but rather to protect the non-Indians from situations where such an allocation would exceed the Indians' requirements. The Court's characterization of the moderate living standard as providing the "minimum" allocation, together with its postulation that a tribe with "just a few members" would not be entitled to a "50% allocation of an entire run" clearly supports such an interpretation.[166] The answer to this, of course, is that the treaties either entitle the tribes to enough fish to meet their fair needs, or they do not. That the moderate living standard can cut both ways — i.e., that it can operate both to reduce the Indian allocation and to buttress Indian demands that the fishery resource be protected from harm — cannot undermine the basis for the standard.

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165. The state pressed the argument set out in note 164, id., in the face of this ruling on the grounds that the Court's repeated use of the term "harvestable fish" implicitly negatived the express statement that the treaties secure to the Indians enough fish to supply them with a livelihood. Judge Orrick responded to this rather strained reading of the Fishing Vessel Ass'n opinion as follows:

> The Supreme Court's use of the term "harvestable" in describing the population of allocable fish did not, contrary to the State's contention, put the tribes at the mercy of any and all, natural and man-made, fluctuations in the resource. The term simply differentiates between the total fish population and those fish subject to allocation under the treaty. The remainder must escape for spawning purposes in order to perpetuate the resource.

Phase II, slip op. at n.61 [citation omitted].

166. The Court's characterization of the moderate living standard as potentially serving as a basis on which to reduce the Indian allocation is perhaps based on the following representation made to the Court by the Solicitor General: "[E]xcept in one instance, the experience of the past five years has shown that the present allocation of roughly 50% of the fishery to the treaty fishermen does not exceed the reasonable needs of the several tribes." Brief for the United States at 71, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979).

Defining a Moderate Living — The fishing rights reserved by the Indians in the Stevens treaties are tribal in nature.[167] Accordingly, it is the welfare of the tribe, not of individual Indian fishermen, that must be examined in order to determine whether the Indians' fair needs are being met through the exercise of their fishing rights.[168] While the average

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167. "The referent of the 'said Indians' who are to share the right of taking fish with 'all citizens of the Territory' is not the individual Indians but the various signatory 'tribes and bands of Indians' listed in the opening article of each treaty." Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979).

168. United States v. Washington, 384 F. Supp. 312, 401 (W.D. Wash. 1974). See also Brief for the United States at 70, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979): "[W]e must remember that the right reserved was for the benefit of entire tribes, all the members of which were dependent on fish for food and much else. To the extent that population figures are relevant, one properly looks to total membership, not the number of active fishermen."

The judge of the Superior Court of Washington in which the Puyallup litigation was initiated viewed the matter quite differently. According to his interpretation of the Fishing Vessel Ass'n opinion, "in order for . . . any judge or special master to allocate fish," each individual fisherman would have to demonstrate an inability to achieve a moderate living without income from fishing. Letter from Hon. W. L. Brown, Jr., to John Howard Clinebell, et al. at 2 (Jan. 11, 1980). Judge Brown stated it was his understanding "that the United States Supreme Court did rule that if an indian [sic] was making a moderate living at some other livelyhood [sic], then he would not be entitled to any allocation of the fish." Id. The judge asked for income tax returns of Indians "who claim they have some right to fish in accordance with the treaty" so he "could determine how many indians [sic] are entitled to fish in this river for this particular specie [sic]." Id. Not surprisingly, none of the Puyallup Indians supplied Judge Brown with the information he felt he would need in order to allocate the steelhead between the Puyallup Tribe and non-Indians: "As a result of the failure of any Puyallup Indians entitled to fish in this river to advise me they need the income from the steelhead fishery to accord them a moderate living I declined to authorize them to fish for steelhead at this time." Letter from Hon. W. L. Brown, Jr. to Hon. Walter E. Craig at 2 (Feb. 5, 1980). On February 6, 1980, U.S. District Judge Craig, assigned to the continuing Phase I litigation in United States v. Washington, signed an order asserting full federal jurisdiction over Indian fishing rights matters on the Puyallup River, thereby effectively ending the seventeen years of state-court litigation over Puyallup fishing rights that produced the trilogy of U.S. Supreme Court decisions.

income of individual tribal members is arguably a relevant factor to include in the moderate living equation,[169] it is by no means the only variable that must be considered.

Fish are important to the tribes not only as a source of commerce, but "form the basis for cultural identity and cohesive force in Indian society."[170] The fish are central to the Indian diet and are important in a religious sense as well.[171] In this regard, it is important to recognize that the tribes reserved the right of taking fish.[172] Viewing the fishing right in monetary terms tends to detract from the immutability of the right. For example, one month after the Fishing Vessel Ass'n opinion was announced, the State of Oregon proposed, in the context of litigation over an Indian claim that insufficient numbers of fish were being allowed to escape the ocean fisheries to tribal fishing grounds, that the Indians be compensated for fish lost to ocean fisheries with proceeds from the sale of surplus hatchery fish.[173] Although the court expressed the view that the proposal should be "seriously considered" as an "interim emergency measure,"[174] it quite properly declined to order the tribes to accept money or surplus hatchery fish in exchange for an easing of restrictions on ocean catches.[175]

The supposition that economic factors should not operate to reduce the Indian allocation except in extraordinary circumstances finds support in the language of the Fishing Vessel Ass'n opinion. The Court postulated two sets of circumstances under which a full 50% allocation of the harvestable fish would be "manifestly inappropriate": (1) if a tribe were to "dwindle to just a few members" (note that the Court referred to tribal members -- not just fishermen); or (2) if a tribe were to "abandon its fisheries" after finding "other sources of support."

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169. The tribes apparently agree, as evidenced by the following excerpt from the brief they filed in Fishing Vessel Ass'n:

> The District Court's decision has presaged a dramatic change in reservation standards of living . . .. This, the tribes suggest, is the result contemplated by the treaty negotiators. Dr. Lane concluded,
>
> > [T]here was no intention of creating a class society with Indians on the bottom economic rung. The treaty commission clearly undertook to provide the Indians the means of participating and prospering . . .. The contribution was seen to be primarily in the fisheries.

Brief of Respondent Indian Tribes, note 160 above at 230.

Even if the aggregate income of tribal members was the only measure of a moderate living, it is unlikely that such a criterion could be used to reduce the tribes' present allocation ceiling. The tribes have asserted that a 40% allocation would support only 390 Indian families at an annual level of $5,000 per family, and that the unemployment rate in the tribes' labor force is approximately 40%, with another 24% earning less than $5,000 per year. Id. at 56, 230.

170. Id. at 125.

171. 384 F. Supp. at 357-58.

172. See Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 678 (1979):

> But we think greater importance should be given to the Indians' likely understanding of the other words in the treaty and especially the reference to the "right of taking fish -- a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise. This language is particularly meaningful in the context of anadromous fisheries -- which were not the focus of the common law -- because of the relative predictability of the "harvest." In this context, it makes sense to say that a party has right to "take" -- rather than merely the "opportunity" to try to catch -- some of the large quantities of fish that will almost certainly be available at a given place at a given time.

(Emphasis in orginal.)

173. See Tr. of Proceedings at 9, Confederated Tribes v. Kreps, No. 79-541 (D. Or. July 30, 1979):

> MS. HALL: If the Indians are short a given number of fish from the share allocated to them . . ., then we will give them either surplus fish from the hatchery or the proceeds from the sale of those fish, as they choose, to be divided among them as they please, in order to make up whatever the deficiency is in their actual catch as a result of permitting the troll season to resume at an earlier time.

At one point in the proceedings, a biologist for the state remarked that it would be better if the surplus fish were sold and the proceeds put in escrow, since if the tribes were given the dead fish as they became available at the hatchery, it would be possible that the Indian allocation would eventually be exceeded. Id. at 15-16.

174. Id. at 15.

175. An attorney for the Yakima Nation responded to the state's proposal as follows: "Your Honor, it has always been [popular] to treat the Indians as somehow having a lesser right and, therefore, that they should take these [hatchery] fish rather than exercise their treaty rights to harvest the fish."

At first glance, the Court's focus on the population of the tribe (under the first scenario) might seem at odds with Arizona v. California.[176] Recall that, in that case, the Supreme Court refused to calculate entitlement to water on the basis of the number of Indians on the reservations.[177] But in a truly extreme case, where the tribe has virtually dissolved, the number of Indians does become important. As the Solicitor General explained in his brief to the Fishing Vessel Ass'n Court:

> Needs, not population, should determine the tribal share of the fishery.
>
> This is not to say that, in the case of fishing rights, the size of the Indian treaty population is wholly irrelevant. The needs of the groups are, to some degree, related to the number of members, and it is of course unnecessary to allocate a portion of the fishery in excess of those needs . . .. To the extent that population figures are relevant, one properly looks to the total membership, not the number of active fishermen. What is more, the "right of taking fish" guaranteed by the treaties was not for dietary subsistence only: it was meant to secure also the continuance of the very substantial Indian commerce in fish, by which means the tribes obtained the other necessities of life.[178]

Clearly, if the population of a tribe is reduced to a small number, fewer fish are required in order to keep the tribe productive. But so long as the populations of the treaty tribes remain relatively constant, the moderate living standard should not influence the allocation formula.

It is also true that a tribe could remain productive if it were to find "other sources of support" (the Court's second scenario). Even if this were to occur, however, the tribe would have to "abandon" it fisheries before the moderate living standard could operate to reduce the tribe's entitlement to a 50% share of the harvestable fish. It would not seem profitable, then, for the State of Washington or others seeking to reduce the Indian share to launch a wide-ranging expedition in search of data on tribal demography, income-producing activities, holdings of land and other natural resources, and related information unless a given tribe voluntarily abandoned its fisheries or substantially diminished in size. Nevertheless, the State of Washington has twice attempted (unsuccessfully) to obtain such information since the decision in Fishing Vessel Ass'n by filing requests for discovery against the plaintiffs to United States v. Washington.[179]

In short, the principal application of the moderate living standard — insofar as it may be used to justify a reduction in the tribal share — will be to extreme situations where an allocation of 50% of a salmon or steelhead run would clearly exceed the fair needs of a given tribe. In the absence of a drastic change in present conditions, the presumption should be that a 50% allocation to the tribes is proper.[180] Judge Orrick reached such a conclusion in Phase II: "If the treaty allocation of harvestable fish is at 50 percent, then there is a presumption that the [tribes'] moderate living needs are not being met."[181]

Specific Rulings on the Environmental Questions — Aside from serving as a basis on which to decrease the Indian allocation, the moderate living standard will operate as a gauge of the adequacy of fisheries protection and mitigation programs. If the numbers of fish reaching the tribal fishing grounds are insufficient to meet the tribes' fair needs, then activities responsible for decreasing the numbers of harvestable fish must be arrested or modified. As Judge Orrick stated:

> The treaties reserve to the tribes a sufficient quantity of fish to satisfy their moderate living needs subject to a ceiling of 50 percent of the harvestable run . . . . That is the minimal need which gives rise to an implied right to environmental protection of the fish habitat. Therefore, the correlative duty imposed upon the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs.[182]

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176. See notes 69-73 above and accompanying text.

177. See notes 72-73 above and accompanying text.

178. Brief for the United States at 70, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979).

179. See United States' Response to Defendant's Request for Determination Re Reallocation of Salmon Resource, United States v. Washington, No. 9213-I (W.D. Wash. July 25, 1980). For a list of the plaintiffs to the litigation, see United States v. Washington, 384 F. Supp. 312, 327 (W.D. Wash. 1974).

180. Recall the representation of the Solicitor General set out in note 166 above.

181. Amended Judgment ¶6 at 3, United States v. Washington, No. 9213-II (W.D. Wash. Jan 16, 1981).

182. Phase II, slip op. at 31.

In addition to using the moderate living standard as a basis on which to rest his conclusion that the tribes "have an implicitly incorporated right under the fishing clauses of the Stevens Treaties not to have the fishery habitat degraded . . . resulting in . . . a reduction of available harvestable fish,"[183] Judge Orrick supported his ruling on the environmental aspect of Phase II on the reserved water rights cases discussed above.[184] Interestingly, Judge Orrick cited United States v. New Mexico[185] as relevant to the question whether an environmental right can be implied from the express reservation of fishing rights in the Stevens treaties.[186] New Mexico, however, did not involve reserved Indian rights, but dealt with an implied right of the United States to withdraw water from a river for use in a national forest.[187] The Court held that an implied reservation of water will be recognized only when the water "is necessary to fulfill the very purposes for which a federal reservation was created," and not where it is merely "valuable for a secondary use of the reservation."[188] On the basis of the principle thus articulated, the Supreme Court declined to recognize an implied right of the United States to withdraw water for the benefit of fish and wildlife within the forest, because the national forest involved was purportedly created primarily to protect timber resources only — not fish and wildlife.[189]

Judge Orrick found New Mexico's narrow view of the reserved water rights doctrine to be no stumbling block, however, because "there can be no doubt that one of the paramount purposes of the treaties in question was to reserve to the tribes the right to continue fishing as an economic and cultural way of life."[190] Since "the expressly-reserved right to take fish would be meaningless and valueless" without the existence of habitat suitable for fish production,[191] Judge Orrick found it "necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause."[192] In support of this ruling, the court cited Cappaert v. United States[193] and United States v. Anderson.[194] In Cappaert, the Supreme Court upheld lower court rulings requiring that a sufficient level of water be maintained in Devils' Hole National Monument to preserve a unique species of fish after agreeing with the lower courts that preservation of the fishlife was one of the purposes for creating the monument.[195] Anderson, a federal district court decision, required that a quality and quantity of water sufficient to maintain fish life in a stream fished by Spokane Indians be maintained after finding that one of the purposes for creating the Spokane Indian Reservation was to enable the Spokanes to continue their historic fishing practices.[196] "The recognition of that implied right [in Cappaert and Anderson] is no less necessary here," Orrick observed, and added that "the fishing clause is even more crucial to the purposes of the treaties here in question than were the fish-related clauses in those cases."[197]

In an effort to discount the need to imply an environmental right under the treaties, the state pointed out that numerous state and federal programs designed to either prevent or compensate for damage to fish and wildlife habitat exist.[198] Judge Orrick responded that the existence of means to at least partially

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183. Amended Judgment, ¶ 3 at 2.

184. See notes 61 to 78 above and accompanying text.

185. 438 U.S. 696 (1978). See note 76 above.

186. Phase II, slip op. at 24-25.

187. See note 76 above and authorities there cited.

188. 438 U.S. at 702.

189. Id.

190. Phase II, slip op. at 25.

191. Id. "The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." Id. at 21. The court noted that fish must have '(1) access to and from the sea, (2) an adequate supply of good-quality water, (3) a sufficient amount of suitable gravel for spawning and egg incubation, (4) an ample supply of food, and (5) sufficient shelter.' [Citing the Joint Statement, note 39 above at 17.] The court emphasized that 'alteration of even one of these essential, finely-balanced requirements will affect the production potential.' Id.

192. Id. at 25.

193. 426 U.S. 128 (1976).

194. No. 3643 (E.D. Wash. July 23, 1979).

195. 426 U.S. at 142 (1976).

196. United States v. Anderson, No. 3643 (E.D. Wash. July 23, 1979), slip op. at 9-10. Not cited by Judge Orrick in his Phase II opinion was a similar case involving the Klamath Indian tribe in Oregon, United States v. Adair, 478 F. Supp. 336 (D. Or. 1979). In that case, Sr. U.S. District Judge Gus Solomon ruled that the Klamath Indians are entitled to as much water from the Williamson River as is necessary to maintain their "time immemorial" fishing and hunting rights.

197. Phase II, slip op. at 25-26.

198. Id. at 26.

protect the fish habitat cannot negate the existence of the right.[199] The court distinguished Confederated Tribes v. Walton, in which a federal district court refused to find an implied reservation of water to protect a species of trout harvested by Indians of the Colville Indian Reservation in Eastern Washington.[200] In that case, Orrick explained, a federally-operated hatchery was shown to have made sufficient numbers of trout available for harvest by the Indians as compensaiton for damage inflicted on the native trout by the construction of dams — consequently, the Indians' fishing rights were not shown to have been impaired.[201] In contrast, the record developed in Phase II "establishes beyond dispute that environmental degradation has impaired the fish habitat."[202] "Moreover," Orrick added, "there is no showing that hatchery programs have fully mitigated the resulting diminution in the fishery."[203]

It is important in this context to recognize that the Phase II decision addressed only the question whether the treaties secure a right to have the fish and related habitat protected from environmental harm. The question whether that right has been or is being violated, along with the issue of what remedies may be appropriate to redress any such violations is to be addressed in a separate stage of the litigation.[204] The following section discusses these two remaining issues in the litigation.

199. Id.

200. 460 F. Supp. 1320 (E.D. Wash. 1978).

201. Phase II, slip op. at n. 67.

202. Id.

203. Id. It should be added that hatchery programs which make fish available to the Indians at places other than their historic fishing grounds would not be an acceptable form of remedying any infringement of the treaty fishing right as a result of environmental degradation. The Supreme Court clearly held, in Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979), by rejecting the argument that the Indians should be required to compete on an "equal opportunity" basis with non-Indian fishermen in the ocean and Puget Sound, that the state and the United States are under a duty to permit sufficient numbers of fish to return to the tribes' usual and accustomed fishing grounds. See 443 U.S. at 676-79, 688. Likewise, a hatchery program that would simply make dead fish available to the Indians for distribution among the tribal members would be plainly inadequate. See notes 173-75 above and accompanying text.

204. Phase II, slip op. at 7: "Excluded from the scope of the plaintiffs' motion, and not yet presented to the Court for resolution, are two subsidiary environmental issues: (1) whether, if such [an environmental] right exists, the State has violated it; and (2) what remedies, if any, are appropriate."

As already noted, so long as the tribal allocation is at 50%, there is a presumption that the moderate living needs of the tribes are not being satisfied. According to the judgment in Phase II, if the tribes can show that a challenged action will "proximately cause the fish habitat to be degraded such that the rearing or production potential of the fish will be impaired or the size or quality of the run will be diminished,"[205] the burden shifts to the state or project proponent to show "that the environmental damage to the fishery resource proved by the plaintiffs will not impair the Tribes' moderate living needs."[206]

It should not be difficult for the tribes to shoulder the initial burden of associating habitat degradation with challenged activities. In support of their motion for partial summary judgment, the United States and the tribes submitted evidence to the effect that the historical production potential of anadromous fish in the case area has been reduced by as much as fifty percent.[207] According to the evidence submitted, the construction and operation of dams is the activity most destructive to anadromous fish,[208] followed in order of decreasing importance by channelization,[209] logging,[210] agriculture,[211] urbanization,[212] estuarine construction,[213] and gravel removal.[214]

205. Amended Judgment, ¶5 at 2-3.

206. Id., 6 at 3.

207. See Affidavit of Donald Chapman at 2, United States v. Washington, No. 9213-II (W.D. Wash. Jan. 16, 1981).

208. Id. at 3: "There is no doubt that dams and diversions have had greater impact on salmon and steelhead runs than any other single type of environmental insult."

209. Id. at 6: "It is unusual to find a stream which has not been physically altered or moved, almost always to the detriment of salmon and steelhead runs."

210. Id. at 4: "Logging in the late 1800's and early 1900's was extremely destructive to anadromous fish . . .. As late as the 1940's and 1950's, environmental degradation was extreme. Massive sediment loads entered stream valuable for anadromous fish, and jammed logs and debris denied fish access to spawning areas." The affidavit goes on to recite that damage caused by poor logging practices need not be permanent, and that vigorous implementation of the Washington Forest Practices Act could markedly improve the present situation.

211. Id. at 8: "Agricultural practices have depressed the abundance of anadromous salmonids in Western Washington. The most serious impact of agriculture has been stream diversions into straight ditches; the second most serious is livestock degradation of stream habitat."

212. Id. at 9: "Urban and industrial development in Western Washington has destroyed or degraded

A literal application of the Phase II decision to each of the above activities could prove very burdensome indeed.[215] Once the burden of showing harm to the fishery is met, it becomes the duty of the party proposing or authorizing the activity to show that the damage to the fishery "will not impair the Tribes' moderate living needs."[216] Notable by their absence from the quoted language are such qualifiers as "signficantly" or "unreasonably."[217] Nevertheless, Judge Orrick's decision need not be read to require a halt to all activities that detrimentally affect the fishery resource.[218] The question of what remedies, if any, are appropriate has not yet been litigated; it should be apparent that the degree of harm occasioned by a given activity will be one of the considerations to be taken into account in fashioning an appropriate remedy.

The question of what remedies are appropriate must, of course, be decided in the context of particular factual situations. Since most activities affecting the fish and fish habitat are regulated by either the state or federal governments,[219] it will be the duty of the affected government agency — once the tribes have met their burden of showing that a challenged activity will cause the requisite harm — to determine whether the tribes' rights will be violated if the activity is approved and, if so, to fashion a remedy.[220] This is clearly what the parties contemplated, as evidenced by the following footnote to Judge Orrick's opinion:

> Plaintiffs have suggested that the declaratory judgment sought in connection with this motion may, as a practical matter, dispose of the entire environmental issue . . .. Plaintiffs seek only prospective relief and, in light of the State's pledge to abide by the ruling in this case, implementation of a declaratory judgment may well resolve the underlying dispute without the necessity of further court proceedings.[221]

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much of the stream habitat of the lowlands surrounding Puget Sound, primarily on the eastern side of the Sound. Streams in the developed areas of Bellingham and Port Angeles have been similarly degraded."

213. Id. at 11: "Filling for docks, jetties and bulkheads -- and log rafts -- have eliminated or degraded significant acreages of habitat for young pink and chum salmon, and for coho and chinook to a lesser extent."

214. Id. at 12: "Gravel mining within stream wetted areas has undoubtedly degraded the intragravel environment downstream by increased sedimentation in Western Washington streams."

215. This is especially true in light of the following statement by a biologist for the plaintiffs: "It is unlikely that environmental improvements will bring fisheries on natural runs of Western Washington to anything close to maximum sustained yield without drastic cutbacks in fishing intensity, especially in the troll and charter fisheries offshore, and in the sport catch in the Strait and Puget Sound." Id. at 4.

216. See note 206 above and accompanying text.

217. In its brief to the court in Phase II, the United States represented that it seeks only to require the state to "refrain from taking or approving actions which have a significant adverse effect on the treaty right fishery." See Phase II, slip op. at 28.

218. Thus, the following characterization by the state of what the plaintiffs sought (and obtained) in Phase II seems exagerated:

> The contention made on behalf of the tribes is that the fishing resource and their interest therein becomes the highest and best use for any activity that occurs in the state of Washington. So that we would have their right be the equivalent of the endangered species status for the snail darter with regard to the TVA project. And, therefore, nothing could be done without their consenting to relinquish their supreme position.
>
> . . .
>
> But to simply declare that the right -- we have the proponent of the right claiming that the right is absolute, and all other things are inferior to it. I don't see how that kind of right can work within any of the environmental law structures, both federal and state, in the process. Because the genesis of the environmental legislation and administration is an attempt to minimize adverse environmental impacts, realizing in a project that there probably will be some. And it's a question of the balancing and structuring to try to minimize that so that appropriate things can be done.

Tr. of Oral Argument at 57-58 (Edward Mackie, Esq.).

219. See Phase II, slip op. at 26, 28.

220. At oral argument, counsel for the United States explained:

> All we're asking is a review of state decisions, to insure, if necessary -- the extent to which that's necessary can be determined later . . .. But a review of state functions, if -- if necessary, to determine whether or not they have sufficiently considered, or sufficiently restrained themselves, in a manner to protect the resource.

Tr. of Oral Argument at 80.

221. Phase II, slip op. at n. 57.

It should not become the responsibility of the courts to make technical decisions concerning the compatibility of various activities with the needs of anadromous fish. Neither should it be the function of the judicial system to attempt to fashion what will necessarily be complex remedies for harm caused by activities that are incompatible with fish. Decisions of that sort are more properly made by the agencies responsible for authorizing or overseeing the activities. If the responsible officials abdicate their responsibilities in this area, the courts will of necessity assume a larger role. A replay of the unfortunate events that followed such an abdication of responsibility by the Washington fisheries agencies (partly in response to state court decisions) subsequent to the Boldt decision would indeed be tragic; it is encouraging to note, in this regard, that the Washington Supreme Court now recognizes that the Stevens treaties are the supreme law of the land and confer distinct, enforceable rights upon the signatory tribes.[222] The function of the courts, then, should be limited to guarding against arbitrary and capricious action at the administrative level and carefully scrutinizing agency interpretations of the tribes' legal rights.

The affected agencies will, of course, need all the assistance they can get from both the tribes and project proponents affected by their decisions.[223] It will be up to the agencies and project proponents, in cooperation with the tribes, to seek means by which industry and fish can co-exist. In deciding whether a challenged action should be authorized, at least the following factors should be considered: (1) the likelihood that the action will actually impair the production potential of the fish or reduce the size or quality of the run; (2) the probable magnitude of the harm if the expected adverse impacts occur; (3) the availability and adequacy of means of mitigating expected adverse impacts on the fishery; and (4) the existence and feasibility of less restrictive means — other than prohibiting the proposed action — of protecting the tribes' right of taking fish. Other considerations will almost certainly be developed in the course of implementing the principles articulated in the Phase II decision. As stated above, however, the moderate living standard will probably not play a significant role in the implementation of Phase II unless present conditions change markedly.[224]

D. A Prospective Look at Phase II

The Supreme Court's decision in Fishing Vessel Ass'n made Judge Orrick's task of deciding the legal issues presented in Phase II considerably less difficult than it might otherwise have been. What will prove far more difficult for the courts and affected agencies is the problem of how to apply the legal principles articulated in the Phase II decision to given factual situations in a manner that will give effect to the treaty rights without unreasonably restricting activities that are vital to the region. This section explores some possible means by which the Phase II decision might be implemented to achieve these objectives.

Whether a challenged action is likely to result in significant harm to fish or related habitat in given situations may arise as a central consideration. Judge Orrick expressly rejected a suggestion that the state be held to a "no significant deterioration" standard.[225] Of course, it does not necessarily follow that "significant deterioration" of fish habitat will be acceptable. Whether a given action will result in significant harm will likely turn on each of the factors set out above. The affected agencies should develop, after full and effective input by the tribes and other affected parties, adequate measures to structure and control their discretion in determining the signficance of various impacts. One way of demonstrating compliance with the treaties, exploring alternatives to proposed actions, and the like would be for the affected agencies to prepare documents similar in nature to environmental impact statements -- whether or not required under federal or state law. Such a process would ensure that potential impacts and alternative courses of action are evaluated and would also facilitate widespread public involvement. As long as the tribes' moderate living needs are not being met, the agencies will be required, at a minimum, to choose the least harmful alternative to each proposed action.

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222. See **Anadromous Fish Law Memo** # 5 at 8.

223. Whether the United States, by virtue of its trust relationship with the tribes, would be required to facilitate tribal participation in the administrative process or participate in agency proceedings on behalf of the tribes is not addressed here. Cf. Tr. of Oral Argument at 34:

> THE COURT: Why shouldn't the United States . . . act as trustee and maintain those [treaty] rights for the Indians, involving the state only to the extent of using its existing [administrative] machinery? And then, if they didn't get satisfaction there, following it on up through the proper legal channels?

224. See notes 178-82 above and accompanying text.

225. Phase II, slip op. at 30.

In cases where a proposed action will result in substantial unavoidable harm to the fishery, there may be no alternative but to abandon the project. An example of such a situation would be where the tribes could show that their right to fish at a given location would be infringed by an activity that would prevent harvestable fish from reaching the location. Such was the case in Confederated Tribes v. Alexander, where a proposed federal dam would have inundated Indian fishing stations and prevented a steelhead run from reaching the fishing area.[226] The Corps of Engineers proposed to trap and haul chinook salmon above the dam to mitigate the loss, but the steelhead fishery would have been eliminated.[227] The court concluded that "[w]hatever the merits of the government's mitigation program," congressional authorization would be required to "nullify treaty rights in this way."[228] The court accordingly concluded that construction of the dam could not proceed.[229]

A number of controversies have already arisen under Phase II that provide some indication of the nature and extent of the relief the tribes will be seeking as implementation of Phase II proceeds. The following section discusses these cases.

VI. Phase II Litigation to Date

The first formal application of the Phase II decision came in Kittitas Reclamation District v. Sunnyside Irrigation District.[230] In that case, the Yakima Indian Nation demonstrated that about sixty deposits of salmon eggs, or redds, would be destroyed if flows were reduced from an irrigation project to provide for "carry-over" water for the next irrigation season (as is the usual practice).[231] The court accordingly ordered that a flow of water sufficient to maintain the viability of the salmon redds be maintained, even though to do so would create uncertainty as to the availability of water for the next irrigation season.[232] The court later ordered the Watermaster for the project to carry out certain actions designed to permit a reduction in the flow of water over the redds while at the same time protecting the spawning area.[233] In addition, the court ordered the parties to study means by which the needs of irrigation water users of the project could be met with less impact on the fish resource.[234]

Requiring the release of water that would normally be stored for irrigation could have a very substantial impact on those who need the water to carry on agricultural pursuits. The court ordered maintenance of the minimum amount of water necessary to preserve the redds, while directing the implementation of any available measures that would permit a reduction in the amount of water released. It is notable that any such flow reductions -- and, indeed, the decision to order the water releases in the first place -- did not turn on a balancing of the tribe's interest in the fish with the interests of water users. The court did, however, instruct the parties to explore means by which the interests of the two groups could be reconciled.

Two other controversies involving Phase II issues were pending as this publication went to press. In NO OILPORT! v. Carter, the issue is whether the proposed Northern Tier Pipeline, which would stretch from Port Angeles, Washington to Clearbrook, Minnesota, will cause a reduction in fish runs subject to the treaties.[235] The matter has been set for an evidentiary hearing, at which the tribes will attempt to meet their burden of showing that the project will adversely impact the fishery.[236] If the tribes meet that burden, the question of what constitutes appropriate relief in a case involving a project of the size and importance of the Northern Tier Pipeline will certainly not be easy to resolve.

In Skokomish Indian Tribe v. Beaubien, the tribe is seeking to enjoin the U.S. Forest Service from proceeding with management and planning concerning a unit of forest land.[237] The tribe participated in administrative proceedings on management of the unit in question, alleging that the Service's management plan would have adverse impacts on fish and game resources reserved to the tribes by treaty.[238] The Forest Service apparently did not respond to the concerns raised by the tribe, nor, apparently, did it demonstrate compliance with its trust and treaty obligations to the tribe.[239] That failure prompted the tribe to initiate the lawsuit to compel such compliance.

226. 440 F. Supp. 553 (D. Or. 1977).

227. Id. at 555.

228. Id.

229. Id. at 556.

230. No. 21 (E.D. Wash. Nov. 28, 1980).

231. Id., Instructions to the Watermaster at 2.

232. Id.

233. Id., Supplemental Instructions to the Watermaster at 3-4 (Nov. 28, 1980).

234. Id. at 4.

235. No. C80-360M (W.D. Wash. Feb. 5, 1981).

236. Id., slip op. at 68.

237. Complaint at 16, No. C80-199T (W.D. Wash. April 23, 1980).

238. Id. at 6.

239. See id., Memorandum in Support of Motion for Preliminary Injunction (Jan. 12, 1981).

These initial lawsuits are but the tip of the iceberg. Given the many activities that may potentially harm the fisheries, more litigation is sure to follow. The outcome of the present suits will probably influence the course and outcome of the impending litigation. In many cases, the tribes' burden of showing a causal relationship between the challenged action and environmental harm will be eased by admissions to that effect made by the responsible agency in EISs or similar documents. Such was the case in both the NO OILPORT! and Skokomish suits.[240] As pointed out above, the burden imposed upon the proponent of the action will be far more difficult to meet. The Phase II decision presents a formidable challenge to the responsible agencies, private parties, and tribes to work together to find means by which fish runs can again prosper without bringing further development -- to the extent it is needed -- to a halt.

CONCLUSION

It is clear from the historical records generated during the treaty negotiations that the tribes were repeatedly assured that they were securing the right to continue to take fish in exchange for clearing title to millions of acres of land. While it is highly unlikely that the parties to the treaties could have anticipated that the huge runs of fish available for harvest in 1855 would someday be reduced to a fraction of their historic levels, it is just as improbable that the Indians understood that by signing the treaties they were relinquishing both their claims to land and their right to meaningfully exercise their traditional fishing practices.

The signatory tribes and non-Indian beneficiaries to the treaties must now deal with the stark reality of seriously depleted fish populations and court decisions that unequivocally affirm the immutability of the Indians' fishing rights. If the tribes are given an opportunity (and responsively seize that opportunity) to influence agency decisionmakers through effective participation in administrative processes, then continuous resort to the courts for enforcement of tribal rights may no longer prove necessary. However, given the uncertainties that still remain regarding the precise scope of the tribes' environmental right, the past reticence of many decisionmakers to take the fisheries impacts of their decisions into account, and the plethora of activities that may be circumscribed by the tribal right, prospects for a reduced judicial role remain at best uncertain.

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240. See slip op. at 68, note 235 above; Memorandum in Support at 9, note 237 above.

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