Comments

STATE POWER AND THE INDIAN TREATY RIGHT TO FISH

Indians living in the Columbia River basin have harvested fish from the Columbia and its tributaries for at least the last several millenia.[1] Historically, fishing provided food for thousands of Indian families,[2] supported an extensive trading economy,[3] and figured prominently in many religious and social activities of Indians living throughout the basin.[4]

Drastic changes in the lives of these Indians followed the arrival of American settlers in the Pacific Northwest in the 1840's.[5] The set-

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1. Archaeological evidence from sites near Wakemap Mound on the Columbia River indicates that as long as 6,000 years ago native dependence on Columbia River fish was substantial. OREGON ARCHAEOLOGICAL SOCIETY, WAKEMAP MOUND 38 (Pub. No.1, 1959). "Salmon was the foremost food. Among many tribes of the Pacific Northwest, the word for 'fish' was simply 'salmon.'" U.S. DEP'T OF THE INTERIOR, INDIANS OF THE NORTHWEST 3 (1966). *See also* R. UNDERHILL, INDIANS OF THE PACIFIC NORTHWEST 16 (1944).

2. The Indian population of the Columbia River basin in the early 19th century relying primarily on fishing for subsistence has been estimated at 50,000. The annual Indian harvest of fish before non-Indian commercial fishing began has been estimated at 18,000,000 pounds. J. CRAIG & R. HACKER, THE HISTORY AND DEVELOPMENT OF THE FISHERIES OF THE COLUMBIA RIVER 141-42 (U.S. Bureau of Fisheries Bull. No. 32, 1940).

3. The fish were pulverized, dried, and packed into bales of matting for trade with Indians in remoter areas. *Id.* at 140. *See also* U.S. DEP'T OF THE INTERIOR, THE COLUMBIA RIVER, H.R. DOC. NO. 473, 81st Cong., 2d Sess. 353 (1950) [hereinafter cited as H.R. DOC. NO. 473].

4. The importance of the salmon to the peoples of the Columbia . . . cannot be overestimated. For the Sanpoil [a tribe of central Washington], living . . as they did on the Columbia itself, salmon unquestionably was the primary staple food. Its importance is further attested by the communal activities and ritual behavior associated with the salmon. . . .

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Supervising the activities of salmon fishing was a special dignitary, the Salmon Chief. This was a person to whom absolute power was given in respect to any communal aspect of fishing. . . . To him fell the priestly role of supervising the First Salmon Ceremony, unquestionably the most important group religious activity of the Sanpoil. He was therefore in charge of the actual fishing and the distribution of the catch, designating the men who emptied the trap each morning and evening. Under his eye, too, a fair distribution of the catch was made throughout the village. . . .

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A man need not have participated in fishing to be given some of the catch . . . .

R. SPENCER & J. JENNINGS, THE NATIVE AMERICANS 219-20, 222 (1965).

5. *See* A. JOSEPHY, JR., THE INDIAN HERITAGE OF AMERICA 324-30 (1969); R. SPENCER & J. JENNINGS, *supra* note 4, at 498.

tlers soon demanded that the federal government negotiate treaties with local Indian tribes to open the area to unimpeded white settlement, and in 1854 and 1855 the federal government concluded ten treaties with tribes in the Northwest.[6] The treaties established a system of reservations and assured each tribe the right to fish outside its reservation at all "usual and accustomed" places.[7] Up to the present time Indians claiming this treaty right have continued to fish for both subsistence and trade[8] although their fishing methods have changed radically.[9]

In seeking to protect their fishing activity against restriction by

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6. Treaty with the Nisqually, 10 Stat. 1132 (1854); Treaty with the Dwamish, 12 Stat. 927 (1855); Treaty with the S'Kallams, 12 Stat. 933 (1855); Treaty with the Makah, 12 Stat. 939 (1855); Treaty with the Walla Walla, 12 Stat. 945 (1855); Treaty with the Yakima Nation of Indians, 12 Stat. 951 (1855); Treaty with the Nez Perce, 12 Stat. 957 (1855); Treaty with the Tribes of Indians of Middle Oregon, 12 Stat. 963 (1855); Treaty with the Qui-nai-elt, 12 Stat. 971 (1855); Treaty with the Flathead, 12 Stat. 975 (1855).

7. A typical treaty fishing provision reads:

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

Treaty with the Yakima Nation of Indians, art. 3, 12 Stat. 953 (1855).

8. "At present . . . only a relatively small portion of the former Indian catch is taken in the commercial and subsistence fishery activities of the Indians. Nevertheless, the present fisheries provide the main source of livelihood for a large number of Indians, and constitute a considerable part of the total Columbia [harvest]." H.R. Doc. No. 473, at 353.

"The Indian treaty fishing right is economically valuable to the Indians involved; it was one of the considerations for the cession of large areas of land, and either purchase or restriction or regulation of the fishing right could possibly affect seriously the economy of several thousand Indian people." Letter from Ass't Sec'y of the Interior Carver to Senator Jackson, Aug. 4, 1964, in *Hearings on S.J. Res. 170 & S.J. Res. 171 Before the Senate Comm. on Interior and Insular Affairs*, 88th Cong., 2d Sess. 4 (1964) [hereinafter cited as *1964 Hearings*].

9. Spencer and Jennings provide a description of traditional Sanpoil fishing techniques:

> The methods of catching fish involved spearing and trapping. Spear fishing could be done successfully only where the rapids in the river forced the fish into a narrower channel. . . . Each man was allowed a turn with his spear, a three-pronged or single-pronged and barbed weapon made of deer bone. When he had taken a fish, he gave his place to the next man. But spearing was not so productive as trapping.
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> Although nets . . . were known to the Sanpoil and used under certain conditions of weather and river action, weirs were considerably more effective. These were placed at or near the mouths of smaller rivers and streams up which the salmon went to spawn. Fence-like barriers were placed across the stream chosen. The first such allowed the fish through, the second formed a barrier, leaving the fish, with their upstream impetus, with no recourse but to swim into especially prepared traps . . . .

R. SPENCER & J. JENNINGS, *supra* note 4, at 219. Various kinds of nets are employed

state fish management agencies, Indians have advanced a broad interpretation of this treaty fishing provision and on occasion have claimed the right to fish free from any state regulation. State governments, on the other hand, have refused to recognize special fishing rights of the Columbia River Indians, contending that these rights are outmoded, impinge excessively on state sovereignty, operate discriminatorily, and undermine state fish conservation programs.

Part I of this Comment explores the original purpose of the treaty fishing provision, the current congressional concern over its enforcement and the Supreme Court's response to state reluctance to recognize the fishing rights secured by this provision. Part II explores the appropriate relationship between the state governments and the Indian treaty fishermen, given the political and geographical circumstances surrounding Indian fishing communities on the Columbia. Part III analyzes the problems of judicial posture inherent in administering the fairest solution to the fishing rights dilemma.

I

THE SCOPE OF THE TREATY FISHING PROVISION

A. The Basic Federal Commitment

Judging from contemporaneous documents, federal officials intended the treaty fishing provision to guarantee to Indians their traditional livelihood. At meetings between the treaty commissioners and the tribes of the Northwest, federal officials assured the Indians that their fishing could continue as it had prior to the treaty, even where traditional fishing grounds would be outside of the newly created reservations.[10] The preservation of traditional sources of food and income was

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by Indian treaty fishermen at the present time. The use of modern gill nets at Indians' "usual and accustomed" sites renders the Indian fishery a commercial fishery as far as state regulatory authority is concerned. See note 102 *infra*.

10. "It was thought necessary to allow them to fish at all accustomed places, since this could not interfere in any manner with the rights of citizens and was necessary for the Indians to obtain a subsistence." Treaty with the Nisqually, Dec. 26, 1854, in *1964 Hearings* 162; "The Great Father . . . wants you to . . . take your fish and go back to the mountains and get berries. Is this good, don't you want this?" Documents Relating to the Negotiation of the Treaty of Jan. 22, 1855 with the Dwamish, Suquamish, et al., January 22, 1855, in *1964 Hearings* 190, 191; "An Indian Chief: . . . Our only food is berries, deer and salmon—where shall we find these? I don't want to sign away all my land . . . . Mr. F. Shaw, the Interpreter, then explained to them that they were not called upon to give up their old modes of living and places of seeking food, but only to confine their homes to one spot." Excerpts from Minutes and Reports of Indian Treaties made with the Indian Tribes West of the Cascade Mountains By Governor Isaac I. Stevens, in *1964 Hearings* 162; "Looking Glass knows that he can . . . catch fish at any one of the fishing stations." Sohappy v. Smith, 302 F. Supp. 899, 906 n.1 (D. Ore. 1969). "General Palmer, when making the

crucial in gaining the assent of Indians to the cession of their lands, and thereby in opening the Northwest for white settlement with a minimum of Indian-white conflict.[11]

It has been urged[12] that the off-reservation fishing provision should no longer be enforced because a few officials responsible for negotiating the treaty in 1854-56 understood these off-reservation rights to be temporary in nature—to expire as Indians abandoned traditional life styles.[13] Declining to enforce the treaty on this basis in effect punishes Indian fishermen for not being absorbed into the dominant culture or vanishing altogether.[14] In *United States v. Winans*[15] the Court rejected such a "Vanishing Indian" argument couched in Darwinian terms. Winans, a non-Indian who held title to a parcel of land on the Columbia River comprising a "usual and accustomed" Indian fishing site, had erected a fish wheel on this site to scoop fish out of the river. He urged the Court to permit him to exclude from his property Indian fishermen using traditional fishing gear on the ground that the natural

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original treaty, told us that we should have the right to the Columbia River fishery always . . . . General Palmer said . . . the country would be settled up between the reservation and the fishery but there would be a way provided for us to always get to the fishery for our fish and to the mountains for berries and game." H.R. EXEC. Doc. No. 183, 50th Cong., 1st Sess. 8 (1888). *See also* Tulee v. Washington, 315 U.S. 681, 684 (1942):

> From the report set out in the record before us, of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by these tribal representatives at the council . . . .

See generally 1 H. STEVENS, LIFE OF ISAAC STEVENS 448-80 (1901); 2 *id.* 1-9, 34-65.

11. *See, e.g.*, H.R. EXEC. DOC. No. 1, 33rd Cong., 1st Sess. 460 (1854) (report of Isaac Stevens, Governor of Washington Territory); S. EXEC. DOC. No. 1, 34th Cong., 1st & 2d Sess. 335 (1855) (Report of the Commissioner of Indian Affairs); S. EXEC. Doc. No. 2, 36th Cong., 1 Sess. 765-66 (1859) (report of M. Simmons, Indian Agent, Washington Territory).

12. State v. McCoy, 63 Wash. 2d 421, 432-33, 387 P.2d 942, 949-50 (1963).

13. *See* 1 H. STEVENS, *supra* note 10, at 454; 2 *id.* at 43. *See also* Brief for Respondents, Puyallup Tribe, Inc. v. Department of Game, 391 U.S. 392 (1968): "It was hoped by Congress that the Indians would be integrated into the agrarian level of the economy within twenty or thirty years of the date of the execution of the treaty. Unfortunately for the Indian, this has not occurred." *Id.* at 52. *See also* Department of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 273-74, 422 P.2d 754, 770-71 (1967) (Hale, J., dissenting). The pervasiveness of the belief that Indians were a vanishing race may be measured by the fact that in 1911 Congress saw fit to provide for "a suitable memorial to the memory of the North American Indian." Act of Dec. 8, 1911, ch. 1, 37 Stat. 45.

14. SECRETARY OF THE INTERIOR, ANN. REP. 209 (1938). In enacting the Indian Reorganization Act, 48 Stat. 984 (1934), Congress attempted to change the conditions which had contributed to the decline in Indian population. *See* 78 CONG. REC. 7807 (1934) (remarks of President F.D. Roosevelt on the Indian Reorganization Act).

15. 198 U.S. 371 (1905).

course of events in American history dictated that Indian needs should yield to the interests of the technologically superior white race.[16] The Court rejected Winans' "temporary in nature" construction of the treaty off-reservation fishing provision, rejecting the notion that an increase in technology expanded an individual's legal right to exploit resources.

Underneath the "Vanishing Indian" gloss states have implicitly raised the legitimate question whether the treaty fishing provision is not merely a relic of a now-forgotten era better left to a quiet demise.[17] In *Winans* the Court enforced the treaty fishing provision because it clearly revealed a congressional purpose to require future settlers on Indian sites to respect the Indian fishermen's right of access.[18] Nevertheless, *Winans* does not require enforcement of the treaty under all circumstances. The Court must always consider the totality of relevant congressional enactments in deciding whether, in its view,[19] Congress intended that a particular interest be brought within the circle of protected rights and that the preemption doctrine be applied to that state action which is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[20] Congress' action in recent years makes clear that maintenance of Indian treaty fishing activity along the Columbia River is within the scope of current congressional concern for Indian economic security.[21]

As the federal government constructed a series of hydroelectric projects along the Columbia River, it either provided for new Indian fishing sites to replace those flooded by the new dams[22] or, alternatively,

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16. *Id.* at 382.

17. *Cf.* remarks of W. Zaegal, *Hearings on S. 2906 Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 1st Sess. 244 (1968): "There is no moral obligation for the federal or state government to enact more special legislation [*e.g.*, the Federal Alaska Native Land Claims Act of 1968, S. 2906] for the direct benefit of a small minority of our citizens."

18. 198 U.S. at 381-82. *But see* Seufert v. Olney, 193 F. 200 (E.D. Wash. 1911) (site claimed not "usual and accustomed" within meaning of treaty). *But cf.* Seufert Bros v. Hoptowit, 193 Ore. 317, 237 P.2d 949, *cert. denied*, 343 U.S. 926 (1951). *See also* Seufert Bros. v. United States, 249 U.S. 194 (1919); United States v. Brookfield Fisheries, 24 F. Supp. 712 (D. Ore. 1938).

19. Although it is true that the Court has "played a notable part in affecting the adjustment of national and state powers so necessary to the harmonious working of the federal system" [Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 1 (1940)], the partnership of Court and Congress in effectuating this adjustment in the field of Indian affairs is only rarely recognized. *Cf.* United States v. Kagama, 118 U.S. 375, 382 (1886). *But see* Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 330, 361 P.2d 950, 953 (1961).

20. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

21. But see notes 52-54 *infra* and accompanying text for the three types of cases in which the Court has not enforced Indian economic rights.

22. Act of Mar. 2, 1945, ch. 19, 59 Stat. 22; Act of June 8, 1955, ch. 131, 69 Stat. 85 (new sites to replace those flooded by Bonneville Dam). *See also* Act of

compensated the Indians for their economic loss resulting from federal power developments.[23] Thus, despite its massive commitment to development of the power potential of the Columbia River Basin, Congress has tailored its plans to preserve as much as possible the traditional Indian economic base.[24]

Another clearcut example of the congressional commitment to Indian off-reservation fishing rights[25] is Congress' persistent refusal to recognize a 1865 treaty with the Warm Springs Indians[26] purporting to be a relinquishment of their treaty off-reservation fishing rights. Indian consent to the 1865 treaty was procured under what the Commissioner of Indian Affairs has declared were fraudulent circumstances,[27] but under traditional views of the Court's competence, such circumstances are beyond the Court's purview.[28] Congress could, therefore, disregard the 1855 treaty with the Warm Springs Indians in favor of the 1865 relinquishment of their fishing rights. Nevertheless, congressional action has explicitly assumed that the Warm Springs are entitled to exercise these off-reservation rights.[29]

Mar. 2, 1917, ch. 146, 39 Stat. 986; Act of Feb. 9, 1929, ch. 166, 45 Stat. 1158; Act of July 25, 1947, ch. 357, 61 Stat. 466 (replacement of sites rendered unusable by construction of ship locks and canal at Celilo Falls).

23. Act of July 27, 1953, ch. 245, 67 Stat. 198 (compensation for economic loss caused by construction of The Dalles Dam). *See also* K. KESEY, ONE FLEW OVER THE CUCKOO'S NEST 178-82 (1962).

24. *See* Act of Mar. 2, 1945, ch. 19, 59 Stat. 10 (establishing new sites along Lake Bonneville to be "subject to the same conditions, safeguards and protections as the treaty fishing grounds submerged or destroyed." *Id.* at 22). *Cf.* 16 U.S.C. § 797(e) (1964). *See generally* H.R. Doc. 473, *supra* note 3, at 471-74.

25. Attempts to terminate the Indian treaty right to fish have died in committee. *See* H.R.J. Res. 698, 87th Cong., 2d Sess. (1962); H.R.J. Res. 48, 88th Cong., 1st Sess. (1963); S.J. Res. 170 & 171, 88th Cong., 2d Sess. (1964). Although such congressional inaction is not the best index of congressional intentions, arguments based on such evidence have been made. *See* Menominee Tribe v. United States, 391 U.S. 404, 415 (Stewart, J., dissenting).

26. Supplemental Treaty with the Confederated Tribes and Bands of Indians of Middle Oregon, 14 Stat. 751 (1865).

27. H.R. EXEC. DOC. No. 183, 50th Cong. 1st Sess. 2-3. *See also* COMMISSIONER OF INDIAN AFFAIRS, ANN. REP. liii-lv (1886); COMMISSIONER OF INDIAN AFFAIRS, ANN. REP. lxxxii-lxxxiii (1887).

28. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), holding that the circumstances under which Kiowa, Comanche, and Apache Indians consented to the agreement of October 6, 1892, with Congress are "solely within the domain of the legislative authority and insulated from judicial inquiry." *Id.* at 567-68.

29. *See* Act of June 29, 1888, ch. 503, 25 Stat. 253; Act of Mar. 2, 1917, ch. 146, 39 Stat. 986; Act of July 25, 1947, ch. 337, 61 Stat. 466; Act of July 27, 1953, ch. 245, 67 Stat. 198; Act of June 30, 1954, ch. 425, 68 Stat. 331. The validity of the 1865 relinquishment of Warm Springs off-reservation fishing rights was argued without success to the Oregon supreme court in Miles v. Veatch, 189 Ore. 506, 524, 220 P.2d 511, 518 (1950). *See also* FPC v. Oregon, 349 U.S. 435, 438 n.5 (1955) (Oregon bound by the 1855 Warm Springs Treaty).

The federal government has made further commitments to promoting Indian economic security. For example, improvement of Indian economic security has been the overriding theme of the last three presidential administrations.[30] Federal efforts to advance Indian economic conditions without terminating the special legal status of Indian communities dates back to the 1934 Wheeler-Howard Act.[31] Beginning in the late 1940's a movement began to develop within the federal government[32] espousing the equality of rights between Indians and non-Indians,[33] which would by definition have stripped Indians of their treaty fishing rights.[34] This flirtation with legal equality was, however, inconsistently executed,[35] renounced within a few years by the Secretary of the Interior,[36] and has been repudiated by the Senate.[37]

Although Congress' commitment to Indian economic security in the last decade has not been massive in financial terms,[38] Congress has exhibited a basic concern for the economic development of Indian com-

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30. *See, e.g., Report to the Secretary of the Interior by the Task Force on Indian Affairs, July 10, 1961,* in J. FORBES, THE INDIAN IN AMERICA'S PAST 128 (1964); *Message of President Lyndon Johnson,* BUREAU OF INDIAN AFFAIRS, INDIAN RECORD, Mar. 1968, at 2; President's Message to the Congress, 116 CONG. REC. H. 6438, S. 10,799 (daily ed. Jnly 8, 1970).

31. Act of June 18, 1934, ch. 576, 48 Stat. 984.

> The purposes of the bill, briefly stated, are as follows: (1) To stop the alienation, through action by the Government or the Indian, of such lands . . . as are needed for the present and future support of these Indians. (2) To provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land. . . . (4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations. (5) To establish a system of financial credit for Indians . . . .

SEN. REP. No. 1080, 73rd Cong., 2d Sess. 1 (1934).

32. *See* SEN. REP. No. 1483, 84th Cong., 2d Sess. 236, 239 (1956); Collier, *Letter to General Eisenhower,* 176 THE NATION 29 (1953).

33. H.R. Con. Res. 108, 67 Stat. B132 (1953).

34. However, in transferring a portion of its civil and criminal jurisdiction over Indians to states, Congress specifically excepted from the force of that Act Indian hunting, fishing, and trapping activity secured under treaty, statute, agreement, or regulation, Act of Aug. 15, 1953, ch. 505, § 2(b), 67 Stat. 589 (codified at 18 U.S.C. § 1162(b) (1964)).

35. Few major Indian reservations were terminated. *See, e.g.,* 25 U.S.C. §§ 564 (termination of Klamath), 891-902 (termination of Menominee) (1964); *cf.* Act of Aug. 31, 1964, Pub. L. No. 88-533, § 18, 78 Stat. 738 (Secretary of the Interior required to submit plan for termination of federal supervision over Seneca Nation).

36. On September 18, 1958 Secretary of the Interior Fred Seaton announced that henceforth no tribe would be terminated without its consent and that federal Indian policy would be redirected toward economic development and social welfare. A. JOSEPHY, JR., THE AMERICAN INDIAN AND THE BUREAU OF INDIAN AFFAIRS—1969, at 2 (1969). *See also* S. Witt, *Nationalistic Trends Among American Indians* 53-75, in THE AMERICAN INDIAN TODAY (S. Levine & N. Lurie eds. 1968).

37. *See* S. Con. Res. 11, 114 CONG. REC. 26656-57 (1968) (passed by the Senate September 12, 1968).

38. The appropriation for fiscal year 1970 for the Bureau of Indian Affairs totaled

munites. In legislating for the benefit of a particular tribe, for instance, Congress manipulated the Indians' special legal status to facilitate economic security in a broad variety of ways. Congress has authorized the Secretary of the Interior to acquire land to be held in trust for Indians,[39] and confirmed its nontaxable status,[40] permitted the Secretary to approve leases of Indian lands provided that the terms maximize economic benefits for the Indian owners,[41] increased the powers of tribal government to promote economic development,[42] conditioned development of Indian resources on tribal consent,[43] and used the Indian legal status in other ways.[44] Debate over the ill-fated Indian Resources Development Act of 1967[45] reveals that congressional hesitancy to substantially fund a nationwide program of Indian economic development is the result of a concern that such schemes might vest in the Secretary of the Interior excessive power over Indian communities.[46]

Moreover, in 1966 Congress made it possible for Indian tribes to sue in federal courts on federal claims regardless of the amount in controversy.[47] The purpose was explicit: Indian tribes should not have

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approximately 300 million dollars. Act of Oct. 29, 1969, Pub. L. No. 91-98, 83 Stat. 147. "In more recent years, with an increasing Indian population and a growing complexity of reservation problems, the appropriations have risen, but consistently stayed well below a level needed to carry out [congressional] intentions." A. JOSEPHY, JR., *supra* note 36, at 90.

39. Act of June 2, 1970, Pub. L. No. 91-274 (Tulalip Tribe); Act of June 10, 1968, Pub. L. No. 90-335, 82 Stat. 174 (Spokane Indians).

40. Act of Sept. 28, 1968, Pub. L. No. 90-534, 82 Stat. 884 (Swinomish Indians).

41. Act of Nov. 2, 1966, Pub. L. No. 89-715, 80 Stat. 1112 (San Xavier and Salt River Pima-Maricopa Indians).

42. Act of May 22, 1970, Pub. L. No. 91-264, 84 Stat. 260 (Hopi Indian Tribe of Arizona).

43. Act of Oct. 15, 1966, Pub. L. No. 89-664, 80 Stat. 913 (Crow Indian Tribe).

44. Act of Oct. 17, 1968, Pub. L. No. 90-597, 82 Stat. 1164 (No conservator for any Agua Caliente Indian shall be appointed under state law or continued in office without the consent of the Indian involved).

45. *See* S. 1816, H.R. 10,560, 90th Cong., 1st Sess. (1967). Both bills died in committee. Hearings on S. 1816 were held before the Indian Affairs Subcommittee of the Senate Committee on Interior and Insular Affairs in July, 1967 and May and June, 1968; hearings on H.R. 10,560 were held before the Indian Affairs Subcommittee of the House Committee on Interior and Insular Affairs in July, 1967.

46. *See* Comments of Congressman Aspinall, *Hearings on H.R. 10,560 before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 89th Cong., 1st Sess., ser. 12, at 45 (1967) [hereinafter cited as *1967 Hearings*]. Various other explanations have been offered for the lack of congressional support for the Indian Resources Development Act of 1967. According to John Belindo, Executive Director of the National Congress of American Indians, the bill placed more emphasis on development of land than of human resources. *Hearings before the Special Subcomm. on Indian Education of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st & 2d Sess., pt. 1, at 220 (1968). According to Edgar Cahn, Indians were not fully consulted before the administration drew up the bill. E. CAHN, OUR BROTHERS' KEEPER 191 (1969).

47. Act of Oct. 10, 1966, Pub. L. No. 89-635, § 1, 80 Stat. 880 (codified at

to litigate preemption questions in state courts which might be hostile to Indian economic claims.[48]

Because of the specific congressional commitment to Columbia River Indian fishermen, and because the treaty fishing provision is within the scope of Congress' general commitment to Indian economic security, enforcement of the provision and preemption of contrary state action would seem appropriate today.[49] In fact, the Court has preempted state action even where there was some evidence that Congress might want to end Indian special rights at some uncertain date.[50] As a general rule, the cases where the Court has enforced Indian economic rights are those where ambiguities in congressional purpose could reasonably be resolved in favor of satisfying Indian economic need.[51] Enforcement has been denied where there was either an overriding congressional purpose inconsistent with the Indian claim,[52] insufficient evidence of congressional purpose,[53] or a finding that satisfaction of the Indian claim could not reasonably be said to promote Congress' aims.[54]

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28 U.S.C. § 1362 (Supp. V, 1970)). Section 1362 was enacted in response to a decision of the Ninth Circuit which denied a federal forum for vindication of an Indian economic interest impinged on by state action for lack of the $10,000 jurisdictional minimum required by 28 U.S.C. § 1331(a) (1964). *See* Yoder v. Assiniboine & Sioux Tribes, 339 F.2d 360 (9th Cir. 1964), *rev'g* 223 F. Supp. 909 (D. Mont. 1963).

48. H.R. REP. No. 2040, 89th Cong., 2d Sess. 2-3 (1966); S. REP. No. 1507, 89th Cong., 2d Sess. 2-3 (1966).

49. *See, e.g.*, Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (state taxation of federally licensed reservation traders not consistent with congressional purpose of protecting Indians against unfair prices and trade practices); Seufert Bros. v. United States, 249 U.S. 194 (1919) (treaty should be construed to protect right of Yakima Indians to fish outside ceded area).

The Court, in ascertaining the intensity of the congressional purpose against which to evaluate conflicting state action, has stated that the treaty will be interpreted in light of the generous spirit which a powerful nation feels towards a dependent people. *See, e.g.*, Tulee v. Washington, 315 U.S. 681, 683-84 (1942). This may be read as a short hand way by which the Court states its conclusion that on the facts of the case the Indian activity would seem so clearly to fall within the boundaries of congressional purpose that further elaboration would be fruitless. It should not be read as an enunciation of doctrine that the Court will automatically extend the boundaries of congressional purpose to render protectable every Indian activity with a moral claim to preemption. *Cf.* Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945).

50. *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959). *See also* United States v. Rickert, 188 U.S. 432 (1903); see text accompanying notes 162-66 *infra.*

51. See part III *infra* for an elaboration of the possible logic behind the Court's method of resolving these ambiguities.

52. *See, e.g.*, Kake Village v. Egan, 369 U.S. 60 (1962); F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

53. *See, e.g.*, Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943); Ward v. Race Horse, 163 U.S. 504 (1896); see text accompanying notes 56-67 *infra.*

54. *See, e.g.*, Kennedy v. Becker, 241 U.S. 556 (1916); Thomas v. Gay, 169 U.S. 264 (1897); *cf.* Seufert Bros. v. Hoptowit, 193 Ore. 317, 237 P.2d 949, *cert. denied*, 343 U.S. 926 (1951).

In general, however, the Court has consistently applied the preemption doctrine to state regulation of Indian off-reservation fishing in order to forward Indian economic security, which was both the original treaty purpose and is now the chief concern of federal Indian policy. In so doing, the Court has made clear its adherence to the general proposition that state regulation of Indian fishermen must reflect the special and distinct status to which the treaties entitle them. The propriety of any particular restriction of Indian fishing activity must, then, be measured in terms of whether it inhibits or promotes Indian economic security.

B. State Challenges to the Special Status of Indian Fishermen

While the Court has adhered to its practice of preempting contrary state action where the Indian interests to be vindicated fall within the scope of a viable congressional purpose, states have not conceded the enforceability of the treaty fishing provision. They have made several arguments for the proposition that they need not accord any special legal status to Indian fishermen.

In *Ward v. Race Horse*,[55] a Shoshone-Bannock Indian had been convicted of hunting outside his reservation in violation of state law,[56] although the 1868 Shoshone-Bannock Treaty[57] permitted tribal members to engage in such hunting. The Court was urged to hold that the treaty provision unconstitutionally denied Wyoming an equal footing with the existing states of the Union by limiting its "inherent power" to regulate the harvest of game within its borders. The Court did not decline to enforce the treaty solely on constitutional grounds.[58] Rather, the Court reasoned that Congress had not actually intended to preserve Indian off-reservation hunting rights, relying upon Congress' failure to insert in the Wyoming Admission Act[59] a provision preserving such

55. 163 U.S. 504 (1896).

56. Law of July 20, 1895, ch. 98 [1895] Wyo. Laws 225.

57. 15 Stat. 673 (1868).

58. Although the Constitution provides that "New states may be admitted by the Congress into this Union" [U.S. CONST. art. IV, § 3], it does not expressly compel Congress to respect the right, as it were, of each new state to admission on an equal footing with the existing states. Nevertheless, the Court has read into the admission clause this limitation on congressional power to admit states. *See, e.g.*, Escanaba Co. v. Chicago, 107 U.S. 678, 688-89 (1882). Thus where an admission or enabling act speaks of admission on an "equal footing" such a declaration "is simply an expression of the general rule, which presupposes that States, when admitted into the Union are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted . . . ." Ward v. Race Horse, 163 U.S. 504, 514 (1896).

59. Act of July 10, 1890, ch. 664, 26 Stat. 222. The Court was not entirely accurate in asserting that the Wyoming Admission Act revealed no congressional purpose to preserve Indian rights, since WYO. CONST. art. 21, § 26, which was "accepted, ratified, and confirmed" by the United States in section 1 of the Admission Act pro-

rights. Nevertheless, the equal footing doctrine figured prominently in the Court's reasoning. The doctrine compelled the Court to prefer the undiminished exercise of state police powers over Indian off-reservation activity in the absence of an express congressional preference for Indian rights.[60]

The Court's treatment of congressional intent in *Race Horse*, if a little harsh, is consistent with its subsequent treatment of enforceability questions.[61] The treaty provision limited the right to hunt to "the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians . . . .";[62] as such, the hunting right was indeed "temporary and precarious in nature."[63] The absence of a preservation clause in the Wyoming Admission Act itself, in contrast with the existence of such a clause in the act establishing the Wyoming Territory,[64] might fairly be read as evidence of congressional intent to terminate what was by its very terms a temporary right to hunt.

Since *Race Horse*, the Court has declined to apply the equal footing doctrine to disputes involving state action and Indian interests.[65] The use of equal footing reasoning would have swept far beyond the facts of *Race Horse*, condemning, for instance, the establishment of reservations within state borders after the admission of a state to the Union.[66] Moreover, the equal footing analysis would ultimately have

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vided that Wyoming would disclaim all right and title to lands held by Indians until such title was extinguished by federal action. Thus Congress might reasonably have supposed that by ratifying the Wyoming constitutional disclaimer it was expressing its intention that statehood not abrogate Indian rights.

60. 163 U.S. at 515.

61. See text accompanying notes 47-54 *supra*.

62. Art. IV, 15 Stat. 674-75.

63. 163 U.S. at 510.

64. Act of July 25, 1868, ch. 235, 15 Stat. 178.

65. *See* Johnson v. Geralds, 234 U.S. 422, 438-40 (1914); Donnelly v. United States, 228 U.S. 243, 259-64 (1913); Coyle v. Smith, 211 U.S. 559, 570 (1911); United States v. Winans, 198 U.S. 371, 382-84 (1905). *Race Horse*'s equal footing reasoning is widely regarded as dead law. *See, e.g.*, Holcomb v. Confederated Tribes of the Umatilla Indian Reservation, 382 F.2d 1013, 1014 n.3 (9th Cir. 1967) (off-reservation hunting rights); State v. Arthur, 74 Idaho 251, 258-59, 261 P.2d 135, 138-39 (1953), *cert. denied*, 347 U.S. 937 (1954) (off-reservation hunting rights). State fish management officials have persistently relied on *Race Horse* for the equal footing doctrine, however. *See, e.g.*, Brief for Appellees at 19, Tulee v. Washington, 315 U.S. 681 (1942); Brief for Respondents at 27, Kautz v. Department of Game, 391 U.S. 392 (1968). *See also* Miles v. Veatch, 189 Ore. 533, 534, 221 P.2d 905, 906 (1950).

66. Congress did not seem to have any qualms about creating new Indian reservations within already established western states. *Compare* S.J. Res. 57, 37 Stat. 39 (Aug. 21, 1911) (New Mexico admitted to Union) *with* Act of May 25, 1918, ch. 86, § 2, 40 Stat. 561, 570 (only Congress may create new Indian reservations within State of New Mexico). *See also* Act of June 18, 1934, ch. 576, § 5, 48 Stat. 984, 985 (codified at 25 U.S.C. § 465 (1964)).

required the Court to define the constitutional limits of federal power over Indians, which the Court has declined to do.[67] Faced with the abandonment of the constitutional doctrine of *Race Horse*, states must live with the proposition that there is no constitutional bar to federal recognition of a special legal status for Indians.

State governments have taken another route in asserting power to regulate off-reservation fishing by arguing that a state law affecting Indian fishermen is valid provided that it is non-discriminatory on its face. The Supreme Court rejected this contention in *Tulee v. Washington*,[68] where non-discriminatory state commercial license fees were struck down as too heavy a burden on the exercise of the federal treaty fishing right.[69] *Tulee*, however, became the basis for another ground which a state may urge to limit Indian rights under the fishing provision. The Court's opinion implicitly distinguished between a state tax on Indian fishermen which benefited all citizens through support of state institutions and a state regulation of Indian fishermen the sole purpose of which was to permit a state conservation program to function.[70] The Court apparently reasoned that, while the general tax was unacceptable, conservation regulations could be imposed on Indians because they are directly beneficial to the Indian economic interests protected by the treaty, if not absolutely necessary to a furtherance of such interests.[71]

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67. After acquiring almost one billion acres in 400 treaties negotiated with Indian tribes between 1778 and 1871 [*see* SEN. REP. No. 91-501, 91st Cong., 1st Sess. 11 (1969)], Congress abandoned its practice of making treaties with Indian tribes [Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1964))], and, in so doing, abandoned its constitutionally conferred power under the treaty-making clause as the source of its exclusive power in Indian affairs.

In United States v. Kagama, 118 U.S. 375 (1866), upholding exclusive federal criminal jurisdiction over the Hoopa Valley Reservation in California, the Court stated that "[t]he power of the General Government over [Indians] . . . must exist in that Government, because it never existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, and because it has never been denied, and because it alone can enforce its laws on all the tribes." *Id.* at 384-85. The broad definition of the sources of federal power in Indian affairs in the *Kagama* decision represents the culmination of a long line of Supreme Court decisions seeking to define the sources of such power. *See generally* P. ASCHENBRENNER & D. SNOW, LAW AND THE NATIVE AMERICANS, CASES AND MATERIALS ch. 2 (1971). Thus preemption has been virtually the exclusive vehicle for creating limits on state action affecting Indians. But see notes 169-70 *infra*.

68. 315 U.S. 681 (1942).

69. *Id.* at 685.

70. While the tax struck down provided for the support of the state government and its institutions, "such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish" might still be enforced against Indians. *Id.* at 684.

71. *See* State v. Satiacum, 50 Wash. 2d 513, 538, 314 P.2d 400, 414 (1957) (Finley, J., concurring). Even if state conservation efforts were not considered beneficial to Indian fishermen, Indians would still have to share the cost of such programs in terms of reduced allocations of harvestable fish, in light of the longstanding congres-

The *Tulee* view—that permissible state regulations must be consistent with the economic purposes of the treaty—has been broadly restated in a recent decision, *Puyallup Tribe v. Department of Game*,[72] where the Court held that state regulations are valid if necessary for conservation and do not discriminate against Indians.[73]

The *Puyallup* "discrimination" language[74] may inject some confusion into the Indian fishing rights controversy if read to imply approval of the state's position, explicitly rejected in *Tulee*,[75] that a law non-discriminatory on its face is presumptively consistent with the treaty, irrespective of its impact on Indian economic security. Because the *Puyallup* Court did not implement its test and remanded the case to the state trial court for further findings of fact,[76] the Court will have to

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sional concern for protection of anadromous fish. *See* Act of Aug. 14, 1848, ch. 177, § 12, 9 Stat. 323 (prohibition on damming streams without adequate facilities for fish passage); see note 149 *infra*.

72. 391 U.S. 392 (1968). The Washington Departments of Fisheries and Game sued to enjoin the Puyallup Indians from violating any of Washington's fishing laws and regulations, especially the prohibition on use of set nets in Commencement Bay at the mouth of the Puyallup River. The trial court's decision, granting an injunction against any Indian violation of state law, was reversed by the Washington supreme court. The case was remanded to the trial court with instructions to enjoin only those violations of laws and regulations which were necessary for conservation. The United States Supreme Court affirmed, stating that the state trial court must make further findings of fact as to the necessity of the regulations the state sought to enforce against the petitioners. *Id.* at 403. Decided with *Puyallup* was *Kautz* v. *Department of Game* in which the Court affirmed the Washington supreme court's ruling, 70 Wash. 2d 270, 279, 422 P.2d 771, 774 (1967), that the Nisqually Indians could be enjoined from violating all state laws presently necessary for conservation.

73. 391 U.S. at 398.

74. Justice Douglas has made at least two prior references to "discrimination" in the context of Indian rights. *Compare* Kake Village v. Egan, 369 U.S. 60, 79 (1962) (concurring opinion) (approval of the Alaska supreme court's statement that "discrimination against all fishermen" resulted from the Secretary of the Interior's issuance of permits to Kake and Angoon for fish traps) *with* Choctaw Nation v. Oklahoma, 397 U.S. 620, 633 (1970) (concurring opinion) (reference to a "regime of discrimination" against petitioners).

75. 315 U.S. at 683-84.

76. *Id.* at 403. Usually the Court will prevent a state court from denying a litigant relief on a federal claim by omitting to pass upon basic questions of fact by making an independent determination of "what facts reasonably might be and presumably would be found . . . by the state court." Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 703 (1945). *See also* Merchants' Nat'l Bank v. Richmond, 256 U.S. 635, 638 (1921). The Court has been particularly concerned that lack of state court fact-finding not frustrate the vindication of federal constitutional rights threatened by state action. *See* Norris v. Alabama, 294 U.S. 587, 590 (1935) (jury discrimination); Ker v. California, 374 U.S. 23, 34 (1963) (search and seizure). Thus where the federal claimants make a specific factual assertion to the effect that the vast majority of the harvestable fish were allocated by the state for landing by non-Indians, the Court should find the state's general assertions that its regulations are necessary for conservation inadequate to rebut the presumption that the state has violated its obligations under the treaty. Norris v. Alabama, 294 U.S. 587, 594-95 (1935). Although

provide further illumination on another occasion. On balance, however, it seems unlikely that the Court intended to embrace the position that the treaty secures Indians only what as United States citizens the fourteenth amendment already guaranteed them.[77] A different rule makes more sense in light of the Court's treatment of Indian treaty and economic rights in other contexts.[78]

C. *Equal Protection for Non-Indians*

Never far from the surface of the Indian fishing rights controversy, and indeed of all questions of state power and Indian economic rights,[79] is the fear that special rights for Indians unconstitutionally discriminate against non-Indians. Although a state challenge to Indian fishing rights on discrimination grounds has never been cast in such terms that the Court has directly ruled on the equal protection question,[80] the appearance of unfavorable judicial dicta in state court deci-

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one can only speculate why the Court disposed of *Puyallup* without reaching the merits of petitioners' claims, in certain aspects the case was not a very attractive one for vindicating the fishing rights of the petitioners. There have been charges that members of the Puyallup Tribe have enriched themselves by off-reservation fishing out of proportion with the original treaty purpose. *See 1964 Hearings, supra* note 8, at 39.

77. Even assuming that Indian Fishing at "usual and accustomed" sites is protected only by the fourteenth amendment, state action which keeps the harvestable fish for landing at sites where only the non-Indians are fishing may violate the equal protection clause. *See* Morey v. Doud, 354 U.S. 457 (1957). At a minimum, a state scheme allocating all of the fish to non-Indians would not be consistent with the fourteenth amendment merely because the language of the state regulation was non-discriminatory, especially since Indians are a racially distinct group. *See, e.g.*, Griffin v. County School Bd., 377 U.S. 218 (1964). It is the problem of fashioning judicial relief under the fourteenth amendment, not the initial determination whether the state has violated the equal protection rights of the Indian fishermen, that promises to be difficult. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1141-50, 1190-92 (1969). See part III *infra* where the problems of providing judicial relief to Indian fishermen under the treaty fishing provision is discussed.

78. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968), where the court found that the congressional purpose to preserve Indian hunting and fishing rights evidenced by Pub. L. No. 280 [see note 34 *supra*] overrode provisions of the Act terminating the Menominee Reservation [see note 35 *supra*] even though the Menominee Treaty did not explicitly reserve such hunting and fishing rights. And in Peoria Tribe v. United States, 390 U.S. 468 (1968), the Court held enforceable a treaty provision requiring the United States to invest proceeds of land sales in stocks and pay the interest thereon to the Indians despite the general rule that the United States is not liable for interest on claims against it. *See also* Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

79. See note 76 *supra*.

80. *But see* Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969), where the Oregon Fish Commission made such a contention. Pre-Trial Order at 26-27. The *Sohappy* court, apparently assuming that Oregon had standing to raise the issue of discrimination against its non-Indian licensees, rejected any narrow interpretation of the "state's authority to distinguish between the regulation of Indian treaty-protected fishing and that of fishing by others." 302 F. Supp. at 907.

sions[81] is evidence that the discrimination charge, if not highly visible, is nevertheless potent.[82]

On several occasions courts have disposed of the discrimination charge where non-Indian fishermen, not the state, have raised the issue. These cases have held that inquiry into the constitutionality of any treaty-secured discrimination is foreclosed by the fact that the source of such differences is a federal treaty.[83] This answer, however, is clearly inadequate. Federal exercise of the treaty-making power is not immune from judicial review.[84] As recently as *Baker v. Carr*[85] the Court stated that a group of non-Indians might not be granted special rights under a federal treaty free from a judicial scrutiny: "[C]ourts . . . will not stand impotent before an obvious instance of a manifestly unauthorized exercise of [the treaty-making] power."[86] The Court added that it has historically played a role independent of Congress in defining the status of Indians for purposes of both the treaty-making clause and article III.[87] In light of *Baker v. Carr*'s survey of judicial competence to review legislative action, it is not adequate to say that the existence of a federal treaty places any discrimination flowing therefrom beyond judicial scrutiny and the application of the fifth amendment.

A more satisfactory response to the discrimination charge lies in the fact that in promoting its social and economic goals, government is afforded great latitude in defining the class to be benefited, though such leeway would not extend to promotion of an impermissible goal such as

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81. *See, e.g.*, Department of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 252, 422 P.2d 754, 759 (1967), *aff'd* 391 U.S. 392 (1968); *cf.* Makah Indian Tribe v. Clallum County, 73 Wash. 2d 677, 687, 440 P.2d 442, 448 (1968) (state taxation of Indian property). *But see* Acosta v. County of San Diego, 126 Cal. App. 2d 455, 466, 272 P.2d 92, 98 (4th Dist. 1954). *See also* Department of Game v. Puyallup Tribe, Inc., *supra* at 274, 422 P.2d at 771 (Hale, J., dissenting); Montoya v. Bolack, 70 N.M. 196, 207, 372 P.2d 387, 395 (1962).

82. The Court may properly take this hostility to Indian fishing rights into account when considering the ability of Indian communities to obtain affirmative congressional or state relief from state action impinging on their economic interests. See text accompanying notes 168-79 *infra*.

83. *See, e.g.*, Anthony v. Veatch, 189 Ore. 462, 481-86, 220 P.2d 493, 501-03, *appeal dismissed*, 340 U.S. 923 (1950); Miles v. Veatch, 189 Ore. 506, 521, 220 P.2d 511, 518 (1950); State *ex rel.* Campbell v. Case, 182 Wash. 334, 338-41, 47 P.2d 24, 26-27 (1935).

84. *See* 28 U.S.C. § 1257 (1964) (conferring appellate jurisdiction on Supreme Court where highest state court has declared treaty invalid). Raoul Berger has concluded that the Philadelphia Convention did not intend to exempt the treaty-making power from judicial review. R. BERGER, CONGRESS v. THE SUPREME COURT 369-89 (1969).

85. 369 U.S. 186 (1962).

86. *Id.* at 217.

87. *Id.* at 215-17.

all-white ownership of laundries in a city.[88] Where a minority is benefited in furtherance of accepted goals, strict review of the class is unnecessary because there is no likelihood that the majority is being prejudiced by overbearing political strength.[89] Even where the federal commitment to Indian welfare extends beyond promoting parity of Indian economic circumstances with those of non-Indians, there is still no constitutionally offensive discrimination against the majority of Americans who do not benefit from such programs, since every entrepreneur always runs the risk that governmental action may disproportionately benefit a competitor.[90]

Special rights for Indian fishermen are consistent with the many other systems by which state and federal governments distribute benefits unequally. Veterans, students, farmers, disabled, indigent, and older citizens all are beneficiaries of special programs which, by awarding members of one class certain benefits, arguably discriminate against all non-members of the benefited class.[91] The intricate systems by which state and federal governments allocate tax burdens represent another use of selective distribution of economic benefits.[92] Unequal benefit distribution is, therefore, simply a fact of life in a modern industrial society.[93] Moreover, non-Indians are free to lobby in Congress for revocation of Indian fishing rights,[94] because there is no constitutional barrier to congressional revocation of these rights, other than liability for just compensation,[95] merely because the activity is protected by a federal treaty.[96]

88. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). *See also* Michelman, *Property, Utility and Fairness*, 80 HARV. L. REV. 1165, 1181 (1967).

89. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); see text accompanying notes 172-80 *infra*.

90. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933); Quong Wing v. Kirkendall, 223 U.S. 59 (1912).

91. *See* Michelman, *supra* note 88, at 1165-72; *cf.* Reich, *The New Property*, 73 YALE L.J. 733 (1964). Under the heading "Government-Created Wealth" Professor Reich lists income and benefits, jobs, occupational licenses, franchises, contracts, subsidies, use of public resources, and services. *Id.* at 734-37.

92. *See* Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 925-34 (1967). *See also* Surrey, *Tax Incentives as a Device for Implementing Government Policy*, 83 HARV. L. REV. 705, 706-13 (1970).

93. *But cf.* Reich, *supra* note 91, at 770 (disparaging definition of the "Public Interest State").

94. In fact, non-Indians and state officials have pressed Congress for such legislation. See note 25 *supra*.

95. *See* Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).

96. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871). *But see* Choate v. Trapp, 224 U.S. 665, 674, 678 (1912).

II

STATE RESPONSIBILITY TOWARDS INDIAN TREATY FISHERMEN

A. Indian Hardship Under Non-Discriminatory State Action

Although the Supreme Court has asserted that a state law providing for equal treatment on its face will not necessarily be consistent with the federal treaty commitment to Indian economic security,[97] only recently have courts had to face the question whether Indians were in fact suffering economic hardship under apparently equal state laws regulating fishing conduct. Judicial analysis of whether non-discriminatory state action has inflicted hardship on Indian fishermen has been strongly influenced by courts' construction of the treaty, that is, whether it compels any special state concern for Indians.[98]

As the anadromous fish—salmon and steelhead—make their way at maturity from the Pacific Ocean up the Columbia River to their respective spawning grounds,[99] the run must first pass through the non-Indian fisheries, which are generally located at the mouth of the Columbia.[100] Indian fishermen have remained above Bonneville Dam, 146 miles from the ocean, to fish at their "usual and accustomed" sites in that area of the river.

The state agencies[101] which regulate commercial and sport fishing[102] calculate for each run of fish the number that must reproduce in order

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97. Tulee v. Washington, 315 U.S. 681, 683-84 (1942).

98. *See, e.g.*, State v. McCoy, 63 Wash. 2d 421, 387 P.2d 942 (1963); see text accompanying notes 12-14 *supra*.

99. Anadromous fish are born in the gravel beds of streams, migrate downriver to the ocean, and live there for three to five years. The mature fish then swim back to their place of birth back up the same river down which they travelled as fingerlings. After reproducing in the gravel beds, the salmon die; steelhead, however, may make several such migrations. Several runs of anadromous fish enter the Columbia each year. The spring chinook enter the river in April and May; the fall chinook in August and September; blueback in June and July; and silvers in August through December. A. NETBOY, SALMON OF THE PACIFIC NORTHWEST 3-9 (1958).

100. *See id.* at 24-28.

101. Under the Oregon-Washington Columbia River fish compact [ORE. REV. STAT. § 507.010 (1969); WASH. REV. CODE 75.040.010 (1969)], Oregon and Washington have concurrent jurisdiction over fishing activity on the part of the Columbia River which forms the boundary between the two states. *Cf.* Act of Mar. 2, 1853, ch. 90, § 21, 10 Stat. 172. The compact provides in effect that neither state will change its laws regulating fishing without the consent of the other where both states have concurrent jurisdiction. This compact has been held to have no effect on the treaty rights of Indians fishing in the Columbia River. *See, e.g.*, Anthony v. Veatch, 189 Ore. 462, 481-86, 220 P.2d 493, 501-03 (1950), *appeal dismissed*, 340 U.S. 923 (1951); Sohappy v. Smith, 302 F. Supp. 899, 912 (D. Ore. 1969).

102. Under Oregon and Washington law net fishing is defined as commercial in nature and falls within the jurisdiction of the respective Oregon and Washington commercial fish management agencies—the Oregon Fish Commission and the Washington

to fulfill the agency conservation projections[103] and thereby provide for an undiminished supply of fish for future harvests.[104] The remainder of the run is considered harvestable and the agency fishing regulations are structured to permit these fish, but no more, to be landed.[105] The number of fish landed is controlled by establishing the length of the fishing season and the kind of fishing gear that may be used.[106] Because of the geographical location of the non-Indian fishery, only those fish which escape non-Indian nets are available for harvest by Indians. Thus a state fish regulation permitting, for example, 30 days of commercial fishing above and below Bonneville Dam would by its terms permit the non-Indian fishermen to land most of the harvestable fish[107] in that run.[108]

The Indian fishermen would be further handicapped were state regulations to provide that the seasons open on identical days both above and below Bonneville Dam on the Columbia. Since anadromous fish take about ten days to reach Bonneville Dam from the time they enter the Columbia,[109] the non-Indians would be able to harvest the

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Department of Fisheries. ORE. REV. STAT. § 506.006(4) (1969); WASH. REV. CODE § 75.04.080 (1970). References in the text to state regulation or agency regulation of Columbia River fishing activity are made to rules promulgated by these agencies; for most purposes these rules are identical. See note 101 *supra.*

103. *See, e.g.,* ORE. REV. STAT. § 506.151 (1969): before adopting, amending or repealing any rule the Oregon Fish Commission must hold a public hearing to determine "whether the ultimate supply of fish will be affected injuriously or conserved and enhanced by the effect of the rule or its amendment or repeal."

104. *See* ORE. FISH COMM'N, BIENNIAL REP. 5 (1963).

105. Even among non-Indians there may be disagreement about how many fish the Oregon Fish Commission ought to allocate for landing in any one of the five zones below Bonneville Dam. *See* Sohappy v. Smith, 302 F. Supp. 899, 909 (D. Ore. 1969).

106. *See* A. NETBOY, *supra* note 99, at 28-30.

107. Hereinafter the term "harvestable fish" means that number of fish which may be harvested by any user of the resource consistent with the projected conservation requirements of the state management officials.

108. From 1938 to 1956 inclusive the Indian landings as a percent of total Columbia River commercial landings varied from 8.3% in 1945 to 24.5% in 1952. After 1957 the Indian catch has varied from 0.7% in 1959 to 15.4% in 1965. Oregon Fish Commission, Press Release, Mar. 4, 1966; *cf.* Columbia River & Yakima Indian News, Dec. 1970, at 1 (fall 1970 silver salmon harvest totaled 5,100,000 pounds of which Indians harvested 184,000 pounds).

The Puyallup Indians, fishing as they do near the mouth of the Puyallup River, stand in much the same relationship to the non-Indian fishermen in Puget Sound as the Indian fishermen above Bonneville Dam do to the non-Indian fishermen concentrated at the mouth of the Columbia. In each case the non-Indians have the opportunity to take most or all of the harvestable fish before the run even reaches the Indians' off-reservation treaty sites. And in the Puyallups' case, non-Indians apparently harvest the vast majority of such fish. See note 76 *supra. See generally* AMERICAN FRIENDS SERVICE COMM., UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP AND NISQUALLY INDIANS (1970) [hereinafter cited as UNCOMMON CONTROVERSY].

109. A. NETBOY, *supra* note 99, at 7.

available fish several days ahead of Indian fishermen. Thus identical regulations for Indian and non-Indian areas do not render the two fisheries equally profitable.[110]

The lack of political strength which characterizes Indian fishing communities in the Northwest intensifies the probability that any given state regulation, although non-discriminatory on its face, will in fact handicap Indian fishing efforts. State fish management decisions are strongly influenced by political factors. "[T]he users of the [fishing] gear with the greatest political backing," a Washington Department of Fisheries biologist has written, "[have] usually succeeded in eliminating competition with less political influence."[111] Indian fishermen, unlike sport fishermen, have no state agency to promote their interests vis-à-vis commercial fishermen,[112] are few in number,[113] and are

110. Another disadvantage attaching to these upriver sites involves the weight and resulting economic value of the fish taken above Bonneville. Anadromous fish store up oils in their bodies which enable them to travel hundreds of miles to their spawning grounds without feeding. Since the fish lose weight as they travel upriver, fish caught at the mouth of the Columbia, where the non-Indian commercial fishery is concentrated, are almost invariably heavier than fish caught above Bonneville. *Id.*

111. Wendler, *Regulation of Commercial Fishing Gear and Seasons on the Columbia River from 1859-1963*, 23 WASH. DEP'T OF FISHERIES RESEARCH PAPERS, Dec. 1966, at 15.

112. The Oregon Legislature apparently fully expected conflicts between the Fish Commission and Game Commission by providing two methods of resolving such disagreements. ORE. REV. STAT. § 506.126 (1969) provides for arbitration "in the case of any policy conflict between the two agencies by the Governor or a person designated by him"; ORE. REV. STAT. § 496.035 (1969) provides that "in case of any conflict of authority or jurisdiction" between the two commissions "the Attorney General shall act as arbiter." The commercial and sport fishermen battled in the 1969 Oregon Legislature over the legal status of steelhead. If steelhead remained a commercial fish, then the commercial fishermen would be able to gill net steelhead without having to reserve any fish for the benefit of the sports fishermen who also compete for steelhead. The legislation authorized the OFC to manipulate gill net sizes and use other means to spare as many steelhead as possible for the sports fishermen. Ch. 411 [1969] Ore. Laws 758 (codified at ORE. REV. STAT. § 509.030(3) (1969)). This legislation was the result of a long controversy between the commercial and sport fishermen; the OFC evidently hoped to stave off the sportsmen's demands for a complete ban on commercial fishing in the Columbia River. Portland Oregonian, Feb. 1, 1970, § F, at 2, cols. 5-6.

113. The actual number of Indians fishing commercially along the Columbia River can only be crudely estimated from the available sources. The 1960 census gives the Indian populations of Washington, Oregon and Idaho as 21,076, 8,026, and 5,231 respectively. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES—1968, at 29. In Tulee v. House, 110 F.2d 797, 799 (9th Cir. 1940), the petitioner alleged that "several hundred members of the Yakima Tribe of Indians are now fishing in the [Columbia River], deriving their living from salmon . . . ." Washington officials have set the figure of Indian commercial fishermen at 2,750. WASH. DEP'T OF FISHERIES, ANNUAL REP. 195 (1963). One such fish agency official testified that fewer than 100 Indians fished in such a manner as to threaten the state's conservation programs. *1964 Hearings, supra* note 8, at 39. A report prepared for the American Friends Service Committee estimates that between 800

enmeshed in internal disputes.[114] Thus they could exert little influence on the Washington and Oregon agencies which regulate commercial and sport fishing on the Columbia.[115] One expert witness for the state in a fishing rights case even conceded that state officials used the term "conservation" to mask the fact that state regulations promoted only non-Indian interests.[116] Thus a nondiscriminatory state posture towards Indian fishing activity is no guarantee that state regulation will not seriously undermine Indian economic security while benefiting competing non-Indian fishermen[117] who have the geographical advantage of getting first crack at the mature anadromous fish.

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and 900 commercial Indian fishermen are active in Washington. UNCOMMON CONTROVERSY 121-22.

114. The off-reservation Yakima Indians fishing for a livelihood on the Columbia River and the Yakima tribal government have not been united on the issue of state regulation of Indian fishermen. One of the factors that has contributed to this disunity is the fact that the tribal government has power to regulate the off-reservation fishing of tribal members. State v. Gowdy, 462 P.2d 461, 463 (Ore. App. 1969); Settler v. Yakima Tribal Court, 419 F.2d 486, 488-89 (9th Cir. 1969); Whitefoot v. United States, 293 F.2d 658, 661-63 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962). Violation by a tribal member of both state law and tribal fishing regulations has been held to preclude an Indian's defense to the resulting state prosecution on the grounds that the state law was not necessary for conservation. State v. Gowdy, *supra*. Thus, by enacting tribal regulations identical to state regulations which impinge unduly on Indian economic security, tribal governments may defeat their tribal members economic claims—a result which the state acting alone could not have achieved. There is apparently considerable fear among off-reservation Yakima fishermen that state and federal officials will pressure the tribal government into enacting fishing regulations which accomplish a restriction of Indian off-reservation fishing that the state could not achieve by litigation under the *Tulee* standard. See text accompanying note 68 *supra*.

115. *See* Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969). "The interpretation [of the treaty fishing provision] which the state insists upon . . . seems to be affected much more by the superior political power of sports and commercial fishermen over . . . a handful of Indians and other than upon reason and fairness." United States v. Oregon, Civ. No. 68-513, at 4 (D. Ore. Apr. 23, 1969) (extemporaneous remarks of court, later consolidated with Sohappy v. Smith, *supra* and superseded by opinion reported at 302 F. Supp. 899).

116. Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169, 173 (9th Cir.), *cert. denied*, 375 U.S. 829 (1963).

117. The state management agencies may allocate so many fish to non-Indian fishermen that not only are there no harvestable fish passing Indian sites but also its own conservation goals may not be achieved. In the spring 1967 chinook run on the Columbia the Oregon Fish Commission established an escapement goal of 90 to 95,000 fish; after the non-Indian sports and commercial fisheries had harvested 60,000 fish, only 84,935 fish passed over Bonneville Dam. Plaintiff's Opening Brief on the Segregated Issues at 13, United States v. Oregon, 302 F. Supp. 899 (D. Ore. 1969). Two commentators have criticized state agencies for catering to their licensees by maintaining high harvests of fish at the expense of the state's conservation obligations: "[A] large part of the restraining regulations promulgated by the states were not designed to obtain the maximum sustainable yield; rather, they were designed to divide the catch among all who want to fish. . . . The consequences are conservation policies which do not fulfill the international definitions of conservation . . . ." Royce & Hansen, *Food Fishery Policies in the Western United States*, 43 WASH. L. REV. 231, 257 (1967).

B. *Reconciling Indian Economic Need and the State Conservation Interest*

In *Tulee v. Washington*[118] the Court held that the treaty fishing provision does not preclude states from exercising their police power in order to insure the success of state programs to conserve fish for all users of that resource. Thus such regulations may be applied to Indian fishermen if they actually prevent depletion of the resource. Since *Tulee* attention has focused on the problem of developing a test which distinguishes between the state's obligation to avoid infringement of Indian economic security and the state's legitimate efforts to promote conservation of fish.

In 1969, in *Sohappy v. Smith*,[119] 14 Yakima Indians who lived and fished along the Columbia River above Bonneville Dam sued the Oregon Fish Commission in the Oregon federal district court to enjoin enforcement of certain non-discriminatory fishing regulations.[120] Commercial fishing, prohibited above Bonneville since the flooding of Celilo Falls in 1957, was opened on a nondiscriminatory basis following the *Puyallup* decision. The plaintiffs charged that the state's regulatory scheme permitting non-Indians to land most of the harvestable fish was in violation of their treaty right to fish at their "usual and accustomed"[121] fishing sites located above Bonneville, and that the state had not accorded them the status as a distinct fishery to which the 1855 treaty entitled them. The United States joined the suit against Oregon, for itself and on behalf of the four major tribes in the region, who themselves intervened.[122]

In extemporaneous oral remarks on April 23, 1969 the court in *Sohappy* stated that its forthcoming decision would "require an almost complete surrender by the State of Oregon of the attitudes that they have had toward Indian fishing over the past many years."[123] In its

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118. 315 U.S. 681 (1942); see text accompanying notes 68-71 *supra*.

119. 302 F. Supp. 899 (D. Ore. 1969).

120. "The commercial fishing permitted by [Fish Commission Orders] 180 [6 day summer season above Bonneville], 181, [and] 182 [fall Columbia River season] was not restricted to any particular locations or usual and accustomed fishing places and was open generally to all persons, Indian and non-Indian alike." Pre-Trial Order at 14.

121. *See, e.g.*, Treaty with the Yakima Nation of Indians, 12 Stat. 951 (1855); see note 7 *supra*.

122. The Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakima Indian Reservation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe of Idaho all intervened. The plaintiffs and the intervening tribes all joined in presenting 12 contentions for trial. *See* Pre-Trial Order at 20-24.

123. United States v. Oregon, Civ. No. 68-513, at 5 (D. Ore. Apr. 23, 1969); see note 15 *supra*.

subsequent written opinion the court concluded that the treaty compelled the state to recognize the Indian fishery as a distinct entity. Moreover, its obligation to respect Indian economic security must be measured in numbers of harvestable fish: A state regulation which does not insure that a "fair share" of the harvestable fish actually escapes the lower river non-Indian fishermen to reach the upriver Indian fishermen would be in violation of the Indian treaty right to fish.[124]

The rationale for the *Sohappy* "fair share" result—that the treaty secures Indian fishermen a share of the harvestable fish—may be found in the court's frequent references to the importance of fishing as a means of livelihood to the Columbia River Indians and in the fact that since the treaties were signed these Indians have continued to rely on fishing at their traditional sites as the basis of the Indian economy.[125] Thus it would be consistent with the *Sohappy* rationale to evaluate the size of the Indian share of harvestable fish in terms of Indian economic need; nevertheless, the court did not reach the problem of implementing the "fair share" test.[126]

Sohappy, while not applying the "fair share" test, is nevertheless a landmark decision because it illuminates in three important respects what had been dark corners of the fishing rights controversy.

First, *Sohappy* clearly holds that a state regulation which on its face promotes conservation does not thereby discharge the state's responsibility under the treaty. All state time and manner regulations could otherwise be validly applied to Indian fishing since they would, at least superficially, reveal a purpose to protect fish from Indian nets and enable such fish to reach their spawning grounds.[127] *Tulee v. Washington*,[128] however, requires invalidation of any state restriction which promotes conservation along with another state interest not within the scope of congressional purpose. A fortiori, *Tulee* would also require that where a regulation does not promote conservation in fact, the language of the regulation has no saving value.[129] Thus *So-*

124. 302 F. Supp. at 907, 911.

125. *Id.* at 905, 906.

126. Professor Ralph Johnson proposed that all fish which normally migrate past the Indian fishing grounds should be allowed to do so for the Indians to catch. Seattle Times, Nov. 1, 1970, Magazine, at 10-11.

127. This position is embodied in S.J. Res. 170, 88th Cong., 2d Sess. (1964). *See 1964 Hearings, supra* note 8, at 2. State officials apparently believed that S.J. Res. 170 would settle the controversy by indicating a congressional purpose to permit enforcement of every state law which on its face promoted conservation. *Id.* at 28.

128. 315 U.S. 681 (1942); see text accompanying notes 68-71 *supra.*

129. The licensing fee struck down by the Court in *Tulee* clearly both provided revenue for the Washington state government and promoted conservation, since arguably the greater the license fee the fewer the fishermen and the more likely it would be that the state could meet its conservation goals. The Court has concluded in a deci-

happy properly invalidated state regulations which in effect promoted both conservation and non-Indian economic interests because the state had not permitted the Indian fishermen to land a "fair share" of the harvestable fish.

Second, *Sohappy* is the first decision to identify the process by which state agencies fashion their regulations. According to the court, state agencies calculate the number of fish needed for spawning, making the remainder of the run available to satisfy the demands of the agencies' licensees.[130] This remaining number of harvestable fish is then allocated among the users who fish at various points along the Columbia River by the manipulation of season dates and gear restrictions so that each group takes only its allotted share. A test for state responsibility to Indian fishermen which is expressed in terms of number of fish—whether that number is based on Indian economic need or some other criterion—is thus consistent with the process by which state agencies manage the resource. The *Sohappy* result is highly administerable because the agencies themselves perceive the management problem in terms of allocating numbers of fish to various users of the resource.[131]

Third, *Sohappy* exposes as false the dichotomy with which earlier decisions had struggled. The solutions open to a court, these decisions assumed, were an Indian fishery which enjoyed a complete immunity from state law or one regulated to the full extent that the fourteenth amendment permitted; that is, without any treaty-imposed standards.[132] Such a dichotomy was false because there is a workable test for state regulation which protects state efforts to get some fish past all users of the resource to their respective spawning grounds without the drastic result of permitting the state to shut down the Indian fishery altogether.[133] Since all that is necessary to prevent Indian fishermen

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sion not involving Indian fishermen that the non-conservation impact tainted the state's scheme. Thus, diminishing the number of non-resident fishermen is not merely incidental to the conservation purpose of a state licensing scheme and the Court could not ignore such a uon-conservation impact. Toomer v. Witsell, 334 U.S. 385 (1948). *See also* Brown v. Anderson, 202 F. Supp. 96 (D. Alas. 1962). On at least one occasion *Tulee* has been read explicitly as permitting state regulation *only to the extent that* such regulation in fact promotes conservation, thus rejecting the conservation-on-its-face position. Makah Indian Tribe v. United States, 7 Indian Cl. Comm. 477, 517 (1959), *aff'd*, 151 Ct. Cl. 701 (1960), *cert. denied*, 365 U.S. 879 (1961).

130. See text accompanying notes 101-05 *supra*.

131. *See* A. NETBOY, *supra* note 99, at 19.

132. *See, e.g.*, State v. McCoy, 63 Wash. 2d 421, 428, 387 P.2d 942, 947 (1963); State v. Satiacum, 50 Wash. 2d 513, 533-35, 314 P.2d 400, 412 (1957) (Rosellini, J., concurring).

133. In State v. McCoy, 63 Wash. 2d 421, 387 P.2d 942 (1963), the court insisted that there was no alternative open to the management agencies other than completely prohibiting Indian fishing. Were the state required to permit more fish than

from taking non-harvestable fish is an upper limit on the number of harvestable fish that may be landed, a state prohibition on Indian fishing is overly restrictive. Once a limit on the size of the Indian catch is imposed, the state can make and execute rational management decisions since it can rely on a certain size of Indian harvest.[134] Thus an upper limit on the Indian catch would protect the fish intended for spawning as the state's legitimate interest requires while at the same time permitting Indians to exercise their treaty rights to catch fish for food and income should there be harvestable fish.[135]

Sohappy thus makes abundantly clear that the treaty does not confer on Indian fishermen any broad immunity from state regulation. With respect to the number of fish in each run which must not be caught in the interest of conservation, Indians and non-Indians are equal before the law: it is the resource that receives primary consideration[136] and no fishermen is permitted to fish in such a manner as to diminish this allocation. With respect to the harvestable fish, the state is required to do for the Indians what non-Indians can only compel the state to do by exerting political pressure: get a certain number of harvestable fish to the area of the river where Indians fish, and structure state regulations so that Indians are permitted to land this specified share of harvestable fish. The agency can then monitor Indian landings and insure that Indian fishermen take no more than their fair share.[137] Where the state has discharged its treaty obligations by allocating a fair share, the Indian

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were necessary for conservation to ascend the river, then the state would have no way of limiting Indians to this allocation and protecting the fish originally intended for spawning from Indian nets. *Id.* at 428, 387 P.2d at 947.

134. In Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir.), *cert. denied*, 375 U.S. 829 (1963), the court placed great weight on the trial court's finding that the Indian harvest of fish was stable. 314 F.2d at 172-73. Thus the state could anticipate the Indian demands on the resource and make its management decisions accordingly. The holding of *Umatilla Tribes*, that the state may be required to restrict non-Indian fishing before it restricts Indian fishing, is really limited to the facts of that case, however. It is not always justified to assume that Indian fishermen will continue to exercise self-restraint and take only a fixed share of the fish passing their traditional sites. Where it is not justified to make such an assumption, restricting Indian fishing to a certain number of harvestable fish provides the state with greater assurance that its conservation goals can be met that would be attained if the state increased regulation of non-Indian fishing. The *Umatilla Tribes* reading of the *Tulee* "necessary for conservation" test for state regulation, while appropriate for the level of Indian fishing activity before the trial court in that case, is not readily applicable to most other situations in which state governments and Indian fishermen dispute the scope of treaty fishing rights.

135. See text accompanying note 118 *supra*.

136. *Cf. 1964 Hearings* 45 (remarks of Robert Schoning, Director, Oregon Fish Commission).

137. Oregon's emergency closure procedures require in effect a 72-hour delay before they may be applied to fishermen. *See* ORE. REV. STAT. § 506.161(2) (1969); *cf. id.* §§ 496.215, .220.

fisherman who violates state law and fishes in excess of the Indian fair share has no federal defense to the resulting state prosecution.[138] When the state cannot allocate harvestable fish to Indians because conservation requires that the entire run be permitted to spawn, the state is similarly freed from any obligation under the treaty, and Indian fishermen violating state law may not raise the treaty as a defense. Thus the only circumstance in which the state must expect that the treaty will bar state prosecutions for fish and game violations is a situation of the state's own making. Where there are harvestable fish, but the state has not allocated the Indian fishery a fair share of these fish, the treaty defeats that particular application of state law to Indian fishermen.[139]

III

JUDICIAL POSTURE AND INDIAN ECONOMIC SECURITY

As the problem of accommodating state and Indian interests yields to judicial analysis, courts must consider the appropriate judicial posture in cases where Indians challenge the size of state allocations of harvestable fish. Of course, under any test for the size of the Indians' share of the harvest courts would be understandably reluctant to require management of the Columbia River fisheries solely for the Indians' benefit. But even though it is accurate to say that the *Sohappy* test does no more than require state agencies to justify their allocation of harvestable fish as "fair" in light of the controlling congressional purpose[140] legitimate questions concerning the appropriate judicial posture are raised by the need for vigorous review of state management decisions to fully protect Indian economic claims. The source of these questions may be found in the Supreme Court's frequent—though not recent—assertions that protection of Indian rights lies within the special province of the political branches of the federal government.[141] Part III suggests

138. Under *Tulee*, Indian fishermen might offer to show as a federal defense to a state prosecution the fact that the state regulation was not necessary for conservation. Nevertheless, despite the differences in formulation, *Tulee* and *Sohappy* provide essentially the same defense to Indian fishermen. Where a state regulation promotes some interest other than conservation, or where such a regulation promotes both conservation and other interests, Indian economic security is unnecessarily impinged because there are some harvestable fish that would be available to satisfy Indian needs that the state is withholding for purposes other than conservation. Conversely, the *Tulee* result would obtain under the *Sohappy* "fair share" test, since by enforcing its licensing regulations Washington would be interfering with Indian efforts to land their share of the harvestable fish.

139. "Immunity" is really an inappropriate term, as applied to the rights of Indian treaty fishermen vis-à-vis state power, since the state is never barred from enforcing state law except where *it* has denied Indians fish that may be harvested in conformity with *its own* policy.

140. See note 125 *supra*.

141. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); *cf.* Man-

that courts are competent to devise solutions to the Indian fishing rights controversy and that there are sound reasons for courts taking a vigorous posture in protecting Indian economic claims.

A. Judicial Competence

To refer Indians to Congress for a legislative definition of the extent to which the state must satisfy Indian economic need would be unfair and impractical. "[A] big and heavy machine to set in motion,"[142] Congress is too busy to resolve every dispute over resources in a federal system. When Indians have sought affirmative action on their claims to resources, the conflict tends to be particularly lengthy.[143] Thus in evaluating the feasibility of a legislative solution to the controversy, courts must expect that Indians will be denied satisfaction of their claims for an indefinite period before Congress acts.

Moreover, the past history of congressional investigations into the fishing rights problem indicates that the reliable information on Indian economic need required for rational solution of the controversy will be buried in tangled legal and extra-legal arguments, as witnesses seek to reargue before Congress the pros and cons of judicial decisions on Indian fishing rights.[144]

Remedial action by courts has several advantages over legislative action. The solution most likely to be employed by Congress would be a delegation to the Secretary of the Interior of the authority to define Indian need and to issue regulations determining the Indian share of the harvestable fish. This approach would be pointless since the Secretary apparently already has such power.[145] The Secretary has, for instance,

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chester Band of Pomo Indians, Inc. v. United States, Civ. No. 50276 (N.D. Cal. Mar. 24, 1969).

142. Dowling, *supra* note 19, at 24.

143. The efforts of Taos Pueblo to regain control over Blue Lake from the United States Forest Service date back at least 40 years. *See* Whatley, *The Saga of Taos, Blue Lake*, THE INDIAN HISTORIAN, Fall 1969, at 22-28. The Alaska Native land claims controversy involving federal and state governments dates back 80 years. *See* Ickes, *On Frisking The Alaska Indians*, NEW REPUBLIC, May 9, 1949, at 19-20.

144. *See, e.g.*, Statement of Mike Johnston, Assistant Attorney-General, State of Washington, *1964 Hearings, supra* note 8, at 33-41; Letter from Nicholas Katzenbach, Deputy Attorney-General to Senator Henry Jackson, July 10, 1964, *id.* at 8; Statement of Walter Neubrech, Chief, Enforcement Division, Washington State Department of Game, *id.* at 28-33; Statement of Yakima Indian Nation, *id.* at 50-53; Statement of Alvin Ziontz, Attorney for Makah Tribe, *id.* at 78, 84-88.

145. On July 15, 1967 the Secretary of the Interior issued regulations requiring, *inter alia*, that Columbia River treaty Indians obtain identification cards. 25 C.F.R. § 256 (1970). These regulations were issued under authority of 25 U.S.C. § 2 (1964). The regulations do not define the state's responsibility to satisfy Indian need under the treaty; in fact, a saving provision [25 C.F.R. § 256.7(b) (1970)] indicates that the regulations were intended to have no substantive impact at all on the state's posture towards Indian fishermen. Federal agency determination of Indian need under author-

set the limit of walleyes that may be harvested by the Red Lake Indians of Minnesota at 650,000 pounds.[146] Moreover, state officials would probably regard federal administrative action as the worst possible solution to the controversy,[147] since state governments historically have had primary responsibility for the regulation of fish and game.[148] The federal commitment to development of the power resources of the Columbia River has already raised the specter of increased federal involvement in the regulatory aspects of fisheries management,[149] and state reaction to the mere possibility of such federal involvement has been intense.[150] State officials, while rankling under federal court review of state administrative action affecting Indians,[151] are likely to view federal administrative involvement in fisheries management as even more offensive.

Where Indian fishermen charge that the agency's allocation is too small, few Indians will be involved[152] and relatively few factual determinations are necessary to define Indian need.[153] The management

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ity of 25 U.S.C. § 2 (1964) might, if too small, be subject to attack as an abuse of discretion. *Cf.* Tooahnippah v. Hickel, 397 U.S. 598 (1970). *But cf.* Scholder v. United States, 428 F.2d 1123 (9th Cir.), *cert. denied*, 400 U.S. 942 (1970). Thus federal agency action may only result in a grudging determination of Indian need, requiring Indian fishermeu to attack this federal determination and further delaying resolution of the controversy.

146. 25 C.F.R. § 89.9 (1970).

147. *See 1964 Hearings* 26 (statement of Joseph Coniff, Assistant Attorney General, State of Washington).

148. Royce & Hansen, *supra* note 117, at 255. *See also* U.S. DEPT. OF THE INTERIOR, TRIDENT—A LONG RANGE REPORT OF THE BUREAU OF COMMERCIAL FISHERIES 31 (1963); Schwartz, *Federalism and Anadromous Fish*, 23 GEO. WASH. L. REV. 535 (1955).

149. Congress' response to the threat to anadromous fish posed by the development of the Columbia is embodied in Act of May 11, 1938, ch. 193, 52 Stat. 345 (codified at 16 U.S.C. 755-757 (1964)). *See also* Commercial Fisheries Resource and Development Act of 1964, Pub. L. No. 88-309, 78 Stat. 197 (codified at 16 U.S.C. § 779 (1964)); Anadromous Fish Act of 1965, Pub. L. No. 89-304, 79 Stat. 1125 (codified at 16 U.S.C. §§ 757a-57f (Supp. V, 1970)).

150. *Compare* H.R. Doc. No. 473, *supra* note 3, at 58 *with Hearings on H.R. 1278 before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on the Merchant Marine and Fisheries*, 89th Cong., 1st Sess. 13 (1965).

151. *See 1964 Hearings* 37.

152. See note 113 *supra*.

153. At least on the issue of Indian need for fish resources, agency officials are not entitled to a presumption of administrative expertise. Market Street Ry. Co. v. Railroad Comm'n, 324 U.S. 548, 560-61 (1945). A court should make findings of fact on: the number of Indian fishermen whose livelihood depends substantially on fishing; the number of dependents of such fishermen; federal guidelines on minimum income levels; the average annual cost of equipment and gear; and the average value of fish caught at the Indians' usual and accustomed sites. For comparison the court may consider the fact that the federal government paid each Indian who fished at Celilo Falls $3,754.91 for the damage done resulting from the flooding of that fishery. This figure represented "capitalization at three percent of the total value of the fish caught

agency should hold a trial-type hearing on the issue of Indian need;[154] a record containing evidence on all of the relevant issues would facilitate the reviewing court's decision on whether there was substantial evidence to support the agency's determination. In a case where the agency has not held a hearing which adequately preserves evidence of Indian reliance on fish resources,[155] the court itself, relying on the diligence of the competing litigants, is competent to find the facts necessary to a determination of Indian need.[156] Judicial willingness to make such a determination where state officials engage in dilatory tactics might induce state agencies to prepare a full record on the issue with minimal delay.[157]

A final consideration militating in favor of active review is that judicial attention to the issue of Indian need is not required annually. Until state officials or Indian fishermen bring sufficient evidence to the court's attention to warrant a change, an agency determination, for instance, that Indian need will support an allocation of 60,000 harvestable fish annually, will remain binding; conversely, the agencies will be able to rely on a certain size Indian catch in making short and long run management projections. Thus, a congressional solution in any of its possible forms is probably not forthcoming, and in some forms it might be quite impractical. On the other hand, courts are competent to work

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by the Indians in an average year and sold commercially or to tourists or for subsistence." Whitefoot v. United States, 293 F.2d 658, 672 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962). *See generally* J. CRAIG & R. HACKER, *supra* note 2; U.S. FISH & WILDLIFE SERVICE, SUMMARY REPORT ON THE INDIAN FISHERY AT CELILO FALLS AND VICINITY ON THE COLUMBIA RIVER, 1947-1954 (1955).

154. Under Oregon law, for example, Indian fishermen are not presently entitled to a trial type hearing on the issue of Indian need. *See* ORE. REV. STAT. §§ 183.310(2), 506.151(1) & (2) (1969). A dispute over Indian need involves basically adjudicative facts. See text accompanying notes 152-53 *supra*. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.04, at 421 (1958). Thus a trial type hearing affording Indian fishermen such procedural safeguards as the right to cross examine state officials as to their calculation of Indian need for anadromous fish is appropriate. A trial type hearing is especially appropriate in light of the failure of Congress' rule-making hearing [see note 144 *supra* and accompanying text], to provide any reliable evidence as to the extent of Indian reliance on anadromous fish. See note 144 *supra*. Greater attention to the facts of Indian economic need may help break the deadlock which now grips the Indian fishing rights controversy in which each side assails the other with the conflicting claims of state sovereignty or the sacred nature of treaty rights.

155. Compare the situation where in hearing a petition for habeas corpus the federal district judge is authorized to rely on the state court transcript if the petitioner has received a "full and fair evidentiary hearing" in the state court. Townsend v. Sain, 372 U.S. 293, 312 (1963).

156. Compare the discretion granted to courts by statute to determine the amount of alimony and child support liability. *See, e.g.*, CAL. CIV. CODE §§ 4700(a), 4801 (West 1970).

157. *Cf.* Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights*, 113 U. PA. L. REV. 793, 840-41 (1965).

out the mechanical details of satisfying Indian need even in the absence of cooperation by state officials.

Judicial competence to determine state responsibility to satisfy Indian need can be over emphasized. True, the federal government itself sets income levels for a minimally decent standard of living.[158] Nevertheless, it is only in extreme circumstances of state recalcitrance that a court itself should actually select an income level and require a large enough allocation of fish to attain this level. Both the efficiency of the fish management process and the Indians' long-range economic interests are best served where state officials, and not courts, take primary responsibility for fulfilling the state's treaty obligations. An active judicial posture is only justified insofar as it induces state compliance with the court's interpretation of the treaty. Thus the state must actually define Indian need, subject, of course, to active judicial review.

B. Clarification of Ambiguous Congressional Purpose

One factor must be considered in determining the appropriate judicial stance where state interests and Indian treaty fishing activity collide. To resolve such a controversy, a court must determine the extent of Indian rights secured by the treaty. Problems are likely to be encountered here, for while Congress has evidenced a broad purpose that these treaty rights be enforced,[159] there is some ambiguity concerning the extent of the congressional mandate and the appropriate judicial response to such ambiguity. Thus while a court may conclude that the treaty fishing provision is not outmoded and that enforcement is within the scope of a viable congressional purpose, it may nonetheless decline to compel state agencies to allocate to Indians all of the harvestable fish that they need for a decent standard of living. It might, for instance, discount a figure because it is arguable that Congress might want courts to give deference to state sovereignty, or to take the reliance interest of non-Indian fishermen into account. Alternatively, it might be argued that Congress may not want Indians to use commercial fishing equipment, because use of such gear could not have been foreseen at the time the treaty was negotiated.

The Supreme Court's practice has been to resolve ambiguities in congressional purpose in favor of full satisfaction of Indian economic claims except in three situations.[160] However, it may be urged that

158. *See, e.g.*, Bureau of Labor Statistics, Three Standards of Living for an Urban Family of Four Persons, Spring 1967, Bull. 1570-5, Mar. 1969. *See generally* J. Brackett, *New B.L.S. Budgets Provide Yardsticks for Measuring Family Living Costs*, MONTHLY LABOR REV., Apr. 1969, at 3.

159. See text accompanying notes 11-45 *supra*.

160. See text accompanying notes 52-54 *supra*.

as a condition of full satisfaction of their claims that Indians should have the burden of obtaining congressional clarification of their treaty rights. The validity of this argument can be determined by inquiring first, what logic might lend support to the Court's practice of applying a presumption in favor of full vindication of Indian economic claims, and second, whether the treaty fishing rights controversy is an appropriate case for applying that logic.

1. Rationale for the Presumption of Full Economic Protection

Every preemption question involves a construction of the relevant congressional enactment in light of congressional purpose. Yet Congress does not always speak only once or in a single mood on a given subject, and rarely speaks at all to the issue of preemption.[161] Judicial determination of the field Congress may be said to occupy is therefore almost always pregnant with the danger of error. The Court's classic response to state arguments that congressional ambiguity might be construed in their favor in Indian-state controversies is contained in *United States v. Rickert*.[162] *Rickert* involved the imposition of a county tax on the personal property of Indians residing on land held in trust by the United States for their benefit. The county taxing officials urged that while Congress might want the Indian trust land to be non-taxable to increase its economic benefits for Indians, it had also planned at some point in the future to make Indians citizens subject to the same burdens, including liability for local taxes, that all citizens must bear. The state had granted Indians the right of suffrage and argued that subjecting Indians to liability for local taxes would be consistent with Congress' plan to end Indian dependency on the federal government at some future time.[163]

The Court rejected this contention and insisted instead that if state action impinged on Congress' commitment to Indian economic security the Court would fully vindicate the Indians' interest and refer the states, not the Indians, to Congress for resolution of the ambiguity.

> It is for the legislative branch of the government to say when these Indians shall cease to be dependent [on the federal commitment to Indian economic security] and assume the responsibilities attaching to citizenship. That is a political question which the courts may not determine.[164]

The *Rickert* Court was correct in defining the proper judicial

161. *But see, e.g.*, 45 U.S.C. § 152(11) (1964); Act of Aug. 15, 1953, ch. 505, § 2, 4, 67 Stat. 588. *See generally* P. ASCHENBRENNER & D. SNOW, *supra* note 67, ch. 5.

162. 188 U.S. 432 (1903).

163. *Id.* at 445.

164. *Id.*

posture toward ambiguities in congressional purpose.[165] It is, after all, only a question of which party, the state or the Indian community, must resort to the political branch of government to correct a judicial determination of the controlling congressional purpose, assuming of course that congressional intentions in the case at issue may fairly be characterized as unclear.[166]

Many aspects of the Indians' historical and political circumstances justify the *Rickert* presumption that ambiguities in congressional purpose should be resolved in favor of judicial satisfaction of Indian economic interests. First, the existence of anti-Indian hostility makes non-Indians and state officials better able than Indians to resort to political self-help. "[Indians] owe no allegiance to the States, and receive from them no protection," stated the Court in *United States v. Kagama.*[167] "Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies."[168] Conversely, since the Court has historically *preempted* state action, instead of declaring it an *unconstitutional* intrusion on Congress' treaty-making power[169] or power to regulate commerce with the Indian tribes,[170] those who wish to minimize Indian claims on the harvestable fish are free to exercise their superior political muscle.[171]

This factor bears a certain resemblance to the "special condition" doctrine of *United States v. Carolene Products Co.*[172] where Justice Stone suggested that prejudice against discrete and insular minorities would justify a closer judicial scrutiny of state action affecting their civil

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165. The *Rickert* Court faced and resolved a question which is somewhere near the heart of all questions of state action and congressional power over Indians: the fact that Congress is both committed to promoting Indian economic security in the short run through manipulating the special legal status it has conferred on Indians, while adhering to the view that in the long run such special legal status must come to an end. *Cf., e.g., 1967 Hearings, supra* note 46, at 48-49, 86-87. Two classic instances in which the Court has resolved such ambiguities in congressional purpose against state action are Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), and Williams v. Lee, 315 U.S. 217 (1958).

166. See text accompanying notes 52-54 *supra.*

167. 118 U.S. 375, 384 (1886).

168. *Id. See also In re* Carmen, 48 Cal. 2d 851, 886-87, 313 P.2d 817, 839 (1957) (Carter, J., dissenting). *See generally* R. SPENCER & J. JENNINGS, *supra* note 4, at 502.

169. The Court, in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), may have rested its decision on both preemption and constitutional grounds, although it is more likely that specific congressional enactments, and not the constitutional grant of treaty-making power, were at the heart of the Court's decision.

170. There have been occasional holdings, however. *See* Thomas v. Gay, 169 U.S. 264 (1898) (alternative holding); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 590-94 (1832) (alternative holding); *cf.* Warren Trading Post Co. v. Moore, 95 Ariz. 110, 117, 387 P.2d 809, 814 (1963) (alternative holding), *rev'd on other grounds sub nom.*, Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

171. See text accompanying notes 112-15 *supra.*

172. 304 U.S. 144 (1938).

rights; their capacity for political self-help was presumably diminished by such prejudice.[173] The *Rickert* presumption is even less drastic than the judicial scrutiny suggested by *Carolene Products* because the latter might result in constitutional interpretation permanently blocking state action, while *Rickert* relies only on preemption, leaving the political branches free to clarify the ambiguity and diminish the range of protected Indian interests.[174] Of course, Justice Stone was apparently referring to political and civil rights,[175] which the Constitution secures all citizens, not to special economic rights. The fact that the Indian fishing rights controversy revolves around competition for anadromous fish should not, however, obscure the fact that Indians are a distinct racial group and that struggles over the limited resource available are not just squabbles among businessmen.[176] Community feeling toward Indian fishermen is entirely out of proportion to that expressed towards other groups or institutions whose claims also conflict with conservation or competing economic interests.[177] In the Pacific Northwest, the widespread hostility to Indian treaty fishing[178] is evidence that the local prejudice of *Carolene Products* may operate as harshly against a minority's economic claims as against its efforts to exercise first amendment freedoms. However limited the *Carolene Products* rationale may be as a reason for applying the *Rickert* presumption, it emphasizes the proposition that inability to effectively resort to political self-help may appropriately form the basis for a judicial posture of increased concern for the rights of those subject to local racial hostility.[179] In *Rickert* the Court attached no importance to the fact that South Dakota had enfranchised Indian residents,[180] apparently assuming that these Indians

173. 304 U.S. at 152-53 n.4.

174. *Cf.* Swift & Co. v. Wickham, 382 U.S. 111, 127 (1965).

175. There is evidence, however, that Justice Stone would not exclude from the scope of his analysis economic interests. *See* South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938) (out-of-state truckers attacked state regulation of carriers on state highways).

176. H.E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2d Cir. 1963).

177. There is evidence that local communities [*see 1964 Hearings* 98] and dams [*see Hearings on H.R. 2393, et al. before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 88th Cong., 2d Sess. 19-21 (1964)], are responsible for the decline in the anadromous fish population in the Pacific Northwest. Nevertheless, the Indians receive publicity far out of proportion to the number of fish that they take from the runs. *See generally* UNCOMMON CONTROVERSY, *supra* note 108, at 107. Compare the situation of the Japanese high seas salmon fishermen. *See Hearings on S. 909, et al. before the Subcomm. on Merchant Marine and Fisheries of the Senate Comm. on Commerce*, 89th Cong., 1st Sess. 175 (1965).

178. See *1964 Hearings* 126; (statement of Theodore Bugas, Ex. Sec'y, Columbia River Salmon and Tuna Packers Association); see note 115 *supra*.

179. *See* Minersville School Dist. v. Gobitis, 310 U.S. 586, 601 (1940) (Stone, J., dissenting).

180. 188 U.S. 432, 445 (1903); *see* S.D. CONST. art. VII, § 1. In 1890 the state

would be unable to protect their economic interests through the state political process.

There are additional factors which hinder Indian political self-help. Indians are dependent on congressional power for vindication of their claims because their lands, the original source of all Indian political power, were long ago ceded to the federal government, frequently at a small fraction of their value.[181] Thus Indian tribes have no further leverage with which to force the government to provide any continued assistance or enact specific programs to strengthen the Indian economic base, beyond the provisions of the original treaties of cession.[182] The Court itself has recognized Congress' responsibility for Indian dependency,[183] and at least in dicta has insisted that Congress may not exploit this dependent condition by terminating Indians' special rights in bad faith.[184] Moreover, Indian political strength is also handicapped by the Indians' small numbers[185] and by the debilitating impact of the paternalistic attitudes of federal officials.[186] The fact that every major piece of congressional Indian legislation was initiated by non-Indians, with varying degrees of Indian acquiescence,[187] is a further index of their political weakness.

Finally, when federal and state governments established the patterns by which natural resources were to be allocated, Indians, as non-

legislature proposed an amendment to the Sonth Dakota Constitution [*see* ch. 45 [1890] S.D. Stat.] which would have disenfranchised Indians who sustained tribal relations, received federal economic assistance, or held nontaxable land. The electorate rejected this amendment. *See* S.D. COMP. LAWS 379 (1969).

181. *See* H.R. REP. No. 1466, 79th Cong., 1st Sess. 5-6 (1945).

182. *See e.g.*, Treaty with the Tribes of Middle Oregon, arts. IV, V, 12 Stat. 953-54 (1855) (vesting discretion in the President to expend certain sums for reservation bnildings, opening and fencing farms, teams, stock, seed, and agricultural implements, clothing, provisions, arms and ammunition). Another indication of Indian political weakness may be seen in the fact that in 1875 Congress provided that able-bodied male Indians may be required to work, at rates set by federal officials, as a condition of receiving congressionally appropriated supplies and annuities. Act of Mar. 3, 1875, ch. 132, § 3, 18 Stat. 420, 449 (codified at 25 U.S.C. § 137 (1964)).

183. United States v. Kagama, 118 U.S. 375, 384 (1886); see text accompanying notes 30-45 *supra*. One of the clearest indicia of Indian political weakness is the fact that Congress' responsibility for Indian welfare, according to the Court, is self-imposed. Seminole Indian Nation v. United States, 316 U.S. 286, 296-97 (1942).

184. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

185. See note 113 *supra*.

186. The classic repository of government opinion to this effect is contained in the 1890 Census. *See Report on Indians Taxed and Indians Not Taxed in the United States (Except Alaska) at the Eleventh Census: 1890*, in H.R. MISC. DOC. No. 340, 52d Cong., 1st Sess. pt. 15 (1894); *Policy and Administration of Indian Affairs*, in H.R. MISC. DOC. No. 340, *supra* at 61; *Legal Status of Indians*, in H.R. MISC. DOC. No. 340, *supra* at 663. *Compare* United States v. Clapox, 35 F. 575, 577 (D. Ore. 1888) *with* Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

187. *See* Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 ARIZ. L. REV. 559 (1968).

citizens, were barred from voting and influencing the outcome of these decisions. Congress delayed 122 years after enacting its first permanent legislation affecting Indians[188] before extending the suffrage to all Indians in 1924,[189] although approximately two-thirds of all Indians were citizens prior to 1924 as a result of specific congressional enactments.[190] State regulation of fishing in the Columbia River commenced long before[191] most Indians were able to vote,[192] and during this delay in granting suffrage certain allocation arrangements were established. Non-Indians have come, for example, to rely on a certain portion of the run being available for harvest at the mouth of the Columbia.[193] Thus in seeking political satisfaction of their claims, Indians must attack not just a particular agency decision but longstanding patterns of resource allocation and agency decisionmaking.

The political and historical circumstances of Indians in America provide support for the *Rickert* presumption and dictate that ambiguities in congressional purpose should be resolved in favor of granting full economic relief to Indian claimants, as far as such relief is supported by substantial evidence of Indian economic need.[194] The burden would then properly rest on non-Indians[195] and state officials to urge Congress to narrow the range of protected Indian interests should they feel that courts have been too generous to Indians.

2. *An Alternative Rationale for the Presumption of Full Economic Protection*

The suggested logic for applying the *Rickert* presumption may lack persuasiveness since lower federal and state courts may feel that a judi-

188. Act of Mar. 30, 1802, ch. 13, 2 Stat. 139. Prior to 1802 Congress enacted a series of temporary trade and intercourse acts to handle the problems of keeping the peace on the frontier.

189. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(a)(2) (1964)).

190. *See Hearings pursuant to S. Res. 53 before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 2 (1961).

191. State regulation commenced in 1877 when Washington closed the Columbia River during four months of the year; Oregon followed suit in 1878. A. NETBOY, *supra* note 99, at 28-29.

192. *See, e.g.*, State *ex rel.* Campbell v. Case, 182 Wash. 334, 338, 47 P.2d 24, 26 (1935).

193. *See 1964 Hearings* 122-30.

194. See text accompanying note 154 *supra*.

195. Such a burden may encourage states to negotiate agreements with tribes on the size on the Indians' share of the harvestable fish. *See* Sohappy v. Smith, 302 F. Supp. 899, 912 (D. Ore. 1969); UNCOMMON CONTROVERSY, *supra* note 108, at 132-37. Congress has provided that where a right to property is disputed between Indians and non-Indians, where the Indian shows evidence of ownership or possession in himself, the non-Indian shall have the burden of rebutting the presumption that the Indian rightfully owns the property. Act of June 30, 1834, ch. 161, § 22, 4 Stat. 729, 733.

cial posture based on the inability of some parties to resort to political self-help is an expression of hostility toward the political process.[196] Moreover, the *Rickert* presumption may be expressed in terms suggesting a limit on congressional power: Congress must speak clearly in favor of state or non-Indian interests before courts will get the message.[197] But there are sound reasons for such an approach to reading congressional purpose, and the Court has in fact indulged in such readings at the expense of both federal[198] and state interests.[199]

An alternative rationale for application of the *Rickert* presumption to the Indian fishing rights controversy—based not on the political and historical factors already mentioned but on the reasoning of the *Rickert* Court—may place judicial decisionmaking into a more comfortable partnership with Congress.[200] In *Rickert* the Court held that preemption of state action is proper in order to permit Congress to make policy choices in the future and provide for their implementation free from concurrent state regulation of Indian activity.[201] That reasoning may not at first blush seem applicable to the fishing rights controversy, since compelling states to allocate 70,000 fish to the Indians does not promote the effectiveness of future congressional action to a greater degree than a required allocation of only 60,000 harvestable fish. Yet a case may be made for the modern application of the *Rickert* reasoning, since failure to resolve ambiguities in favor of Indian need and to fully satisfy their claims will preclude effective future congressional action by severely limiting Indian trust in commitments made by federal institutions. If it is fair to say that Congress has raised expectations that Indian economic need will be satisfied, then courts should protect Congress by carrying out this goal.[202]

The Indian fishing rights controversy on the Columbia River presents an excellent case for application of the *Rickert* rationale because

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196. *Cf.* McClesky, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUSTON L. REV. 354, 365 (1966); Michelman, *supra* note 88, at 1251.

197. *See In re* Heff, 197 U.S. 488, 499 (1905); *cf.* Williams v. Lee, 358 U.S. 217, 221 (1959). *See also* Thebo v. Choctaw Tribe, 66 F. 372, 376 (8th Cir. 1895).

198. *See, e.g.*, Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); *In re* Heff, 197 U.S. 488 (1905).

199. See notes 52-53 *supra*.

200. *See generally* Dowling, *supra* note 19, at 23-25.

201. 188 U.S. at 438, 442. The Court suggested such increased burdens on the federal government as liability for state and local taxes and in the alternative foreclosure and loss of Indian lands.

202. Such expectations, to be satisfied by the Court, must be reasonable in light of the terms of the treaty. Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945). This may be regarded as a restatement of the Court's practice not to resolve ambiguities in congressional purpose in favor of satisfying Indian need where there is insufficient evidence of any initial congressional commitment. *Cf.* Ward v. Race Horse, 163 U.S. 504 (1896); see text accompanying notes 56-68 *supra*.

the statements of federal officials at the time the treaties were negotiated,[203] the existence of a specific fishing provision,[204] and Congress' continued concern that Indian fishing survive the hydro-electric development of the Columbia[205] have raised legitimate expectations that Indian communities may continue to fish for a livelihood on the Columbia.

Fully satisfying Indian need under the treaty fishing provision is thus appropriate not merely because of the inherent value of fulfilling treaty commitments[206] but also because of pragmatic considerations. Courts relieve Congress of the need to legislate the details necessary to insure the success of its programs and spare Congress the time-consuming chore of satisfying reasonable expectations raised by congressional commitments. Legislating solutions to such conflicts is particularly wasteful if Congress can do little better than the courts in creating a remedy.[207] Congress, under this version of the *Rickert* rationale, would then be free to concentrate its energy on debating policy alternatives and may draw the outlines of its policy preferences with a reasonable assurance as to how courts in specific litigation would translate these policies into specific rulings. Under such a rationale, judicial resolution of actual ambiguities in congressional purpose is not at odds with the political branches, but instead merely fills the interstices in congressional programs where Congress itself has not provided the details for satisfying Indian need.

3. *Application of the Rickert Presumption to the Fishing Rights Controversy*

In light of the demise of the equal footing doctrine,[208] protection of state sovereignty is not a valid basis on which to scale down the Indian catch without evidence that such a reduction is within the scope of congressional intentions. Since Congress' current preference for state sovereignty over Indians' special status is far from clearly established,[209]

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203. See notes 10, 11 *supra.*

204. See notes 6, 7 *supra.*

205. See text accompanying notes 22-24 *supra.*

206. Compare Justice Black's rationale for extending judicial protection to such expectations in FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960): "Great nations like great men should keep their word."

207. See text accompanying notes 142-58 *supra.*

208. See note 65 *supra.*

209. *See, e.g.*, Act of Apr. 11, 1968, Pub. L. No. 90-284, § 406, 82 Stat. 80 (codified at 25 U.S.C. § 1326 (Supp. V, 1970)). The Court has not yet made clear whether, if it finds that Congress prefers state to federal civil and criminal jurisdiction on Indian reservations on a nationwide basis, that finding commits the Court to rule that the enforcement of an Indian economic claim in a specific dispute with state government is outside the scope of congressional purpose. Kake Village v. Egan, 369

Rickert would correctly require that the state obtain a clear congressional mandate before courts will assume a less than active posture towards fulfilling Indian need. Moreover, since it has already been established that state sovereignty must recognize the special status of Indian fishermen,[210] a requirement that the state satisfy Indian economic need does not seem by comparison to substantially undermine state sovereignty.

The possible advantage to states of avoiding application of *Rickert* does not militate very persuasively for so doing. The state has no protectable interest in seeing that Indians catch fewer fish than they need for a decent standard of living. States should not be able to assert the economic need of one group of fishermen over another in the face of a federal treaty commitment to one group of fishermen.[211] Aside from the impact on non-Indian fishermen, no injury to the state's economy results from allocating the harvest as between competing fisheries. All but a small fraction of the fish caught by Indian commercial fishermen are sold to non-Indian canners and packers and enter normal commercial channels.[212] On the other hand, state public assistance agencies may well have something to lose by the state's failing to permit Indians to land fish they need to live on, since minimizing the Indian catch may force Indian fishermen and their families to seek public welfare.[213]

The interests of non-Indian fishermen should not alter the *Rickert* requirement that courts fully vindicate Indian claims. Non-Indian claims on the resource are of an entirely different nature, since their fishing may be terminated without compensation.[214] Moreover, non-Indian fishermen are no worse off than the many individuals and entrepreneurs who must shoulder disabilities which inure to the advantage of a competitor.[215] Full satisfaction of Indian claims at the expense of non-Indian fishermen seems fair because in fact non-Indians are also beneficiaries under the treaty: they live and work on land which the federal government has purchased and cleared of Indians for their benefit. Finally, the argument that non-Indians have relied on a certain

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U.S. 60 (1962) indicates that almost every kind of congressional action is relevant to determining the controlling congressional purpose, while Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965), appears to limit the Court's inquiry to congressional action directly relevant to the specific economic dispute at issue.

210. See text accompanying notes 65-67 *supra.*

211. Tulee v. Washington, 315 U.S. 681 (1942).

212. *See* Whitefoot v. United States, 293 F.2d 658, 668-70 (Ct. Cl. 1961), *cert. denied,* 369 U.S. 818 (1962).

213. *See* Ward v. Race Horse, 163 U.S. 504, 518 (1896) (Brown, J., dissenting).

214. Anthony v. Veatch, 189 Ore. 462, 220 P.2d 493, *appeal dismissed,* 340 U.S. 923 (1950); State *ex rel.* Campbell v. Case, 182 Wash. 334, 47 P.2d 24 (1935).

215. See text accompanying note 90 *supra.*

portion of the harvest is not persuasive because this reliance interest arose at a time when states barred Indians from voting and thereby affecting these allocation patterns.[216] While the non-Indian fishermen were not wholly responsible for barring Indians from voting, they, and not the Indians, had a voice in creating the patterns of resource allocation that non-Indians now seek to perpetuate.

The *Rickert* presumption should also apply against the argument that Congress would not want treaty fishing activity to involve use of modern nets.[217] This argument asserts in effect that Indians do not have standing to assert rights based on century-old treaties unless they are willing to exercise such rights relying only on the dip nets, weirs, or spears in use at the time the treaties were signed.[218] It is true that the Court has on occasion read congressional intentions to the effect that Indians may not receive any benefits from a congressional program unless they have retained tribal ways or allegiances.[219] Today however, given the variety of forms in which Congress has assisted tribal economic development,[220] it can hardly be said that commercial fishing by Columbia River Indians is outside the scope of Congress' concern for improvement of economic conditions in Indian communities.

Indian use of modern nets is an unacceptable means of exercising treaty rights only if Congress may be said to be hostile to the continued existence of Indian fishing altogether. Thus one may argue that should Indians insist on clinging to a traditional occupation such as fishing, courts ought to shackle Indians to the past by requiring them to use dip nets, weirs, or spears. But to so condition Indian fishing would in effect destroy such activity as a livelihood; federal and congressional concern now indicate[221] that forcing Indians to surrender a traditional occupation, however exercised, is no longer acceptable.[222] Thus, there is insufficient evidence of a congressional purpose to limit Indians to century-old equipment on which to defeat the *Rickert* presumption.

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216. See text accompanying notes 191-93 *supra.*

217. State v. McCoy, 63 Wash. 2d 421, 439, 387 P.2d 942, 953 (1963) (Hill, J., concurring).

218. See note 65 *supra.*

219. *See* The Kansas Indians, 75 U.S. (8 Wall.) 737 (1866). *See also* Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd mem.*, 384 U.S. 209 (1966); ORE. REV. STAT. § 506.045 (1969).

220. See notes 39-44 *supra.*

221. *See, e.g.*, S. Con. Res. 11, 114 CONG. REC. 26656-57 (1968); President's Message to the Congress, 116 CONG. REC. H 6438, S 10799 (daily ed. July 8, 1970).

222. *Compare* Homestead Act 1862, ch. 12 Stat. 392 (codified at 43 U.S.C. § 161 (1964)) (non-citizens excluded from coverage of Act) *with* Act of Mar. 3, 1875, ch. 132, § 15, 18 Stat. 420 (Indians who prove abandonment of tribal relations may be entitled to benefits of Homestead Act).

In summary, courts are competent to find the facts and make the determination of Indian need upon which the state must arrange its allocation scheme, even if state agencies should deny Indians a full evidentiary hearing. The considerations which states and non-Indians might present against satisfying Indian economic need do not rebut the *Rickert* presumption; under either suggested rationale the *Rickert* presumption may be appropriately applied to ambiguities in congressional intentions on the subject of Indian economic need.

CONCLUSION

The sensible solution to the problem of defining limits for state power over Indian treaty fishing activity is to rely on economic security, which is the underlying purpose of the treaty provision. Enforcement of the provision today is consistent with the current congressional commitment to Indian economic security. Indian exercise of this federally secured right requires a state posture different from that taken toward its licensees. For instance, the state has no responsibility to arrange its allocation scheme to satisfy the economic claims of non-Indians; the treaty provision, however, imposes precisely such an obligation on the state vis-à-vis the treaty Indians fishing at their traditional sites. In fulfilling its responsibility under the treaty, the state may restrain Indians from taking fish slated for spawning; thus there should be an upper limit to Indian claims on the resource based on conservation needs, and a lower limit to such claims established after an examination of Indian need. In this way, state agencies may insure the success of their conservation programs through their ability to calculate when the state will have discharged its responsibility to Indian fishermen. Indian fishermen may rely on a consistent fulfillment of state responsibility under the treaty, despite annual and seasonal variations in time, manner and place of permissible Indian fishing.

Basically the fishing rights contest is one between two groups of fishermen competing for a limited resource, and requiring, therefore, a delicate adjustment of state and federal commitments to both these groups and other interests. The route that courts have taken in adjudicating conflicts between state action and federal rights—supported both by considerations of Indian political weakness and effective congressional decisionmaking—is consistent with their adjustment of state and federal commitments in other areas. That state power must bow to rights secured by the national government is the first principle of any federal system. From a broader perspective Indian claims on the resource may be viewed as resting on other grounds, such as our national commitment to fulfill promises made by our forefathers over a hundred years ago or our will to respect discrete cultures in a plural society.

In the final analysis, however, the claim of Indian communities for a decent standard of living from traditional sources speaks for itself as the proper ground on which vindication of such rights may ultimately rely.

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