COMMENTS

STATE REGULATION OF INDIAN TREATY FISHING RIGHTS: PUTTING *PUYALLUP III* INTO PERSPECTIVE.

Puyallup Tribe v. Department of Game,
97 S. Ct. 2616 (1977).

> *We see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the state.*[1]

So spoke Mr. Justice Douglas for a unanimous United States Supreme Court in 1967. The idea that states may regulate Indian treaty fishing rights[2] generated a great deal of criticism.[3] Despite the criticism, the Court has adhered to this statement in each of *Puyallup I's* successors.[4] In the recent *Puyallup III* decision, the Court stated that it was unwilling to re-examine the constitutional soundness of the *Puyallup I* statement.[5]

The *Puyallup I* critics will no doubt find grounds for further criticism in *Puyallup III*, especially in light of the on-going struggle between the Federal District Court for Western Washington and the Washington Supreme Court concerning allocation of fish between treaty and non-treaty fishermen.[6] The critics claim that there is no valid basis for the state's authority to regulate Indian

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1. Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968) [hereinafter cited as *Puyallup I*].

2. Even though this Comment deals with Indian treaty rights to fish, what is said would generally apply to Indian treaty rights to hunt and trap.

3. *See, e.g.*, Johnson, *The States Versus Indian Off-Reservation Fishing*, 47 WASH. L. REV. 207 (1972); Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251, 1259-61 (1968).

4. *See* Puyallup Tribe v. Department of Game, 97 S.Ct. 2616 (1977) [hereinafter cited as *Puyallup III*]; Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) [hereinafter cited as *Puyallup II*]. Unlike the two previous decisions, *Puyallup III* was a 7-2 decision.

5. *Puyallup III*, *supra* note 4, at 2623.

6. *See* § I *infra*. *See also* Justice Stafford's opinion in Puget Sound Gillnetters v. Moos, 88 Wn. 2d 677, 697-98, 565 P.2d 1151, 1161 (1977) (concurring with the dissent)

treaty fishing rights.[7] However, some critics have allowed sympathy for the Indian cause to restrict their constitutional inquiry.[8] When the totality of the problem is objectively viewed, the source of state regulatory power is readily discerned.

With the *Puyallup* decisions, the Supreme Court has identified the parameters of the state and Indian interests. The Puyallups have a treaty right to fish, but they do not have "a federal right to pursue the last living steelhead until it enters their nets."[9] On the other hand, before the state can validly regulate an Indian fishery, it "must demonstrate that its regulation is a reasonable and necessary conservation measure, *and* that its application to the Indians is necessary in the interest of conservation."[10]

Given that the Supreme Court recognizes a state right to reasonably regulate Indian treaty rights, the critics argue that this power comes from dicta in previous Indian hunting and fishing cases,[11] and not from a sound constitutional source. The failure of the Supreme Court in the *Puyallup* decisions to identify the source of this state power has not appeased the critics nor answered their question. It is the purpose of this Comment to analyze the *Puyallup* decisions and reveal the constitutional basis for Justice Douglas' statement in *Puyallup I.*

The source of the state power to regulate Indian treaty fishing rights is to be found in the line of Supreme Court decisions which established the traditional rule that states have the primary power to regulate natural resources such as fish and game.[12] These decisions are buttressed by the tenth amendment.[13]

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which literally pleaded for the Supreme Court to clearly interpret the Medicine Creek Treaty so as to finally resolve the Indian fishing rights controversy.

7. *See, e.g., Johnson, supra* note 3, at 208.

8. *See, e.g.*, Bean, *Off-Reservation Hunting and Fishing Rights: Scales Tip in Favor of States and Sportsmen?*, 51 N. DAKOTA L. REV. 11 (1974).

9. *Puyallup II, supra* note 4, at 49 (quoted in *Puyallup III, supra* note 4, at 2622-23).

10. Antoine v. Washington, 420 U.S. 194, 207 (1975) (citations omitted) (emphasis in the original).

11. *See, e.g.*, Tulee v. Washington, 315 U.S. 681, 684 (1942); United States v. Winans, 198 U.S. 371, 383 (1905); Ward v. Race Horse, 163 U.S. 504, 507 (1896).

12. *See* § II *infra.*

13. U.S. CONST. amend. X.

In addition, the supremacy clause does not operate to preempt all state power in this area. Neither the specific treaties involved nor the special relationship between the federal government and Indian tribes mandate an exclusion of state power to regulate natural resources for necessary conservation. Since the federal government is not constitutionally held to have exclusive jurisdiction over Indian fishing rights, there is room for necessary, concurrent state jurisdiction. This can best be understood by an analogy to commerce clause principles.[14]

It is well established that a state may regulate aspects of interstate commerce, despite the literal language of the commerce clause, where the state's regulation does not overly burden it. Under this analysis, the state's independant power to regulate its natural resources is balanced against the Indians' treaty rights to fish. The Supreme Court's decisions in the *Puyallup* series make it clear that the state's power to regulate fish and game, when necessary for conservation, outweighs the Puyallup Indians' federal treaty fishing rights.[15]

Because the social and cultural interests of the Indians have been adequately presented elsewhere,[16] they will not be dealt with in this Comment. Although the historical background of the problem has also been previously discussed,[17] a brief resume of the modern legal controversy is in order.

I. HISTORY OF THE *PUYALLUP* CASE

Prior to 1953, no open commercial net fishery existed in the Puyallup River.[18] In 1957, the Washington Supreme Court first considered whether the rights reserved by the Puyallups under the Medicine Creek Treaty[19] rendered them immune from the

14. U.S. CONST. art. I, § 8.

15. *See* §§ IV-V *infra*.

16. *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP AND NISQUALLY INDIANS (Rev. ed. 1975).

17. *See, e.g.*, Hobbs, *Indian Hunting and Fishing Rights*, 32 GEO. WASH. L. REV. 504 (1964); Comment, *State Power and the Indian Treaty Rights to Fish*, 59 CALIF. L. REV. 485 (1971).

18. Brief for Respondent at 4, Department of Game v. Puyallup Tribe, 70 Wn. 2d 245, 422 P.2d 754 (1967).

19. Treaty Between the United States and the Nisquallys and Other Bands of Indians, 10 Stat. 1132 (1854) [hereinafter cited as the Medicine Creek Treaty].

state police power to regulate the anadromous fish resources.[20] The Superior Court of Pierce County dismissed the charges of fishing in violation of state law because the state had failed to introduce any evidence that the regulations barring use of nets to catch salmon and steelhead, when applied to the Puyallup defendants, were reasonable and necessary for the conservation of fish.[21] The supreme court was evenly split and, therefore, only the lower court's order dismissing the charges against the defendants was affirmed.[22] Nothing concerning state power to regulate the Puyallups' federal right to fish was decided.

In 1963, the Washington State Game Department, which has jurisdiction over steelhead trout,[23] and the Department of Fisheries, which has jurisdiction over salmon,[24] filed a complaint against forty-one named individuals alleging that the defendants, claiming to be immune from the state's conservation laws, were fishing extensively in the Puyallup River with nets in such a manner as would virtually exterminate the anadromous fishery if not enjoined.[25] The state requested a declaration that members of the Puyallup Tribe were bound to comply with state law regulating fishing in the Puyallup River. The Washington Supreme Court held, in *Department of Game v. Puyallup Tribe, Inc.*,[26] that although the Puyallup Reservation no longer existed,[27]

20. State v. Satiacum, 50 Wn. 2d 513, 314 P.2d 400 (1957).

21. *Id.* at 514, 314 P.2d at 400-01.

22. *Id.* at 538, 314 P.2d at 414.

23. WASH. REV. CODE tit. 77 (1976).

24. WASH. REV. CODE tit. 75 (1976).

25. *See Puyallup III, supra* note 4, at 2619.

26. 70 Wn. 2d 245, 422 P.2d 754 (1967). The Washington Supreme Court has noted three times that there is no such entity as "Puyallup Tribe, Inc." *See* 86 Wn. 2d 664, 666 n.1, 548 P.2d 1058, 1062 n.1 (1975).

27. While a reservation was created by Article II of the Medicine Creek Treaty, Article VI provided that the President might remove the Indians from the reservation "on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands." Article VI also gave the President authority alternatively to divide the reservation into lots and assign them to those individuals or families who were willing to make these places their home. In 1887, Congress passed the General Allotment Act (24 Stat. 388) authorizing the division of the reservation land among the individual Indians. In 1893, Congress passed the Puyallup Allotment Act (27 Stat. 633) which established a commission to make the allotments. By the Act of April 28, 1904, 33 Stat. 565), Congress gave the United States' consent to the removal of prior restrictions on alienation by the Puyallups. The trial court in *Puyallup I* found that all but 22 acres, used as a cemetery for tribal members, of the original reservation had passed into private ownership and much of it is now the City of Tacoma. *See Puyallup I, supra* note 1, at 394 n.1.

the Puyallups still had a treaty right to fish at all usual and accustomed grounds. That right was not absolute, but rather it was subject to the state's exercise of its police power, provided the state's regulations were reasonable and necessary for conservation.[28] The court concluded that the state had sustained its burden by establishing that the continued use of drift and set nets would result in the nearly complete destruction of the fish runs and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery.[29]

On review, the United States Supreme Court affirmed and ruled that a state may, in the interest of conservation, regulate Indian treaty fishing rights.[30] Without much analysis, the Court stated that the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the state in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against Indians.[31] The proceedings were remanded to the state courts to make ultimate findings on the conservation issue.[32]

In response, the Department of Fisheries established special salmon fishing periods for treaty Indians and imposed some restrictions on the non-treaty commercial fishery in Puget Sound to permit a greater number of fish to reach the areas where the Puyallups engage in their fishing activities. In contrast, the Department of Game took the position that the Puyallups' fishing rights were the same as non-treaty fishermen; consequently it refused any commercialization of steelhead by prohibiting net fishing.[33] In the resulting appeal to the state supreme court, the Department of Fisheries' regulations were found to be reasonable and consistent with the necessary conservation standards.[34] In regard to steelhead, the court ruled that while the

28. Department of Game v. Puyallup Tribe, Inc., 70 Wn. 2d 245, 255-57, 422 P.2d 754, 760-61 (1967).

29. *Id.* at 261, 422 P.2d at 763.

30. *Puyallup I, supra* note 1, at 398.

31. *Id.*

32. *Id.* at 403. The Court also ordered that any ultimate findings on the conservation issue had to also cover the issue of equal protection implicit in the phrase "in common with."

33. Steelhead have not been permitted to be caught and sold as a commercial fish since at least 1947. Ch. 275, § 10, 1947 Wash. Laws at 1200.

34. Department of Game v. Puyallup Tribe, Inc., 80 Wn. 2d 561, 569-70, 497 P.2d 171, 177 (1972).

Puyallups may have a right to a net fishery, nevertheless the steelhead run was not of sufficient size to withstand a commercial net fishery for the year of 1970.[35]

On review of that decision, the Supreme Court held that the ban on all net fishing in the Puyallup River for steelhead granted, in effect, the entire run to sports fishermen and remanded.[36] Because net fishing by the Puyallups was covered by their treaty,[37] the Court, in effect, ruled that they had a "supercitizenship" right to fish with nets. Allowing only hook-and-line fishing resulted in discrimination against the Puyallups because their right to fish with nets was completely prohibited.[38]

Before the trial court could determine a fair apportionment of the steelhead, two federal decisions were rendered that complicated the controversy over the Puyallups' fishing rights. The first was the now famous *Boldt* decision in *United States v. Washington*.[39] Judge Boldt rejected the state's contention that he did not have jurisdiction over the Puyallup Tribe.[40] Relying on his interpretation of the Medicine Creek Treaty, the district court judge determined the extent of all the Washington fishing tribes' rights to all anadromous fish. According to the *Boldt* decision, each tribe reserved the exclusive right to fish on its reservation so that treaty fishermen had the right to harvest virtually all the anadromous fish.[41]

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35. *Id.* at 571-73, 497 P.2d at 178-79.

36. *Puyallup II*, *supra* note 4, at 46-47.

37. *Id.* at 48 (citing *Puyallup I*, *supra* note 1, at 398-99).

38. *Puyallup II*, *supra* note 4, at 48. Three Justices concurred, noting that the treaty net fishing right only applied to the natural run of steelhead because sportsmen pay for the hatchery produced steelhead. *Id.* at 49-50 (Burger, C.J., and Stewart & White, JJ., concurring).

39. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1976), *cert. denied*, 423 U.S. 1086, *rehearing denied*, 424 U.S. 978 (1976).

40. *Id.* at 328. This ruling was in direct conflict with the Supreme Court's specific remands to the state courts. *See Puyallup III*, *supra* note 4, at 2622; *Puyallup II*, *supra* note 4, at 401-02; *Puyallup I*, *supra* note 1, at 49. The allocation formula in the *Boldt* decision was based upon the interpretation of the Medicine Creek Treaty that it provided for exclusive on-reservation tribal fishing. Because *Puyallup III* rejects that interpretation of the Medicine Creek Treaty, the allocation formula announced in the *Boldt* decision giving the tribes all the fish they care to catch on their reservations is cast into doubt.

41. 384 F. Supp. at 332. Judge Boldt found that because an exclusive right of fishing was reserved by each of the tribes within its own reservation, the tribes could catch as many fish as they cared to on the reservations, plus as many fish as they needed for religious and consumption purposes. Also, the tribes were entitled to the opportunity

The second federal case was the Ninth Circuit Court of Appeal's decision in *United States v. Washington*,[42] in which Washington challenged the continued existence of the Puyallup Indian Reservation and, as a consequence, the right of the Puyallup Tribe to fish free from state regulation on that part of the Puyallup River lying within the Reservation.[43] The court of appeals did not reach any decision concerning the fishing rights. It only stated that "the Puyallup Indian Reservation continues to exist."[44]

While the *Boldt* decision was on appeal, the Superior Court for Pierce County entered a judgment, under the *Puyallup II* remand, that the fishing rights possessed by the Puyallups under the Medicine Creek Treaty did not extend to hatchery-reared steelhead, that one-half of the natural run had to be allowed to escape in order to perpetuate the species, and that the Puyallups were entitled to catch forty-five percent of the remaining one-half of the natural run.[45] Two months later, *Boldt* was affirmed,[46] apparently in response to the general failure of the state to recognize the legitimacy of the Indian fishery.[47]

In the meanwhile, both the Puyallup Tribe and the Department of Game appealed the Pierce County court's decision.[48] On appeal, the Washington Supreme Court affirmed and held that when required to meaningfully control the conservation of a

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to harvest 50 percent of all fish passing through usual and accustomed off-reservation fishing sites, as well as a favorable adjustment for fish caught beyond the state's territorial waters. *Id.* at 343.

42. 496 F.2d 620 (9th Cir.), *cert. denied*, 419 U.S. 1032 (1974).

43. *Id.* at 620.

44. *Id.*

45. Superior Court of Pierce County, No. 158069, Brown, Jr., J., entered April 8, 1975. *See* Department of Game v. Puyallup Tribe, 86 Wn. 2d 664, 667, 548 P.2d 1058, 1063 (1976). Those treaty fishermen who fill this allotment by net fishing would then be allowed to fish by hook-and-line. *See* § IV *infra*.

46. United States v. Washington, 520 F.2d 676 (1975), *cert. denied*, 423 U.S. 1086 (1976).

47. *See id.* at 693 (Burns, J., concurring).

48. In arguing that the trial court, despite the Supreme Court's remand concerning the steelhead, lacked jurisdiction to adjudicate the Puyallups' treaty rights to hatchery steelhead, allocate the natural run, and assume continuing jurisdiction in the matter, Ramona Bennett stated, "The most serious difficulty with this exercise of authority is that it is patently in conflict with Judge Boldt's continuing jurisdiction." Brief for Appellant Ramona Bennett at 23, Department of Game v. Puyallup Tribe, 86 Wn. 2d 664, 548 P.2d 1058 (1976).

species of fish, both on-and off-reservation Indian treaty fishing may be regulated.[49] The court stated that it interpreted the *Puyallup* decisions as leaving open the issue whether the Medicine Creek Treaty gives the Puyallups a right to a commercial net fishery for steelhead.[50] The court then offered its interpretation of the Treaty,[51] concluding that it permits the state to promulgate conservation regulations meeting appropriate standards that affect all people, Indian and non-Indian.[52] The Puyallups' petition for certiorari to the United States Supreme Court was granted.[53]

About two weeks before the Supreme Court issued its decision, the state supreme court decided *Puget Sound Gillnetters v. Moos.*[54] In that case the court followed its interpretation of the Medicine Creek Treaty—that treaty fishermen only have the right to an equal opportunity to fish—and rejected *Boldt's* interpretation that treaty fishermen are entitled to more than half of the harvestable fish.[55] The court held that it was not bound by the *Boldt* decision[56] and that the federal district court could not require the Department of Fisheries to implement the *Boldt* decision.[57] In a separate opinion concurring with the dissent, Justice

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49. Department of Game v. Puyallup Tribe, 86 Wn. 2d 664, 668-69, 548 P.2d 1058, 1063 (1976).

50. *Id.* at 669-71, 548 P.2d at 1064-65.

51. *Id.* at 671-81, 548 P.2d at 1065-70.

52. *Id.* at 678, 548 P.2d at 1069.

53. The question before the Supreme Court on the petition for certiorari was whether a state court may adjudicate on-reservation treaty fishing rights of an Indian tribe and allocate the catch among tribal and non-tribal fishermen consistently with established principles of tribal immunity. 97 S.Ct. 1740 (1977).

54. 88 Wn. 2d 677, 565 P.2d 1151 (1977).

55. *Id.* at 679-80, 565 P.2d at 1152. The dissent accurately pointed out that the issue was not whether the *Boldt* decision was correct, but rather whether the state court could order the Fisheries Department to take action violative of the *Boldt* decision. *Id.* at 693, 565 P.2d at 1159 (Horowitz, Stafford, & Utter, JJ., concurring in part, dissenting in part).

56. *Id.* at 689-92, 565 P.2d at 1158-59.

57. *Id.* at 684-89, 565 P.2d at 1156-57. The court reached this conclusion by holding that the Department of Fisheries has no power to regulate fishing except for conservation purposes and that allocating fish between Indian and non-Indians is not conservation. *Id.* at 680-83, 565 P.2d at 1152-54. *But see* § V(A) *infra.* The court then held that because the treaties do not reserve special rights, equal protection concepts require that fishing regulations apply equally to Indian and non-Indian commercial fishermen. *Id.* at 684, 565 P.2d at 1154. The underlying rationale of the court is clearly erroneous. *See* text accompanying notes 63-66 *infra.*

Stafford virtually pleaded that the Supreme Court fully dispose of the treaty fishing-rights conflict by clearly interpreting the Medicine Creek Treaty.[58]

Two weeks later the United States Supreme Court issued the *Puyallup III* decision[59] and held that the state courts had done precisely what they had been directed to do in the *Puyallup II* remand. The Court held that the Medicine Creek Treaty did not reserve to the Puyallups an exclusive right to take steelhead passing through their reservation.[60] Furthermore, the Puyallups' treaty right to the steelhead was held to be subject to reasonable regulation by the state pursuant to its power to preserve an important natural resource.[61] Even though the majority opinion did not mention the *Boldt* decision, *Puyallup III* accepted *Boldt's* concept of allocating a certain percentage of fish to treaty tribes. However, the Supreme Court specifically ruled that the Medicine Creek Treaty did not reserve an exclusive on-reservation fishery to the Puyallups. Because the entire *Boldt* decision was based upon this treaty, that element of the *Boldt* allocation formula allowing unlimited Indian on-reservation fishing has been reversed sub silencio. The result is that the treaty tribes are only entitled to a specific percentage of fish instead of the indefinite percentage the *Boldt* allocation formula provided.[62]

As previously mentioned, just before the *Puyallup III* decision, the state supreme court ruled in *Puget Sound Gillnetters* that equal protection barred the Fisheries Department from allocating any specific share of salmon to the treaty tribes. After the *Puyallup III* decision, the state court continued this approach

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58. *Id.* at 697-98, 565 P.2d at 1161 (Stafford & Horowitz, JJ., concurring with the dissent).

59. 97 S.Ct. 2616 (1977).

60. *Id.* at 2623. Only two Justices agreed with the *Boldt* decsion that the Medicine Creek Treaty guaranteed exclusive on-reservation fishing rights. *Id.* at 2624 (Brennan & Marshall, JJ., dissenting).

61. *Id.* at 2623-24.

62. Of all the tribes involved in the *Boldt* decision, the Yakima Tribe may not be affected by this result because its treaty with the federal government expressly provides for exclusive Indian on-reservation fishing rights. *Compare* Treaty with the Yakimas, June 9, 1855, 12 Stat. 951, 953 *with* Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, 1133. *See also* notes 168-73, 179-80 and accompanying text *infra*.

when it held in *Purse Seine Vessel Owners Association v. Moos*[63] that an injunction issued by the federal district court against state court proceedings concerning the 1975 salmon fishing season was ineffective. The underlying rationale of both cases was that because Indians are citizens of both the United States and Washington, equal protection forbids distinctions between fishermen based upon their race or ethnic background.[64]

This equal protection rationale is in clear conflict with Supreme Court precedent which holds that special treatment for tribal Indians, although relating to Indians as such, is not based upon impermissible racial classifications. Rather, the special treatment is based upon the Indians' unique status with the federal government.[65] *Puyallup II* and *III* have at least established that treaty Indians have some sort of "supercitizenship" right to fish with nets in the rivers. They have this right because of the tribes' treaties with the federal government, not because of their race or ethnic background.

By ignoring this controlling precedent, the state is inviting reversal by the Supreme Court not only on its interpretation of equal protection with regard to treaty Indians, but also on its definition of conservation, since the Supreme Court has defined conservation as including allocation of fish among user groups.[66] If the state continues the defiant attitude exemplified in *Puget Sound Gillnetters* and *Purse Seine Vessel Owners Association*, it may eventually be necessary for the federal government to assume full conservation regulatory power and completely preempt state power.

Regardless of how the Indian fishing rights problem in Washington is ultimately resolved, *Puyallup III's* holding that the state may regulate on-reservation fishing is significant. Unfortunately, the Court did not analyze the source of state power by which Washington may regulate Indian treaty fishing rights. Supplying that analysis is the first step in putting *Puyallup III* into perspective.

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63. 88 Wn. 2d 799, 567 P.2d 205 (1977).

64. *Id.* at 810-11, 567 P.2d at 212 (citing Puget Sound Gillnetters Ass'n v. Moos, 88 Wn. 2d 677, 684, 565 P.2d 1151, 1154 (1977)).

65. Antelope v. United States, 97 S.Ct. 1395, 1399 (1977). *See also* Fisher v. District Court, 424 U.S. 382 (1976); Morton v. Mancari, 417 U.S. 535 (1974).

66. *See* § V(A) *infra*.

II. WASHINGTON'S CONSTITUTIONAL INTEREST

The initial step in discovering the source of state power to regulate Indian treaty hunting and fishing rights is to identify the state's interest in the fish and game within its borders. There is a long line of Supreme Court cases which inherently recognizes the power of the states to enforce regulations designed to conserve the collective natural resources within each state. There has been no uniform articulation of this power because its recognition has arisen in varying circumstances spanning the history of the country. Despite this lack of clarity, the Court has consistently recognized that states have a special interest in natural resources such as fish and game. These cases are buttressed by the tenth amendment which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[67] As the following cases demonstrate, the Supreme Court has found only limited circumstances in which a state has intruded so much upon clearly identified national policies that the Court had to restrict the state regulation.

In *Smith v. Maryland*,[68] a county sheriff seized a vessel federally licensed to be employed in the coasting trade and fisheries while it was dredging for oysters in Chesapeake Bay. The vessel allegedly violated a Maryland statute enacted for the purpose of preventing the destruction of the oyster fishery in state waters.[69] The issue presented to the Court was whether the state violated the commerce, admiralty and maritime jurisdiction clause, or the privileges and immunities clause. In upholding the statute, the Court stated that federal enrollment and licensing do not confer immunity from valid state laws.[70] The source of the state's power to regulate fishing was its jurisdiction over its own physical territory.[71] Whether the federal government, by a treaty

67. U.S. CONST. amend. X.
68. 59 U.S. (18 How.) 71 (1855).
69. *Id.* at 72-73.
70. *Id.* at 74.
71. The Court stated:

The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This

or an act of Congress, could grant non-citizens of the state the right to participate in the fishery was a matter beyond the scope of the case and upon which the Court gave no opinion.

In *McCready v. Virginia*,[72] the Court upheld state action which discriminated against commercial fishing by citizens of other states even though no persuasive independent reasons justifying the discrimination were advanced.[73] The issue was whether Virginia was violating the privileges and immunitites clause by prohibiting only the citizens of other states from planting oysters—a non-migratory fish—in the Ware River, a Virginia stream in which the tide ebbed and flowed.[74] The Court recognized the long-settled principle that each state owns the beds of all tide-waters within its jurisdiction unless they have been granted away and that, in like manner, the states own the tide-waters themselves and the fish in them, so far as they are capable of ownership while running.[75] Since there had been no grant of power over the fisheries to the federal government, as there had been over navigation, exclusive control over fisheries remained with the states. Thus, Virginia could appropriate its fisheries any way it saw fit because appropriation was nothing more than a regulation of the people's use of their common property. The Court saw the right which the people of the state thus acquired as coming from their citizenship and property combined. As the Court stated, "It is, in fact, a property right, and not a mere privilege or immunity of citizenship."[76]

A state statute regulating the taking of menhaden within Buzzard's Bay by outlawing net fishing within the state's jurisdiction was challenged in *Manchester v. Massachusetts*.[77] The Court held that the state law was valid and applied to a vessel which was federally licensed to fish for menhaden. The power of the state to regulate a federal licensee was derived

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power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held.

Id. at 75.

72. 94 U.S. 391 (1876).

73. *Id.* at 396-97. *See also* Toomer v. Witsell, 334 U.S. 385, 400 (1948).

74. 94 U.S. at 394.

75. *Id.*

76. *Id.* at 395.

77. 139 U.S. 240 (1891).

from Congressional inaction. The Court stated, "[A]s the right of control exists in the state in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the states."[78]

The defendant in *Geer v. Connecticut*[79] had lawfully killed game birds within the state, but was charged with possession of the birds for the purpose of transporting them outside the state.[80] The issue was whether the state had the power to regulate the killing of game within its borders so as to confine its use to the state and forbid its transmission outside the state. In affirming the conviction, the Court found two separate sources of state power to regulate the taking and use of game. The first was the "common ownership" theory which has subsequently been disfavored.[81] The second source of police power flowed from the duty of the state to preserve for its people a valuable food supply. The Court held that the exercise of this duty is valid even though interstate commerce may be remotely and indirectly affected.[82]

In *Missouri v. Holland*[83] the states' interests in the game within their borders were held to be not necessarily exclusive, but rather subject to treaties made by the federal government with foreign nations. Missouri had sought to prevent a federal game warden from enforcing the regulations issued by the Secretary of Agriculture pursuant to the Migratory Bird Treaty Act.[84] Missouri argued that migratory birds were owned by the states in their sovereign capacity for the benefit of their people

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78. *Id.* at 266.

79. 161 U.S. 519 (1896).

80. *Id.* at 521.

81. *See* Douglas v. Seacoast Products, Inc., 97 S.Ct. 1740 (1977); Toomer v. Witsell, 334 U.S. 385, 402 (1948). *See also* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420-21 (1948).

82. 161 U.S. at 534. The Court surveyed common law and found that the control of fish and game was vested by the British monarchy in the colonial governments and that this power passed to the states insofar as its exercise was not incompatible with the rights of the federal government. *Id.* at 528.

83. 252 U.S. 416 (1920).

84. Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755, 16 U.S.C. §§ 703-71((1970).

and that, under *Geer*, Congress had no power to displace this state interest. Thus, the issue became whether or not the treaty was a valid exercise of the treaty power, which would provide the federal government the basis for regulating migratory birds.[85] In holding the treaty valid, Justice Holmes found that there was a national interest in conservation of migratory birds and that national action, in concert with that of another power, was necessary.[86] Because the power to conserve game was "a power which must belong to and somewhere reside in every civilized government,"[87] and because the states individually had proven incompetent to conserve the birds, the power to conserve them "*had* to exist somewhere in American government."[88] Together, the treaty and the challenged federal statute provided the federal government with the necessary plenary power. *Missouri v. Holland* can thus be interpreted as meaning that the states retain the primary responsibilities for conserving fish and game until they are unable to do so. At such time, the federal government may fill the conservation gap by national law, and thereby supersede the state power.[89]

In two cases decided on the same day in 1948, the Supreme Court rejected the state "ownership" theory as a basis for exceptions to the privileges and immunities clause and to the equal protection clause. At issue in *Toomer v. Witsell*[90] were South Carolina statutes which imposed a poundage tax on shrimp taken in the three-mile belt off its coast and required a license fee for each shrimp boat owned by a nonresident, one hundred times the

85. 252 U.S. at 432. If the treaty were valid, there could be no dispute about the validity of the federal regulations as necessary and proper means to execute the powers of the government under U.S. CONST. art. I, § 8. *Id.*

86. *Id.* at 435. State protection of migratory birds existed, but "strong temptation pressing upon every state to secure its full share of edible game birds during the spring and fall migrations . . . rendered harmonious and effective state supervision impossible." Lofgren, *Missouri v. Holland in Historical Perspective*, 1975 SUP. CT. REV. 77, 78.

87. 252 U.S. at 433 (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)).

88. *See* Lofgren, *supra* note 86, at 98.

89. This same conclusion has recently been reached concerning the wild mustang case. Kleppe v. New Mexico, 426 U.S. 529 (1975). It has been suggested that because state and local protection of the mustangs was largely ineffective, a national system of management was necessary, thus allowing Congress to supersede state power to control the animals. *See* Note, *Expansion of National Power Under the Property Clause: Federal Regulation of Wildlife. Kleppe v. New Mexico, 426 U.S. 529 (1975).* 12 LAND AND WATER L. REV. 181, 191-92 (1977).

90. 334 U.S. 385 (1948).

fee for boats owned by residents. The state argued that its regulations did not violate the privileges and immunities clause because state "ownership" of fish and game provided an exception to the privileges and immunities clause[91] by allowing a state to discriminate as it saw fit against nonresidents.[92] Because the shrimp involved were free-swimming migratory fish and the fishing took place in the sea instead of in inland water, the Court refused to extend the *McCready* exception to the privileges and immunities clause.[93] The Court held that the state had sufficient interest in the shrimp fishery within three miles of its coast to warrant its protection and regulation of the fishery.[94] However, the imposition of a discriminatory license fee for boats owned by nonresidents was held to be unreasonable and therefore violated the privileges and immunities clause.[95]

In *Takahashi v. Fish & Game Commission*,[96] a California statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship was held to violate the constitutional right of such aliens to equal protection. The issue was whether California could use the federally created racial ineligibility for citizenship as a basis for barring the plaintiff, a resident Japanese, from earning his living as a commercial fisherman in the ocean waters off the California coast.[97] The Court simply refused to allow the state to use its interest in the fish as a basis for racial discrimination.[98]

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91. *Id.* at 399.

92. *Id.* at 400.

93. In rejecting the state's argument, the Court said:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states.

Id. at 402 (footnote omitted).

94. *Id.* at 393.

95. *Id.* at 396-97.

96. 334 U.S. 410 (1948).

97. *Id.* at 412.

98. *Id.* at 421. The Court stated:

> To whatever extent the fish in the three-mile belt off California may be "capable of ownership" by California, we think that "ownership" is inadequate to justify California in excluding any or all aliens who are lawful residents of the state from making a living by fishing in the ocean off its shores while permitting all others to do so.

The natural resource involved in *Huron Portland Cement Co. v. City of Detroit*,[99] was clean air. The appellant, a corporation engaged in operating federally licensed steam vessels in interstate commerce, sought to enjoin the enforcement against it of provisions of the Smoke Abatement Code of the City of Detroit, under which the corporation's steam vessels could not, without undergoing structural alteration, perform necessary cleaning of their fires within the city.[100] The Court held that the code could constitutionally be applied to the corporation's ships. The Court rejected the arguments that federal statutes relating to inspection, approval and licensing of steam vessels in interstate commerce pre-empted the area, and that the code unconstitutionally burdened interstate commerce.[101] Traditional state police power was the source of legislation[102] by which the city could criminally prosecute the appellant for using the precise equipment which the federal government said could be used.[103] In deciding that the city had not imposed an undue burden on interstate commerce, the Court said, "Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."[104]

A recent Supreme Court decision dealing with the power of a state to regulate the taking of fish is *Douglas v. Seacoast Products, Inc.*,[105] in which Virginia statutes in effect prohibited nonresidents of Virginia from catching menhaden in the Virginia portion of Chesapeake Bay and barred noncitizens from obtaining commercial fishing licenses for any kind of fish from Virginia waters.[106] Plaintiff's fishing vessels were enrolled and licensed pursuant to federal law,[107] but were excluded from the fishery by

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As the concurring opinion noted, the state statute was the direct outgrowth of antagonism toward persons of Japanese ancestry. *Id.* at 422 (Murphy & Rutledge, JJ., concurring).

99. 362 U.S. 440 (1960).
100. *Id.* at 441.
101. *Id.* at 441-42.
102. *Id.* at 442.
103. *See id.* at 449 (Douglas & Frankfurter, JJ., dissenting).
104. *Id.* at 444 (citations omitted).
105. 97 S.Ct. 1740 (1977). *See also* Massachusetts v. Westcott, 97 S.Ct. 1755 (1977).
106. 97 S.Ct. at 1742-44.
107. 46 U.S.C. §§ 251, 252, 263 (1970).

state statutes. The Court treated the problem as "statutory"[108] and noted that it was dealing with federal legislation which superseded state law in a field traditionally occupied by the states,[109] so that pre-emption arises only if that was the clear and manifest purpose of Congress.[110] Finding that the state statutes were pre-empted by the federal enrollment and licensing laws to the extent that Virginia could not prevent plaintiff's vessels from fishing in Virginia's waters, the Court rejected the appellant's argument that because states "own" fish they can exclude federal licensees.[111] It also held that, under its precedents, reasonable and nondiscriminatory state conservation measures are applicable to federal licensees.[112] The majority repeated its definition of the state interest as "the importance to its people that a state have power to preserve and regulate the exploitation of an important resource,"[113] while the concurring opinion stated that the retained interests of states in fish and game are "of substantial legal moment, whether or not they rise to the level of a traditional property right."[114]

However the state interest or power is defined, certain conclusions about it can be drawn from the foregoing cases. The power is reserved to the states by the tenth amendment and is to be exercised for the benefit of each state's citizens. If the resource in issue is nonmigratory, the states have much stronger "ownership" claims than if the resource is migratory. This state power gives the states the primary duty to conserve natural resources such as fish and game so that if the states cannot, then the federal government has the pre-emptive power to step in and fill the conservation gap. This conservation power is a field which has been traditionally occupied by the states so that pre-emption arises only if that was the clear and manifest purpose of Congress. Congressional silence is indicative that a state is meeting its duty. The state's power over its fish and game may

108. 97 S.Ct. at 1745.

109. *Id.* (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

110. 97 S.Ct. at 1745 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

111. *Id.* at 1751.

112. *Id.* at 1753.

113. *Id.* at 1751 (quoting Toomer v. Witsell, 334 U.S. 385, 402 (1948)).

114. 97 S.Ct. at 1753 (Rehnquist & Powell, JJ., concurring in part and dissenting in part).

be limited by federal treaty. Furthermore, the exercise of that state power may not exclude minorities or federal licensees, but reasonable nondiscriminatory conservation and environmental regulation by the states is constitutional.[115]

It follows that Washington does not, in the traditional sense, "own" any free-swimming migratory salmon or steelhead; yet it does have a substantial interest in such fish.[116] Washington derives the power to regulate all fishing within its territory from this substantial interest. As *Douglas v. Seacoast Products* suggests, the modern approach to determining the limits of Washington's interest is simply to allow it to exercise its police power until such exercise conflicts with federal law established by Congress with the clear and manifest purpose of pre-empting local regulations.[117]

III. THE PUYALLUPS' CONSTITUTIONAL INTEREST

The argument in *Puyallup III* was that the Medicine Creek Treaty[118] reserved to the Puyallups the exclusive federal right to fish on-reservation,[119] and that because Indian treaties are the same as foreign treaties, the rights reserved under the Medicine Creek Treaty are part of the supreme law of the land.[120] The Puyallups thus contended that the Medicine Creek Treaty

115. For a list of similar conclusions concerning state versus federal ownership of wildlife, *see* Etling, *Who Owns the Wildlife?*, 3 ENVTL. L. REV. 23, 31 (1973).

116. Besides its "substantial quasi-proprietary interest" in the salmon and steelhead as natural resources, Washington also has an interest in the fish as an economic resource. For a glimpse at the size of this economic interest, see Justice Rosellini's concurring opinion in State v. Satiacum, 50 Wn. 2d 513, 530-35, 314 P.2d 400, 410-12 (1957).

Under Miller v. Schoene, 276 U.S. 272 (1928), when a state is faced with making a choice between preserving conflicting classes of property, it does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the legislature's judgment, is of greater value to the public. *Id.* at 279. Thus, when there is a preponderant public concern in the preservation of the one interest over the other, a state may protect the preponderant interest. This is not to say that Washington can destroy the Indian fishery in the interest of the commercial and sports fisheries, rather it merely suggests that Washington's economic interest may be a distinct second source of constitutional power to regulate all fishing in its territory.

117. 97 S.Ct. at 1745.

118. Treaty of Medicine Creek, note 19 *supra*.

119. *Puyallup III*, *supra* note 4, at 2623 (Brennan & Marshall, JJ., dissenting).

120. U.S. Const. art. VI, cl. 2, provides that the "Constitution . . . of the United States . . . and all Treaties . . . made, under the authority of the United States, shall be the supreme Law of the Land. . . ." *See, e.g.*, United States v. McBratney, 104 U.S. 621 (1882); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

automatically pre-empted the state from regulating their fishing rights.[121] This argument might have been valid if the treaty did, in fact, reserve exclusive on-reservation fishing rights to the Puyallups,[122] and if the Puyallups had shown they could supply modern conservation management of the fish on their own.[123] This second possibility will be explored later,[124] but first it must be shown through close analysis of the Medicine Creek Treaty—in light of the Supreme Court's apparent interpretation of it—why no exclusive on-reservation fishing rights were reserved by the Puyallups.

A glimpse at the historical setting of the Pacific Northwest treaties shows that hostilities were occurring between the Indians and settlers as the Washington territory was being settled in the 1850's. To facilitate peaceful development, the United States adopted a policy of treaty rather than conquest.[125] The primary goal of the treaties was to relocate the Indians onto reservations to protect them and transform them into farmers.[126] Governor Stevens, who negotiated the treaties, did not achieve the degree of concentration he had desired, though it was more than the Indians wanted.[127] Stevens did not intentionally reserve to the Indians any more rights than he thought necessary, but he was so impressed with the importance of the fish to the Indians that he realized they had to be assured the continued right to fish before they would cede their lands.[128] Thus, the secondary goal of the treaties was to assure the Indians' continued right to

121. *Puyallup III*, *supra* note 4, at 2622; *see, e.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1975).

122. The *Puyallup III* majority stated, "[T]hat treaty as construed by this Court does not confer the complete immunity they claim." *Id.* at 2620. The *Puyallup I* decision had previously noted that the manner in which the Puyallups may fish was not covered by their treaty so that the manner of fishing, the size of the take, the restriction of commercial fishing, and the like could be regulated by Washington. *Puyallup I*, *supra* note 1, at 398.

123. Even the *Boldt* decision found that the Puyallup Tribe did not have sufficient qualifications to be self-regulating. United States v. Washington, 384 F. Supp. 312, 340-42 (1974).

124. *See* notes 315-26 and accompanying text *infra*.

125. AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS, 19 (Rev. ed. 1975) [hereinafter cited as UNCOMMON CONTROVERSY].

126. *Id.* at 20.

127. *Id.* at 21.

128. *Id.*

fish at their accustomed places to supplement their new agricultural subsistence.[129] This two-pronged approach to the treaties reflected the assumption that the homestead farming pattern would encourage the Indians to assimilate within the course of a generation of federal assistance.[130]

The Medicine Creek Treaty was the first Pacific Northwest Indian treaty. It ceded the territory of the Nisquallys and Puyallups along with that of several other bands to the United States.[131] A valid interpretation of the Medicine Creek Treaty must begin with the premise that "the treaty was not a grant of rights to the treating Indians, but a grant of rights from them, and a reservation of those not granted."[132] Thus in Article I, the Puyallups "cede[d], relinquish[ed], and convey[ed] to the United States, all their right, title and interest in and to the lands and country occupied by them."[133] Logically the Puyallups' fishing rights were part of their "right, title and interest in and to" their lands,[134] so that under Article I they granted their fishing rights to the United States. In Article II, reservations were set aside "for the present use and occupation"[135] of the Puyallups. The Puyallup reservation was "set apart, and, so far as necessary, surveyed and marked out for their exclusive use."[136] The structure of these first two articles reflected Stevens' basic goal of relocating and civilizing the Indians.[137] If the treaty ended with Article II, the failure to mention fishing rights would make the extent of Article II's "exclusive use" ambiguous, and the general rule of Indian treaty construction would apply. Thus the ambiguity would be construed in the Puyallups' favor so that "exclusive use" would be interpreted as including fishing

129. *Id.*

130. C. Coon, *The Adoption of the Reservation Policy in the Pacific Northwest, 1853-1855*, ORE. HIST. Q. XXIII (March 1922), 1-38.

131. UNCOMMON CONTROVERSY, *supra* note 125, at 25-28.

132. United States v. Winans, 198 U.S. 371, 381 (1905). *See also* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 617 (1975).

133. Treaty of Medicine Creek, *supra* note 19, Article I.

134. *But see* Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971).

135. Treaty of Medicine Creek, *supra* note 19, Article II.

136. *Id.*

137. *See* notes 128-30 and accompanying text *supra*.

rights.[138] The Puyallups would then have the exclusive right to fish on-reservation. However, the language of Article III forecloses this interpretation.

In Article III, "the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory."[139] The word "all" refers to both on-and off-reservation fishing rights, and the phrase "is further secured" shows that no fishing rights were previously reserved by the Puyallups in Article II. The treaty language is clear and unambiguous in that the only Indian fishing right is that right reserved in Article III. Therefore, the rights of the Puyallups to fish on-and off-reservation are the same, *i.e.*, in common with the non-treaty citizens. It is the "in common with" language of Article III that is ambiguous.

This is the interpretation of the Medicine Creek Treaty that the Supreme Court appears to have adopted in its three *Puyallup* decisions. In *Puyallup I*, the Indians themsevles manifested that their fishing rights were found in Article III by asserting that article, and not Article II, as a defense in the initial action.[140] The original suit sought an injunction against certain fishing within and without the boundaries of their reservation. The Supreme Court noted that the state supreme court appeared to hold that the right to fish in streams within the reservation was solely within Article III.[141] The Supreme Court accepted this interpretation, and stated, "There are indeed no other fishing rights specifically reserved in the Treaty of Medicine Creek except those covered by Article III."[142]

The Court later recognized its *Winans*[143] rule that treaty fishing rights are "continuing" rights that do not expire by a change in the ownership of land.[144] It follows that if any fishing

138. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); notes 187-95 and accompanying text *infra*. *See generally* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174 (1973); Choctaw Nation of Indians v. Oklahoma, 397 U.S. 620, 631 (1970).

139. Treaty of Medicine Creek, *supra* note 19, Article III.

140. Department of Game v. Puyallup Tribe, Inc., 70 Wn. 2d 245, 247, 422 P.2d 754, 755 (1967).

141. *Puyallup I*, *supra* note 1, at 394 n.1.

142. *Id.* at 394-95 n.1.

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

144. *Puyallup I*, *supra* note 1, at 397.

rights existed in Article II, then the Court would have found that they "continued" after the reservation was transferred to fee holders. Because the Court did not so find, it must have read the treaty as unambiguously providing fishing rights only in Article III.

In *Puyallup II* the Supreme Court interpreted the "in common with" provision of Article III as reserving to the Puyallups the right to a commercial net fishery in the river.[145] The Department of Game was not allowed to abrogate this treaty right by prohibiting all Puyallup net fishing for steelhead. Such a prohibition discriminated against the Puyallups by denying them the exercise of their federal treaty right to fish with nets.[146] In other words, under the general rule of construction that ambiguous language is interpreted liberally in the Indians' favor, "in common with" reserved to the Puyallups a "supercitizenship" right greater than the rights now secured to them by the equal protection clauses of the fifth and fourteenth amendments. But the Supreme Court also held that Washington still had the power to regulate this "supercitizenship" right so as to accomodate the Puyallups' fishing rights with the fishing rights of non-treaty fishermen.[147]

In *Puyallup III* the Supreme Court noted that the Puyallups had asserted that the Medicine Creek Treaty gave the tribe an exclusive right to fish in the Puyallup River which amounted to "ownership" of the steelhead.[148] The Court rejected this assertion by repeating its interpretation of the treaty in *Puyallup I* that the Puyallups have no exclusive fishing rights, but only a right "in common with" non-treaty fishermen.[149]

The Puyallups also argued in *Puyallup III* that Article II reserved to them the right to fish free of state interference.[150] The Court also rejected this argument, but, unfortunately for clarity's sake, appeared to limit its rejection to the specific facts of the case—that the Puyallups no longer hold the fishing

145. *Puyallup II, supra* note 4, at 45.
146. *Id.* at 48-49.
147. *Id.* at 49.
148. *Puyallup III, supra* note 4, at 2619 n.5.
149. *Id.* at 2622-23.
150. *Id.* at 2622.

grounds for their exclusive use.[151] The dissent argued that Article II provided "in plainest English" for "exclusive" fishing rights for the Puyallups[152] and that the majority also interpreted Article II as including exclusive fishing rights.[153] The majority has never precisely said that and, as shown above,[154] if the majority had interpreted Articles II and III in that manner, it would have found that such exclusive fishing rights still "continued" in the Puyallups. Therefore, it must be that the majority only appeared to limit its rejection of the Puyallups' argument to the specific facts that the Puyallups no longer own the reservation. The Court's actual meaning can be inferred from footnote thirteen: Article III, not Article II, is the source of the Puyallups' treaty fishing rights.[155] The fact that the Court made no distinction between the first two *Puyallup* cases and the *Puyallup III* case is further support that Article II does not reserve exclusive fishing rights.

In effect, the Court has looked at the face of the treaty, noted that Article III specifically mentions fishing rights while Article II is silent as to fishing rights, and decided that the treaty is clear in that Article III is the only source of fishing rights. However, the Court has determined that Article III's phrase "in common with" is ambiguous and is therefore interpreted in the Puyallups' favor to reserve a "supercitizenship" right to an allocation of fish. As the dissenting opinion shows,[156] the Court's

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151. *Id.* at 2622. The Court stated:

> Such an interpretation clashes with the subsequent history of the reservation . . . Pursuant to two acts of Congress . . . the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000 acre reservation. None of the 22 acres abuts on the Puyallup River. Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their "exclusive use." (citation omitted).

However, the Court also said that such an interpretation "clashes with . . . the facts of this case." *Id.* After the Court discussed the passage of the Puyallup reservation into private ownership, it repeated that as a matter of treaty construction the Medicine Creek Treaty did not reserve any exclusive fishing right. *Id.* at 2623.

152. *Id.* at 2625 (Brennan & Marshall, JJ., dissenting).

153. *Id.* at 2624.

154. *See* notes 143-44 and accompanying text *supra*.

155. *Puyallup III*, *supra* note 4, at 2622 n.13.

156. *Id.* at 2624-27 (Brennan & Marshall, JJ., dissenting). *See generally* McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Winters v. United States, 207 U.S. 564 (1908).

interpretation that Article II does not reserve any fishing rights may be criticized. However, there is support for it.

The reason for the general rule that, when rights are not clearly stated in a treaty, ambiguous expressions should be resolved in the Indians' favor is to rectify the assumed inequality of bargaining positions between the tribes and the federal government.[157] However, this assumed inequality of bargaining positions was not as great when the Pacific Northwest treaties were signed as when most other treaties were signed. As the Ninth Circuit said when it affirmed the *Boldt* decision, "Although the United States dealt from a clearly superior position, the treaties were negotiated at arm's length. The treaties were not dictated to a defeated nation."[158] Thus there is less reason to apply this general rule to the Medicine Creek Treaty than there is to apply it to treaties of those tribes which bore the brunt of westward expansion before their treaties were signed.

The Supreme Court has recognized several limitations upon this general rule. These limitations support the *Puyallup III* majority's interpretation that the Medicine Creek Treaty's only source of fishing rights is Article III. These limitations are: (1) a canon of construction is not a license to disregard clear expressions of tribal and congressional intent;[159] (2) even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties;[160] (3) courts may not vary treaty terms to meet alleged injustices—such generosity is for the Congress;[161] and (4) Indian rights cannot be determined "under any acceptable rule of interpretation" merely because the Indians thought the right existed.[162] Also, because Indian treaties are analogous to international treaties,[163] general rules of regular treaty construc-

157. Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 617 (1975).

158. United States v. Washington, 520 F.2d 676, 684 (9th Cir. 1975).

159. DeCoteau v. District County Court, 420 U.S. 425, 447 (1975).

160. Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1970).

161. Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945).

162. Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 180 (1947).

163. *See* The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871). *But see* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (tribes are "domestic dependent nations").

tion lend further support to the Supreme Court's interpretation that Article III is the sole source of fishing rights. These rules of regular treaty construction are: (1) a treaty should be construed as a whole;[164] (2) a treaty should be construed so as to give a reasonable and sensible meaning to all of its provisions;[165] (3) with a view to giving a fair interpretation to the whole;[166] (4) all provisions relevant to the matter under consideration should be considered;[167] and (5) where reasonably possible, meaning should be given to all the words.[168]

The *Puyallup III* majority, in conformity with the above rules of construction, examined the literal wording of the Medicine Creek Treaty to determine whether the treaty provided for the reservation of fishing rights. Since the majority found that fishing rights were reserved in Article III, it must be that the Court felt that the special rules of construction of ambiguous phrases were inapplicable to that particular question.[169] However, the full Court undoubtedly found Article III's reservation of fishing rights ambiguous, and so interpreted "in common with" in the Puyallups' favor to reserve them the "supercitizenship" right to harvest steelhead.[170] This interpretation is supportable and meets the other two special rules of construction of Indian treaties when rights are not clearly stated in them.

The second general rule is that ambiguous phrases should be interpreted as the Indians would have understood them at the

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164. Perkins v. Elg, 307 U.S. 325 (1939).

165. Collins v. O'Neil, 214 U.S. 113 (1909).

166. Sullivan v. Kidd, 254 U.S. 433 (1920).

167. Perkins v. Elg, 307 U.S. 325 (1939).

168. Factor v. Laubenheimer, 290 U.S. 276 (1933). However, a federal district court has held that a special provision in a treaty following one of a general nature does not necessarily show an understanding that the general provision does not include that which is special. The Roseville, 11 F. Supp. 151 (1935). Yet the same court said that the use of the word "also" shows an intent to give something which had not already been given. *Id.* at 153. It follows that Article III's use of the word "further" supports the interpretation that no fishing rights were reserved to the Puyallups in Article II.

169. *See* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975).

170. In addition to this "supercitizenship" right to fish reserved by their treaty, the Puyallups also have the regular citizenship right to sportfish for steelhead. *See* notes 225-26 *infra*.

time of the particular treaty.[171] Since the Puyallups were making their livelihood by fishing, it is only reasonable to assume that they intended to continue doing so. Allocating the steelhead was the only practical method of recognizing this presumed intent. However, it was suggested before the state supreme court that some of the other Northwest treaties expressly reserved exclusive on-reservation fishing rights,[172] and that if the Puyallups had wanted to reserve any special proportion of fish, they could have done so.[173] The Supreme Court quite properly rejected such an interpretation by adopting allocation of fish as the solution to balancing the interests in the fish.

The final special rule of construction of Indian treaties when rights are not clearly stated is that they be liberally construed in favor of the Indians.[174] The conservative construction of the "in common with" language of Article III would be that the Puyallups only reserved those rights which are now secured to them by the equal protection clauses of the fifth and fourteenth amendments.[175] Thus the Supreme Court's final interpretation of the Medicine Creek Treaty in *Puyallup III* satisfies the liberal construction rule by reserving a "supercitizenship" right to harvest forty-five percent of the natural run of the steelhead.

Finally, other treaty language used by the Supreme Court to interpret Indian hunting and fishing rights also lends support to the Court's interpretation of the Medicine Creek Treaty.[176] For

171. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

172. *See* note 62 *supra*.

173. Department of Game v. Puyallup Tribe, 86 Wn. 2d 664, 692-93, 548 P.2d 1058, 1076-77 (Rosellini & Brachtenbach, JJ., concurring).

174. *See, e.g.*, Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

175. This was the interpretation of the Washington Supreme Court. Department of Game v. Puyallup Tribe, Inc., 86 Wn. 2d 664, 679, 548 P.2d 1058, 1069 (1976). The rationale supporting this construction is that when the treaty was written, Indians were not citizens and, in addition, some of the normal methods of obtaining citizenship were not open to them. Thus, according to the state supreme court, the conservative interpretation of "in common with" is fair because it reserves to the Puyallups certain rights that they otherwise would not clearly have retained at the time of the treaty. *Puyallup III* has rejected this argument.

176. The three Supreme Court cases interpreting Indian hunting and fishing rights which are not discussed in this comment are: Tulee v. Washington, 315 U.S. 681 (1942); New York *ex rel.* Kennedy v. Baker, 241 U.S. 556 (1916); Ward v. Race Horse, 163 U.S. 504 (1896). Other commentators agree that these cases created, by dicta, a body of law

example, in *United States v. Winans*,[177] the issue was whether state property law could, in effect, completely abrogate treaty rights of certain Yakima Indians to fish at a particular fishing ground.[178] The treaty involved was negotiated by Governor Stevens and followed the same pattern as the Medicine Creek Treaty in that the Yakimas "cede[d], relinquish[ed], and convey[ed] to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them."[179] A reservation was also reserved for the Yakimas in Article II. However, the Yakima treaty differed fundamentally from the Medicine Creek Treaty because Article III read, "the exclusive right of taking fish in all the streams where running through or bordering said reservations, is further secured . . . as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."[180]

The defendants were operating a fishing wheel as authorized by state law in such a manner as to completely prohibit the Yakimas from reaching a "usual and accustomed" fishing ground.[181] Because they were not allowed to fish at all on the grounds, the Yakimas sued to enforce their treaty right to fish "in common with" the non-treaty fishermen.[182] The lower court had held that the Yakimas were on an equal footing with other citizens who had not received a state permit for a fishing wheel at the particular fishing ground.[183] The Supreme Court said,

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authorizing state regulation of Indian hunting and fishing treaty rights. *See, e.g.*, Johnson, *The State Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 219-22 (1972); Comment, *Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study*, 51 WASH. L. REV. 61, 76-79 (1975).

177. 198 U.S. 371 (1905).

178. At least one recent commentator has distinguished *Winans* from the *Puyallup* cases on the grounds that *Winans* did not involve an attempt by the state to regulate Indian treaty fishing rights. *See* Johnson, *The State Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 221 (1972). This distinction is tenuous at best because the issue in *Winans* was what effect, if any, state law could have on Indian treaty rights.

179. Treaty Between the United States and the Yakima Nation of Indians, 12 Stat. 951 (1859).

180. *Id.*, Article III. The language in this treaty is further support that there are no exclusive on-reservation fishing rights reserved to the Puyallups in Article II of their treaty. If there were, the "exclusive right" language in the Yakima treaty would be completely superfluous.

181. 198 U.S. at 380.

182. *Id.* at 372.

183. *Id.* at 380.

"This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."[184] The Court then held that to give the treaty effect, it had to be interpreted to give the Yakimas an easement to reach their fishing grounds.[185] The Yakimas were secured in the enjoyment of their right to fish "in common with" other citizens, and that right could not be completely taken away by state regulation of fish wheels. The Court also stated, in dicta, "Nor does it [the treaty right] restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."[186] The Court must have meant that although the Yakimas reserved, through the treaty language "in common with," a "right" greater than that which equal protection provides, that "right" may be subject to state regulation which does not completely abrogate it.

Menominee Tribe of Indians v. United States[187] was decided the same day as *Puyallup I.* The issue was whether the hunting and fishing rights of the Menominees had been abrogated by Congress through the Menominee Indian Termination Act of 1954.[188] The Wolf River Treaty[189] was involved, and it, too, differed significantly from the Medicine Creek Treaty. The Medicine Creek Treaty explicitly provides for fishing rights in its Article III.[190] The Wolf River Treaty, however, does not specifically mention these rights. This treaty, in Article II, simply states that the United States reserved the Wolf River Reservation for the Menominees "for a home, to be held as Indian lands are held."[191] The Court in *Menominee* apparently regarded the treaty's lack of any provision for hunting and fishing rights as an ambiguity. The rule of construction that ambiguities should

184. *Id.*

185. *Id.* at 384.

186. *Id.*

187. 391 U.S. 404 (1968).

188. 25 U.S.C. §§ 891-902 (1970). The Menominee Termination Act has been repealed and the tribe has been restored to full federal treaty status. Menominee Restoration Act, 25 U.S.C. § 903 (Supp. 1975). If their hunting and fishing rights had been abrogated, the Menominees were asking for just compensation for their loss. 391 U.S. at 407.

189. Treaty Between the United States and the Menominee Indians, 10 Stat. 1064 (1854) [hereinafter cited as the Wolf River Treaty].

190. Medicine Creek Treaty, *supra* note 19, Article III.

191. Wolf River Treaty, *supra* note 189, Article II.

be construed in the Indians' favor was implicitly applied by the Court. The treaty was held to authorize the Menominees to maintain on their reservation their way of life which included hunting and fishing.[192] The Court then found that the Termination Act, which had removed the federal government's special recognition of the Menominee Tribe, had not abrogated these implied rights to hunt and fish.[193] However, the Court did not determine the precise nature of those rights nor the extent to which the state could regulate them.[194]

The Medicine Creek Treaty is clear as to what fishing rights it reserves, while the Wolf River Treaty is ambiguous.[195] Therefore the rule of construction behind the *Menominee* holding was not applied in *Puyallup.*

In *Antoine v. Washington*[196] the defendant Colville Indians had been convicted in state court of hunting and possession of deer during closed season[197] on land of a former reservation which the Colville Confederated Tribes had ceded to the United States under a congressionally ratified and adopted agreement.[198] By that agreement the Colvilles ceded "all their right, title, claim, and interest in" the land,[199] but the agreement also expressly provided that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in any way abridged."[200] The Colvilles defended on the ground that this provision retained for them the exclusive, absolute and unrestricted rights to hunt and fish, thus limiting governmental regulation of those rights to federal regulation and precluding application of state law to them.[201] The Washington Supreme Court interpreted the provision in question as merely a promise by the United States that so long as it re-

192. 391 U.S. at 406.

193. *Id.* at 412-13. Because the Court found that the rights had not been abrogated, it was unnecessary to consider the claim for just compensation.

194. *Id.* at 409 n.10.

195. *See* notes 169-75 and accompanying text *supra.*

196. 420 U.S. 194 (1975).

197. *Id.* at 196. The charges were brought under WASH. REV. CODE §§ 77.16.020-.030 (1974).

198. Agreement of May 9, 1891. *See* 420 U.S. at 196.

199. *See* 420 U.S. at 208 (Douglas, J., concurring).

200. Agreement of May 9, 1891. *See* 420 U.S. at 196.

201. 420 U.S. at 197.

tained any ceded land and allowed others to hunt thereon, the Colvilles would also be allowed to hunt.[202] The United States Supreme Court rejected both contentions and struck a middle ground. The Court examined the "in common with" provision and declared that the state court's interpretation could not be supported.[203] Congressional legislation ratifying the agreement had to be interpreted as granting the Colvilles a greater "right" than that enjoyed by non-treaty hunters or else the agreement would have preserved nothing for the Colvilles.[204] The Court then held that although Washington could not qualify the Colvilles' hunting and fishing rights, it could regulate those rights provided the state met the *Puyallup I* "appropriate standards" requirement.[205] The Court defined "appropriate standards" as meaning that the state must demonstrate that its regulation is a reasonable and necessary conservation measure, and that its application to Indian treaty rights is necessary in the interest of conservation.[206]

Certain conclusions can be drawn from the foregoing concerning the constitutional interest Indians have under federal treaties, as well as the Puyallups in particular under the Medicine Creek Treaty. Just as the states, neither individual Indians nor Indian tribes "own" fish and game. Any particular tribe's interest in fish and game is initially determined by its treaty with the federal government, and different treaty language preserves different treaty rights. Because Indians traditionally enjoyed exclusive hunting and fishing rights on their reservations, these rights are inferred where not specifically mentioned in the treaty or agreement establishing a given reservation, unless such rights were relinquished by the treaty. The Puyallups relinquished their fishing rights to the United

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202. State v. Antoine, 82 Wn. 2d 440, 449-50, 511 P.2d 1351, 1357-58 (1973).

203. 420 U.S. at 206.

204. *Id.* This is a point at which the Washington Supreme Court differs drastically in its approach to interpreting the "in common with" treaty language. The state court has said that such language insured equal protection to Indians, a right "that they otherwise would not clearly have retained at the time." Department of Game v. Puyallup Tribe, Inc., 86 Wn. 2d 664, 679-80, 548 P.2d 1058, 1069-70 (1976). *See* note 173 and accompanying text *supra.*

205. 420 U.S. at 207. Because the language, "shall not be taken away or in anywise abridged," did not bar necessary state regulation, it appears that the Supreme Court does not define state regulation of Indian treaty hunting and fishing rights as a taking.

206. *Id.*

States in Article I of the Medicine Creek Treaty. In Article III, the Puyallups preserved the right to fish both on- and off-reservation "in common with" non-treaty citizens. No exclusive right to on-reservation fishing is inferred from Article II. However, Article III, by its phrase "in common with" preserves for the Puyallups a right to fish which is construed as being greater than the right possessed by non-treaty fishermen. This "supercitizenship" right entitles the Puyallups to harvest forty-five percent of the natural run of steelhead with nets.

IV. SOURCE OF STATE POWER TO REGULATE INDIAN FISHING RIGHTS

The early approach to determining the degree of autonomy held by Indian tribes recognized that they were not independent foreign states.[207] Nevertheless, the Court, observing the special status the Indians had with the federal government, held that the states had no jurisdiction to enforce their laws in Indian country.[208] States could assert such jurisdiction only if the particular tribe consented, if the tribe's treaty allowed the intervention, or if federal laws authorized the intervention.[209]

The modern position of the Supreme Court recognizes that Indian tribes are unique aggregations which possess attributes of sovereignty, among which is the power to regulate their internal and social relations.[210] The Court now holds that states, absent contrary acts of Congress, may exert their power over tribes so long as the states do not infringe upon the Indians' right of self-governance.[211] Indian "sovereignty" merely provides a backdrop for determining whether treaties and federal statutes pre-empt a particular form of state action.[212] The trend of analysis has moved away from the idea of "sovereignty" as a bar to state jurisdiction. The focus is now whether state jurisdiction has been pre-empted by federal law.[213]

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207. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (tribes are not foreign states).

208. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

209. *Id.* at 560.

210. United States v. Mazurie, 419 U.S. 544, 557 (1975).

211. Williams v. Lee, 358 U.S. 217 (1959).

212. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973).

213. *Id.*

A treaty with an Indian tribe has the force and effect of a treaty with a foreign nation,[214] and all treaties are part of the supreme law of the land.[215] There can be no doubt that if the Medicine Creek Treaty reserved all the anadromous fish for the Puyallups, then state regulation of the number of fish harvested would be pre-empted. Also, as the Court said in *Puyallup I*, if the treaty reserved the exclusive right to fish in the usual and accustomed manner, state regulation as to the method of fishing would be pre-empted.[216] However, the treaty only reserved a "supercitizenship" right to fish.[217] Thus, the Supreme Court has established the rule of law that an Indian treaty right to fish is not *per se* shielded by the supremacy clause from necessary state regulation.

Perhaps the issue most difficult for proponents of the Indians' position to understand is why the Supreme Court has not found automatic federal pre-emption of state regulation of Indian hunting and fishing rights.[218] In fact, recent commentators consider this rule to be an aberration of Indian law.[219] Whether or not this rule is an aberration is purely academic because the Supreme Court appears bent on following this conservation necessity rule. It is therefore essential to understand the Court's refusal to find federal pre-emption under the supremacy clause. The first step is to distinguish between state "qualification" and state "regulation."[220]

That the state cannot qualify the Indians' treaty right to fish is derived from *Tulee v. Washington*,[221] which held that a state

214. United States v. McBratney, 104 U.S. 621 (1881); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

215. U.S. CONST. art. VI, § 2.

216. *Puyallup I*, *supra* note 1, at 398.

217. *See* text accompanying notes 145-47 *supra*.

218. For example, in affirming the *Boldt* decision, the court of appeals stated that the Medicine Creek Treaty was "express federal law" which pre-empted all state regulation, but then it held that the state may regulate. United States v. Washington, 520 F.2d 676, 684-86 (9th Cir. 1975). *Puyallup III*, in effect, rejected this contention that the treaty itself pre-empted the state.

219. 2 D. Getches, D. Rosenfelt, & C. Wilkinson, Cases and Materials on Federal Indian Law 930 (Aug. 1977) (unpublished version).

220. For example, Judge Boldt stated that he found it very difficult to comprehend how a treaty right, guaranteed as the supreme law of the land by the Constitution, cannot be "qualified" but the exercise of that right may be "regulated." United States v. Washington, 384 F. Supp. 312, 337 (W.D. Wash. 1974).

221. 315 U.S. 681 (1941).

cannot require Indian treaty fishermen to pay a license fee before exercising their treaty right to fish.[222] Such a requirement would act as a charge for the exercise of the very right the appellant's ancestors intended to reserve for him.[223] The state would thus be able to completely abrogate that treaty right by "qualifying" it upon his individual ability to pay the license fee. Such state "qualification" is specifically rejected by the Supreme Court.[224]

The distinction between state "qualification" and "regulation" can be shown by considering the two distinct rights treaty Indians have to fish. For example, under the allocation plan approved by *Puyallup III*, the Medicine Creek Treaty gives the Puyallups the "supercitizenship" right to harvest forty-five percent of the natural run of steelhead. In addition, their citizenship makes them eligible to sportfish on an equal basis with non-treaty fishermen.[225] If they decide to sportfish, after harvesting their treaty allocation of fish, the state could "qualify" this right by charging them a license fee and requiring them to observe all its regulations. Thus, the state may only regulate the treaty right to fish, but it may both regulate and qualify the citizenship right to fish.[226]

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222. *Id.* at 684. In response to the appellant's claim that the treaty gave him an unrestricted right to fish free from state regulation of any kind, the Court stated in dicta, "The treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing as are necessary for conservation of the fish." *Id.*

223. *Id.*

224. *Id.* However, the *Puyallup III* majority, when discussing *Puyallup I*, stated, "The state may qualify the Indians' right to fish 'at all usual and accustomed places.' " *Puyallup III*, *supra* note 4, at 2620. It appears the majority meant to use the word "regulate" instead of "qualify" because *Puyallup I* specifically held that the state could not qualify the Puyallups' right to fish. *Puyallup I*, *supra* note 1, at 399. If the majority really meant to use the word "qualify," it was referring to the Puyallups' regular citizenship right to fish. *See* text accompanying notes 225-26 *infra*.

225. Indians are now citizens of the United States by the Act of June 2, 1924, 43 Stat. 253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U.S.C. § 1401(a)(2) (1970). Apparently the Supreme Court did not realize that treaty Indians have two rights to fish when it stated in *Puyalup II*, "There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed." *Puyallup II*, *supra* note 4, at 48. The Puyallups were free to join the hook-and-line fishing. There was discrimination because the ban against all net fishing completely abrogated the Puyallups' treaty right to fish, not because only non-Indians could participate in hook-and-line fishing.

226. Regulation of the treaty right must meet the necessity test, to be discussed later. *See* § V *infra*.

The second step in understanding why the Supreme Court adheres to the conservation necessity rule is to analogize state regulation of Indian fishing to modern state regulation of interstate commerce. After all, the Constitution gives the federal government power to deal with Indians under the commerce clause[227] as well as under the treaty clause.[228] Further, when the treaties with the Northwest fishing tribes were made, the tribes were engaged in commerce as they made their livelihood by fishing.[229] The Supreme Court recognized this in *Puyallup I* when it stated, "We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present."[230] Thus, the treaties with the Pacific Northwest fishing tribes can be interpreted as the result of the commerce power as well as the treaty power.

The commerce clause reads, "Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."[231] Despite this grant of power to the federal government, the states retain police power to legislate in matters of local concern.[232] Not every exercise of local power is invalid merely because it somehow affects the free flow of commerce.[233] Regulation designed to protect and conserve natural resources such as anadromous fish is undoubtedly within this police power,[234] just as Detroit's clean air statute was held to be legislation falling within the traditional concept of police power.[235] Furthermore, it has been held that the

227. U.S. CONST. art. I, § 8, cl. 3.

228. U.S. CONST. art. II, § 2, cl. 2. *See* Pierce v. State Tax Comm'n, 29 App. Div. 2d 124, 286 N.Y.S. 2d 162 (1968).

229. The Indians of the Northwest Coast were among the few hunting and gathering societies in the world which produced wealth beyond that needed for subsistence, and the basis of their aboriginal economy was fishing. UNCOMMON CONTROVERSY, *supra* note 125, at 3.

230. *Puyallup I, supra* note 1, at 391.

231. U.S. CONST. art. I, § 8.

232. *See, e.g.*, Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531-32 (1949).

233. *See, e.g.*, Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976); Freeman v. Hewit, 329 U.S. 249, 253 (1946).

234. *See* § II *supra*.

235. Huron Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960). *See* text accompanying notes 99-104 *supra*.

congressional power to regulate commerce with Indians is not exclusive.[236] Just as states may act in many areas of interstate commerce concurrently with the federal government,[237] so too, as the *Puyallup* decisions acknowledge, they may act concurrently in the area of Indian affairs in the interest of conservation.

Evenhanded local regulation of interstate commerce to effectuate a legitimate local public interest is valid unless it is pre-empted by federal action or it unreasonably burdens interstate commerce.[238] In determining whether state regulation of interstate commerce has been pre-empted, congressional intent to pre-empt "is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state."[239] The test for pre-emption of state laws for conservation of fish and game is even stronger. Because conservation is a field which has been traditionally occupied by the states, pre-emption will arise only if it is "the clear and manifest purpose of Congress."[240] Under this test, there has been no express federal pre-emption of state regulation of Indian fishing rights.

There is little doubt that Congress, by its power to regulate commerce with the Indian tribes, could expressly pre-empt the states from regulating Indian treaty rights to hunt and fish.[241] However, Congress has not seen fit to do so. When it affirmed the *Boldt* decision, the Ninth Circuit said that treaties reserving hunting and fishing rights are themselves "express federal law" which pre-empt state power to regulate.[242] However, the Supreme Court ignored this interpretation of such treaties in *Puyallup III.* The Ninth Circuit itself later said in the same opinion that the state could still regulate in certain situations.[243]

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236. Aqua Caliente Band of Mission Indians' Tribal Council v. Palm Springs, 347 F. Supp. 42 (D.C. Cal. 1972) (*vacated and remanded on other grounds by unpublished order,* Jan. 24, 1975).

237. *See, e.g.,* Huron Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Minnesota Rate Cases, 230 U.S. 352 (1913); Gibbons v. Ogden, 22 U.S. 1 (1824).

238. *See, e.g.,* Huron Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Service Transfer Co. v. Virginia, 359 U.S. 171 (1959).

239. Savage v. Jones, 225 U.S. 501, 533 (1912).

240. Douglas v. Seacoast Products, 97 S.Ct. 1740 (1977); Jones v. Rath Packing Co., 430 U.S. 519 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

241. *See* United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876).

242. United States v. Washington, 520 F.2d 676, 684 (9th Cir. 1975).

243. *Id.* at 686.

The closest Congress has come to expressly pre-empting state regulation was Public Law 280.[244] This act granted to certain named states the jurisdiction over civil and criminal violations on Indian reservations. PL-280 also provided that all states having constitutional disclaimers of jurisdiction over Indian lands, could assume such jurisdiction by action of the state legislature, or by amendment to the state constitution.[245]

The general grant of criminal jurisdiction over Indians in PL-280 is subject to the exclusion that "Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."[246] If this exclusion proviso limits state jurisdiction to regulate when necessary for conservation, it appears to limit only state criminal jurisdiction. The grant of civil jurisdiction does not include any exclusion pertaining to treaty hunting, trapping, or fishing rights.[247] The record is clear that the congressional intent in enacting PL-280 was to combat Indian lawlessness on the reservations.[248] The Supreme Court has held that legislative history is silent as to the reasons behind the exclusion proviso.[249] It might be too imprecise to infer that the imperfect parallelism of the provisions is significant.[250] All that is certain is that the purpose of the proviso was to protect federally reserved fishing rights,[251] and that the exclusion proviso is not absolute, as it is stated in terms of state deprivation of Indian treaty rights to hunt, trap,

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244. 18 U.S.C. § 1162 (1970) (criminal jurisdiction), 28 U.S.C. § 1360 (1970) (civil jurisdiction) [hereinafter cited as PL-280]. In 1968, Congress amended PL-280 so that before any state could assert jurisdiction over Indian lands, it must first obtain the consent of the tribes. 25 U.S.C. § 1326 (1970).

245. State response to PL-280 has not been uniform. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 567-75 (1975).

246. 18 U.S.C. § 1162(b) (1970).

247. 18 U.S.C. § 1360 (1970).

248. *See* H.R. REP. No. 848, 83d Cong., 1st Sess.; S. REP. No. 699, 83d Cong., 1st Sess.; 99 Cong. Rec. 9962, 10782, 10928, *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 2409. *See also* Bryan v. Itasca County, 426 U.S. 373 (1976); Metlakatla Indian Community v. Egan, 369 U.S. 45, 57 (1962).

249. *See* Metlakatla Indian Community v. Egan, 369 U.S. 45, 57 (1962).

250. *See id.*

251. *Id.*

and fish.[252] *Puyallup II* established that state regulation may not completely prohibit the exercise of such rights,[253] but *Puyallup III* also established that the state may regulate those rights when necessary for conservation.[254] The Supreme Court has never held that state regulation necessary for conservation constituted a deprivation.[255] Therefore, even though PL-280 came close to expressly pre-empting state regulation, it failed to do so.[256]

The second time the federal government came close to pre-empting state regulation was with the Secretary of the Interior's promulgation of off-reservation treaty fishing regulations in 1967.[257] The regulations attempted to provide a framework within which the exercise of off-reservation Indian fishing rights could be regulated by the federal government instead of by the states. However, all the regulations provide for is the identification of those Indians entitled to exercise treaty fishing rights off their reservations and the issuance of identification cards to them.[258] The purposes of the regulations include encouraging cooperation between the fishing tribes and the states.[259] These regulations

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252. *See* note 246 *supra*.

253. *Puyallup II*, *supra* note 4, at 48.

254. *Puyallup III*, *supra* note 4, at 2622-23.

255. The closest the Court has come to holding that state regulation of treaty rights constituted a taking was in Menominee Tribe v. United States, 391 U.S. 404 (1968), but the majority avoided the issue by finding that the Menominees' treaty rights had not been extinguished by the Menominee Indian Termination Act of 1954.

256. In contrast to the *Puyallup* situation, a federal court held in Klamath & Modoc Tribes v. Maison, 139 F. Supp. 634 (D. Ore. 1956), that PL-280 did not confer criminal jurisdiction to regulate treaty hunting rights where no such jurisdiction existed before the passage of PL-280. The treaty involved only provided for exclusive on-reservation fishing. Because hunting rights were not mentioned on the face of the treaty, those rights were ambiguous and therefore interpreted in the Modocs' favor. Thus, on-reservation hunting and trapping rights were exclusive, and PL-280's exclusion proviso prevented the state from assuming any criminal jurisdiction to regulate those rights.

257. 25 C.F.R. § 256 (1977). There is some question as to the Secretary's authority to issue these regulations. *See Recent Developments, Regulation of Treaty Indian Fishing*, 43 WASH. L. REV. 670, 680-83 (1968).

258. 25 C.F.R. § 256.3.

259. *Id.* § 256.1(a)(5). This purpose of encouraging cooperation between the states and tribes is similar to the evolving concept of cooperative federalism espoused in De Canas v. Bica, 424 U.S. 351 (1976); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973); New York Dep't of Social Services v. Dublino, 413 U.S. 405 (1973); Goldstein v. California, 412 U.S 546 (1973). Also, the American Indian Policy Review Commission has recently recommended that the federal government stimulate the tribes and states to enter into agreements concerning off-reservation fishing by both treaty and non-

are not comprehensive and do not show an intent to pre-empt state regulation of Indian fishing.

Apparently the Supreme Court is of the opinion that until Congress satisfies the "clear and manifest purpose" test, it will not find federal pre-emption of the traditional power of states to regulate fish and game. Thus, federal action to date has been insufficient to constitute federal pre-emption of state regulation of Indian treaty rights. This more stringent test for finding pre-emption of state fish and game regulation may explain the "aberration" of Indian law which allows the state to impose necessary conservation measures to preserve the fish runs.

Absent applicable federal legislation, the question is whether the state action infringes on the right of reservation Indians to make their own laws and be ruled by them.[260] Indian sovereignty provides a backdrop against which applicable treaties and federal statutes are read.[261] *Puyallup III* satisfies these general principles of Indian law by its statement that the state has no interest in how the tribe's treaty allocation of steelhead is divided among the tribal fishermen.[262] Thus the state's power to regulate the Puyallups' treaty right is to ensure that the total harvest by net does not exceed the tribe's treaty allocation.

The question by analogy to state regulation of interstate commerce is phrased in terms of the *Cooley* doctrine:[263] whether the concept of Indian sovereignty requires such a uniform national policy in favor of Indians so as to outweigh the need for non-uniform state regulation to meet the complexities of local conservation requirements. In subjects where activities of legitimate local concern overlap with the national interests expressed by

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treaty fishermen. AMERICAN INDIAN POLICY REVIEW COMMISSION, 94th Cong., FINAL REPORT 187 (Comm. Print 1977).

260. Williams v. Lee, 358 U.S. 217 (1959).

261. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). *See also* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

262. *Puyallup III, supra* note 4, at 2624.

263. In Cooley v. Board of Wardens, 53 U.S. 299 (1851), the Court took a middle position between the view that the commerce clause vested exclusive regulatory power in Congress, and the opposite view that the commerce clause imposed no limitations, in itself, upon state regulatory power in the absence of superseding federal legislation. If the problem in question demands uniform national regulation, in order to promote the free trade objective of the framers, the power to legislate is exclusively in Congress even though Congress has not exercised its power.

the commerce clause, it is established that courts, in the absence of congressional guidance, must make "delicate adjustment of the conflicting state and federal claims."[264] Courts thereby attempt "the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce,"[265] and in undertaking this task, courts are confronted with a problem of balance.[266] If a legitimate local purpose is found, the extent of the burden upon national commerce that is tolerated depends on the nature of the local interest, and on whether it could be promoted as well with a lesser impact on interstate activities.[267] State conservation of fish and game is clearly a legitimate local purpose, just as Indian treaty rights are a national interest; therefore, the balancing process used in commerce clause analysis is appropriate to solving the Indian fishing problem.

Conservation of anadromous fish is vital to both the treaty Indians and Washington. But the complexities of each fishing rights case, as well as the intricacies of conservation needs, should clearly outweigh any policy of national uniformity relating to fishing rights. For example, the Pacific Northwest contains about two thousand streams, and frequently more than one run of the five species of salmon occurs in each stream. Hence, there are about ten thousand salmon spawning units, plus two thousand steelhead spawning units.[268] The state, not the federal government, has developed a comprehensive conservation pro-

264. Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) (quoting H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 553 (1949) (Black, J., dissenting)).

265. Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) (quoting Freeman v. Hewit, 329 U.S. 249, 253 (1946)).

266. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

267. *Id.* at 142. On similar reasoning, the Ninth Circuit Court of Appeals held that direct regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved it is unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power. United States v. Washington, 520 F.2d 676, 686 (9th Cir. 1975). This is valid only if conservation is given the restrictive meaning of merely insuring optimum spawning escapement for perpetuation of a run. *See id.* However, the proper definition of conservation includes allocation among user groups as well as protection of treaty Indians' supercitizenship rights. *See* text accompanying notes 305-07 *infra*. Thus, the "lesser impact" rule for state regulation of interstate commerce does not apply to state regulation of Indian treaty rights in the interest of "conservation" if conservation is properly defined as including recognition of Indian treaty rights.

268. Royce, *Concepts and Practices in the Conservation of Fishery Resources*, in THE FISHERIES: PROBLEMS IN RESOURCE MANAGEMENT 21 (J. Crutchfield ed. 1965).

gram and the expertise necessary to administer it.[269] The Supreme Court agrees, as shown by its *Puyallup III* decision and its dismissal of the appeal in *State v. Bundrant.*[270] In that case the Alaska court had stated, "The continued abstention from federal regulation of fishing in territorial waters, despite constitutional power to do so, confirms the wisdom of the traditional approach of local, non-uniform management of fisheries resources."[271]

In its balancing of interests in *Puyallup III,* the Court placed particular importance on the state's contribution of artificially propagated fish to the total supply of steelhead. The Court had noted this earlier in *Puyallup II* when it directed the state to make a fair apportionment of steelhead.[272] There, the present run of the steelhead was found to consist of both natural and planted fish. The Court further observed that eighty percent of the revenues necessary to run the state hatcheries were derived from license fees paid by sportsmen.[273] The majority in *Puyallup II* suggested that this funding issue could be considered by the state when deciding the ultimate allocation formula.[274] The concurring opinion succinctly stated, "The treaty does not oblige the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen."[275] This concurring opinion also stated that the Puyallup net fishery could not take so many fish as to deplete the natural run.[276] On the remand, the state courts found that because the Medicine Creek Treaty specifically provided that the Indians "shall not take shellfish from any beds

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269. *See Recent Developments, Regulation of Treaty Indian Fishing,* 43 WASH. L. REV. 670, 682 (1968). The commentator even suggested that because Congress recognized this, it has decided not to pre-empt state regulation of Indian hunting and fishing rights. *Id.* at 682-83 n.63.

270. 546 P.2d 530 (Alaska 1976), *appeal dismissed,* 97 S.Ct. 40 (1977). Defendants were charged with violation of state law relating to crabbing in the Bering Sea. The state supreme court held that regulation of crabbing in the Bering Sea both within and without the three-mile limit, was not under exclusive federal jurisdiction despite the Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1970), and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1970).

271. 546 P.2d at 539.

272. *Puyallup II, supra* note 4, at 48.

273. *Id.* at 47-48.

274. *Id.* at 48.

275. *Id.* at 49 (Burger, C.J., White & Stewart, JJ., concurring).

276. *Id.* at 50.

staked or cultivated by citizens,"[277] the treaty negotiators could not have intended to reserve to the Puyallups any artificially propogated fish.[278] Therefore, the Puyallups' treaty right did not extend to the hatchery fish.[279]

The state supreme court decided that an equitable apportionment would be to numerically divide the total run into natural and hatchery fish. Since the treaty right did not extend to the hatchery fish, the Puyallups were not entitled to a special allocation of those fish. It found that fifty percent of the natural run had to escape to perpetuate the natural run so that neither the sportsmen nor the Puyallups could harvest this number of fish.[280] This left fifty percent of the natural run subject to the Puyallups' treaty right to net fish and all citizens' right to sportfish. The court allocated forty-five percent to the Puyallups' net fishery and five percent to the sportfishery. On review, the *Puyallup III* majority said that this type of allocation was precisely what was mandated in *Puyallup II*.[281] However, the majority noted that the Puyallups had not sought certiorari on the issue of whether their treaty right extended to the hatchery fish and so declined to decide that issue.[282] That sportsmen underwrite the steelhead hatchery program influenced the Court's apparent finding that local regulation outweighed a uniform policy of excluding Indians from state regulation.

Under the commerce clause a state cannot completely prohibit the exercise of a federal right,[283] and any state regulation of such a right must be reasonable.[284] Because of the Indians' unique status, the Supreme Court has established an even higher standard for state regulation of Indian hunting and fishing rights.

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277. Medicine Creek Treaty, *supra* note 19, at 1132-33.

278. Department of Game v. Puyallup Tribe, 86 Wn. 2d 664, 682, 548 P.2d 1058, 1071 (1976).

279. The state supreme court rejected the Puyallups' claim that the hatchery fish merely made up for the loss of fish due to modern civilization. *Id.* at 683, 548 P.2d at 1071.

280. *Id.* at 685, 548 P.2d at 1072.

281. *Puyallup III*, *supra* note 4, at 2623.

282. *Id.* at 2623 n.17.

283. Castle v. Hayes Freight Lines, 348 U.S. 61 (1954). Similarly, Washington could not completely prohibit the Puyallups from net fishing for steelhead in *Puyallup II*.

284. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); South Carolina State Highway Dep't. v. Barnwell Bros., 303 U.S. 177 (1938); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

This standard was established in *Antoine v. Washington*[285] and is that "the state must demonstrate that its regulation is a reasonable and necessary conservation measure, *and* that its application to the Indians is necessary in the interest of conservation."[286] It now only remains to be shown why *Puyallup III* met this constitutionality test.

V. CONSERVATION NECESSITY IN *Puyallup III*

A. *Conservation*

One reason why final resolution of the Pacific Northwest Indian fishing rights controversy has been so elusive is because of the nebulous language involved. For example, it has been shown that the constitutional interests of both the states[287] and the Indians[288] cannot be precisely stated. All that can be said for certain is that the states have the primary duty and power to conserve the fish, while treaty Indians have a "supercitizenship" right to a commercial fishery in the rivers.[289] Even the semantics of conservation and regulation cause difficulty. Fish are a renewable natural resource which is wasted if not used to maximum benefit.[290] To some people, exploitation of anadromous fish has a negative sound and connotes the misuse and selfish use of these resources.[291] To others, exploitation means full utilization and has a desirable connotation.[292]

The *Boldt* decision defined "conservation" as being limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish.[293] "Reasonable" meant that a specifically identified conservation

285. 420 U.S. 194 (1975). *See* text accompanying notes 196-206 *supra*.

286. *Id.* at 207 (citations omitted).

287. *See* § II *supra*.

288. *See* § III *supra*.

289. Since the Supreme Court interprets the Medicine Creek Treaty as reserving to the Puyallups an allocation of fish which they may harvest with nets in the Puyallup River, it follows that all the other fishing tribes with identical treaties also have this right. At the least, *Puyallup III* conclusively settles this aspect of the *Boldt* decision.

290. Royce, *Concepts and Practices in the Conservation of Fishery Resources*, in THE FISHERIES: PROBLEMS IN RESOURCE MANAGEMENT 15-16 (J. Crutchfield ed. 1965).

291. Bevan, *Methods of Fishery Regulation*, in THE FISHERIES: PROBLEMS IN RESOURCE MANAGEMENT 26 (J. Crutchfield ed. 1965).

292. *Id.*

293. United States v. Washington, 384 F. Supp. 312, 342 (W.D. Wash. 1974).

measure be appropriate to its purpose, and "necessary" meant that such purpose, in addition to being reasonable, must be "essential" to conservation.[294] Under this definition, the state would not be able to enforce any limitation on the Indians' treaty fishing until it prohibited all fishing by non-treaty fishermen and proved that preservation of a run further required limitation of the treaty fishing.[295] The rationale for the "essential" requirement was that the treaty Indians have a right to fish while non-treaty fishermen merely have a privilege to fish.[296]

The United States Supreme Court has, in effect, rejected the *Boldt* definition of conservation and its "essential" requirement, as well as its rationale, by its rejection of the Ninth Circuit's decision in *Maison v. Confederated Tribes.*[297] The federal court held that a state may regulate Indian treaty rights[298] provided: (1) there was a need to limit the taking of fish; and (2) the particular regulation sought to be imposed was "indispensable" to the accomplishment of the needed limitation.[299] There is no practical difference between *Boldt's* "essential" requirement and *Maison's* "indispensable" requirement, and in *Puyallup I* the Supreme Court specifically rejected *Maison's* "indispensable" requirement.[300] In *Puyallup II*, the Court stated, "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people."[301] Both Indian treaty fishermen and all other fishermen have rights to fish; the difference being that the Indian rights include the right to fish commercially with nets in the rivers, which cannot be completely abrogated by the state.[302] However, the Supreme Court also ruled that this right may be regulated by the state "provided the regulation meets appropriate standards and does not discriminate against the In-

294. *Id.*

295. *See* United States v. Washington, 520 F.2d 676, 686 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

296. United States v. Washington, 384 F. Supp. 312, 337 (W.D. Wash. 1974).

297. 314 F.2d 169 (9th Cir. 1963).

298. The treaty right involved was identical to the right reserved in the Medicine Creek Treaty, *i.e.*, "at all other usual and accustomed stations in common with citizens of the United States." *Id.* at 170.

299. *Id.* at 172.

300. *Puyallup I*, *supra* note 1, at 401-02 n.14.

301. *Puyallup II*, *supra* note 4, at 49.

302. *Id.* at 48.

dians."[303] "Appropriate standards" has been defined by the Court as meaning that a state "must demonstrate that its regulation is a reasonable and necessary conservation measure, *and* that its application to the Indians is necessary in the interest of conservation."[304] By accommodating the competing interests present in *Puyallup III*, and by ruling that the state may regulate on-reservation fishing in order to prevent Puyallup fishermen from frustrating the state's conservation efforts,[305] the Court has adopted an "orderly fishery" as an element of "conservation."[306] Thus, the Court appears to define conservation of fish as being: (1) allowing sufficient escapement to perpetuate the fish runs; (2) providing a specific allocation formula that assures an orderly fishery and the maximum benefit of the fish available for harvest; (3) providing for a fair accommodation among the various user groups; (4) insuring that the "supercitizenship" rights of Indians are recognized by a special allocation of fish; and (5) allowing the state to regulate all user groups when necessary to accomplish these goals.[307]

B. Necessity

It is often assumed that it is against the very nature of Indians to harvest fish or game to such an extent as to jeopardize the continued existence of a particular species. In fact, one recent commentator has attempted to resolve the Indian hunting and fishing rights controversy by synthesizing it into a conflict between stereotyped "greedy" sportsmen who allegedly often waste fish and game and "noble" Indians who allegedly never waste fish and game.[308] Such stereotyping is not only inaccurate,

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303. *Puyallup I*, *supra* note 1 at 398.

304. Antoine v. Washington, 420 U.S. 194, 207 (1975) (citations omitted). *See* text accompanying notes 196-206 *supra*.

305. *Puyallup III*, *supra* note 4, at 2624.

306. *Contra*, Washington v. United States, 520 F.2d 676, 686 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), where the court of appeals rejected an orderly fishery as an element of conservation.

307. Since allocation is an element of "conservation," the recent state supreme court decisions that the Department of Fisheries cannot enforce the *Boldt* decision because allocation is not within its statutory conservation authority, are highly questionable. *See* Purse Seine Vessel Owners Ass'n v. Moos, 88 Wn. 2d 799, 567 P.2d 205 (1977); Puget Sound Gillnetters v. Moos, 88 Wn. 2d 677, 565 P.2d 1151 (1977). *See also* text accompanying notes 63-66 *supra*.

308. *See* Bean, *Off-Reservation Hunting and Fishing Rights: Scales Tip in Favor of*

but also it accomplishes nothing except to further alienate both sides. Statistics show that the real controversy in Washington is between the treaty Indians and the non-treaty commercial salmon fishing industry.[309] The concern of the sportsmen in the *Puyallup III* case was to assure fair allocation of steelhead both to the Puyallups and to themselves.[310] The sportsmen argued before the state supreme court that the trial court should have set guidelines for an annual allocation of steelhead. The first two guidelines the sportsmen supported were: (1) full consultation with and participation by the Puyallups in developing the regulations; and (2) recognition of the impact on the livelihood of the Puyallup commercial fishermen.[311]

Furthermore, it is historically incorrect that Indians never wasted fish and game resources. Undoubtedly the greatest calamity wrought upon the Indian by the white settlement of the continent was the buffalo slaughter by the hide skinners. The traditional view has been that the Plains Indians would never have exterminated the buffalo herds. However, a recent authority has suggested that the Indians might have exterminated the herds on their own, although it would have taken them much longer.[312] The reasons are that once the Plains Indians obtained the horse, their mobility and ability to kill buffalo increased dramatically, and contact with white traders provided an incentive to kill buffalo for just their hides.[313] There is historical evidence that Indians would wantonly destroy buffalo on the hunting grounds of their enemies or when hides were needed to barter.[314]

States and Sportsmen?, 51 N. DAKOTA L. REV. 11, 26 (1974) (quoting W. MEYER, NATIVE AMERICANS: THE NEW INDIAN RESISTANCE 68 (1972)).

309. *See* UNCOMMON CONTROVERSY, *supra* note 125, at 123-29.

310. Brief for Respondents Northwest Steelheaders Council of Trout Unlimited and Gary Ellis at 21, Department of Game v. Puyallup Tribe, Inc., 86 Wn. 2d 664, 548 P.2d 1058 (1976).

311. *Id.* at 20-21. Although an allocation of forty-five percent of the natural run of steelhead may seem insufficient to support the tribe's commercial fishery, it must be remembered that *Puyallup II* and *III* only dealt with steelhead. *See Puyallup II*, *supra* note 4, at 43. Because of this fact, the Puyallups are still entitled to their treaty allocation of salmon as determined by the *Boldt* decision. Thus, the Puyallups are entitled to at least half of the entire Puyallup River salmon run in addition to their allocation of steelhead.

312. D. DARY, THE BUFFALO BOOK, THE FULL SAGA OF THE AMERICAN ANIMAL 68 (1974).

313. *Id.*

314. *Id.* (quoting J. Hunter, *Manners and Customs of Indian Tribes*, in BUFFALO DAYS, THE CHRONICLE OF AN OLD BUFFALO HUNTER 287 HOLLAND'S MAGAZINE (1933)).

Just as the technological advances represented by the horse and rifle gave the Plains Indians the capability to exterminate the buffalo, so, too, modern fishing technology gives fishing tribes the capability to exterminate fish runs.[315] Although there is no evidence in Washington of treaty Indians threatening the fish runs, Alaska is currently confronted with very real threats to wildlife species because of Eskimo hunting.[316] Apparently Alaska state officials have not attempted to enforce conservation regulations against the Eskimos because of the fear of being branded racists.[317] Proper management of the fisheries resources is of vital importance to the Indian fishermen as well as to the states, and since the capability to exterminate a fish run exists, some control is required.

When it affirmed that part of the *Boldt* decision allowing certain tribes to qualify for self-regulation, the Ninth Circuit Court of Appeals noted that so long as those tribes responsibly ensure that the run of each species in each stream is preserved, the legitimate conservation interests of the state are not infringed.[318] And in *Puyallup II*, the Supreme Court ruled that the treaty did not confer upon the Puyallups the right to wipe out the

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315. Of course, there is a difference between a tribe having the capability to exterminate a fish run and a tribe actually exercising that capability either intentionally or accidentally. For example, Judge Boldt found that none of the fishing tribes of western Washington had conducted their off-reservation fisheries in such a manner as to endanger any species. United States v. Washington, 384 F. Supp. 312, 338 n.26 (W.D. Wash. 1974).

316. Lopez, *An Alaskan Tragedy*, HARPER'S MAGAZINE, Sept. 1977, at 30. In describing the effect modern technology has had on the Eskimos and wildlife, this author writes:

> Last year forty-two headless walrus were found floating on an ice floe in the Chukchi Sea; perhaps 50,000 pounds of meat dumped for the 400 pounds of ivory. In 1970 the Western Arctic caribou herd numbered close to 242,000 animals. Now it is down to 60,000 and the Alaska Department of Fish and Game has killed wolves and restricted native hunting to restore the herd. The annual native take was cut from 25,000 to 3,000. The natives, indignant, say that the ADF&G does not know how many animals there are; and that they are infringing on a sacred right, the right to hunt, the right to sustenance.

Id. at 32.

317. *Id.*

> In Fairbanks an Alaska Fish and Game officer went over the statistics documenting the collapse of the Western Arctic caribou herd with me. When I asked why his department hadn't done something about the excessive hunting sooner he looked at his hands in silence. I have seen the same response in other Alaskan officials. He thinks that if he speaks out about what Eskimos are doing to wildlife in the North, people in the Lower Forty-eight will think him a bigot.

318. United States v. Washington, 520 F.2d 676, 686 (9th Cir. 1975).

steelhead run; but rather, the state had the power to ensure the survival of the steelhead.[319] Thus, the federal courts, which generally are sympathetic to the Indians' position, will not allow Indians immunity from state regulatory power merely because of their heritage.

In light of the Supreme Court's rejection of the concept of "dual sovereignty" in *Kennedy v. Becker*,[320] by which the state would regulate non-Indians and the tribe would regulate the Indians,[321] it is not surprising that in *Puyallup III* the Court ruled in favor of the state. The majority reasoned that if Puyallup treaty fishermen were allowed unregulated on-reservation fishing, they could completely interdict the migrating fish and "pursue the last living [Puyallup River] steelhead until it enters their nets."[322] The treaty fishermen could thus totally frustrate the state's conservation program.

Although the Court did not mention it, there was evidence in the record that without some state regulation the Puyallups would have threatened the steelhead run.[323] For example, Ramona Bennett, chairperson of the tribe, testified that: (1) the tribe had no enforcement officers; (2) there was no direct reporting of the Puyallup catch—the only reporting was from commercial fish buyers; (3) the tribe did not know what its members' average catch was; (4) the tribe did not know how many fish escaped to spawn; (5) the only evidence of overfishing relied on by the tribe was subsequent reports of poor fishing; and (6) the tribe had planned to increase its steehead catch 1,000 fish per year even though it did not have any studies of future run sizes.[324] Hank Adams, the fisheries management coordinator of the tribe, testified that: (1) he had no courses in fisheries management; (2) his future plans did not specifically include

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319. *Puyallup II*, *supra* note 4, at 49.

320. 241 U.S. 556 (1916).

321. The Court held that such a duality would be unworkable; either entity would be able to destroy the resource, free of check by the other. *Id.* at 563.

322. *Puyallup III*, *supra* note 4, at 2623 (quoting *Puyallup II*, *supra* note 4, at 49).

323. However, the majority did note, "The ability of the on-reservation activity to completely destroy the resource in question has not been a factor in other cases which have rejected regulation." *Puyallup III*, *supra* note 4, at 2623 n.15.

324. Brief for Respondents Northwest Steelheaders Council of Trout Unlimited and Gary Ellis at 12-13, Department of Game v. Puyallup Tribe, Inc., 86 Wn. 2d 664, 548 P.2d 1058 (1976).

direct reporting of fish catches by Puyallup fishermen; and (3) the Puyallup fishermen "would not necessarily" disregard the escapement and sports catch in determining the amount of their harvest.[325] Because of these factors, it appears that the Court was justified in finding that regulation for the purpose of conservation was a necessity.[326]

VI. CONCLUSION

The *Puyallup III* case presented the United States Supreme Court with an opportunity to finally resolve many of the ambiguities which are plaguing final resolution of the Indian fishing rights problem in Washington. Perhaps because of the uniqueness of the facts, the Court may have thought it unwise to specifically set forth a ruling with broad application to all Indian hunting and fishing rights cases. For that reason, the *Puyallup III* opinion may prove to merely add confusion to the subject of state regulation of Indian treaty rights. However, two issues were finally resolved by the opinion. First, despite tribal sovereignty, state regulation of Indian treaty fishing rights may be enforced provided the necessity test is met. Second, the basic thrust of the *Boldt* decision in allocating fish among the various user groups is a proper means of settling the Indian fishing rights controversy. The major remaining issue is to determine how the fish are to be allocated.

The *Boldt* decision held that because tribal on-reservation treaty right fishing is exclusive, fish taken on the reservations would not be included in the allocation of fish between treaty and non-treaty fishermen.[327] However, the *Puyallup III* Court in effect reversed this aspect of *Boldt*, at least with respect to steelhead, by rejecting the Puyallups' claim that they had the exclusive right to regulate the harvest of fish passing through their reservation.[328] Thus, according to the Supreme Court ma-

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325. *Id.* at 13-14.

326. An interesting contrast is presented in Confederated Tribes v. Washington, 412 F. Supp. 651 (E.D. Wash. 1976), in which the court, after finding the tribes had exclusive on-reservation fishing rights, appears to have ruled that the state could not regulate on-reservation fishing because the tribes had enacted their own comprehensive program for management of the tribal fisheries resources. *Id.* at 655-56.

327. United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974).

328. *Puyallup III*, *supra* note 4, at 2623.

jority, the need for an orderly fishery required limiting treaty fishermen to a specified share of fish.

Because of the significant differences between salmon and steelhead—salmon greatly outnumber steelhead and steelhead are quite possibly the most highly prized American gamefish—*Puyallup III* may be limited in the future to controversies over gamefish as opposed to commercial fish. There is no reason to suspect that the Supreme Court would ever allow non-treaty fishermen to make their livelihoods from commercial fish resources and at the same time deny at least equal livelihoods to Indian treaty fishermen. But when game fish such as steelhead are involved, the Court may be more sympathetic to the sportsmen who pay for extensive hatchery programs. Even several tribes have recognized the special importance steelhead have to sportsmen. For example, in an agreement among the Warm Springs, Yakima, Umatila, and Nez Perce Tribes and the states of Washington and Oregon allocating Columbia River fish runs, the tribes agreed to limit their take of steelhead to ceremonial and subsistence use.[329]

Because of their sympathy for what the American Indian lost with the growth and development of the country, many people undoubtedly are vehemently opposed to what the Supreme Court has done in *Puyallup III*. History certainly dictates that equity remain the cornerstone of modern treatment of Indians, but that does not mean their interest is never outweighed by any other interest. *Puyallup III* was a compromise between conflicting constitutional powers and interests. Although the Court is open to criticism for being ambiguous, the decision was another step toward final identification of all the parties' interests in the anadromous fish. One direct result of the opinion is that the Puyallup Tribe and the state must stop wasting their efforts fighting each other and cooperate in the interests of the steelhead, the future of which must be of ultimate concern to both the state and the tribe.[330]

It took over a hundred years for the Indian treaty fishing rights problem in Washington to evolve to its current legal

329. Spokane Daily Chronicle, Feb. 5, 1977, at 12, col. 1.

330. For example, although the tribe properly resisted the authority of the state court to order it to provide information with respect to the status of enrolled members of

status. Hopefully, final resolution will not take as long. This Comment has shown how *Puyallup III* could put some of the issues impeding that final resolution into perspective.

James C. Giudici

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the tribe and the size of each member's catch, the Supreme Court suggested that it would be in the tribe's best interests to voluntarily provide such information. The reason was that such voluntary cooperation would minimize the risk of erroneous enforcement efforts by the state against individual tribal members. *Puyallup III, supra* note 4, at 2624.