THE BELLONI DECISION AND ITS LEGACY: *UNITED STATES V. OREGON* AND ITS FAR-REACHING EFFECTS AFTER A HALF-CENTURY

BY

MICHAEL C. BLUMM* & CARI BAERMANN**

Fifty years ago, Judge Robert Belloni handed down a historic treaty fishing rights case in Sohappy v. Smith*, later consolidated into* United States v. Oregon*, which remains among the longest running federal district court cases in history. Judge Belloni ruled that the state violated Columbia River tribes' treaty rights by failing to ensure "a fair share" to tribal harvesters and called upon the state to give separate consideration to the tribal fishery and make it a management priority co-equal with its goals for non-treaty commercial and recreational fisheries. This result was premised on Belloni's recognition of the inherent biases in state regulation, despite a lack of facial discrimination.*

The decision was remarkable because only a year before, in Puyallup Tribe v. Department of Game*, the U.S. Supreme Court seemed to accord considerable deference to state regulation of tribal harvests (which it would soon clarify and circumscribe). Instead of deference, the Belloni decision reinstated burdens on state regulation that the Supreme Court had imposed a quarter-century earlier, in* Tulee v. Washington*, but seemed to ignore in its* Puyallup *decision. The directive for separate management was prescient because otherwise, tribal harvests would remain overwhelmed by more numerous and politically powerful commercial and recreational fishers.*

Judge Belloni eventually grew tired of resolving numerous conflicts over state regulation of the tribal fishery, calling for the establishment of a comprehensive plan, agreed to by both the state and the tribes, to manage Columbia Basin fish harvests. Eventually, such a plan would be negotiated, implemented, and amended over

*Jeffrey Bain Faculty Scholar & Professor of Law, Lewis & Clark Law School. Thanks to Charles Wilkinson, Monte Mills, Kris Olson, and Laurie Jordan for comments on a draft of this Article, and to Mitchell Thielemann, 3L, Lewis & Clark Law School, for help with the footnotes. The draft was presented at Lewis & Clark Law's *U.S. v. Oregon*: 50th Anniversary Symposium on October 18th, 2019.

**J.D. cum laude 2019, Lewis & Clark Law School; B.A. 2011 University of Oregon.

the years. Today, the Columbia River Comprehensive Management Plan is still in effect a half-century after the Belloni decision, although the district court's oversight role is now somewhat precariously perched due to statements by Belloni's latest successor. Nonetheless, the plan remains the longest standing example of tribal–state co-management in history and a model for other co-management efforts. The Belloni decision was the first judicial recognition of the importance of the tribal sovereignty in regulating reserved rights resources. This Article examines the origins, effects, and legacy of the Belloni decision over the last half-century.

I. INTRODUCTION

1969 was a momentous year in many respects, from the moon landing to the Miracle Mets.[1] In the Northwest, the most significant event of 1969 in terms of long-term effect was Judge Robert Belloni's historic decision rejecting the state of Oregon's claim to regulate tribal

[1] In 1969, man first walked on the moon. Richard Nixon was inaugurated as President. The Vietnam War induced massive antiwar demonstrations. The massacre of Vietnamese civilians by American troops at My Lai went public. The Chicago Eight stood trial for allegedly conspiring to induce the rioting that marred the Democratic Convention the year before. Charles Manson shocked the public with the wanton murder of five, including actress Sharon Tate. The raid of the Stonewall Inn in Greenwich Village christened the modern gay rights movement. The Cuyahoga River caught fire in Cleveland, propelling what would become an onslaught of environmental legislation over the next decade. The Beatles broke up. Woodstock and the Miracle Mets happened. *See generally 1969: Woodstock, the Moon and Manson: The Turbulent End to the '60s*, TIME MAG., SPECIAL EDITION (n.d.).

fishing on the Columbia River without acknowledging or protecting treaty fishing rights.[2] A half-century later, the case continues to allocate harvest rights on the Columbia River, historically the salmon stronghold of the Pacific Northwest.[3] This Article explains the conditions that brought about Judge Belloni's historic decision, explores his reasoning, and examines the case's legacy after fifty years.

Columbia Basin tribes had been salmon harvesters for millennia before the Belloni decision.[4] In fact, it would be difficult to overstate the importance of salmon runs to native life. Natives held "first salmon" ceremonies, which included prayers thanking the creator for annual return.[5] The fish were vital to the native diet, culture, and economy, as salmon were always a major item of trade. Trade in salmon was brisk; it made the natives of the Pacific Northwest North America's wealthiest aboriginals north of Mexico.[6] Salmon were no less central to the way of life of "the salmon people" of the Northwest than the buffalo was to the natives of the plains or the reindeer to the Inuit of the Arctic.[7]

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2 Sohappy v. Smith, 302 F. Supp. 899, 907 (D. Or. 1969).

3 Under its retained jurisdiction of the case, the court has been and continues to be instrumental in ensuring that the tribes receive a fair share of the fish harvest on the Columbia River each year. *See infra* Part IV. Although thirteen species of Columbia Basin salmon are currently on the endangered species list, with production at more than 10 million fish below historical levels, the Columbia River salmon runs remain a significant source of fish for both nontreaty and treaty fishermen. *See* CONG. RESEARCH SERV., ENDANGERED SPECIES ACT LITIGATION REGARDING COLUMBIA BASIN SALMON AND STEELHEAD 2 (2016); CONG. RESEARCH SERV., COLUMBIA RIVER TREATY REVIEW 2 (2018).

4 Tribes have depended on the abundance of salmon in the Columbia River for over 9,000 years. Prior to white settlement, numerous tribes established temporary and permanent fishing camps along the Columbia River, including major fishing areas such as Celilo Falls, now drowned behind The Dalles Dam. Their travel between these traditional fishing sites and other tribal homes revolved around the seasonal fish runs, with thousands of families gathering during the spring to harvest, trade, and celebrate the salmon. *See* Michael C. Blumm & James Brunberg, *"Not Much Less Necessary . . . Than the Atmosphere They Breathed": Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of* United States v. Winans *and Its Enduring Significance,* 46 NAT. RES. J. 5, 6, 7, 55 (2006).

Judge Robert Belloni, a newly appointed judge in 1967, had no previous background in Indian Law, so he had no predetermined views on treaty fishing rights. The chief judge, Gus J. Solomon, assigned the case to Belloni simply as part of the administration of the court. Interview by Laura Berg with Judge Robert Belloni, D. Or. (Dec. 18, 1989) [hereinafter "Berg, Interview with Belloni"]; *see also* Laura Berg, *Let Them Do as They Have Promised*, 14 HASTINGS W.-NW. J. ENVT'L L. & POL'Y 311, 317 (2008).

5 Charles F. Wilkinson & Daniel Keith Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 U. KAN. L. REV. 17, 26 n.40 (1983).

6 *See* MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 3 (2002) [hereinafter SACRIFICING THE SALMON].

7 *Id.* at 53.

> Salmon dominated life the Pacific Northwest before white settlement. Trade in salmon enabled Northwest Indians tribes to become one of the world's few hunting and gathering economies that generated wealth beyond . . . subsistence. Salmon gave these tribes the economic prosperity to support a population density higher

Thus, it was no surprise that when white settlement threatened displacement of the natives, they were willing to enter into treaties in which the tribes ceded some 64 million acres of land to the federal government that enabled white settlement largely without wars.[8] The treaties left the tribes some relatively small land reservations, schools, missionaries, and federal recognition of their right to continue to take fish "at all other usual and accustomed [fishing locations] in common with" the settlers.[9] This promise that tribal harvesters could continue to fish at their historic locations, as they had since "time immemorial," was central to the treaty bargain.[10]

Unpacking what the treaty right meant to both the settlers' property rights and the states' regulatory authority would take over a century of litigation, including seven U.S. Supreme Court opinions.[11] Judge Belloni's 1969 decision came only a year after a confused Supreme Court in *Puyallup Tribe v. Department of Game*[12] (*Puyallup I*)—in its fourth Stevens Treaty decision—seemed to sanction a large role for state regulation of treaty rights.[13] Judge Belloni would be much more skeptical of state regulation than the *Puyallup* Court, and that Court would soon clarify that state regulation could not discriminate

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> than anywhere north of Mexico. Salmon were abundant, available for harvest at predictable times, and could be preserved for later consumption. Salmon were the centerpiece of the natives' diet, their lifestyle, and their religion. Seasonal migrations of natives coincided with annual fish runs. Most tribes celebrated a First Salmon Ceremony which . . . involved a religious right thanking the deity for the salmon's return . . . . These symbolic acts, attitudes of respect, and concern for the well-being of the salmon reflected the interdependence and interrelatedness of all living things that dominated the native world view. This attitude ensured that salmon were never wantonly waster, and water pollution was generally prohibited.

Id.

[8] *See id.* at 62–63 (explaining a brief "war" in the late 1850s, caused by a broken federal promise that the tribes would have two years to relocate to reservations before settlers claimed their ceded lands). Most natives were willing to negotiate treaties rather than fight wars because their numbers had declined—due largely to white-induced diseases like smallpox for which the natives had no immunity—drastically since their encounter with the Lewis and Clark expedition, from an estimated 50,000 to just 5,000 in just a half-century. *Id.* at 56.

[9] *E.g.*, Treaty with the Walla-Walla, Cayuses, and Umatilla Tribes and Bands, art. 1, June 9, 1855, 12 Stat. 945 (an example of what are known as Stevens Treaties, after the U.S. negotiator of the treaties); for elaboration, see Michael C. Blumm & Olivier Jamin, *Indigenous Rights in the U.S. Marine Environment: The Stevens Treaties and Their Effects on Harvests and Habitat, in* INDIGENOUS RIGHTS IN THE MARINE ENVIRONMENT (Stephen Allen, et al., eds., 2019).

[10] United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983) (upholding a tribe's "time immemorial" fishing rights); SACRIFICING THE SALMON, *supra* note 6, at 60–63 (discussing what was the Supreme Court's first interpretation of Stevens Treaty language).

[11] *See, e.g.*, FAY COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 55, 75, 198–99 (1986).

[12] 391 U.S. 392 (1968).

[13] *See Sohappy*, 302 F. Supp. 899, 911–12 (D. Or. 1969); *Puyallup I*, 391 U.S. at 398, discussed *infra* notes 85–112 and accompanying text.

against tribal harvesters.[14] The Belloni decision would prove to be the turning point in judicial interpretation of treaty fishing rights, leading to two important Supreme Court decisions.[15]

Rejecting the state's claim that its sovereignty equipped it with plenary authority to regulate tribal harvesting rights, Judge Belloni interpreted the Stevens Treaties to require the state to produce a substantive result: a tribal "fair share" of the salmon harvests.[16] His prescription for doing so was to require the state to begin to treat the tribal fishery separate from the non-treaty fishery.[17] That was a prerequisite to a fair allocation of harvest opportunities because the Columbia Basin tribes' upriver fishing sites put them at a locational disadvantage compared to non-Indian ocean and lower river fishers.[18]

As Judge Belloni understood, close judicial review was essential to prod the state to act in a fair and non-discriminatory fashion, given the state's close ties to its commercial and recreational fishers.[19] Eventually,

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[14] Dep't of Game v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 48 (1973) (clarifying that state regulation could not lawfully discriminate against tribal harvesters in applying a facially nondiscriminatory regulation).

[15] The first was Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685–87, *modified sub nom.* Washington v. United States, 444 U.S. 816, 816–17 (1979) (affirming Judge Boldt's 50% allocation of fish run harvests), discussed *infra* note 181. The second was Washington v. United States, 138 S. Ct. 1832 (2018) (affirming, without opinion, a Ninth Circuit decision that held that the state of Washington had violated the Stevens Indian Treaties by building and maintaining culverts that prevented salmon from reaching tribal usual and accustomed fishing grounds), discussed *infra* note 263. Two 2019 decisions of the Supreme Court reaffirmed the off-reservation rights contained in the Stevens Treaties. Wash. State Dept. of Licensing v. Cougar Den Inc., 139 S. Ct. 1000 (2019) (concerning off-reservation rights on public highways), discussed *infra* notes 149, 246, 266 and accompanying text; Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (concerning off-reservation hunting rights similar to those reserved in the Stevens Treaties), discussed *infra* note 78.

[16] *Sohappy*, 302 F. Supp. at 911.

[17] *Id.*

[18] The non-treaty fisheries were and are primarily downriver of the Bonneville Dam, including extensive ocean fisheries. Treaty fishermen had exclusive fisheries between the Bonneville and McNary Dams. The state implemented most of its conservation regulations upriver of the Bonneville Dam, thereby forcing the treaty fishermen to bear the brunt of the conservation. Penny H. Harrison, *The Evolution of a New Comprehensive Plan for Managing Columbia River Anadromous Fish*, 16 ENVTL. L. 705, 712–13 (1986); *see also infra* notes 192–193 (discussing the conservation burden imposed on tribes).

[19] State regulation was problematic for the tribes because the states were "captured" by the commercial and recreational fishermen they regulated. The classic study of agency capture by rent-seeking, well-organized interest groups is MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 143 (1965); *see also* Jeffrey K. Randall, *Improving Compliance in U.S. Federal Fisheries: An Enforcement Agency Perspective*, 35 OCEAN DEV. & INT'L L. 287, 303 n.22 (2004) (discussing compliance issues with the U.S. federal fisheries management process and explaining that "'[a]gency capture' occurs when the regulated industry is successful at aligning the regulatory agency's goals with its own, leading to lax application of the regulations and willingness to overlook certain violations by inspectors."). Belloni recognized agency capture in *Sohappy*, noting that the state's regulation of fisheries favored non-treaty commercial and sports fishermen to the detriment of treaty fishing rights. *Sohappy*, 302 F. Supp. at 908–09 (explaining that

Belloni would call for a comprehensive plan to ensure a fair allocation.[20] That call would not be consistently met over the ensuing years,[21] but in recent years the tribes and states have successfully negotiated two consecutive ten-year plans, which have governed harvest management since 2008.[22] Judge Belloni's successors have continued to oversee the development and implementation of revised plans that reflected changed conditions over time, and there is a judicially approved plan in effect today.[23]

This Article considers the significance and legacy of the Belloni decision a half-century later. Part II provides background, briefly explaining Stevens Treaty fishing rights litigation prior to the Belloni decision, including the Supreme Court's first *Puyallup* opinion, for its flawed reasoning could have cast a long shadow over the case before Judge Belloni. But as Part III—exploring the reasoning of the Belloni decision—shows, the judge was unfazed by some implications that might have been drawn from *Puyallup*. He instead ruled that the state of Oregon's position was inconsistent with the tribes' treaty rights by failing to ensure "a fair share" harvest of the resource.[24] To achieve this result, Belloni established a number of innovative procedural requirements, like "meaningful" tribal participation in managing the fishery and requiring that state regulation minimally intrude on tribal harvests.[25] Part IV examines the legacy of the decision throughout the Pacific Northwest, while Part V looks more broadly at the national legacy of the case beyond the region. We conclude that the Belloni decision, after a half-century, is an underappreciated landmark both in terms of achieving a fair allocation of a highly contested and valuable natural resource and in faithfully interpreting Indian treaties according to the intent of the parties that negotiated them.

II. TREATY INTERPRETATION PRIOR TO THE BELLONI DECISION

This Part explains some of the important early interpretations of the treaty right "of taking fish . . . in common with" others.[26] It then turns to focus on the Supreme Court's important decision in its 1942

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regulation of the Oregon's Fish Commission and Game Commission, "as well as their extensive propagation efforts, [was] designed not just to preserve the fish but to perpetuate and enhance the supply for their respective user interests"); *see also* Berg, Interview with Belloni, *supra* note 4 (discussing the persistent unfairness of state regulation).

20 *See infra* notes 197–202 and accompanying text.

21 *See infra* notes 203–221 and accompanying text.

22 *See infra* notes 222–228 and accompanying text.

23 *See infra* notes 224, 231 and accompanying text. Judge Belloni's successors included Judges James Burns, Walter Craig, Edward Leavy, Macolm Marsh, Garr King, and Michael Mosman.

24 *Sohappy*, 302 F. Supp. at 911.

25 *Id.* at 912.

26 *Id.* at 904.

decision *Tulee v. Washington*,[27] which seemed to impose a significant burden on state regulation of state so-called conservation measures.

A. The Early Decisions

The Stevens Treaties of the 1850s, which cleared title to some 64-million acres of formerly tribal land and enabled the peaceful settlement of the Northwest, promised the tribes the right to continue fish on the lands they ceded at all "usual and accustomed" fishing sites "in common with" the settlers.[28] Although the original idea was that native fishing would supply food for the settlers, within a few decades the expanding white population began to compete for salmon harvests.[29] Technological developments, like gasoline-powered fishing boats, fish wheels, and barbed-wire fences enabled the white settlers to exclude tribal harvests over the objections of Indian agents.[30] Fences led to the first major appellate decision interpreting the Stevens Treaties.[31]

At Celilo Falls, the great Indian fishery on the lower Columbia, O.D. Taylor—a Baptist minister—bought riverside land adjoining the falls in what became the state of Washington and strung barbed wire to exclude tribal fishers, so he could rent access to the falls to white harvesters.[32] An Indian agent and several tribal harvesters unsuccessfully sought to enjoin the fencing in territorial district court, but the territorial supreme court reversed in a mostly forgotten 1887 decision of *United States v. Taylor*.[33] *Taylor* was the first appellate court decision to articulate a rule of Stevens Treaty construction that the Supreme Court would soon endorse: the treaties should be interpreted

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[27] 315 U.S. 681, 685 (1942).

[28] *See* SACRIFICING THE SALMON, *supra* note 6, at 53–67 (discussing the treaty negotiations and the aftermath of the treaties).

[29] *See id.* at 63–65.

[30] *See* Blumm & Brunberg, *supra* note 4, at 506–10 (discussing, *inter alia*, the role of Indian agent, Robert H. Milroy); *see also id.* at 517–18. On fish wheels, *see infra* note 39.

[31] *See* Blumm & Brunberg, *supra* note 4, at 511–14 (discussing an earlier case involving tribal exclusion, *Spedis v. Simpson* (Klickitat Cty. Ct., July 22, 1884) (on file in Klickitat County, Wash. Archives, File KLK-126), but that case did not generate appellate review).

[32] *See id.* at 512. For thousands of years, Celilo Falls was the most prominent fishing site for tribes. Celilo was a series of formidable, fast rapids that forced the salmon to cluster the waters downriver of the falls. This funneling allowed the tribal fishermen to harvest vast amounts of fish. Six tribes maintained permanent villages near the falls, and, during the spring, thousands of natives gathered there, harvesting fish and engaging in extensive trading. *Id.* at 494–96. In the early twentieth century, in a landmark Supreme Court decision concerning treaty fishing harvesting rights at Celilo Falls, the Court recognized the critical importance of the salmon to the tribes, describing the fish as "not much less necessary to the existence of the Indians than the atmosphere they breathed." United States v. Winans, 198 U.S. 371, 381 (1905). However, in 1957, the federal government's Dalles Dam flooded the falls and wiped out nearby tribal villages. *See Celilo Falls*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, https://perma.cc/G38U-YBCB (last visited Apr. 18, 2020).

[33] 3 Wash. Terr. 88, 94, 98 (1887).

as the unlettered Indians would have understood.[34] *Taylor* also advanced an early version of what became known as the reserved rights doctrine—that treaties should be understood as conveyances of rights granted from the tribes to the federal government, while reserving to the tribes all rights not expressly conveyed.[35] This recognition of reserved rights led the court to conclude that Taylor's land title was burdened with implied rights of access for tribal fishers to reach their fishing grounds.[36] He therefore had no right to fence out the tribal fishers.[37]

The *Taylor* decision did not settle the issue of tribal access to their fishing places, as exclusions continued to be widespread throughout the Columbia Basin, largely due to a narrow interpretation by lower courts and lax vigilance by federal agents.[38] For example, settlers on the Washington side of Celilo Falls, the Winans brothers, erected a large fish wheel and then fenced out tribal harvesters seeking access to their historic fishing grounds.[39] Although the federal district court temporarily enjoined the fencing for nearly seven years, in 1903 Judge Cornelius Hanford suddenly dissolved the injunction, deciding that the treaty put the tribes only "on an equal footing" with white settlers, whom the Winans brothers could exclude based on their land ownership rights.[40] The federal government appealed the dissolution of the injunction directly to the Supreme Court.[41]

In an opinion by Justice Joseph McKenna, the Court decided, 8–1, that the "equal footing" argument that the lower court adopted was "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."[42] Ratifying the rule of interpretation that Indian treaties be construed as the tribes would understand, Justice McKenna described the nature of the treaty fishing right in eloquent, almost poetic terms: "The right to resort to the

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[34] *Id.* at 96–98; *see* Blumm & Brunberg, *supra* note 4, at 519. On the Supreme Court's adoption of the rule of liberal interpretation in light of likely tribal understanding, *see infra* note 43 and accompanying text.

[35] *Taylor*, 3 Wash. Terr. at 96–97 ("the Indians in making the treaty . . . more likely . . . grant[ed] only such rights as they were to part with, rather than . . . conveyed all . . . .").

[36] *Id.* at 97–98.

[37] *Id.* at 98.

[38] *See* Blumm & Brunberg, *supra* note 4, at 521–22.

[39] *See id.* at 523–24. A fish wheel was a kind of dipnet powered by the river that had huge baskets continually scooping salmon out the river. Fishermen used weirs, or wooden fences, to funnel the fish into the wheel. *Columbia River Fish Wheel*, OR. HISTORY PROJECT, https://perma.cc/2P88-KTTX (last visited Apr. 18, 2020). Fish wheels, first introduced on the Columbia by non-Indians in 1879, enabled harvesters like the Winans brothers to catch fish by the ton with little effort. Their fences threatened monopolization of traditional native fishing sites because the fish wheels could harvest massive amounts of fish, completely destroying a fish run. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679, *modified sub nom*. Washington v. United States, 444 U.S. 816–17 (1979).

[40] *See* Blumm & Brunberg, *supra* note 4, at 528–29.

[41] *See id.* at 529.

[42] *Winans*, 198 U.S. 371, 380 (1905).

fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which was not much less necessary to the existence of Indians than the atmosphere that they breathed."[43] The Court saw the treaty right as creating in the tribes vested property rights to access their historic fishing sites, describing the "right of taking fish" as establishing a "right in land . . . a servitude upon every piece of land as though described therein."[44] This servitude, a property right, ran against both the federal government and its grantees like the Winans brothers.[45] Thus, the brothers could not fence out the tribes from fishing at Celilo Falls.[46] However, the Court sowed the seeds of confusion by stating that the treaty right did not "restrain the state reasonably, if at all, in the regulation of the right."[47]

A decade and a half after *United States v. Winans*, the Court revisited the Stevens Treaty fishing rights in a case involving similar rights of tribal fishers to access Celilo Falls, this time from the Oregon side of the falls.[48] Oregon landowners attempted to distinguish the *Winans* situation by asserting that the fishing rights of the Yakama tribe did not extend to the Oregon side of the Columbia River because the tribe's treaty ceded lands only to the middle of the Columbia River.[49] The Court would not have any of it, invoking the rule of construction requiring courts to interpret treaties as the Indians would understand, and noting that they fished on both sides of the falls both before and after the treaty.[50]

Some two decades later, the Supreme Court again took up the Stevens Treaties in a case involving the issue of whether the state of

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43 *Id.* at 381. In discussing the rules of interpreting Indian treaties, McKenna explained, "[w]e have said that we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoised the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules." *See id.* at 380–81.

44 *Id.* at 381–82.

45 *Id.*

46 The Court also rejected the Winans' argument that the tribes' treaty rights were affected by the state of Washington's admission to the Union in 1889 on "an equal footing with the original states." *Id.* at 382–83. Citing *Shively v. Bowlby*, 152 U.S. 1, 48 (1894), the Court upheld federal authority to recognize treaty rights on federal territory prestatehood. *Id.*; *see also id.* at 384 ("And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.'").

47 *Id.*

48 Seufert Bros. v. United States, 249 U.S. 194, 195–96 (1919).

49 *Id.* at 198.

50 *Id.* at 197–99 (also noting that the Seufert brothers had ample notice of the existence of the treaty fishing right from the "habitual and customary use of the premises, which must have been so open and notorious . . . that any person, not negligently or willfully blind to the conditions of the property he was purchasing, must have known of them.").

Washington could charge a license fee to tribal fishers.[51] A state court convicted Sampson Tulee, a Yakama tribal member, of violating state law by selling salmon without a state dipnet license.[52] Tulee filed petition for writ of habeas corpus in district court, but a state court denied the petition on the grounds that he was subject to state regulation, and the Washington Supreme Court affirmed his conviction.[53] However, the U.S. Supreme Court, in a unanimous opinion by Justice Hugo Black, reversed, invoking the rules of treaty interpretation and concluding that the tribes would not have understood their treaty rights to be subject to state revenue measures like license fees.[54] Consequently, the Court rejected the state's defense that the fee was necessary for conservation, a claim which was no doubt undercut by the state's exempting non-Indian recreational hook-and-line fishers from license fees.[55]

Justice Black stated that in order to successfully invoke the "conservation necessity" defense, the state had to show that the fees were "indispensable" for conservation.[56] By refusing to accept a facially nondiscriminatory state regulation that imposed financial barriers on the exercise of the treaty fishing right, the Court seemed to impose a significant proof burden on state conservation measures. That burden would not be one that survived ensuing case law.

B. The Ninth Circuit's Interpretation of Tulee v. Washington*'s Conservation Necessity Standard*

In 1949, the Makah tribe filed suit against the state of Washington, seeking an injunction against the state's fishing regulations that restricted its members fishing to "one pole and line with two single hooks or one artificial bait per person" at certain traditional river fishing grounds.[57] Since salmon do not feed after entering the fresh water rivers, this restriction effectively prohibited tribal members from employing their traditional harvesting practices. The Makah's treaty with the United States, the Treaty of Neah Bay, included an express provision securing "[t]he right of taking fish and of whaling or sealing at usual and accustomed grounds and stations" to the Makah "in common with all citizens of the United States."[58]

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51 *Tulee*, 315 U.S. 681, 682 (1942).

52 *Id.*

53 State v. Tulee, 7 Wash. 2d 124, 125 (1941), *rev'd sub nom.* Tulee v. Washington, 315 U.S. 681 (1942).

54 *Tulee*, 315 U.S. at 684–85.

55 *Id.* at 682 n.1, 685.

56 *Id.* at 685.

57 Makah Indian Tribe v. Schoettler, 192 F.2d 224, 225 (9th Cir. 1951).

58 Treaty Between the United States of America and the Makah Tribe of Indians, U.S.-Makah Tribe, art. IV, Jan. 31, 1859, 12 Stat. 939; *see also Makah*, 192 F.2d at 225. The Makah's treaty is the only one of the Stevens Treaties including a right to whale. Blumm & Jamin, *supra* note 9, at 300–01.

The federal district court dismissed the tribe's complaint, and the tribe appealed.[59] The state defended its regulations, claiming they were consistent with the treaty language "in common with" because the state had the authority to prohibit non-Indian fishing, so it claimed the same authority to prohibit Indian fishing.[60] The Ninth Circuit rejected this argument in *Makah Indian Tribe v. Schoetter*, relying on the principle established in *Tulee* that the treaty reserved to the tribe an exemption from state interference that non-Indians do not share.[61] The court also emphasized *Tulee's* conservation necessity doctrine, ruling that because the state had not proved its regulation was necessary for the conservation of the fish, it could not impair the Makah's treaty fishing rights guaranteed by the treaty.[62] The appeals court dismissed the state's justification for rejecting alternative conservation regulations on cost grounds as well, deciding that the state could not restrict exercise of the treaty fishing right simply "because of the cost of preventing their taking of fish in excess of that right."[63] The court consequently ordered the district court to enjoin the state from enforcing its regulations against the tribe.[64]

A dozen years after the *Makah* decision, a dispute over the off-reservation fishing rights of the Confederated Tribes of the Umatilla reservation—which also had a Stevens Treaty right of "taking fish" off-reservation "in common with citizens of the United States"[65]—resulted in another Ninth Circuit decision.[66] In 1958, the state of Oregon arrested three tribal fishermen for violating its regulation closing fishing during certain parts of the year on tributaries of the Columbia and Snake Rivers.[67] The tribes responded by suing, seeking both declaratory and injunctive relief against state enforcement of its regulations.[68]

This time the district court ruled in favor of the tribes, holding that they had an unimpeded treaty right to fish at all usual and accustomed fishing grounds, which was not subject to state game laws or regulations.[69] The Ninth Circuit affirmed in *Maison v. Confederated Tribes of the Umatilla Indian Reservation*,[70] relying on the reserved rights doctrine first laid down in *Winans*, that the "treaty was not a

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59 *Makah*, 192 F.2d at 225.

60 *Id.* at 225–26.

61 *Id.* at 226 (citing *Tulee*, 315 U.S. 681, 684 (1942)).

62 *Id.*

63 *Id.* at 225.

64 *Id.* at 226

65 Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169, 170 (9th Cir. 1963), *disapproved of by Puyallup I*, 391 U.S. 392, n.14 at 401–02 (1968).

66 *Maison*, 314 F.2d at 169.

67 *Id.* at 170–71.

68 *Id.* at 171.

69 *Id.*

70 *Id.* at 174.

grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[71]

As in *Makah*, the *Maison* court concluded that the state had failed to meet the conservation necessity test established by *Tulee*.[72] The state was not only unable to show that there was a need to limit the taking of fish, it could not prove its regulation limiting treaty fishing rights was "indispensable" to conserving fish for the preservation of the species.[73] Consequently, the court decided that the state's aim was actually to conserve fish for use by non-Indian commercial and sports fishermen, with no regard for the needs of treaty fishermen.[74] The court ruled that any state restriction of treaty fishing rights on conservation grounds was unjustified if conservation goals could be met through regulation of other user groups, a ruling that Judge Belloni would enforce.[75] In contrast, the treaties did not reserve rights for non-Indians; therefore, the court held that the state could exclude sports fishermen from the fishing grounds in question, but not tribal harvesters.[76]

Three years after *Maison*, the same tribes challenged Oregon's attempt to regulate off-reservation subsistence hunting rights. In *Holcomb v. Confederated Tribes of Umatilla Indian Reservation*,[77] the tribes sought declaratory and injunctive relief against the Oregon State Police Department's enforcing state hunting regulations against tribal members hunting deer on ceded open and "unclaimed land."[78] The lower

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71 *Id.* at 171 (quoting *Winans*, 198 U.S. 371, 381 (1905)).

72 *Id.* at 172–73 (citing *Tulee*, 315 U.S. 681, 684 (1942)).

73 *Id.* at 173.

74 *Id.* at 172–73; *see also* Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 223 (1972) (explaining that the state in *Maison* failed to meet "the burden of proving that the regulations in question were necessary for conservation").

75 *Maison*, 314 F.2d at 172–73; *see infra* notes 147–175 and accompanying text (discussing the Belloni decision).

76 *Maison*, 314 F.2d at 174. The Ninth Circuit did recognize that the tribes' treaty rights were "in common" rights, meaning that the tribes could not harvest to the exclusion of non-Indian fishers, although the state could exclude non-Indians from tribal "usual and accustomed" fishing grounds. *Id.* at 171–72.

77 382 F.2d 1013 (9th Cir. 1967).

78 *Id.* at 1013–14; *see* State v. Miller, 689 P.2d 81, 85 (1984) (describing the tribes' case against Oregon). The tribes' treaty, like the other Stevens Treaties, recognized Indian rights to hunt on open and "unclaimed lands." Treaty with the Walla-Walla, Cayuses, and Umatilla Tribes and Bands, art. 1, June 9, 1855, 12 Stat. 945. In 2019, the Supreme Court interpreted similar language in the Crow Treaty ("the right to hunt on the unoccupied lands of the United States so long as game may be found thereon" and "peace subsists . . . on the borders of the hunting districts") to survive Wyoming statehood and the establishment of Big Horn National Forest because there was no evidence that Congress intended the right to be implicitly terminated or that the tribe understood that to be the case, applying the canons of treaty interpretation. Herrera v. Wyoming, 139 S. Ct. 1686, 1691 (2019). However, Justice Sonia Sotomayor's opinion for a 5-member majority did suggest that, while the formation of the Big Horn National Forest did not categorically occupy for purposes of the treaty, the state could argue that the place where the hunting took place was occupied, and it could also regulate if the standards for conservation necessity. *Id.* at 1691, 1703.

court agreed with the tribes that their treaty reserved their right to hunt on all unclaimed land they ceded without state regulation, absent a showing of conservation necessity.[79] The lower court consequently enjoined state regulations that prohibited Indian off-reservation hunting.[80]

The Ninth Circuit affirmed the lower court, rejecting the state's argument that Oregon's admission into the Union on an equal footing with other states diminished the tribes' treaty rights.[81] The court reaffirmed its ruling in *Maison* that the state may restrict treaty hunting and fishing rights only if that restriction is indispensable to conservation.[82] The district court found that the deer population was healthy enough to support both sportsmen hunting and Indian hunting, and that the state possessed alternative methods of conservation.[83] The Ninth Circuit therefore held that the regulation was thus not necessary to conservation needs, and consequently the state could not restrict the Confederated Tribes' hunting rights.[84]

C. The Effect of the Supreme Court's Decision in Puyallup Tribe v. Department of Game

At the same time that *Holcomb* was pending in federal court, *Puyallup I* was making its way through state courts to the United States Supreme Court.[85] The suit began in Washington state courts as two separate suits.[86] In both cases, the state of Washington sought declaratory relief and an injunction against Puyallup and Nisqually tribal harvesters to stop them from net fishing in the Puyallup and Nisqually Rivers.[87] Representatives of both tribes had signed the Treaty of Medicine Creek, a Stevens Treaty which recognized the tribes' "right

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79 *Holcomb*, 382 F.2d at 1014–15.

80 Confederated Tribes of Umatilla Indian Reservation v. Maison, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd sub nom. Holcomb*, 382 F.2d at 1013. The Supreme Court's recent *Herrera* decision, 139 S. Ct. 1686 (2019) (discussed *supra* note 78), would justify the result in *Holcomb*.

81 *Holcomb*, 382 F.2d at 1014. That result was ordained by *Winans*, 198 U.S. 371, 382–83 (1905) (rejecting the argument that the equal footing doctrine gave the state of Washington the right to regulate lands below the high-water mark of navigable waters).

82 *Holcomb*, 382 F.2d at 1014.

83 *Confederated Tribes of Umatilla*, 262 F. Supp. at 873. Each year, the state issued around 30,000 elk tags and 45,000–50,000 deer licenses to sportsmen. In contrast, treaty hunters killed only 150–175 elk and 300–350 deer annually. The lower court stated that if the state wanted to conserve the deer and elk population, it should issue fewer licenses to sportsmen before limiting Indians exercising their hunting rights. *Id.* at 872–73.

84 *Holcomb*, 382 F.2d at 1015.

85 391 U.S. 392, 394 (1968).

86 Dep't of Game v. Puyallup Tribe, Inc. (*Puyallup Tribe*), 422 P.2d 754, 754 (Wash. 1967), *aff'd sub nom. Puyallup I*, 391 U.S. 392 (1968); Dep't of Game v. Kautz, 422 P.2d 771, 772 (Wash. 1967), *aff'd sub nom. Puyallup Tribe I*, 391 U.S. 392 (1968). These cases were combined in petition for certiorari to the United States Supreme Court in *Puyallup I*, 391 U.S. at 394.

87 *Puyallup I*, 391 U.S. at 394–96.

of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[88] The state claimed that the tribes' treaty rights contained no exemption from state regulations, and a Washington superior court agreed.[89]

The Washington Supreme Court affirmed, concluding that tribes' off-reservation fishing rights were subject to state regulation if those regulations were reasonable and necessary for preservation of the fish.[90] The state court announced its disagreement with the indispensability test established in *Tulee*, relying instead on the "reasonable and necessary" test the lower court invoked.[91]

The tribes appealed to the U.S. Supreme Court, where their appeal was hampered by the position of the federal government. As one commentator noted, despite the federal trust responsibility to the Indians, the Department of Justice submitted an amicus brief that rejected the tribes' argument that their treaty fishing rights were not subject to state regulation.[92] Instead of advocating for tribal treaty rights under its duty as trustee for the Indians, the federal government compromised one of the Indians' treaty rights—the right to fish at usual and accustomed fishing grounds, subject only to "indispensable" state conservation regulation, as apparently recognized in *Tulee*.[93] The brief advocated use of the *Schoettler–Maison* rule that states may regulate off-reservation treaty fishing when "necessary" for conservation.[94]

The federal brief laid an unfortunate foundation that led the Supreme Court to affirm the Washington Supreme Court's decision.[95] A unanimous Court did recognize that the tribes' treaties reserved the tribes' right to fish off-reservation at "all usual and accustomed" places.[96] However, Justice Douglas's opinion proceeded to narrowly interpret the reserved fishing right, finding it significant that the treaty did not explicitly reserve the right to fish "in the 'usual and accustomed'

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[88] *Puyallup Tribe*, 422 P.2d at 755–56 (quoting Treaty of Medicine Creek, art. 3, Dec. 26, 1854, 10 Stat. 1132); *see also Kautz*, 422 P.2d at 772.

[89] *Puyallup Tribe*, 422 P.2d at 755–56; *Kautz*, 422 P.2d at 772–73; *Puyallup I*, 391 U.S. at 394.

[90] *Puyallup Tribe*, 422 P.2d at 764; *Kautz*, 422 P.2d at 774.

[91] *Puyallup Tribe*, 422 P.2d at 761–64; *Kautz*, 422 P.2d at 774 (citing State v. McCoy, 387 P.2d 942, 953 (Wash. 1963)) ("The treaty secured to the Indians an interest in land, consisting of an easement, which secured to them the right *not* to be excluded from their usual and accustomed fishing grounds by non-Indians. Those cases which recognize this right and protect the Indian from such exclusion do not hold that a state may not subject the Indians to reasonable and necessary regulations in the exercise of these rights, for the protection of the fishery resource.").

[92] Johnson, *supra* note 74, at 225; Brief for the United States as Amicus Curiae at 4–5, *Puyallup I*, 391 U.S. 392 (1967) (No. 76-1631), 1976 WL 181286.

[93] *Tulee*, 315 U.S. 681, 684–85 (1942); *see supra* note 56 and accompanying text (discussing the Court's indispensability test).

[94] Brief for the United States, *supra* note 92, at 3–5.

[95] *See* Johnson, *supra* note 74, at 226.

[96] *Puyallup I*, 391 U.S. at 398–99 (citing *Winans*, 198 U.S. 371, 381 (1905)).

manner," nor did it specify the purpose for which the Indians fished.[97] This circumscribed reading seemed contrary to the rules of treaty interpretation under which treaties are liberally construed in favor of the Indians, with ambiguities interpreted as the tribes themselves would have understood them.[98]

Justice Douglas focused instead on the treaty language stating that the tribes had the right to fish "in common with all citizens of the Territory."[99] This language, combined with the fact that the treaties were silent as to manner and purpose of fishing, induced the Court to suggest there was no reason why the state could not regulate the tribes, just as it regulated non-Indian harvests.[100] But in a prescient commentary on the decision, Professor Ralph Johnson claimed that "[n]o valid basis for the existence of such state power can be found."[101] As Johnson noted, because Indian treaties are the "supreme law of the land," they can be abrogated only by Congress.[102] Moreover, the Supreme Court long before had stated that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[103] Johnson argued that under these established rules of interpretation, unless Congress or the treaties expressly provided for state regulation, the tribes' exercise of treaty rights is not subject to state regulation.[104]

Ignoring rules of treaty interpretation, the *Puyallup I* Court declared that while the tribes' fishing right could

> not be qualified by the State, . . . the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the

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97 *Id.* at 398.

98 *See* Choate v. Trapp, 224 U.S. 665, 675 (1912) (construction of Indian treaties should be liberal, with doubtful expressions to be resolved in favor of the Indians); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); Alaska Pac. Fisheries Co. v. United States, 248 U.S. 78, 89 (1918); *see also Tulee*, 315 U.S. at 684–85 ("In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. . . . 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 the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.").

99 *Puyallup I*, 391 U.S. at 395.

100 *Id.* at 398.

101 Johnson, *supra* note 74, at 208.

102 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see* Johnson, *supra* note 74, at 208.

103 Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (quoting Pigeon River Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934)).

104 Johnson, *supra* note 74, at 208; *see also* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1620 (1996) (stating that "tribal sovereignty may only be abrogated only with a clear statement of congressional intent").

> State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.[105]

This led Justice Douglas to narrowly construe *Tulee* to merely forbid the state from charging license fees, while emphasizing that the state could regulate the "time and manner of fishing . . . necessary for the conservation of fish."[106] The *Puyallup I* decision made no mention of the burden *Tulee* imposed on the state to prove that its regulation be "indispensable to the effectiveness of a state conservation program."[107] Instead, it deferred to the Washington Supreme Court's "reasonable and necessary" standard.[108] This deference to alleged state conservation led Dean Getches to conclude that Justice Douglas favored what he perceived to be environmental results over Indian treaty rights.[109]

Although *Puyallup I* decided that the state could regulate off-reservation treaty fishing, it declined to rule on the state's ban on net fishing in the Puyallup River. Instead, the Court sent the matter back to the state courts to determine whether the ban was a reasonable and necessary conservation measure.[110] Justice Douglas' opinion did direct the state courts to address the matter of equal protection implicit in the treaty language "in common with."[111] But by deferring to the state's position that treaty fishing rights could be subject to state regulation without giving close scrutiny as to whether those regulations were indispensable to conservation, the Court seemed to accord the states a significant discretion in controlling the exercise of treaty rights. Judge Belloni would not give the deference to state regulation that Justice Douglas implied in *Puyallup I*, realizing that, as Professor Johnson predicted,[112] deference to state regulation amounted to discrimination against treaty rights.

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105 *Puyallup I*, 391 U.S. at 398.

106 *Id.* at 398–99 (citing *Tulee*, 315 U.S. 681, 684 (1942) ("[W]hile the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.").

107 *Tulee*, 315 U.S. at 685.

108 *Puyallup I*, 391 U.S. at 399–401.

109 Getches, *supra* note 104, at 1632 n.284 ("Douglas favored Indians only when their interests overlapped with other, higher concerns of his such as civil rights. He sharply curbed Indian rights, going against established doctrine, when he feared that tribal sovereignty would clash with his preference for wildlife conservation."). *Puyallup I* also relied on a half-century old decision which suggested that the treaty fishing right at issue in that case was merely a privilege, and thus subject to appropriate state regulation. *Puyallup I*, 391 U.S. at 399 (citing Kennedy v. Becker, 241 U.S. 556, 563–64 (1916)).

110 *Puyallup I*, 391 U.S. at 401–02.

111 *Id.* at 393, 403. In *Puyallup II*, 414 U.S. 44, 48 (1973), Douglas clarified his *Puyallup I* decision, reflecting a heightened awareness of the plight of Indian harvesters and the discriminatory effect of the state regulations. Belatedly recognizing the state's ongoing discrimination, Douglas announced that there must be a fair allocation between Indian fishing and non-Indian sports fishing. *Id.* at 48.

112 Johnson, *supra* note 74, at 228.

III. THE BELLONI DECISION

This Part examines the fishing conflict that led to the *Sohappy v. Smith*[113] decision and the people who were instrumental in convincing the federal government to bring suit on behalf of the tribes. It then discusses Belloni's ruling that required the state to ensure tribes had a fair share of the harvest, as well as his insistence that the tribes must have a voice in managing the fish runs.

A. The Intensifying Conflict in the 1960s

The decades-old conflict that led to *Sohappy* began to intensify in the 1960s, due in large part to a significant decline in the salmon population. In 1964, Oregon and Washington closed commercial fishing on the Columbia River, based on information indicating a critical decrease in summer chinook salmon.[114] Tribes also closed their fisheries in response to this data.[115] In 1966, Oregon ordered state police to strictly enforce commercial fishing regulations and impose closures on the Columbia River.[116] However, many treaty fishermen ignored both state and tribal closures, believing that their treaty rights exempted them from all regulation.[117] Tribal fishermen also began to hold demonstrations and "fish-ins," to draw attention to what they perceived as an escalating elimination of their treaty rights through state fishing restrictions.[118] As a result, Oregon arrested many tribal harvesters.[119]

One such fisherman was Richard Sohappy, a Yakama Indian tribal member and decorated army veteran.[120] During the summer of 1968, Oregon state officials arrested Richard and his uncle David Sohappy for fishing in the Columbia River with gillnets, contrary to state

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113 302 F. Supp. 899 (D. Or. 1969).

114 *See Honorable Robert C. Belloni, Foreword to* Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 311–12; *see also* John C. Gartland, Sohappy v. Smith: *Eight Years of Litigation over Indian Fishing Rights*, 56 OR. L. REV. 680, 685 (1977); Harrison, *supra* note 18, at 711.

115 Gartland, *supra* note 114, at 685.

116 *Id.*

117 *Id.*

118 ALVIN J. ZIONTZ, A LAWYER IN INDIAN COUNTRY: A MEMOIR 87–89 (2009). During the 1960s and 1970s, treaty fishermen from tribes in both Oregon and Washington, all of whom had similar treaty language reserving their fishing rights, were holding "fish-ins" and other protests across the Pacific Northwest. *See* COHEN, *supra* note 11, at 75 (describing some fish-ins that occurred in Washington and Oregon). The protests drew national support, with actors and celebrities such as Marlon Brando and Jay Silverheels (who played Tonto on "The Lone Ranger" television show) demonstrating their support by participating in the fish-ins. *See* William Schulze, *Brando Held, Freed in Fishing Dispute*, SEATTLE POST-INTELLIGENCER (Mar. 3, 1964) https://perma.cc/JFK7-XV6E. Hundreds of non-native university students, civil rights activists, professors, and others joined protests across the nation.

119 *See, e.g.*, COHEN, *supra* note 11, at 75–76.

120 *Id.* at 78.

regulations.[121] In response, Richard and David Sohappy, along with twelve other Yakama treaty fishermen, filed suit against Oregon Fish Commissioner Mckee Smith and other state game and fish officers, challenging the state's restrictions on treaty fishing and seeking to stop the state's arrests of treaty fishermen.[122] Professor Johnson and two other attorneys, David Hood and Fred Nolan, volunteered to litigate the case for the fourteen individuals.[123] The chief judge assigned the case to Judge Robert C. Belloni, a newly appointed federal judge who would eventually halt the increasing state restrictions on treaty fishing rights.[124]

A significant factor that changed the dynamics of the tribes' legal battles over treaty rights in the 1960s was a shifting perspective of the Department of Interior's Office of the Solicitor. Throughout the early twentieth century and into the 1960s, the Solicitor's Office had been only peripherally concerned with Indian rights, focusing mainly on reclamation and public power issues.[125] Moreover, many of the Secretaries of Interior during the 1950s were champions of tribal termination.[126] Only a few attorneys in the Solicitor's Office during the 1960s had any expertise or interest in Indian Law. One was Assistant Regional Interior Solicitor, George Dysart, who had a great deal of expertise in Indian law by the 1960s.[127] Dysart would play a pivotal role in protecting tribal treaty fishing rights in the coming decades.

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121 *Id.* at 77–78.

122 *Sohappy*, 302 F. Supp. 899, 903–04 (D. Or. 1969); *see* COHEN, *supra* note 11, at 78.

123 COHEN, *supra* note 11, at 78.

124 *See id.*; CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING 49 (2000); Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 317. Belloni was born in Coos County, Oregon and earned an undergraduate degree from the University of Oregon in 1941 and a law degree in 1951 after serving as an Army officer in World War II. President Lyndon B. Johnson appointed him to the federal district court in 1967. *See* Eric Pace, *Obituary: Robert C. Belloni, 80, Judge Who Upheld Indian Fishing Right*s, N.Y. TIMES (Nov. 15, 1999), https://perma.cc/8FES-YBF8. Belloni later stated that knew little about Indians or their cultures prior to the case: "I had never had any particular call to be interested in Indian affairs except as any other citizen is, proud of the history and ashamed of some of it, too . . . . I didn't know anything about these people . . . . I ended up with the highest respect for Indian people, those that I dealt with, the four tribes in particular." Berg, Interview with Belloni, *supra* note 4.

125 *See* Reid Peyton Chambers, *Implementing the Federal Trust Responsibility to Indians after President Nixon's 1970 Message to Congress on Indian Affairs: Reminiscences of Reid Peyton Chambers*, 53 TULSA L. REV. 395, 452 (2018).

126 *Id.* During the 1950s and 1960s, the federal government adopted an official policy of tribal termination, in an effort to end the federal–tribal trust relationship. This so-called termination era included terminating a number of tribes completely, transferring civil and criminal jurisdiction over Indians on reservations to state governments, transferring control of educational policies designed to assimilate Indians, and relocating Indians from reservations to urban cities; *see, e.g.*, Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 149–53 (1977) (discussing the federal termination policy).

127 *Indian Fishing Rights: Hearings on S.J. Res. 170 and S.J. Res. 171 Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 88th Cong., 2nd Sess. 11 (1964) (statement by John A. Carver, Jr., Assistant Secretary of the Department

As the fishing controversy in the Pacific Northwest increased during the 1960s, Dysart and U.S. Attorney Sidney Lezak became increasingly concerned about the tribes' fishing problems.[128] Heightened national awareness of, and activism regarding, the tribal fishing issue in the Pacific Northwest pressured the federal government to take action on behalf of the tribes, and in the early 1960s, the tribes requested federal support to protect their treaty rights.[129] The federal government began supplying that support in April 1966, when the Department of Justice authorized U.S. Attorneys to represent individual treaty fishermen whom the state was arresting and charging with violations its fishing regulations.[130]

Later in 1966, the Department of Justice issued a report on the treaty fishing conflict.[131] The report characterized as mere dictum the Supreme Court's statement in *Tulee* that the state had the authority to impose on treaty fishing rights "restrictions of a purely regulatory nature concerning the time and manner of fishing."[132] Instead, the report emphasized that the state of Washington lacked authority to regulate or restrict tribal members' exercise of their treaty fishing rights, even though state officials were arresting and threatening treaty harvesters fishing in compliance with tribal regulations.[133]

As a result of the Justice Department's initiative, U.S. Attorneys helped defend treaty fishermen in state criminal prosecutions. However, as Dysart himself noted, fighting individual court battles on behalf of a single treaty fishermen in state court was inefficient and unproductive.[134] First, because treaty fishing rights are federal rights, the issues were properly adjudicated in federal, not state court. Second, individual criminal cases limited the tribal defense attorneys to the facts of the individual situation rather than focusing on broader treaty rights issues.[135]

Due to the limits imposed by case-by-case criminal prosecutions, Dysart, Lezak, and other federal attorneys chose to pursue a different path: persuading the Solicitor's Office and the Department of Justice to protect tribal fishing rights on a much broader scale. Along with other treaty rights advocates, Dysart and Lezak prepared a comprehensive

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of the Interior to the Senate Subcommittee on Indian Affairs concerning Dysart's experience). Dysart, a humble, self-effacing attorney proved to be a dedicated advocate of tribal treaty rights who quietly made things happen. Throughout the *United States v. Oregon* case, Dysart made active efforts to make peace between the parties. Interview with Former Assistant U.S. Attorney Kris Olson (Feb. 25, 2019) [hereinafter "Olson Interview"].

128 Olson Interview, *supra* note 127.

129 *Id.*; *see also* COHEN, *supra* note 11, at 76–78.

130 Report of Assistant Attorney General Edwin L. Weisl, Jr. in Charge of the Land and Natural Resources Division, 1966 Att'y Gen. Ann. Rep. 294, 306 (1966).

131 *Id.* at 305.

132 *Id.* at 305–06 (quoting *Tulee*, 315 U.S. 681, 684 (1942)).

133 *Id.*

134 Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 317 (quoting an interview with George Dysart (Dec. 6, 1989)).

135 *Id.* at 317 (quoting Dysart interview); Chambers, *supra* note 125, at 439.

federal suit for declaratory and injunctive relief that would prove more efficient than defending individual treaty fishermen accused of crimes in state court.[136]

Dysart and Lezak faced an uphill battle to convince the Departments of Justice and Interior attorneys to pursue the case, as many federal attorneys thought that states had largely unfettered discretion to regulate treaty fishing.[137] According to long-time tribal lawyer, Alvin Ziontz, "Dysart wrote a lengthy and analytical request describing the history of state violation of Indian rights. With respect to Oregon, he zeroed in on the blatant illegality of allocating Columbia River salmon runs to the downstream non-Indian sport and commercial fishermen to the detriment of the Indians upstream."[138] Dysart's report convinced the Interior and Justice Departments to initiate a federal action against state regulation at the same time that Sohappy and thirteen other Yakama tribal members filed *Sohappy*.[139]

The federal government had the option of intervening in the *Sohappy* case. However, given state sovereign immunity, the *Sohappy* treaty fishermen were able only to bring suit against state officials, not the state itself.[140] Dysart and the others working with him thus chose to initiate a separate suit against Oregon itself, which enjoyed no sovereign immunity against a suit brought by the federal government.[141] The action that Dysart and the Justice Department planned would require the state of Oregon to manage the fishery resource to "assure the Indians a fair and equitable share of the salmon and steelhead destined to reach the Indians' 'usual and accustomed' fishing places."[142]

Dysart's efforts paid off. In September 1968, the United States filed its complaint in *United States v. Oregon*.[143] The four Columbia River treaty tribes intervened in the case: the tribes of the Yakama, Umatilla, and Warm Springs reservations and the Nez Perce Tribe.[144] Given the

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136 Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 317 (quoting Dysart interview); Olson Interview, *supra* note 127.

137 Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 317; Olson Interview, *supra* note 127.

138 ZIONTZ, *supra* note 118, at 94.

139 Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 317.

140 The 11th Amendment protects states from suits by individuals in federal, courts, see for example *Hans v. Louisiana*, 134 U.S. 1, 10 (1890), although it does not apply to suits by the federal government.

141 Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1656 (2002).

142 Honorable Robert C. Belloni, *Foreword: Let Them Do as They Have Promised, supra* note 4, at 312.

143 Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 317. Because Dysart played such a substantial role in advocating for protection of tribal treaty rights, and because of his expertise in Indian law, Lezak cross-designated him as Special Assistant U.S. Attorney in *United States v. Oregon*. Olson Interview, *supra* note 127.

144 The formal names of the tribes are the Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Reservation (the Walla Walla, Cayuse, and Umatilla Tribes), the Nez Perce Indian Tribe of Idaho, and the Confederated Tribes of the Warm Springs Indian Reservation. Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 317.

overlap of treaty rights issues, Judge Belloni consolidated the two cases, *Sohappy* and *United States v. Oregon*, into a single proceeding in 1969.[145]

B. Analyzing the Sohappy *Decision*

In response to the federal allegation that the state was violating the tribes' treaty rights by failing to ensure a fair share of the fishery, Oregon defended on the ground that, under the Supreme Court's *Puyallup I* decision, it had the same authority to regulate tribal harvests as it did to regulate non-Indians.[146] The state argued that the Indians' fishing rights did not warrant separate protection or treatment.[147] Judge Belloni disagreed. In memorable words, he stated that the state's position "would not seem unreasonable if all history, anthropology, biology, prior case law and the intention of the parties to the treaty were to be ignored."[148] In giving no deference to the state's interpretation, Belloni thus resoundingly affirmed the judicial role in interpreting the promises made in Indian treaties.

Belloni reviewed the origin and reason for the federal government's treaties with the various Pacific Northwest tribes, emphasizing the importance of construing the treaties consistent with the Indian canons of construction, one of which stipulates that treaties are to be interpreted as the tribes understood.[149] Belloni quoted from the Supreme Court's *Tulee* decision to the effect that:

> [i]t is [the courts'] 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 the tribal representatives* at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.[150]

Belloni recognized the vital importance of fish to the tribes throughout their history and the tribal leaders' concerns at the time of treaty-signing that their right to fish at their usual and accustomed grounds be

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145 *Sohappy*, 302 F. Supp. 899, 904 (D. Or. 1969). The court severed *United States v. Oregon* and *Sohappy* in 1977, *United States v. Oregon*, 657 F.2d 1009, 1011 n.1 (9th Cir. 1981), and decided to continue litigation in the years since under the name of *United States v. Oregon*. *See* Harrison, *supra* note 18, at 708 n.16.

146 *Sohappy*, 302 F. Supp at 907.

147 *Id.*

148 *Id.* at 905.

149 *Id.* The Supreme Court recently reaffirmed the validity of the Indian canons of construction in *Cougar Den*, 139 S. Ct. 1000 (2019); *see infra* note 246 and accompanying text; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02, 113–16 (Nell Jessup Newton ed., 2012) (discussing the canons).

150 *Sohappy*, 302 F. Supp. at 905 (quoting *Tulee*, 315 U.S. 681, 684 (1942)).

protected.[151] With this understanding, Belloni then analyzed the state's restrictions on treaty fishing.

The state's claim that it could regulate tribal harvests just as it could regulate other non-tribal fish harvests was soundly rejected by Judge Belloni. The state maintained that its regulation met the conservation necessity principle first articulated by the Supreme Court in *Tulee* and reaffirmed in *Puyallup I*.[152] But Belloni saw two limitations on state regulation in *Puyallup I*, even if necessary for conservation. First, the state regulation of treaty fishing could not discriminate against tribal fishing; second, the regulations must, according to *Puyallup I*, meet "appropriate standards."[153] Because he concluded that the state's claim to an unfettered right to regulate treaty fishing had already been repeatedly rejected in *Puyallup I*, *Tulee*, *Holcomb*, *Maison*, and *Makah*, Judge Belloni rejected the state's position.[154]

To ascertain whether the state's regulations were "necessary for the conservation of the fish,"[155] Belloni analyzed *Puyallup I* in some detail. He concluded that the Supreme Court was clearly interpreting "conservation in the sense of perpetuation or improvement of the size and reliability of the fish runs."[156] The Court did not, according to Judge Belloni, endorse any particular state program for allocating fish harvests among particular user groups, harvest areas, or modes of taking, so long as the conservation goal was achieved.[157]

Belloni was clear that the conservation necessity principle did not allow the state to subordinate treaty fishing rights to other state objectives or policies.[158] Instead, the state could regulate treaty fishing rights only when necessary for the *conservation of the species*.[159] Additionally, the regulations must be the least restrictive method possible for meeting conservation requirements.[160] In a subsequent unpublished opinion, he reiterated that requirement, holding that the state must use every other alternative method of conserving the fish runs, like restricting non-Indian harvesting, before regulating treaty

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151 *Id.*

152 *Id.* at 906; *see Puyallup I*, 391 U.S. 392, 398 (1967) (stating the treaty right to take fish "at all usual and accustomed places" may be regulated by the state only when its regulation "meets appropriate standards and does not discriminate against the Indians"); *Tulee*, 315 U.S. at 684 (asserting the state can regulate the time and manner of treaty fishing outside of the reservation when the restrictions are necessary for conservation of fish).

153 *Sohappy*, 302 F. Supp. at 907.

154 *Id.* at 907–08 (citing *Puyallup I*, 391 U.S. at 398–99; *Tulee*, 315 U.S. at 684–85; *Holcomb*, 382 F.2d 1013, 1013–15 (9th Cir. 1967); *Maison*, 314 F.2d 169, 171–74 (9th Cir. 1963); *Makah*, 192 F.2d 224, 226 (9th Cir. 1951)).

155 *Id.* at 906–07.

156 *Id.* at 908 (interpreting *Puyallup I*, 391 U.S. at 398–99).

157 *Id.*

158 *Id.*

159 *Id.* at 906 (citing *Tulee*, 315 U.S. at 684).

160 *Id.* at 908.

fishing.[161] He thus reinstated the high bar for state regulation of tribal exercise of treaty fishing rights.[162] To prove the conservation necessity of a regulation, the state had to demonstrate that 1) a limit on tribal treaty taking of fish was required for the perpetuation or stability of a fish run, and 2) the proposed regulation restricting exercise of treaty fishing rights was indispensable to the state's ability to accomplish that limitation.[163]

Restrictions on both the time and manner of treaty fishing, including the type of gear the treaty fishermen use, had to meet those requirements.[164] Belloni also reiterated *Maison*'s holding that the treaties reserved no rights for non-Indians.[165] Instead, treaty fishermen could fish in ways proscribed to non-Indians, and the state could not limit the type of fishing gear treaty fishermen used simply on the basis that non-Indians could not use that gear.[166] Belloni determined that the state failed to meet these standards in *Sohappy*; consequently, the state's regulation unlawfully discriminated against treaty rights.[167]

The *Puyallup I* Court previously announced that the state could not qualify the tribes' treaty "right to fish at all usual and accustomed places," which Belloni interpreted to mean "that the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located."[168] This interpretation was a critical one for the tribes because the state had regulated fisheries in such a way that a significant portion of fish runs were harvested before the runs reached the tribes' traditional fishing grounds.[169] Then, due to depleted fish runs, the state would impose conservation limits *after* the fish runs had passed the Bonneville dam, thus forcing the treaty fishermen to bear the burden of the conservation efforts.[170] This

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161 Sohappy v. Smith, No. 68-409, slip op. at 2–3 (D. Or. Oct. 10, 1969).

162 *Sohappy*, 302 F. Supp. at 907–08; Sohappy v. Smith, No. 68-409, slip op. at 2–3 (D. Or. Oct 10, 1969); *see also* Timothy Weaver, *Litigation and Negotiation: The History of Salmon in the Columbia River Basin*, 24 ECOLOGY L.Q. 677, 680–81 n.12 (1997) (discussing Belloni's least restrictive alternative requirement).

163 *Sohappy*, 302 F. Supp. at 908 (restating the *Maison* interpretation of *Tulee* that *Puyallup I* ignored); *see Maison*, 314 F.2d 169, 172 (9th. Cir.1963).

164 *Sohappy*, 302 F. Supp. at 908–09.

165 *Id.* at 911 (citing *Maison*, 314 F.2d at 174).

166 *Id.*

167 *Id.* at 910–11. Judge Belloni found this discrimination to be the equivalent of that proscribed by the Ninth Circuit in *Maison*, 314 F.2d. at 173 (deciding that the state's efforts to conserve fish for non-treaty commercial and sports harvesters, without regard for treaty fishermen needs and use, failed to meet the conservation necessity requirement).

168 *Sohappy*, 302 F. Supp. at 911 (citing *Puyallup I*, 391 U.S. 392, 398 (1967).

169 Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 316.

170 *See* Harrison, *supra* note 18, at 708; *see also Sohappy*, 302 F. Supp. at 908–11 (noting that the state set escapement goals (i.e., fish that "escaped" harvest) far below Bonneville Dam that gave priority to non-tribal commercial and sport fishing. The regulations gave no consideration to tribal harvests above the dam.). *See supra* notes 156–157 and accompanying text (discussing Belloni's analysis of *Puyallup I* in which he concluded that

combination effectively prohibited treaty fishermen from harvesting, imposing the full conservation burden on the tribes.[171] Belloni's interpretation thus recognized the inherent discriminatory nature of the state's regulations and required the state to meet conservation goals in a manner that did not unfairly burden treaty fishermen.

Belloni reiterated the Ninth Circuit's suggestion in *Makah* that the state and tribes agree to a cooperative plan to govern the state's regulation over treaty fishing rights.[172] He then dismissed the state's contention that statehood diminished treaty fishing rights.[173] Finally, in the most significant long-term aspect of his decision, Judge Belloni retained jurisdiction of the case to grant relief for further disputes that arose from his decree.[174] He was quite prescient in anticipating disputes and foreseeing the need for continued judicial oversight:

> This court cannot prescribe in advance all of the details of appropriate and permissible regulation of the Indian fishery . . . . As the Government itself acknowledges, "proper anadromous fishery management in a changing environment is not susceptible of rigid pre-determination . . . . [T]he variables that must be weighed in each given instance make judicial review of state action, through retention of continuing jurisdiction, more appropriate than overly-detailed judicial predetermination."[175]

Belloni's continuing jurisdiction over the case was essential to implementing the principles he established in *Sohappy*. No judicial appeal was forthcoming.

Five years after the Belloni decision, Judge George Boldt interpreted the "fair share" principle to allocate to the Puget Sound tribes up to half of the harvests.[176] Judge Belloni promptly amended his 1969 order to apply that allocation to the Columbia.[177] The states of Oregon and Washington then appealed his 1974 amended order to the Ninth Circuit, which in 1976 affirmed the 50 percent allocation as being fair and practicable.[178] The Ninth Circuit emphasized that the 1974 order simply defined the amount required by the 1969 "fair share"

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the Supreme Court was not clearly interpreting conservation in the sense of perpetuation or improvement of the size and reliability of the fish runs).

171 *See* Harrison, *supra* note 18, at 708.

172 *Sohappy*, 302 F. Supp. at 912 (citing *Makah*, 192 F.2d 224, 225 (9th Cir. 1951)).

173 *Id.* (citing *Puyallup I*, 391 U.S. at 400); *Holcomb*, 382 F.2d 1013, 1014 (9th Cir. 1967).

174 *Sohappy*, 302 F. Supp. at 911.

175 *Id.*

176 United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

177 The amended order decreed that "'[t]he Indian treaty fishermen are entitled to have the opportunity to take up to 50 percent of the harvest of the spring Chinook Salmon run destined to reach the tribes' usual and accustomed grounds and stations. Except insofar as amended here, the 1969 judgment remains in full force and effect.'" *See* Sohappy v. Smith, 529 F.2d 570, 572 (9th Cir. 1976) (quoting the 1974 order).

178 *Id.* at 573.

ruling, which was necessary given the states' failure to manage their resources in a manner that complied with Belloni's 1969 decree.[179] With the "fair share" tied to a specific percentage of fish, Belloni ensured that the treaty fishermen had a more substantial, concrete harvest share to measure whether the state fairly allocated fish runs.

Despite the Ninth Circuit's affirmance, implementation of the Boldt decision faced substantial opposition in Washington, as both the state and non-tribal harvesters resisted.[180] When state courts upheld the state's claims that it lacked authority to implement the decision, the U.S. Supreme Court to review the case, and its ensuing 6–3 decision largely upheld Judge Boldt's equal sharing formula (approved by Judge Belloni) as necessary to prevent the state from "crowding out" the tribal fishery.[181]

The Supreme Court's ratification marked the Belloni decision as a turning point in the courts' recognition of treaty fishing rights, expanding the scope beyond access to fishing sites and an insulation from license fees to impose significant, systematic restrictions on state regulation.[182] Not only did it establish that the state must allocate treaty fishermen a fair share of the harvest, it also re-established the high bar for state regulation of treaty fishing that the *Puyallup I* decision seemed to undermine the previous year.[183] Judge Belloni

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179 *Id.*

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> Like southern white fighting desegregation two decades earlier, the state of Washington and its citizens resisted the Boldt decision vigorously . . . . Widespread noncompliance with the state's grudging efforts to implement the court's orders occurred during 1975–77; shooting threats were even reported. Then, in 1977, in response to a suit brought by non-native fishers, the Washington State Supreme Court ruled that the state lacked authority to implement Judge Boldt's sharing formula, claiming it was contrary to both state statutes and the federal Constitution. As a result Judge Boldt was forced to enter a series of orders that had the effect of directly managing the fishery. Although these orders were widely decried as usurping the state's role in managing the fishery and establishing the court as a 'fishmaster,' the orders were upheld again by the appeals court. . . .

SACRIFICING THE SALMON, *supra* note 6, at 81. Affirming Judge Boldt's authority to run the fishery by judicial degree, the Ninth Circuit pointed to the state's "extraordinary machinations," which were "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." Puget Sound Gillnetters Ass'n v. U.S. District Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

181 Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 676, 682, 686–87 (1979) (concluding that neither the state nor the treaty tribes can destroy each other's harvest share, and that the "central principle" of the treaty right was that the tribal right to "a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.").

182 *See* SACRIFICING THE SALMON, *supra* note 6, at 83–85 (also noting that the Belloni and Boldt decisions induced a re-tribalization of Northwest tribes, eventual recognition of the tribes as fish managers, an eventual alliance with the states to protect salmon habitat, all of redounded to the benefit of the salmon resource).

183 *See supra* notes 105–111 and accompanying text.

changed the course of Indian case law by requiring the state to use only the least restrictive means of conserving the amount of fish necessary for species' survival.[184] Further, he recognized the importance and necessity of having a tribal voice in the management of fish, laying the foundation for the co-management plans that the tribes and states would later develop.[185]

IV. THE EFFECT OF THE BELLONI DECISION

This Part discusses the effect that Belloni and his decision in *Sohappy* had on the management of the fish runs on the Columbia River and its tributaries, emphasizing Judge Belloni's role in inducing the development of co-management plans. We then examine the evolution of these co-management plans and explain some of the successes and setbacks the tribes and states faced in developing and implementing them.

A. The Role of the Court

Judge Belloni declared that treaty fishing rights must be co-equal with the state's objective of conserving fish runs for other user groups.[186] The decision effectively required Oregon to completely change its management of salmon harvests on the Columbia River.[187] Because Belloni recognized that the states' ongoing management of the fish runs might continue to be unfair to the tribes, he focused on ensuring that the tribes had a role in the decision-making process of managing the fish runs, ordering the state to give the tribes an opportunity "to participate meaningfully" in the regulation of the fishery,[188] in effect, recognizing a kind of shared sovereignty over managing fish harvests.

Belloni anticipated that continuing conflicts between the tribe's fair share and the state's conservation regulations could lead to a "commuter run" to the courthouse.[189] He therefore implored the parties to work together to develop a co-management plan for the conservation and allocation of anadromous fish in the Columbia River.[190] Not until 1977 did the states actually develop a plan incorporating the principles

184 *See supra* notes 158–167 and accompanying text.

185 *See infra* notes 203–230 and accompanying text.

186 *Sohappy*, 302 F. Supp. 899, 911 (D. Or. 1969).

187 *See* Harrison, *supra* note 18, at 708.

188 *Sohappy*, 302 F. Supp. at 912 (ordering that the tribes must "be heard on the subject [of state fishing regulations] and, consistent with the need for dealing with emergency or changing situations on short notice, . . . be given appropriate notice and opportunity to participate meaningfully in the rule-making process"); Harrison, *supra* note 18, at 713.

189 *See* Weaver, *supra* note 162, at 681; Harrison, *supra* note 18, at 709; Gartland, *supra* note 114, at 680.

190 *Sohappy*, 302 F. Supp. at 912; *see* Harrison, *supra* note 18, at 715–16 (describing Belloni's continual efforts to encourage the parties to cooperate over the next decade).

Belloni established in his 1969 decree.[191] His encouragement was essential in convincing the parties to eventually meaningfully negotiate, laying the groundwork for the agreements they would reach in later decades. Although the Belloni decision was a critical step in ensuring that tribes had a voice in both the allocation and the conservation of fish, the fish runs continued to decline in the 1970s, leading to more disputes as to how to fairly achieve both allocation and conservation goals.[192]

B. The Evolution of Co-Management Plans

For several years following the Belloni decision, Oregon's interpretation of conservation continued to unfairly burden the tribes. This discrimination was partly due to the location of tribal fisheries, upstream from Bonneville Dam.[193] In contrast, the non-Indian sport and commercial fisheries were primarily below the dam.[194] Since fish counting did not occur until the runs reached the dam, the state would begin to implement its conservation regulations once the fish passed the dam, thereby limiting the allocation to treaty fishermen without affecting the allocation to non-treaty fishermen.[195] This management coincided with the state's priority of allocating fish to sports and non-Indian commercial fishermen, but was inconsistent with the Belloni decision's directive instructing the state to manage the fishery so that treaty harvesters have co-equal rights with non-treaty fishers.[196]

Throughout the early 1970s, litigation continued. With no long-term conservation plan in place, state management of the fish runs often occurred on a run-by-run basis.[197] This ad hoc management forced the tribes to ask the court for emergency injunctions, frequently leaving the court no more than a few days to consider the issues and arguments.[198] Judge Belloni grew weary of waiting for the states to

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191 *The Columbia River Fish Management Plan*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, https://perma.cc/87UB-ZHZQ (last visited Apr. 18, 2020).

192 *See* Harrison, *supra* note 18, at 709, 713. In 1980, the states and the tribes formed a surprising alliance in a successful effort to pressure Congress to elevate the status of fish and wildlife preservation and restoration in what became known as the Northwest Power Act, 16 U.S.C. § 839. *See generally* Michael C. Blumm & Brad L. Johnson, *Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection*, 11 ENVTL. L. 497, 501–02 (1981) (analyzing the statute); Michael C. Blumm, *Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program*, 14 ENVTL. L. 277, 281 (1984) (analyzing the ensuing restoration plan). *See also infra* note 201.

193 *See* Harrison, *supra* note 18, at 713–14.

194 Gartland, *supra* note 114, at 694 n.99.

195 Harrison, *supra* note 18, at 713–14; A Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries Above Bonneville Dam (1977) (entered into pursuant to *Sohappy*, 302 F. Supp. at 912) [hereinafter "1977 Management Plan"].

196 *See* Gartland, *supra* note 114, at 695.

197 *See* Harrison, *supra* note 18, at 707–08.

198 *Id.* at 715.

develop a more comprehensive management plan that involved tribal cooperation to ensure a fair share allocation of the harvests.[199] Therefore, in 1975 he ordered the tribes and states to cooperate on developing a comprehensive fish management plan.[200] His 1975 order reflected the importance of tribal sovereign control over natural resources in which they possessed reserved rights.[201] Tribal–state co-management, which would characterize co-management plans over the next forty years, involved "shared decision-making responsibility with federal and state governments and agencies where the exercise of such agency authority would affect tribal rights."[202] In short, in order to ensure tribal proprietary fishing rights, the tribes had to have some sovereign control over harvest management. Belloni's 1975 order was an indispensable step in co-management plans, which gave the tribes and states an alternative to the litigation they had used to resolve fishing conflicts for decades.

After nearly a decade of more litigation and extensive negotiations, the tribes and states finally adopted a five-year co-management plan in 1977.[203] The plan called for joint management and fair allocation of the harvestable fish.[204] Despite this agreement, litigation between the tribes and states continued. Many ensuing disputes related to the fact the plan focused primarily on the allocation of harvest without effectively addressing the conservation of the declining fish runs.[205] Nor did the plan address regulation of ocean harvest or fishing locations, times, or quotas.[206] Since salmon migrate from their inland spawning grounds to the northern coasts of British Columbia and Alaska and back, regulation of ocean fisheries was necessary to ensure adequate conservation, especially because during the 1960s–1980s, Alaska and British Columbia fishers harvested a majority of Columbia River harvests.[207]

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199 *Id.* at 709, 715–16.

200 *Id.* at 716.

201 Order at 5, *Sohappy v. Smith*, No. 68-513 (D. Or. Aug. 20, 1975), discussed in Harrison, *supra* note 18, at 716–19; *see also* Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 333–34 (2000) (discussing Settler v. Lameer, 507 F.2d 231, 238 (9th Cir. 1974) (recognizing the Yakama Tribe's right to exercise police powers at off-reservation usual and accustomed fishing grounds with respect to tribal members exercising treaty rights) and United States v. Michigan, 471 F. Supp. 192, 256–58 (W.D. Mich. 1979) (holding that the Chippewa Tribes reserved the right to regulate tribal fishing at off-reservation traditional fishing grounds, preempting state regulations)).

202 Goodman, *supra* note 201, at 336; *see infra* notes 203–230 and accompanying text.

203 *See* 1977 Management Plan, *supra* note 195.

204 COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 191; *see* Gartland, *supra* note 114, at 700; *see also* 1977 Management Plan, *supra* note 195.

205 *See* 1977 Management Plan, *supra* note 195.

206 *See* United States v. Oregon, 699 F. Supp. 1456, 1459 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990); Harrison, *supra* note 18, at 709, 717–18.

207 Interview with Laurie Jordan, Columbia River Inter-tribal Fish Commission (Feb. 28, 2019) [hereinafter "Jordan Interview"]. Overharvesting of Columbia River-origin salmon off the coasts of British Columbia and Alaska eventually led Canada and the United

The 1977 plan expired in 1982.[208] The next year, the parties were back in court, litigating the same conservation issues over which the parties struggled since the 1969 *Sohappy* decision.[209] In 1983, the Columbia River Compact, an interstate agency that regulates commercial fishing on the Columbia River, established regulations for the 1983 fall fish runs.[210] These regulations were more restrictive on treaty fishing, both in terms of duration and the geographic area of harvests, than those proposed by the tribes. The tribes responded by seeking an injunction to prevent the states from enforcing the regulations.[211] District Judge Walter Craig—one of Judge Belloni's successors[212]—determined that the states' regulations failed to meet criteria of being the least restrictive methods of regulating fish for conservation purposes by again subordinating the protection of treaty fishing rights to other state priorities.[213] Consequently, the court enjoined the states from enforcing the 1983 regulations and ordered the tribes and states to negotiate a new management plan.[214] Washington and Idaho appealed, but the Ninth Circuit affirmed the district court's decision in 1985, concluding that the states' regulations failed to comply with the standards established in *Puyallup I, U.S. v. Oregon,* and *Sohappy*, and therefore violated the tribes' treaty rights.[215]

States to agree to the Pacific Salmon Treaty in 1985 and amendments in 1999, see SACRIFICING THE SALMON, *supra* note 6, at 161–72.

208 *See* 1977 Management Plan, *supra* note 195.

209 *See* Harrison, *supra* note 18, at 709, 720.

210 Oregon and Washington have shared concurrent jurisdiction over the Columbia River since 1853. Act of Mar. 2, 1853, 10 Stat. 172, 179 (1853). A 1918 compact continued the two states' concurrent jurisdiction. Act of Apr. 8, 1918, Pub. L. No. 64-123, 40 Stat. 515 (1918); *see* United States v. Oregon, 769 F.2d 1410, 1413 (9th Cir. 1985).

211 United States v. Oregon, 769 F.2d at 1413.

212 After twelve years of presiding over the case, in 1980 Belloni surprisingly recused himself from the case. Despite his lack of familiarity with Indian law when he was first assigned the case in 1968, he startled courtroom observers by explaining that he could no longer be fair and impartial. Later, in an interview in 1989, he discussed his reasons for recusal:

> I had spent all this time seeing Indians in lawsuit after lawsuit, winning these suits but still failing to get the fish to which they were entitled. This was because they didn't have much power with state agencies because the Indians don't have much voting power . . . I came to the point where it became frustrating to me . . . to be continually finding points in favor of the Indians when they deserved it, and then later see . . . . the rulings went disobeyed [by the state]. There were end runs around them. There were ingenious ways of figuring out interpretations contrary to the spirit of the decision.

Berg, Interview with Belloni, *supra* note 4.

213 United States v. Oregon, 769 F.2d at 1412.

214 United States v. Oregon, No. 68-513 (D. Or. Sept. 1983), *as discussed in* United States v. Oregon, 769 F.2d 1410, 1413–14 (9th Cir. 1985).

215 Idaho intervened in *United States v. Oregon* in 1983. *Puyallup*, 745 F.2d 550, 551 (9th Cir. 1984); United States v. Oregon, 769 F.2d at 1418 (citing *Puyallup I*, 391 U.S. 392, 397–98 (1968)).

The tribes and the states continued to negotiate from 1983 to 1988, with the district court playing a role in overseeing the negotiations and settling disputes.[216] In 1988, a decade after the initial plan, the tribes and states agreed to a new ten-year Columbia River Fish Management Plan (1988 plan), which Judge Malcolm Marsh, another of Judge Belloni's successors, approved in October 1988.[217]

The 1988 plan included not only harvest limits but also established "specific goals, timetables, and methods for cooperative management" of both natural and hatchery fish for Columbia River Basin fish runs in Idaho, Oregon, and Washington.[218] The plan also called upon both the tribes and states to construct new hatcheries on some of the Columbia River tributaries in order to increase salmon run sizes,[219] expanding the role of the plan beyond harvest management. A key aspect of the 1988 plan concerned its provisions for resolving potential disputes and changed circumstances in advance, rather than as they arose on a seasonal basis.[220] These dispute resolution procedures reflected the parties' growing sophistication in how to cooperatively manage the fishery.[221]

In 1998, the 1988 plan expired. Over the next decade, the parties were able to reach only short-term agreements. These agreements amounted to stopgap measures that managed the fish runs in specific years, rather than plans addressing long-term, ongoing conservation and allocation issues. Then, in 2008, after years of negotiations, the parties finally agreed to a new ten-year plan.[222] The 2008 plan

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[216] The five tribes are the four mentioned *supra* note 144, as well as the Shoshone-Bannock tribes, which were allowed to intervene in 1986 because their reservation is located along the Snake River, the principal tributary of the Columbia River. United States v. Oregon, 122 F.R.D. 571, 573 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990); *see also* COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 191; Goodman, *supra* note 201, at 349.

[217] United States v. Oregon, 699 F. Supp. 1456, 1457 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990) (approving the 1988 plan).

[218] SUMMARY OF *U.S. V. OREGON* AND THE COLUMBIA RIVER FISH MANAGEMENT PLAN 2 (1988); NORTHWEST POWER PLANNING COUNCIL, COLUMBIA RIVER FISH MANAGEMENT PLAN 84 (1988) [hereinafter 1988 MANAGEMENT PLAN].

[219] SUMMARY OF *U.S. V. OREGON* AND THE COLUMBIA RIVER FISH MANAGEMENT PLAN, *supra* note 218, at 2–4. Many critics believe that salmon hatcheries—because of their adverse effects on spawning salmon due to disease, overcrowding, and genetic drift—are a false hope for salmon restoration. *See* SACRIFICING THE SALMON, *supra* note 6, at 83–86.

[220] *See* SUMMARY OF *U.S. V. OREGON* AND THE COLUMBIA RIVER FISH MANAGEMENT PLAN, *supra* note 218, at 3–4.

[221] Jordan Interview, *supra* note 207; *see also* Goodman, *supra* note 201, at 350 (describing the plan's provisions for dealing with disputes and the changing circumstances of the fish runs).

[222] Jordan Interview, *supra* note 207; All Parties' Joint Motion and Stipulated Order Approving 2008–2017 *United States v. Oregon Management Agreement*, United States v. Oregon, No. 3:68-cv-00513-KI (D. Or. Aug. 11, 2008). The plan was approved by the court as a stipulated order. Joint Memorandum in Support of Joint Motion to Reconsider, Alter or Amend This Court's March 19, 2018 Orders Pursuant to Fed. R. Civ. P. 59(e) and 60(b) at 6, United States v. Oregon, Order Dismissing Case Without Prejudice, No. 3:68-cv-0513-MO (D. Or. May 21, 2018) [hereinafter Tribes' Joint Memorandum in Support].

reestablished a co-management framework that reduced the need for court resolution of disputes.[223]

With the 2008 plan about to expire, the parties succeeded in agreeing to a new ten-year plan, which the court approved in March 2018.[224] Because the state and tribes have differing views on the effect of hydropower operations,[225] this new agreement was basically a continuation of the 2008 agreement.[226] Consequently, one of its shortcomings is that it makes no effort to resolve larger conservation issues like balancing federal hydropower operations with the conservation of endangered species.[227] The plan does, however, provide the parties a procedural framework within which to attempt to resolve hydropower versus conservation goals in the future.[228]

Through several generations of plans, the parties have negotiated agreements establishing collaborative fishery management that reflected a spirit of cooperation between the tribes and states that did not exist prior to the *Sohappy* decision.[229] Although they have often

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223 Defendant State of Oregon's Response to Joint Motion to Reconsider, Alter or Amend March 19, 2018 Orders at 2, United States v. Oregon, No. 3:68-cv-0513-MO (D. Or. May 7, 2018) [hereinafter Oregon's Response to Joint Motion].

224 Order Approving 2018–2027 *United States v. Oregon* Management Agreement, United States v. Oregon, No. 3:68-cv-0513-MO (D. Or. Mar. 19, 2018).

225 *See* Tribes' Joint Memorandum in Support, *supra* note 222, at 18. One disagreement concerned the Bonneville Power Association's (BPA's) settlement with the state of Washington and three of the tribes, in which they agreed to withdraw from ongoing litigation over the federal government's failure to comply with the requirements of the Endangered Species Act (ESA) concerning the operations of Columbia Basin federal dam in return for $900 million to be used for habitat restoration over ten years. The state of Oregon and the Nez Perce did not sign on, refusing to take money from BPA to withdraw from litigation. *See* Michael C. Blumm, *The Columbia River Gorge and the Development of American Natural Resources Law: A Century of Significance*, 20 N.Y.U. ENVTL. L.J. 1, 22 (2012) (discussing the so-called Columbia Basin Accords).

226 Jordan Interview, *supra* note 207; Tribes' Joint Memorandum in Support, *supra* note 222, at 6.

227 Those issues have been left to ESA litigation before another federal judge in the district court of Oregon, Michael Simon. *See, e.g.*, Michael C. Blumm et al., *Still Crying Out For a "Major Overhaul" After All These Years—Salmon and Another Failed Biological Opinion on Columbia Basin Hydroelectric Operations*, 47 ENVTL. L. 287, 307 (2017) (examining the failure of the federal 2014 biological opinion to satisfy the ESA); Michael C. Blumm & Doug DeRoy, *The Fight Over Columbia Basin Salmon Spills and the Future of the Lower Snake River Dams*, 9 WASH. J. ENVTL. L. & POL'Y 1, 5–13 (2019) (discussing Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 886 F.3d 803, 814–24 (9th Cir. 2018), the Ninth Circuit's affirmation of the district court's injunction requiring federal agencies to spill water at federal dams to facilitate downstream salmon migration to fulfill ESA obligations).

228 COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 191 (discussing the dispute resolution procedures laid out to help parties resolve conflicts); Tribes' Joint Memorandum in Support, *supra* note 222, at 6, 23 (discussing the benefits of the "continuing procedural framework" allowing the parties to resolve continuing disputes).

229 United States' Memorandum in Support of Joint Motion to Reconsider, Alter, or Amend this Court's March 19, 2018 Orders Pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6) at 2, 4, United States v. Oregon, No. 3:68-cv-0513-MO (D. Or. Apr. 16, 2018) [hereinafter U.S. Memorandum in Support]; Oregon's Response to Joint Motion, *supra* note 223, at 2

struggled to reconcile their diverging views as to how best to manage the allocation of fish harvests between the tribal and state fisheries, their efforts have also produced what may be the most longstanding example of co-management in the United States.[230] Considering the decades of tribal–state conflicts over salmon and declining salmon runs, the efforts of the tribes and states to work together to ensure a fair allocation of salmon harvests represents a marked shift in the history of Columbia River fish management.

C. Continuing Court Jurisdiction

Although the four generations of plans reflect the parties' successful co-management of the fish resource, there remains a pressing need for the court's continuing jurisdiction. The parties have continued to dispute elements of the plans throughout the last fifty years, and the reviewing court has been essential to resolving these disputes.[231]

So it was quite a surprise when, in March 2018, District Judge Michael Mosman—another of Judge Belloni's successors[232]—in

(recognizing that "substantial progress in collaborative management of fisheries over the course of nearly 50 years has been made while under the court's explicit statement of 'retained jurisdiction'"); Jordan Interview, *supra* note 207; Harrison, *supra* note 18, at 723; State of Washington's Response to Joint Motion to Reconsider, Alter, or Amend this Court's March 19, 2018 Orders Pursuant to Fed. R. Civ. P. 59(E) and 60(B)(6) at 3, United States v. Oregon, No. 3:68-cv-0513-MO (D. Or. May 7, 2018) [hereinafter Washington's Response to Joint Motion] (declaring that the state of Washington has "grown from that past and the State has fully embraced the need to implement treaty rights as a distinct obligation of its fishery management").

230 COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 191; *see* Harrison, *supra* note 18, at 713. Since the late 1970s, the states and tribes, with the assistance of the federal government, have collaborated in creating the Fish and Wildlife Program to restore salmon runs in the Columbia Basin under the Northwest Power Act. 16 U.S.C. §§ 839–839h (2012). Although that program is not a co-management plan, tribes have an important consultative role in its development and implementation. *See* Nw. Res. Info. Ctr. v. Nw. Power Planning Council, 35 F.3d 1371, 1395 (9th Cir. 1994) (rejecting a program approved by the four Northwest states because it failed to give sufficient deference to the recommendations of federal and state fishery agencies and the Columbia Basin tribes). No doubt the cooperation between the tribes and state fishery agencies in the Northwest Power Act program helped to encourage similar cooperation in the plan to manage Columbia Basin harvests. The evolution of the Columbia Basin program, including the important role played by a coalition of tribes with federal and state fishery agencies, is sketched in some detail in SACRIFICING THE SALMON, *supra* note 6, at 139–60. In some respects, the program has been eclipsed in recent years by the federal government's repeated failure to comply with ESA concerning thirteen listed salmon species. *See, e.g.*, Blumm & DeRoy, *supra* note 227, at 5–19 (discussing the Ninth Circuit's affirmation of Judge Simon's directive that federal dams spill water to facilitate downstream salmon migration in order to comply with the ESA).

231 Jordan Interview, *supra* note 207 (explaining that the parties have often disagreed on whether and how to implement methods of conserving endangered fish species in the face of continued hydropower operations).

232 Judge Mosman was assigned the case in 2018. *United States v. Oregon*, N.W. POWER & CONSERVATION COUNCIL, https://perma.cc/BH4X-ECU5 (last visited Apr. 18, 2020).

approving the 2018 plan, unexpectedly dismissed the case without prejudice.[233] The states of Idaho, Washington, and Oregon, all five of the tribes now party to the case, as well as the United States Department of Justice quickly filed motions seeking clarification of the dismissal and requesting reconsideration.[234]

The federal government and the tribes opposed the dismissal and listed numerous disputes and emergency injunction motions throughout the forty-nine years of the parties' negotiations.[235] According to the tribes, in just the period between 2002 and 2008 alone, the court "presided over 40 status conferences with the parties to ascertain, encourage and order the parties' negotiation of a successor long-term agreement."[236] They viewed the court as a neutral overseer, providing timely resolution of disputes and whose presence was critical in fostering growing amicable working relationships among the parties.[237]

Even more essentially, continuing court jurisdiction has encouraged the parties to collaborate and minimized the number of disputes that the parties bring to the court.[238] The federal government responded to Judge Mosman's initial order by reiterating Judge Belloni's 1969 statement that "[c]ontinuing the jurisdiction of this court in the present cases may, as a practical matter, be the only way of assuring the parties an opportunity for timely and effective judicial review of such

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233 United States v. Oregon, Order Approving 2018–2027 *United States v. Oregon* Management Agreement, No. 3:68-cv-0513-MO (D. Or. Mar. 19, 2018); United States v. Oregon, Order Dismissing Case Without Prejudice, No. 3:68-cv-0513-MO at 1 (D. Or. Mar. 19, 2018).

234 The five tribes are: Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Reservation (the Walla Walla, Cayuse, and Umatilla Tribes), the Nez Perce Indian Tribe of Idaho, the Confederated Tribes of the Warm Springs Indian Reservation and the Shoshone-Bannock Tribes. Plaintiffs' Joint Motion to Reconsider, Alter, or Amend this Court's March 19, 2018 Orders Pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6) at 1–2, *United States v. Oregon*, (D. Or. Mar.19, 2018) (No. 3:68-cv-0513-MO) [hereinafter Plaintiffs' Joint Motion]; U.S. Memorandum in Support, *supra* note 229; State of Idaho's Memorandum in Support of Joint Motion to Reconsider, Alter, or Amend this Court's March 19, 2018 Orders Pursuant to Fed. R. Civ. P. 59(E) and 60(B)(6), *United States v. Oregon*, (D. Or. Mar. 19, 2018) (No. 3:68-cv-0513-MO) [hereinafter Idaho's Response to Joint Motion]; Oregon's Response to Joint Motion, *supra* note 223; Washington's Response to Joint Motion, *supra* note 229.

235 U.S. Memorandum in Support, *supra* note 229, at 4; Tribes' Joint Memorandum in Support, *supra* note 222, at 4–5; *see, e.g.*, United States v. Oregon, 769 F.2d 1410, 1412 (9th Cir. 1985) (holding that the Columbia River Compact's fishery regulations violated Indian treaty fishing rights); *see also* United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983) (upholding an injunction against a Compact regulation that restricted the geographical area of a treaty fishery).

236 Tribes' Joint Memorandum in Support, *supra* note 222, at 5.

237 U.S. Memorandum in Support, *supra* note 229, at 14; Oregon's Response to Joint Motion, *supra* note 223, at 2 (recognizing that "substantial progress in collaborative management of fisheries over the course of nearly 50 years has been made while under the court's explicit statement of 'retained jurisdiction'"); Jordan Interview, *supra* note 207.

238 U.S. Memorandum in Support, *supra* note 229, at 15; *see also* Tribes' Joint Memorandum in Support, *supra* note 222, at 5, 15–19 (stating that the court's continuing jurisdiction assists the parties in resolving disputes before the disputes reach the court).

restrictions should such review become necessary."[239] In negotiating the 2018 plan, both the federal government and the tribes emphasized that all parties agreed to its terms with the understanding that the district court would continue its jurisdiction over the case. Indeed, had the parties known that the reviewing judge would dismiss the case and terminate the court's jurisdiction, they claimed they would have negotiated much broader terms than those contained in the 2018 plan.[240]

Judge Mosman responded to the motions to reconsider by issuing an order that continued the court's jurisdiction over the case but administratively closed it.[241] What this means is not quite clear going forward in terms of the continuing jurisdiction established in Judge Belloni's 1969 decision.[242] The parties expressed the unanimous sentiment that the court should maintain a continuing role interpreting the effect of treaty rights on long-term fish harvests and conservation issues.[243]

One factor that distinguishes this case from others is that all the parties in *United States v. Oregon* are sovereigns, which argues for continuing judicial oversight because sovereign immunity would preclude both the states and the tribes from seeking relief against the other unless the federal government participated.[244] A half-century after Judge Belloni retained continuing jurisdiction over the case, all parties in the case opposed a judicial dismissal.[245] There is perhaps no better evidence of the wisdom of the Belloni decision.

V. LEGACY

Judge Belloni's rejection of the state of Oregon's claimed defense that its regulation of tribal fishing was reasonable was pathbreaking. Without reciting them in detail, he employed the canons of treaty

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239 U.S. Memorandum in Support, *supra* note 229, at 13 (quoting *Sohappy*, 302 F. Supp. 899, 911 (D. Or. 1969)).

240 U.S. Memorandum in Support, *supra* note 229, at 5; Tribes' Joint Memorandum in Support, *supra* note 222, at 25–26.

241 Order Granting Parties Request for Clarification and Amending the Order Approving 2018–2027 *United States v. Oregon* Management Agreement at 2, United States v. Oregon, No. 3:68-cv-0513-MO (D. Or. May 21, 2018).

242 Several attorneys involved in the case at the *U.S. v. Oregon*: 50th Anniversary Symposium indicated that they thought that the administrative closure of the case, whatever it means, would not preclude a party from raising implementation issues to the court, since the court retained jurisdiction, which is a judicially approved settlement agreement.

243 *See, e.g.*, U.S. Memorandum in Support, *supra* note 229, at 9–10; Tribes' Joint Memorandum in Support, *supra* note 222, at 5–6, 12; *see supra* notes 235–240 and accompanying text.

244 *See supra* notes 140–142 and accompanying text.

245 U.S. Memorandum in Support, *supra* note 229, at 5; Tribes' Joint Memorandum in Support, *supra* note 222, at 25–26; Oregon's Response to Joint Motion, *supra* note 223, at 2–3; Idaho's Response to Joint Motion, *supra* note 234, at 2; Washington's Response to Joint Motion, *supra* note 229, at 2.

interpretation[246] to dismiss the state's allegation. Its facially nondiscriminatory regulation was as unsupportable[247] as it was inconsistent with "history, anthropology, biology, prior case law, and the intention of the parties to the treaty."[248] Despite the Supreme Court's cursory treatment of the state regulation at issue in *Puyallup I*,[249] he insisted that the state demonstrate that its regulation was both nondiscriminatory and required for the perpetuation of the species.[250]

Belloni's interpretation of the conservation necessity defense required the state to treat the tribal fishery separate from the non-Indian fishery,[251] and it peered beyond mere facial nondiscrimination, demanding that the state shoulder the burden of showing that its regulation was the least restrictive method on tribal harvests possible and still preserve the fish runs.[252] This requirement proved difficult for the state to meet because it could require cutbacks in non-Indian harvests. Belloni's interpretation of conservation necessity, based on

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[246] *See supra* notes 149–151 and accompanying text. The Supreme Court's recent decision in *Cougar Den*, 139 S. Ct. 1000, 1011–13 (2019), reinforced the Court's commitment to the treaty canons of interpretation. The *Cougar Den* Court analyzed whether the state of Washington could tax fuel transported by Cougar Den, a company chartered by the tribe and owned by a Yakama tribal member. *Id* at 1006. The Yakama treaty expressly reserved to the tribe the "right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakima, U.S.- Yakama Nation, art. 3, June 9, 1855, 12 Stat. 951 ("[I]f necessary for the public convenience, roads may be run through said reservation; and on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right, in common with citizens of the United States, to travel on all public highways."). Both the lower state court and the Washington Supreme Court ruled that the treaty promise preempted the state fuel tax against the application of the fuel tax and in favor of the Yakama tribal company, and the U.S. Supreme Court, somewhat surprisingly, affirmed, 5–4. *Cougar Den*, 139 S. Ct. at 1006, 1016. The Court's majority consisted of a three-justice plurality written by Justice Breyer, for Justices Sotomayor and Kagan, together with a concurrence by Justice Gorsuch, joined by Justice Ginsberg. *Id.* The plurality cited *Winans, Tulee, Seufert Brothers,* and *Fishing Vessel*, in declaring that the treaty language "in common with" must be interpreted as the Yakama would have understood it. *Id.* at 1012. As a result, the treaty's reservation of tribal right to travel on highways off-reservation enabled them to sell fuel on-reservation exempt from state taxation. Justice Gorsuch's concurrence may signal that a tribal advocate has ascended to the Court:

> Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.

Id. at 1021 (Gorsuch, J., concurring).

[247] *See supra* notes 152–154 and accompanying text.

[248] *See supra* note 148 and accompanying text.

[249] *See supra* notes 96–112 and accompanying text.

[250] *See supra* notes 156–160 and accompanying text.

[251] *See supra* notes 152–154 and accompanying text (rejecting the state's argument that it need not treat the tribal fishery separately).

[252] *See supra* notes 155–167 and accompanying text.

substantive fairness, has stood the test of time.[253] In fact, the Supreme Court, in its recent *Wyoming v. Herrera* decision, reaffirmed the centrality of the conservation necessity defense.[254] Future interpretations of the application of conservation necessity will likely start with Belloni's interpretation of the defense.

Judge Belloni's decision to use continuing jurisdiction to oversee implementation of his decree was, of course, pivotal, as was his call for the state to ensure the tribes' "meaningful participation" in the regulatory process.[255] The federal court thus became a central component in developing co-management plans, reworking federal–state relations along the way. The federal government's role should not be overlooked, as officials like George Dysart and Sid Lezak urged the court to restrain the state's regulatory discretion.[256] The co-management plans that ensued helped Judge Belloni avoid the day-to-day management of Columbia River harvests required of Judge Boldt in Puget Sound.[257]

Effective co-management required the tribes to develop scientific, technical, and legal expertise. That led to the founding of the Columbia River Inter-Tribal Fish Commission in 1977,[258] a chief legacy of the Belloni decision, for it fostered inter-tribal cooperation as well as eventually a surprising collaborative spirit between the tribes and the state, which worked to the benefit of the salmon resource.[259] Finally, not to be overlooked is the educative effect of Judge Belloni's decision. Not only Judge Boldt but other courts relied on the Belloni decision to articulate the nature of treaty rights and the effects on state regulation, including, surprisingly enough, state courts like the Washington

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253 *See* Monte Mills, *Beyond the Belloni Decision:* Sohappy v. Smith *and the Modern Era of Tribal Treaty Rights*, 50 ENVTL. L. 387, 411–14 (2020) (explaining recent case law).

254 *See supra* note 78.

255 *See supra* notes 174–175 and accompanying text (discussing continuing jurisdiction), *supra* note 188 and accompanying text (discussing meaningful participation).

256 *See supra* notes 127–128, 136 and accompanying text.

257 The intransigence of the state agencies in Washington concerning implementing Judge Boldt's decision caused the judge and his successors to assume "fishmaster" status, issuing nearly daily orders to manage fish harvests. Those orders eventually consumed two volumes of published reports. *See UNITED STATES V. WASHINGTON*, 1974–1985 (Thomson Reuters, vol. 1, 2015); *UNITED STATES V. WASHINGTON* 1985–2013 (Thomson Reuters, vol. 2, 2015).

258 *See The Founding of CRITFC*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, https://perma.cc/RNZ9-7A84 (last visited Apr. 18, 2020).

259 *See supra* notes 229–230 and accompanying text (discussing the tribal and state collaboration in the formulation of the Columbia Basin Fish and Wildlife Program); *see generally* Michael C. Blumm, *Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program*, 14 ENVTL. L. 277, 284, 286 (1984) (discussing the Northwest Power Act's elevation of Columbia Basin tribes to a status co-equal to the states in the Columbia Basin Fish and Wildlife Program and the ensuing set of comprehensive program recommendations submitted by a coalition of tribes and states).

Supreme Court.[260] Going forward, the Belloni decision's effect on other judges will be one of its principal legacies.

VI. CONCLUSION

The Belloni decision altered the trajectory of state regulation of treaty fishing rights. Only the year before, the Supreme Court's *Puyallup I* decision seemed to lower the bar for the requirements state regulations had to meet in order to restrict treaty fishing rights.[261] A lower bar for state regulation would have surely continued the erosion of treaty fishing rights. But Judge Belloni's analysis of the conservation necessity exception for state regulation reinstated a high bar for state regulation by requiring that the regulations be the least restrictive means possible for ensuring that conservation needs are met.[262]

In a larger sense, the Belloni decision is a reminder of the critical role that federal courts can play a counterweight to democratic decision making—as the Oregon and Washington legislatures and agencies of that era never would have allocated a fair share without an authoritative decision from a federal court.[263] Official resistance was widespread: as the Ninth Circuit recognized in affirming Judge Boldt's

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260 *See infra* note 266 and accompanying text (discussing *Cougar Den* and *Washington v. Buchanan*).

261 *See supra* notes 85–112 and accompanying text (discussing *Puyallup I*'s apparent erosion of treaty rights).

262 *See supra* notes 158–163 and accompanying text.

263 *See, e.g.*, *supra* notes 208–215 and accompanying text. For another example of the critical role of the courts in vindicating treaty rights, consider the so-called "culverts case," an outgrowth of the Boldt decision. When the tribes filed suit in what became the Boldt decision in 1970, they not only sought a fair allocation of the salmon resource, they also asked for hatchery fish to be included in the allocation and for protection of salmon habitat. Judge Boldt retired after the Supreme Court affirmed his equal sharing decision, but a successor, Judge William Orrick, ruled that hatchery fish were included in tribes' treaty allocation, and an *en banc* Ninth Circuit affirmed. United States v. Washington, 759 F.2d 1353, 1358–60 (9th Cir. 1985), *aff'g* 506 F. Supp. 187, 198–99 (W.D. Wash. 1980). But the Ninth Circuit refused to decide the habitat issue, declaring that doing so by declaratory judgment in the absence of a concrete factual dispute would be judicially "imprudent." *Id.* at 1357.

The habitat issue lingered for another two decades, until another of Judge Boldt's successors, Judge Ricardo Martinez, ruled in 2007 that the state of Washington's road culverts blocking salmon migration violated the treaty right. United States v. Washington, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007). Six years later, after negotiations between the state and tribes broke down, he issued detailed injunctive relief which required, among other measures, fixing some 800 barrier culverts by 2030. United States v. Washington, 2013 WL 1334391 (W.D. Wash. Mar. 29, 2013). The state's resistance to the injunction led to the Ninth Circuit's unqualified affirmance. United States v. Washington, 853 F.3d 946 (9th Cir. 2017). *See* Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1 (2017). After Justice Kennedy recused himself (due to his participation in the case when he was a Ninth Circuit judge), the Court divided 4–4, affirming the Ninth Circuit's approval of the injunction without opinion. Washington v. United States, 138 S. Ct. 1832 (2018).

decision, apart from desegregation cases, the state of Washington and its citizens engaged in the "most concentrated official and private efforts to frustrate a decree of a federal court witnessed in this century."[264] So, while the Belloni decision came over eight decades after federal courts first began to interpret the meaning of the Stevens Treaties,[265] reflecting the long, winding trail of achieving justice through the courts, there is no other obvious way to vindicate treaty rights.

Although the arc of justice through the judiciary may be slow-going, court decisions can serve educative functions, as seems to be evident from recent decisions of the Washington state courts.[266] The surprising metamorphosis of those state courts is a product of federal court decisions like Judge Belloni's. So is the recognition of the political branches of government. For a prominent example, in 1980, Congress embraced the comprehensive plans that Judge Belloni called for in the Northwest Power Act,[267] a statute which placed the tribes and the states on equal footing in authorizing a Columbia Basin fish and wildlife restoration program to compensate for damage inflicted by federal dams, a program based on best available science and consistent with

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[264] Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

[265] *See supra* notes 33–37 and accompanying text (discussing *United States v. Taylor*).

[266] The transformation of the Washington courts was signaled in the Washington Supreme Court's surprisingly sensitive treatment of treaty hunting rights in *State v. Buchanan*, 978 P.2d 1070, 1080–81 (Wash. 1999), in which the court decided that the treaty hunting right could extend to lands not expressly ceded in a treaty if they were historically used by tribal members. And in the recent *Cougar Den* case, *see supra* text accompanying note 246, both the lower state court and the Washington Supreme Court upheld the Yakama's treaty right, employed the rules of treaty interpretation. Cougar Den Inc. v. Dep't of Licensing, No. 14-2-03851-7, 2015 WL 13762927 (Wash. Super. Aug. 18, 2015), *aff'd*, 392 P.3d 1014, 1015–16 (Wash. 2017), *aff'd*, 139 S. Ct. 1000, 1007–08 (2019). These decisions may be counted as a legacy of the educative influence of the Belloni decision. As a measure of how far the Washington courts have evolved, consider *State v. Towessnute*, 154 P. 805, 807 (Wash. 1916), in which the racist approach of the Washington Supreme Court to treaty rights was more than evident:

> The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors, in getting title to this continent, ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could come from them was always disdained. . . . Only that title that was esteemed which came from white men . . . .
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> The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence. . . .
>
> These arrangements were but the announcement of our benevolence, which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy, and whom we have so often permitted to squander vast areas of fertile land before our eyes.

[267] 16 U.S.C. §§ 839–839h (2012).

treaty rights.[268] That program, first promulgated in 1982 and now in its sixth iteration,[269] has helped to elevate the tribes and their expertise into the forefront of salmon restoration. The Belloni decision's influence in paving the way for this program is no exaggeration.

Finally, the co-management plans that the Belloni decision prompted—the most tangible results of the 1969 decision a half-century later—required the prodding and oversight of federal judges like Belloni, and no doubt still require judicial review to this day.[270] These plans were the first judicial call for the states and the tribes to use their sovereign authorities to create co-management principles to govern an extremely valuable but increasingly scarce natural resource that they shared. Belloni's insight was that in order to achieve the tribes' proprietary promise of a "fair share" of the resource, the court—and the state—had to recognize their sovereign role in management. Charles Wilkinson's claim that this recognition was a signal moment for tribal sovereignty is no overstatement.[271] The Belloni decision was indeed a watershed in tribal sovereignty. The evolution and implementation of the plans he ordered serve as examples for other natural resources in need of co-management,[272] and they almost certainly would not have existed without the prodding and patience of a wise federal judge.

Judge Belloni well understood both the educative and mediative roles that a federal court can play concerning longstanding and controversial issues like state regulation of treaty fishing rights. His

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[268] *Id.* § 839b(h)(6)(B) (best available science); *id.* § 839b(h)(6)(D) (consistent with treaty rights).

[269] *See 1982 Columbia River Basin Fish & Wildlife Program*, NORTHWEST POWER AND CONSERVATION COUNCIL, https://perma.cc/KD64-PQYY (last visited Apr. 18, 2020). The importance of the tribal role in formulating the program was emphasized by the Ninth Circuit in *Northwest Res. Info. Ctr. v. Northwest Power Planning Council*, 35 F.3d 1371, 1395 (9th Cir. 1994) (instructing what is now known as the Northwest Power and Conservation Council that it must adopt recommendations of the tribes in its program or explain with specificity why not); *see* Michael C. Blumm, Michael A. Schoessler & R. Christopher Beckwith, *Beyond the Parity Promise: Struggling to Save Columbia Basin Salmon in the mid-1990s*, 27 ENVTL. L. 21, 44–49 (1997) (discussing the case); *see also supra* notes 229–230.

[270] *See supra* notes 232–243 and accompanying text (discussing Judge Mosman's curious "administrative closure" of the case).

[271] Charles Wilkinson, *The Belloni Decision: A Foundation for the Northwest Fisheries Cases, the National Tribal Sovereignty Movement, and an Understanding of the Rule of Law*, 50 ENVTL. L. 331, 332 (2020).

[272] One of the advantages of the plans the parties agreed to under the guidance of Belloni and his successors was that the process was a repetitive one, often quarterly and sometimes more often. Eventually, the parties agreed that the most expeditious means of implementing the plans was to avoid judicial review by reaching negotiated agreements on issues on which they disagreed. The repeated process disciplined the parties, encouraged agreement on common goals and collaborative scientific inquires, as well as developing a measure of trust among the participants that fostered a spirit of compromise. *See* Panel Discussion: Coby Howell, Senior Trial Attorney, U.S. Dep't of Justice, John Ogan, Tribal Attorney, Warm Springs Tribe, and Michael Grossman, Senior Counsel, State of Washington, *U.S. v. Oregon*: 50th Anniversary Symposium, held by Lewis & Clark Law School (Oct. 18, 2019).

example is one that has, so far, endured. We hope that its educative and mediative examples remain a model for the next half-century and beyond.