INDIAN FISHING RIGHTS: A LOST OPPORTUNITY FOR ECOSYSTEM MANAGEMENT

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Table of Contents

I. INTRODUCTION

Today, the depletion of salmon and steelhead fisheries in the Northwest United States is a concern not only to commercial fishers whose livelihoods depend on the resource but also to conservationists who fear the endangerment or extinction of the species. The implementation of a comprehensive approach to fisheries management could have reduced this threat of depletion. The federal courts had the opportunity to promote regulation and conservation of the fisheries in two cases, *Sohappy v. Smith*[1] and *United States v. Washington* (*Boldt*),[2] but failed to adopt an effective

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1. 302 F. Supp. 899 (D. Or. 1969), *aff'd in part*, 529 F.2d 570 (9th Cir. 1976).

2. 384 F. Supp. 312, 355 (W.D. Wash. 1974), *aff'd in part and rev'd in part*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). *United States v. Washington* is popularly

management model that would address the environmental concerns of the fisheries as a whole. In these cases, Indian fishers in Oregon and Washington sought to enforce historic treaty fishing rights and invalidate state regulations that infringed upon their rights to resource allocation and habitat protection. Although the courts determined how fishery resources should be allocated among treaty and non-treaty fishers, only one court specifically addressed habitat protection and was later reversed on the issue.[3] That court attempted to implement a conservation program that followed the basic tenets of what is now known as the Ecosystem Management Model.[4]

This article gives a brief overview of the history of the decisions and the federal legislation that stemmed from them and discusses the Ecosystem Management Model with respect to fishery protection. Part II provides a historical overview of the decision addressing the rights of Indian fishers, focusing on the *Boldt* and *Sohappy* decisions. Additionally, Part II recounts the legislative measures taken in response to these decisions. Part III describes the Ecosystem Management Model and its interplay with fisheries management. Finally, Part IV concludes that the rejection of the ecosystem approach may result in the serious and permanent depletion of fisheries.

II. HISTORICAL BACKGROUND

In 1854, Governor Isaac Stevens of the Oregon Territory and Joel Palmer, Superintendent of Indian Affairs, negotiated treaties that were designed to provide for "peaceful and compatible coexistence" between Indians and non-Indians and that would move the tribes from their historic lands to reservations.[5] The tribes, concerned about their dependence on anadromous fish,

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referred to as the *Boldt* decision. *See* H.R. REP. NO. 96-1243, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6793, 6794.

3. *See* United States v. Washington, 506 F. Supp. 187, 190 (W.D. Wash. 1980), *vacated*, 759 F.2d 1353 (9th Cir. 1980), *cert. denied*, 474 U.S. 994 (1985); *see also* discussion *infra* Part II.E.

4. *See* Peter C. Monson, Case Note, *United States v. Washington (Phase II): The Indian Fishing Conflict Moves Upstream*, 12 ENVTL. L. 469, 481 (1982).

5. *Id.* at 355.

wanted to preserve their rights to continue fishing for these resources both on and off the reservation.[6] Governor Stevens assured them that both Indians and American settlers alike would be able to fish off-reservation.[7] To implement this promise, he included specific language in these treaties that provided that Indian tribes retain the right to fish "at their usual and accustomed places in common with the citizens of the territory."[8]

In the late 1960s and early 1970s, Indian tribes and the United States filed fishing rights lawsuits in the federal courts of Oregon and Washington.[9] The tribes claimed these rights based on the Stevens treaties that allowed members of treaty tribes to fish for salmon and steelhead in areas that were not part of the reservation.[10] Decisions in these cases granted Indians increased rights to off-reservation fisheries and implicitly promised restoration of the fisheries to their historic levels, as they existed before over-exploitation and pollution.[11] The decisions also led to state opposition, and then non-acceptance and increased conflict between white and Indian fishers.[12]

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6. *See id*.

7. *See id.*

8. Judge Robert C. Belloni, *Foreword*, 3 HASTINGS W.-N.W. J. ENVTL L. & POL'Y 7, 7 (1995) (quoting Yakima Treaty, art. III (June 9, 1855)); *see* United States v. Washington, 520 F.2d 677, 683 (9th Cir. 1975).

9. *See* United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969), *aff'd in part*, 529 F.2d 570 (9th Cir. 1976). In the Oregon case, the tribes and the United States filed separately, but Judge Belloni consolidated the suits. *See id.* at 903. In *Boldt*, the tribes joined a suit filed by United States. *See Washington*, 384 F. Supp. at 327-30.

10. *See Sohappy*, 302 F. Supp. at 904; *Washington*, 384 F. Supp. at 330-33.

11. *Cf.* Brian R. Campbell, *Casting a Net into Turbulent Waters: Indian Salmon Fishing Rights in Canada and the United States*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 101, 113 (1995).

12. *See* Laura Berg, *Let Them Do as They Have Promised*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 8, 14-17 (1995). Fishers and state officials opposed the *Sohappy* and *Boldt* decisions legally and physically. Similar to desegregation cases, some parties responded by attempting to frustrate federal court power. *See* Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F.2d 1123, 1125 (9th Cir. 1978), *vacated*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

In response, the federal government enacted legislation to soothe the hostilities between treaty and non-treaty fishers.[13] Federal funds would be used to pay white fishers for their boats, equipment, and other material and thus "buy them out" of the fishery.[14] The legislation also authorized federal funding to develop projects and incentives for fishery enhancement.[15] Despite this legislation, subsequent court decisions, lack of funds, and lack of an ecosystem focus have quashed the hope of enriching fisheries. In fact, many of the salmon resources involved are now considered in danger.[16]

A. The Sohappy *and* Boldt *Decisions*

In *Sohappy v. Smith*,[17] Judge Robert C. Belloni reviewed the Stevens treaty provisions and ruled that the State of Oregon's restrictions on Indian treaty fishing rights were invalid.[18] The court stated that the treaties entitled Indians to a "fair share" of the fish resources at "all usual and accustomed places."[19] The court would allow only limitations on the Indians' rights that were necessary for conservation purposes,[20] and held that the state's power to regulate Indian fisheries differed from its power over non-Indian fisheries.[21]

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13. *See* Salmon and Steelhead Conservation and Enhancement Act of 1980, Pub. L. No. 96-561, 94 Stat. 3275 (1980) (codified at 16 U.S.C. §§ 3301-3345 (1995)); H.R. REP. NO. 96-1243, at 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6793, 6796-97; *see also* Daniel J. Evans, Keynote, *Toward the Return of Pacific Salmon and Steelhead*, 16 ENVTL. L. 359, 360 (1986).

14. 16 U.S.C. § 3301(b)(1).

15. 16 U.S.C. § 3321.

16. *See* John V. Byrne, *Salmon is King—or is It?*, 16 ENVTL. L. 343, 344 (1986); Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 770-73 (1995). The National Marine Fisheries Service is presently considering petitions to list at least some salmon species as threatened or endangered under the Endangered Species Act. *See id.; see also* Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 545-46 (1991).

17. 302 F. Supp. 899 (D. Or. 1969), *aff'd in part*, 529 F.2d 570 (9th Cir. 1975).

18. *See id.* at 911.

19. *Id*. at 907-08, 911-12.

20. *See id.* at 908.

21. *See id*.

According to *Sohappy*, when off-reservation treaty Indian fisheries are involved, "state regulatory powers are limited and bound by certain conditions and standards."[22] The regulations must be reasonable and necessary for conservation, must not discriminate against the Indians, and must be the least restrictive means of achieving the objective.[23] The protection of treaty fishing rights must be a state regulatory objective, coequal with its fish conservation objectives.[24] Therefore, state police powers may be used only if the continued existence of the fish resource is threatened. Indians may be permitted to fish at places and by means prohibited to non-Indians, and the tribes must have an opportunity for meaningful participation in the rulemaking process.[25]

Five years later, Judge George H. Boldt ruled that the State of Washington had similarly violated the Indians' treaty fishing rights in the *Boldt* decision.[26] He held that "fair share" meant "equal share," and that the tribes were entitled to 50% of the off-reservation fishery.[27] He found that the tribes should regulate Indian off-reservation treaty fishing, but required that they meet certain minimum qualifications and agree to stated conditions.[28] The required qualifications and conditions included effective leadership, which would enable the tribe to promulgate and enforce off-reservation regulations that did not adversely affect conservation objectives.[29] Furthermore, the tribe needed to maintain a membership roll, provide identification to be carried by the fishers,[30] allow the state to monitor off-reservation fishing, and provide data to the state upon request.[31]

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22. *Id.* at 912; Berg, *supra* note 12, at 11.

23. *See Sohappy*, 302 F. Supp. at 908-12.

24. *See id.* at 911.

25. *See id.* at 911-12.

26. United States v. Washington, 384 F. Supp. 312, 405-08 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

27. *See id.* at 343; *see also* Campbell, *supra* note 11, at 113.

28. *See Washington*, 384 F. Supp. at 340.

29. *See id.* at 341.

30. *See id.*

31. *See id.*

At the same time, the court granted the state regulatory power over Indian off-reservation fishing solely for the purpose of conservation.[32] Regulations had to be "reasonable and necessary to the perpetuation of a particular run or species of fish."[33] They also had to be specifically designed to achieve the purpose and "essential to conservation."[34] Finally, the state had the burden of showing that the conservation measure met these standards.[35]

Both judges rejected the idea that any change in treaty rights occurred upon the granting of statehood to Oregon and Washington or by subsequent legislation by Congress.[36] Rather, the judges found that these treaty rights were binding because, like international treaties, they were the law of the land.[37] Both judges reserved jurisdiction to ensure state compliance with the decisions.[38]

Boldt became the focus of public attention, later court action, state attempts at nullification, confusion in the federal court of appeals, and eventually a Supreme Court decision. Judge Boldt's decision also suggested a possible "Boldt II"[39] that could have mandated a comprehensive ecosystem management approach to Northwest fisheries.[40]

B. Boldt *and Its Progeny—Resource Allocation*

The complaint that led to the *Boldt* decision came in two parts. Part One, decided in 1974, sought access to off-reservation

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32. *See id.* at 342.

33. *Id.*

34. *Id.*

35. *See id.*

36. *See Sohappy*, 302 F. Supp. at 905; *Washington*, 384 F. Supp. at 354.

37. *See Sohappy*, 302 F. Supp. at 905; *Washington*, 384 F. Supp. at 337.

38. *See Sohappy*, 302 F. Supp. at 911; *Washington*, 384 F. Supp. at 347.

39. As suggested, this decision did lead to a later decision, United States v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980), *vacated*, 759 F.2d 1353 (9th Cir. 1980), *cert. denied*, 474 U.S. 994 (1985). This article later refers to the decision as Phase II. *See* discussion *supra* Part II.E.

40. *See generally* Martin H. Belsky, *Implementing the Ecosystem Management Approach: Optimism or Fantasy?*, 1 ECOSYSTEM HEALTH 214 (1995) [hereinafter Belsky, *Implementing the Ecosystem Management Approach*] (arguing for an ecosystem approach to balance resource development and environmental protection).

fisheries.[41] As explained above, Judge Boldt held that members of appropriate tribes were to receive 50% of the resources in those off-reservation sites that were the tribes' usual and accustomed fishing areas.[42] Part Two involved the impact of activities on these fisheries and the obligation of the government to return the fisheries to their historic health. The court deferred resolution of this claim until after it resolved the access claim.[43]

The aftermath of *Boldt* occurred on many fronts. First, the salmon catch by treaty fishers more than doubled from 6% of the total salmon harvest to 15% within two years after the decision.[44] In addition, non-native sports fishers, commercial fishers, and the press reacted with anger and threats to the decision and the resulting increase in native fishing.[45] Lastly, Washington state officials openly defied the decision, while repeatedly appealing it.[46]

When the State of Washington appealed Judge Boldt's decision,[47] the Ninth Circuit Court of Appeals affirmed, stating that the treaties' history indicated that the "treaty Indians are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds."[48] The court made one minor clarification, holding that any equitable adjustment "should not take account of fish caught by non-Washington citizens outside the

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41. *See Washington*, 384 F. Supp. at 327-28.

42. *See id*. at 408.

43. *See Washington*, 384 F. Supp. at 328. The plaintiffs asserted claims regarding "alleged destruction or impairment of treaty right fishing" by state action or inaction, but the court heard the issues separately. *Id*. at 327.

44. *See* H.R. REP. NO. 96-1243, at 25, *reprinted in* 1980 U.S.C.C.A.N. 6793, 6807.

45. *See* Monson, *supra* note 4, at 481; Berg, *supra* note 12, at 14-15. The Indians reported incidents of vandalism, and bumper stickers displayed resentment for the *Washington* and *Sohappy* decisions. Media accounts of the death of non-Indian commercial fishers implied that the deaths were related to the decisions. *See id.; see also* H.R. REP. NO. 96-1243, at 26, *reprinted in* 1980 U.S.C.C.A.N. 6793, 6808.

46. In his concurring opinion, Federal District Judge Burns suggested that the recalcitrant acts of government officials and their non-Indian fisher allies forced judges to act unwillingly as managers of the fisheries. *See* United States v. Washington, 520 F.2d 677, 693 (9th Cir. 1975).

47. *See id.* at 682.

48. *Id.* at 688.

state's jurisdiction."[49] The Supreme Court refused to consider the issue, denying certiorari.[50]

C. Commercial Fishers Take Action

The State of Washington refused to accept the Ninth Circuit's decision and went to its own courts to nullify it. *Boldt* required the Washington State Department of Fisheries to adopt regulations to implement the decision.[51] Immediately after the Department issued the regulations, commercial fisherman, assisted by State of Washington officials, filed suit in Washington state court seeking a writ of mandate "ordering the Director of Fisheries to issue regulations which apply equally and in a nondiscriminatory fashion to both treaty and non-treaty fisherman."[52]

In two decisions, *Puget Sound Gillnetters Ass'n v. Moos*[53] and *Washington Commercial Passenger Fishing Vessel Ass'n. v. Tollefson,*[54] the Washington Supreme Court ultimately held the federal court actions invalid and forbade the Department of Fisheries to comply with the federal injunction.[55] Specifically, in *Puget Sound*, the court held that Washington law allowed regulations of fisheries for conservation purposes only, and that Indians, as citizens of the State of Washington, are subject to the laws of the State of Washington. The court added that no court, including a federal court, had the authority to order a state agency to do any act inconsistent with its statutory authority.[56] The court asserted that it, not the federal district court, had the authority to interpret state statutes as to the power of state agencies and had at least equal authority as federal courts to interpret Indian treaties.[57]

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49. *Id.* at 693.

50. United States v. Washington, 423 U.S. 1086 (1976).

51. *See* United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

52. Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151, 1152 (Wash. 1977).

53. 565 P.2d 1151 (Wash. 1977).

54. 571 P.2d 1373 (Wash. 1977).

55. *See Puget Sound*, 565 P.2d at 1157; *Tollefson*, 571 P.2d at 1378.

56. *See Puget Sound*, 565 P.2d at 1157.

57. *See id.* at 1153-58.

The Washington Supreme Court was obviously concerned about the impact of the *Boldt* decision on non-native fishers.[58] After asserting its authority to interpret the treaty, the court addressed the adverse economic impact on the fishers, the growing hostility between the Indian and non-Indian fishers, and the ecological impact on the fish population.[59] Its final order was simple: "[T]he Director of Fisheries has the authority to pass regulations only for conservation purposes [and therefore] . . . cannot allocate fish [differently] to any user of the same class, that every fisherman in a class must be treated equally, and that each should be given an equal opportunity to fish within lawful statutes and regulations."[60]

In *Tollefson*, the Washington Supreme Court reaffirmed that "the director of the Department of Fisheries [does not] have the statutory power to make an unequal allocation of fish . . . ."[61] and that "a Federal District Court [cannot] order a state official to act beyond the powers vested in the state official by the legislature . . . ."[62] The court then held that allocating an equal share, rather than providing equal access, violated the Equal Protection Clause of the United States Constitution, and that this Constitutional provision superseded any possible Indian treaty rights.[63]

D. The United States Supreme Court on Indian Treaty Rights

Although the Supreme Court denied certiorari in the original *Boldt* decision, the Court could not ignore this blatant state court challenge to federal authority. In a footnote, the United States Supreme Court quickly rejected the equal protection argument.[64] While the treaties provided special rights to signatory Indian tribes,

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58. *See id*. at 1158-59.

59. *See id.*

60. *Id*. at 1159.

61. *Id.*

62. *Tollefson*, 571 P.2d at 1375.

63. *See id*. at 1376-77. The court compared the number of Indian fishers to the number of non-Indian fishers in the state, and found that over 50% of the state's resources are reserved for less than 1% of the citizens. The court found that this level of proportionality violated the Equal Protection Clause of the Fourteenth Amendment. *See id.*

64. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979).

the tribes' "peculiar semi-sovereign and constitutionally recognized status . . . justifies special treatment on their behalf."[65] The Court also rejected the idea that the federal district court could not order a state agency to take action when the agency supposedly had no state law authority to do so.[66]

The Court then moved to the allocation formula itself. It rejected the State's argument that the treaties only provided for equal access and accepted, in principle, the idea of an equal share of fish for treaty and non-treaty fishers.[67] However, the Court added a "moderate living" limitation that allowed a reduction in tribal allocation if tribal needs could be met by a lesser amount.[68] Finally, the Court modified Judge Boldt's allocation formula by disallowing the exclusion for subsistence and ceremonial catches and by including fish caught by tribal members on their reservations in the equal share calculation.[69]

After *Commercial Fishing Vessel Ass'n*, Indian treaty rights secure as much as, but no more than, is necessary to provide the Indians with a livelihood or moderate living.[70] Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum allocation is flexible.[71] Upon proper submissions to the district court, the court will modify the latter in light of changing circumstances.[72] For example, if a tribe should dwindle to just a few members or if it should find other sources of support that lead

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65. *Id*.

66. *See id*. at 695. The Supremacy Clause of the United States Constitution forbids state law prohibition of compliance with a federal court. Thus, the Game and Fisheries may be compelled to act without state law authority to do so. *See id.*

67. *See id*. at 685; *see also* Monson, *supra* note 4, at 482. Three Justices dissented on this issue and stated, in an opinion by Justice Powell, that the treaty language provided only for equal access. *See Commercial Fishing Vessel Ass'n*, 443 U.S. at 698.

68. *See id*. at 686-87. For a criticism of the moderate living doctrine, see Dana Johnson, Comment, *Native American Treaty Rights to Scarce Natural Resources*, 43 UCLA L. REV. 547 (1995).

69. *See Commercial Fishing Vessel Ass'n*, 443 U.S. at 687-89. Fish that are of the type that regularly pass through Indian fishing waters and are caught by an Indian fisher who is a party to the suit, or a non-Indian citizen of Washington shall count against that party's share of the permitted catch. *See id.*

70. *See id.* at 688-89.

71. *See id.* at 686-87.

72. *See id.*

it to abandon its fisheries, a 45% or 50% allocation of an entire run of fish that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require the allotment of such a large amount.[73]

E. Legislative Action

The courts had made their resource allocation decision. The non-native fishing community now turned to the political process to soften the blow.[74] On December 22, 1980, Congress enacted the Salmon and Steelhead Conservation and Enhancement Act.[75] Congress was explicit in its response to the *Boldt* and *Sohappy* decisions.[76] In light of the new rights of treaty fishers, their goal was to assist the non-treaty fishers who had too many boats for the reduced fishing capacity.[77] They responded to the severe economic problems in the fishing community[78] by providing necessary funds to purchase non-treaty fishing licenses and equipment, to coordinate research for improvement of the resource, and to undertake an enhancement program.[79] After years of controversy,

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73. *See id.*

74. The NOAA, working as part of a Federal Task Force on Washington State Fisheries and with the relevant House and Senate Committees, drafted the legislation providing for buy-backs of vessels from non-native fishers and the development of a program for fishery enhancement. *See* H.R. REP. NO. 96-1243, 12-13, 33-35, *reprinted in* 1980 U.S.C.C.A.N. 6793, 6794-95, 6816-17; *see also* 16 U.S.C. § 3301 (1995).

75. 16 U.S.C. § 3301.

76. 16 U.S.C. § 3301(a)(4).

77. 16 U.S.C. § 3301(b)(1).

78. 16 U.S.C. § 3301(a)(4) (stating that the fishing capacity of non-treaty fishers in conservation areas established by this title exceed the capacity required to harvest the available salmon resources).

79. 16 U.S.C. § 3301(b). This section authorizes:

> the establishment of a cooperative program involving the United States, the States of Washington and Oregon, the treaty tribes . . . and other parties, to (1) encourage stability in and promote the economic well being of the treaty and nontreaty commercial fishing and charter fishing industries and improve the distribution of fishing power between treaty and non-treaty fisheries through—(A) the purchase of nontreaty commercial and charter fishing vessels, gear, and licenses; and (B) coordinated research, enhancement, and management of salmon and steelhead resources and habitat; and (2) improve the quality of, and maintain the opportunities for, salmon and steelhead recreational fishing.

Id.

both treaty and non-treaty fishers had some cause for optimism when Congress created the Fleet Adjustment Program to fund the purchase of licenses, vessels, and equipment of non-treaty fishers[80] and to enhance the habitat and fishery.[81]

Congress recognized that funding alone was not enough, and that a comprehensive coordinated management approach was necessary.[82] Congress had expressed its concerns about the multiplicity of management regimes[83] and regulatory bodies involved in enhancement programs.[84] It stressed the need for "improved management coordination" because the management of salmon was "largely a product of political rather than biological realities" up to that time.[85] Congress viewed the existing management arrangements between the states, the Indian tribes, and the federal government as complicated and uncoordinated[86] and recognized the difficulty of embarking on a fishery enhancement effort under such a system.[87] The State of Washington and tribal leaders also saw the need for management coordination and conservation of the fishery.[88] In short, the salmon and steelhead fishery in the Northwest was ready for an ecosystem management approach that provided for an enhanced and restored fishery based upon a conservation and protection management model. The approach would force conflicting parties to stop disputing sovereignty and jurisdiction and work together.

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80. *See* 16 U.S.C. §§ 3331-3336 (establishing a Fleet Adjustment Program where the State could buy the licenses, vessels, and equipment of nontreaty fishers and the federal government would supply 75% of the funding).

81. *See* 16 U.S.C. §§ 3321-3325 (providing for development of comprehensive enhancement plans and funding for specific projects developed in accordance with the plans). Section 3302 (8) defines "enhancement" as "projects undertaken to increase the production of . . . stocks of salmon or steelhead, or to preserve, conserve, or improve the habitat of such stocks." 16 U.S.C. § 3302 (8).

82. *See* H.R. REP. NO. 96-1243, at 36-43 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6793, 6818-26.

83. *See id*. at 36.

84. *See id.* at 41.

85. *Id.* at 36

86. *See id.* at 37.

87. *See id.* at 40.

88. *See id.* at 42-43.

E. Judge Orrick's Decision—Phase II

When Judge Boldt decided the resource allocation issues that the tribes and the United States raised in their lawsuit against the State of Washington, he reserved jurisdiction to decide "whether the right of taking fish [guaranteed by treaty to the tribes] incorporates the right to have treaty fish protected from environmental degradation."[89] Judge Boldt was no longer living by the time of Phase II. Judge William H. Orrick, Jr. presided in his place.[90]

The tribes and the United States argued that authorization of non-native fishing and state authorization of "watershed alterations, water storage dams, industrial developments, stream channel alterations, and residential developments" led to a degradation of their usual and accustomed fishery grounds.[91] Federal treaty rights implied a promise of habitat integrity[92] and specifically granted the right "to have the fishery resource protected from adverse environmental actions or inactions of the State of Washington."[93] Implying this right was essential because the fishery resource would continue to decline, and the species would perhaps become listed as endangered or threatened without real protection of the fish and their habitats.[94] "Unless the decline of these species is arrested, the right 'to fish in common' becomes meaningless and the gains achieved by the Indians become 'empty victories.'"[95]

Judge Orrick found that "[i]t is now beyond dispute that natural fish have become relatively scarce, due at least in part to

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89. United States v. Washington, 506 F. Supp. 187, 190 (W.D. Wash. 1980), *vacated*, 759 F.2d 1353 (9th Cir. 1980), *cert. denied*, 474 U.S. 994 (1985).

90. *See id.* at 189.

91. *Id.* at 203 (quoting UNITED STATES FISH AND WILDLIFE SERV., WASHINGTON DEP'T OF FISHERIES, & WASHINGTON DEP'T OF GAME, JOINT STATEMENT REGARDING THE BIOLOGY, STATUS, MANAGEMENT, AND HARVEST OF THE SALMON AND STEELHEAD RESOURCES OF THE PUGET SOUND AND OLYMPIC PENINSULAR DRAINAGE AREAS OF WESTERN WASHINGTON 17 (1973)); *see also* Johnson, *supra* note 68, at 573.

92. *See Washington*, 506 F. Supp. at 205; *see also* Johnson, *supra* note 68, at 574.

93. *Washington*, 506 F. Supp. at 194 (quoting Plaintiff's Joint Statement of Issues I.1 (June 23, 1978)).

94. *See* Monson, *supra* note 4, at 483.

95. *Id.*

the commercialization of the fishing industry and the degradation of the fishing habitat caused primarily by non-Indian activity in the case area."[96] He also found an implicit right in the treaties to have the fishery habitat protected from "man-made despoliation" created by urbanization and intensive settlement of fishing areas.[97] The court relied on a joint statement by several state and federal agencies that reported that the development of water power, lumbering, irrigation, and pollution contributed to the alteration and destruction of the habitat conditions required for successful fish production.[98] According to the statement, these factors also reduced the quality and amount of accessible spawning grounds and the capacity of the streams.[99] Thus, Judge Orrick noted that "[w]ere this trend to continue, the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty."[100] He further recognized that the Ninth Circuit and the Supreme Court "all but resolved the environmental issue" in Phase I and confirmed the right to a fishing habitat protected from man-made despoliation by rejecting the State's contention that the treaty right is merely an equal opportunity for the native fishers to attempt to fish.[101]

The court believed that a paramount purpose of the treaties is the preservation of the tribes' right to continue fishing as an economic and cultural way of life.[102] Because the existence of an ecologically-sound habitat is essential to the survival of the fish, the court asserted that the express right to take fish would be without meaning or value without a parallel, implied right to habitat

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96. *Washington*, 506 F. Supp. at 198. The court further stated that "the record also establishes that the State has developed and promoted its artificial propagation program in order to replace the fish that were artificially lost." *Id.* Therefore, hatchery fish had to be included in the allocation from which the native treaty fishers were entitled to an equal share up to the moderate living level set that the Supreme Court set. *See id.*

97. *See id.* at 203.

98. *See id.*

99. *See id.*

100. *Id.*

101. *See id.* at 203-04 ("Such result would render nugatory the nine-year effort in Phase I, sanctioned by this Court, the Ninth Circuit, and the Supreme Court, to enforce the treaties' reservation to the tribes of a sufficient quantity of fish to meet their fair needs.").

102. *See id*.

protection.[103] The State disagreed with this contention, arguing that existing federal and state laws and programs sufficiently protected the fish habitat and thereby obviated the need to imply any right regarding the environment.[104] However, the court found the existence of current programs irrelevant to the issue of whether the fishing clause actually created the right and left the determination of whether present means to enforce that right must be supplemented in the future.[105]

The Indians and the United States sought the recognition of a duty on behalf of the State to refrain from impairing the environmental conditions necessary for the survival of treaty fish.[106] Accordingly, the United States argued that the State's duty is to avoid taking or approving actions that significantly and adversely impact the fishery.[107] The district court agreed with the existence of this duty and accepted the moderate living standard imposed by the Supreme Court in *Boldt* as a standard by which the State must refrain from harming the marine habitat.[108] Under this standard, the State had the burden to show that any environmental degradation of the fishery, if proximately caused by the State, would not harm the tribes' ability to meet their moderate living needs.[109] The decision was historic because the court ordered the State of Washington to refrain from destroying the fish habitat to

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103. *See id*. "One stick in the proverbial bundle of property rights is the right not to have the property itself degraded or destroyed." Monson, *supra* note 4, at 487.

104. *See id.* at 205-06.

105. *See id.*

106. *See id*. at 207.

107. *See id.* However, the Indians were not requesting any new legislation or expenditure of resources by the State. *See id.*

108. *See id.* at 208. The court summarized the standard:

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

Id.

109. *See id.* The court noted that the initial burden of demonstrating that the challenged action will proximately cause degradation remained with the tribes. *See id.*

the detriment of the tribes' living needs.[110] All agencies had to review their actions to ensure that their actions did not adversely affect the fishery habitat.[111] If this review was ineffective, the tribes could seek further remedial action.[112] Thus, the approach comprehensively considered the fisheries and all the impacts of regulation and pollution.

Additionally, the decision also had a broad impact on the reserved rights of Indian tribes in general because its concepts applied not only to the State of Washington but also to other states and to third parties including the United States under its trust responsibilities.[113] Other tribes could assert their reserved rights to potentially protect their natural resources on and off the reservation.

III. THE ECOSYSTEM MANAGEMENT MODEL

The Ecosystem Management Model, a new model of fisheries management, has evolved over the last decade.[114] The Model is based on the scientific truism that the ocean is a total resource system consisting of a pattern of relationships between species and man's coastal activities.[115] As a result, the Model assumes that a comprehensive coordinated ecosystem approach is the wisest way to manage and conserve our resources because cooperative action

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110. Before Phase II was reversed, federal agencies were subject to both the duties imposed by Phase II and additional trust obligations to the tribes. *See id.* at 497; *see also* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (analogizing the relationship of the United States and an Indian tribe to a guardian and its ward). *See generally* Wood, *supra* note 16, at 735, 738-39, 743-50 (critiquing the Clinton administration's performance in fulfilling the United States' trust responsibility to native interests in the implementation of environmental and natural resource laws).

111. *See Washington*, 506 F. Supp. at 207.

112. *See id.*

113. *See* Monson, *supra* note 4, at 495-97 (discussing who could assert reserved rights and against whom they could be asserted following the Phase II litigation).

114. *See, e.g.*, Martin H. Belsky, *Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law*, 22 SAN DIEGO L. REV. 733 (1985) [hereinafter Belsky, *Management of Large Marine Ecosystems*]; Martin H. Belsky, *The Ecosystem Model—Mandate for a Comprehensive United States Ocean Policy and Law of the Sea*, 26 SAN DIEGO L. REV. 417 (1989) [hereinafter Belsky, *The Ecosystem Model*]; Belsky, *Implementing the Ecosystem Management Approach*, *supra* note 40, at 214.

115. *See* Belsky, *The Ecosystem Model*, *supra* note 114, at 448.

is essential to avoid conflicts between claimants of resources and to assure access and future use of resources.[116]

Nation-states resisted the model until recently because their governing philosophies stressed preserving each country's sovereign rights, promoting the freedom of the high seas, and exploiting natural resources to their fullest potential.[117] When resources crossed over jurisdictional lines, nation-states and political units within nation-states were reluctant to relinquish either sovereignty or jurisdiction.[118] When resources were shared by multiple users, each user sought to maximize returns on the resource to the exclusion of others.[119] Therefore, conservation and management were dealt with on an *ad hoc* or as needed basis.[120]

In recent years, leaders have begun to favor a more holistic approach, adopting the concepts expressed in models of bio-diversity and ecosystem management and incorporating them in their domestic laws, international resolutions, and treaties.[121] International tribunals and some domestic courts have also started to apply this comprehensive approach and have created in essence a legal presumption for ecosystem management in international law.[122] The legal and political presumptions that these actions created may in fact be obligations of the nation-states in light of the inclusion of such presumptions in international law.[123] International law is incorporated into the domestic law of the United States and mandates that both citizens and government officials comply with the international rule.[124]

Thus, within the United States, this principle requires that federal and state regulatory agencies apply the Ecosystem

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116. *See id.* at 458.

117. *See* Belsky, *Implementing the Ecosystem Management Approach*, *supra* note 40, at 216.

118. *See* Belsky, *Management of Large Marine Ecosystems*, supra note 114, at 738.

119. *See* Belsky, *The Ecosystem Model*, *supra* note 114, at 450.

120. *See* Belsky, *Implementing the Ecosystem Management Approach*, *supra* note 40, at 216.

121. *See id.*

122. *See id.* at 216-17.

123. *See* Belsky, *Implementing the Ecosystem Management Approach*, *supra* note 40, at 216-17; Belsky, *The Ecosystem Model*, *supra* note 114, at 461-64.

124. *See id.* at 472-73.

Management Model to existing statutes and regulatory policies.[125] Environmental and fisheries statutes provide broad discretion to regulators and policymakers, but that discretion must be exercised consistent with the Model.[126] Although implementation is not universal or complete, the Model has been accepted by American policymakers, particularly fisheries policymakers as the preferred model because it makes scientific, political, and legal sense.[127] Phase II and the implementation of the Salmon and Steelhead Conservation and Enhancement Act provided these policymakers with a particularly well-suited opportunity for its application. Judge Orrick's decision in Phase II essentially used an Ecosytem Management Model because his scheme worked to avoid future harm, integrated the treaty right to protect the fishery with other legislative and regulatory policies, and continued court supervision to ensure that such integration occur.[128]

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125. *See id.*

126. *See id.* at 478.

127. *See* John Byrne, *Large Marine Ecosystems and the Future of Ocean Studies: A Perspective, in* VARIABILITY AND MANAGEMENT OF LARGE MARINE ECOSYSTEMS 299, 300 (Kenneth Sherman & Lewis M. Alexander eds., 1986). *See generally* Kenneth Sherman, *Sustainability of Resources in Large Marine Ecosystems, in* FOOD CHAINS, YIELDS, MODELS, AND MANAGEMENT OF LARGE MARINE ECOSYSTEMS 1-34 (Kenneth Sherman et al. eds., 1991) (comparing large marine ecosystems under ecosystem management to unmanaged systems and the resulting effect on resource availability). Vice-President Gore has called on all environmental agencies to "ensure a sustainable economy and a sustainable environment through ecosystem management," and Republican Senator Mark Hatfield has introduced a proposed Ecosystem Management Act. The Forest Service has also incorporated ecosystem management into their public lands policies. *See* Rebecca Thomson, *Ecosystem Management: Great Idea, But What Is It, Will It Work, and Who Will Pay?*, 9 NAT. RESOURCES & ENV'T 42 (1995).

128. *See generally* Monson, *supra* note 4, at 502-03 (discussing the changes that Phase II will create for resource developers).

A. The Shutdown of the Ecosystem Management Model

The treaty right to habitat rehabilitation and control of man-made actions was not favorably received by the federal appellate court.[129] In *United States v. Washington*, a three judge court quickly disposed of the ecosystem approach adopted in principle by Judge Orrick.[130] The court found that the application had no basis in precedent and was unnecessary, unworkable, and potentially disruptive.[131] The court held that the only approach required is a best effort by all to avoid any further degradation.[132]

Both sides quickly sought reconsideration by the full court of appeals.[133] The court in a *per curiam* opinion vacated the original opinion on the environmental issue and decided that the district court should not have issued a declaratory judgment.[134] The court believed that sound judicial discretion indicated that a decision should await a concrete case. "The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case."[135] Therefore, the issue of applying Judge Orrick's approach remained for another day. Unfortunately, discussion of the issue

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129. *See* United States v. Washington, 694 F.2d 1374, 1375 (9th Cir. 1983), *reh'g*, 759 F.2d 1353, *cert.denied*, 474 U.S. 994 (1985).

130. *See id.* at 1377 n.7 (stating that the district court's interpretation of the moderate living standard misconstrued *Commercial Fishing Vessel Ass'n*).

131. *See id.* at 1381.

132. *See id.* at 1389. The court stated:

> Let us repeat the essence of our interpretation of the treaty. Although we reject the environmental servitude created by the district court, we do not hold that the State of Washington and the Indians have no obligations to respect the other's rights in the resource. Instead, we affirm the district court on the fish hatchery issue and we find on the environmental issue that the State and the Tribes must each take reasonable steps commensurate with the resources and abilities of each to preserve and enhance the fishery when their projects threaten *then-existing* harvest levels.

Id. (emphasis added).

133. *See* United States v. Washington, 759 F.2d 1353, 1354-55 (9th Cir. 1985). The court affirmed the hatchery issue. *See id.*

134. *See id.* at 1356-58.

135. *Id.* at 1357.

has ended after this decision as the case was remanded back to federal district court[136] where it remains. The tribes do not see a high likelihood of success and instead are focused on preserving their rights to appropriate allocation of the resources if and when the salmon and steelhead stocks are found to be threatened or endangered under the Endangered Species Act.[137]

Of course, in 1980 Congress did provide a mechanism for a cooperative approach and for enhancement projects based on a comprehensive model,[138] but inadequate funding ensured that this alternative would not be applied.[139] Fisheries are in danger as a result.[140] Ironically, the fighting over allocation may become unnecessary as resources continue to dwindle, leaving nothing over which to fight.[141]

IV. THE FINAL RESULT

Many native tribes continue to depend on the availability and accessibility of natural resources and thus on ecosystem health which ensures this continued availability.[142] Phase II and the implementation of the Salmon and Steelhead Conservation and Enhancement Act provided the courts and Congress with an opportunity to apply the ecosystem approach to prevent fishery depletion. The failure of the courts and the federal government to seize this opportunity will result in the continued degradation of the habitat and the fisheries themselves. That unchecked degradation and lack of a comprehensive ecosystem focus on rehabilitation might mean the temporary and potentially permanent loss of commercial and recreational fisheries. Either

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136. *See id.* at 1355.

137. *See* Interview with Elizabeth Mitchell & Eileen Cooney, Assistant General Counsels, NOAA, Seattle, Washington (May 6, 1996); Interview with Vernon Peterson, Assistant Solicitor, Department of the Interior, Washington, D.C. (May 7, 1996). For a discussion of the potential impact of a finding that salmon or steelhead stocks would have on native fishing rights, see Miller, *supra* note 16, at 543.

138. *See supra* notes 74-88 and accompanying text.

139. *See* Interview with Jay Johnson, Deputy General Counsel, NOAA, Washington, D.C. (May 3, 1996).

140. *See id*.

141. *See id.*

142. *See* Wood, *supra* note 16, at 735.

species could become so depleted that they must be listed as threatened or endangered, or the fisheries could be destroyed altogether.

The Ecosystem model, of course, is not dead. In fact, recognition of the dangers to our living resources had led to its increasing use for all forms of management and conservation.[143] It will, I am confident, eventually, be applied to fisheries covered by Indian treaties. However, an opportunity has been lost to have these treaties be the vehicle for early implementation of the model and perhaps avoidance of the harm to the fisheries involved.

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143. *See, e.g.*, Richard H. Burroughs & Tim W. Clark, *Ecosystem Management: A Comparison of Greater Yellowstone and Georges Bank*, 19 ENVTL. MGMT. 649 (1995); W. Herbert McHarg, *The Federal Advisory Committee Act: Keeping Interjurisdictional Ecosystem Management Groups Open*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 437 (1995); Raymond A. Just & Brett M. Hager, *Predator MIS: A Mechanism for Ecosystem Management under the FCMA*, 9 TULSA ENVTL. L. J. 385 (1996).