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THE STRUGGLE FOR CULTURAL SURVIVAL: THE FISHING RIGHTS OF THE TREATY TRIBES OF THE PACIFIC NORTHWEST*

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I. Introduction

The Indians of the coastal regions of the Pacific Northwest developed a distinct and flourishing civilization centuries before the intrusion of Americans and Europeans. The abundant water resources of the region constituted the social, religious, and economic basis for this successful development. The coming of American and European military forces and settlers, however, marked the beginning of a significant change which seriously weakened not only the economic viability of this Indian civilization but also eroded, and in some instances has virtually destroyed, the cultural integrity of that civilization. Because the Indians of the Pacific Northwest had developed great skill in catching and utilizing the abundance of the sea, it was not surprising that many of the tribes sought to insure continued access to such resources when encroaching settlers and military forces appeared to threaten traditional Indian hunting and fishing patterns.

II. Treaty Provision

By the middle of the 19th century a number of treaties were signed by Pacific Northwest tribes with the government of the United States. The major safeguard was a provision utilized in nearly identical fashion by a number of tribes in separate treaties with the United States government. In the first of these, the Medicine Creek Treaty of 1854, the Nisquallys and Puyallup tribes ceded their tribal lands to the United States.[1] The treaty provided that, "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory." Similar language was employed in treaties signed by other tribes in the region in 1855.[2]

Despite the language of these treaties, the Indians were still subjected to a variety of pressures which over a period of decades stripped them of effective fulfillment of the promise of continued access to the ocean and river resources which had been a fundamental ingredient of their previous cultural as well as economic development. When Washington became a state in 1889, the patterns of population growth as well as violence and discrimination had a detrimental impact upon the then outnumbered members of marine oriented Indian tribes. Moreover, the tribes protected by treaties discovered that the above-quoted

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1 Treaty with the Nisqually and Puyallups, December 26, 1854, art. III, 10 Stat. 1132 (1855).

2 Treaty with the Duwamish (and the Muckleshoot), January 22, 1855, 12 Stat. 927 (1863); Treaty with the Yakimas, June 7, 1855, 12 Stat. 951 (1963); Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957 (1863).

safeguarding provision often did not afford much protection. In some instances, subsequent international agreements superceded hunting and fishing rights secured under the Indian treaties. Thus by the 1890's, several members of a Washington tribe supposedly protected by the treaty of 1855, were defeated in an attempt to assert treaty rights. A group of Makah Indians, hunting seal in the Bering Sea, were deemed to have no immunity from an act of Congress limiting seal hunting in order to implement a more recent treaty with Russia.[3]

III. Judicial Interpretation

The United States Supreme Court seriously curtailed for over seventy years the scope of the treaty provision by holding that states may regulate off-reservation fishing and hunting when necessary for conservation. State fish and game officials, under federal and state court authority, have ruled that Indian off-reservation fishing and hunting are governed by precisely the same regulations that applied to non-Indians.

The Pacific Northwest Indians have protested that such regulations by officials of states, not in existence when the treaty safeguards insuring off-reservation fishing rights were promulgated, incorrectly eliminated a commitment vital to their cultural integrity. The intensity with which Indians maintain their treaty claims and the manner in which such claims are directly related to their sense of cultural identity were underscored in the amicus curiae brief presented for the Puyallup tribe in its challenge to the Washington State Department of Game in 1968. As a friend of the Court, the National Congress of American Indians stressed the importance of fishing and hunting rights:

> One not familiar with Indians and how they think (at least the typical reservation Indians) cannot appreciate how important hunting and fishing rights are to them, not only because of their poverty, but also because of their Indian traditions. Hunting and fishing (by individuals for subsistence) has a symbolic, perhaps quasi-religious meaning to many Indians. It is a practicing of their ancient culture, something many of them cling to fiercely in the face of the efforts of the state governments, and sometimes even the federal government, to eliminate Indian rights in the name of progress and equality. Many non-Indians feel that treaty promises are as alive today as if made yesterday.[4]

The persistence of Indian assertions of off-reservation fishing and hunting rights founded upon treaty provisions is remarkable, in light of the long period of judicial attrition of those claims. The impact of a major 19th century Supreme Court decision set the stage for a series of subsequent decisions negative to Indian claims.

Despite a treaty in 1868 guaranteeing the Bannock Indians "the right to hunt on the unoccupied lands of the United States as long as game may be found thereon,"[5] a member of that tribe was arrested in Wyoming on the ground that

3 *See* The James G. Swan, 50 F. 108 (D. Wash. 1892).

4 National Congress of American Indians, Brief for Petitioner as Amicus Curiae, Puyallup Tribe v. Washington State Department of Game, 391 U.S. 392 (1968).

5 Treaty with the Shoshonees and Bannocks, July 3, 1868, art. IV, 15 Stat. 673 (1868).

he shot seven elk in violation of state law. The Bannock, named Race Horse, was granted a writ of habeas corpus in a federal district court, but the United States Supreme Court reversed the lower court decision on the ground that the treaty right had expired.[6] The treaty clause was held to create only a temporary right existing for the period that hunting districts were maintained on unoccupied federal lands. The equality of newly admitted states was also cited as a basis for this ruling. The dissent contended that treaties should not be abrogated on the basis of ambiguous interpretations. The dissent referred directly to the inference of the majority opinion that the admission of Wyoming to the Union automatically superceded the Indian treaty hunting right.

Although the next major United States Supreme Court decision on the subject did not directly address state regulation of Indian fishing rights, the Court's opinion included dicta which again emphasized state regulatory authority. In *U.S. v. Winans*[7] the Court resolved the issue in favor of a group of Yakima Indians who had been denied access to taking fish at a site on the Columbia River where the tribe traditionally took fish. The Winans, riparian owners of the property bordering the river, had asserted that the Indians' right to take fish existed only while the land was owned by the federal government. The Supreme Court ruled that treaty Indians retained rights of access to property owned privately if this involved a "usual and accustomed" tribal fishing site. Justice White, who had written the majority opinion in *Ward v. Race Horse,* dissented without opinion in this 8 to 1 decison.

The next major United States Supreme Court decision was *Tulee v. Washington.*[8] Although the position of the Yakima Indian, Sampson Tulee, was upheld, the general status of treaty Indians was not enhanced. Indeed, dicta in the *Tulee* decision reinforced state regulatory authority. Tulee was arrested and convicted for fishing with a net without having obtained a state fishing license. His conviction was overturned by the Court on the ground that Washington could not require an Indian to buy a license in order to exercise his off-reservation fishing rights guaranteed by treaty. But the Court also stated that:

> [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.[9]

The uncertainties created by *Race Horse, Winans,* and *Tulee* were reflected in decisions in the state supreme courts of the Pacific Northwest and in the Court of Appeals for the Ninth Circuit. Some state court decisions upheld the relative immunity of Indians asserting treaty rights while others strongly asserted state regulatory authority. *Race Horse* became the basis for a variety of state supreme court decisions abrogating Indian treaty rights. Among those relating to fishing

6 Ward v. Race Horse, 163 U.S. 504 (1896).
7 198 U.S. 371 (1905).
8 315 U.S. 681 (1942).
9 *Id.* at 684.

rights in the Pacific Northwest, *State v. Towessnute*[10] and *State v. Alexis*[11] provided the opportunity for the Supreme Court of Washington to assert state regulatory authority over Indians fishing off-reservation who claimed immunity under the 1854-1855 treaties. In the latter case, the court stated that "Congress, in making provision for Indians, could not do it at the expense of the police power of the future state."[12] In *State v. Arthur*,[13] the Idaho Supreme Court held that an off-reservation hunting right guaranteed by treaty could be subject to state hunting laws only by the consent of the Indians covered by the treaty or by positive act on the part of the federal government extinguishing the right. Similarly, in 1957 the Supreme Court of Washington applied the same doctrine in upholding the dismissal of criminal charges against a Puyallup Indian charged with fishing in violation of state law.[14] Yet a few years later in 1963, the Washington Supreme Court in *State v. McCoy*, reversed a trial court which had applied this doctrine.[15] Instead, it held that the treaty with Indians was merely a "real estate transaction" in which "the United States was buying and the Indians were selling the aboriginal right of use and occupancy to the Washington Territory."[16] This holding was a devastating blow to proponents of the traditional Indian position. The court also reiterated the state equality argument of *Ward* which was established in the 19th century. The *McCoy* decision strongly supported state regulatory authority. This assertion of state control was underscored again by a major decision of the United States Supreme Court in 1968.

In *Puyallup Tribe v. Department of Game of Washington*,[17] the Court unanimously supported Washington's argument that the state had the power to regulate off-reservation fishing despite the existence of an unabrogated treaty. Speaking for the Court, Justice Douglas wrote:

> The treaty right is in terms the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places" *in the "usual and accustomed" manner*. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. *And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State.* The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U.S.C. § 1401(a)(2).

10 89 Wash. 478, 154 P. 805 (1916).
11 89 Wash. 492, 155 P. 1041 (1916).
12 *Id.* at 493, 155 P. 1042.
13 74 Idaho 251, 261 P.2d 135 (1953).
14 State v. Satiacum, 50 Wash. 2d 513, 314 P.2d 400 (1957).
15 63 Wash. 2d 421, 387 P.2d 942 (1963).
16 *Id.* at 435-36, 387 P.2d 951.
17 391 U.S. 392 (1968).

> But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.[18]

This case aroused a good deal of interest. Amici curiae briefs were filed on behalf of the Puyallup and Nisqually Indians by the office of the Solicitor General of the United States, the Association of American Indian Affairs, the National Congress of American Indians, and the Confederated Bands and Tribes of the Yakima nation. Similarly, amici curiae briefs supporting the Washington Department of Game were filed by the offices of the Attorney Generals of Oregon and Idaho. The Douglas interpretation and the earlier reference by the Washington Supreme Court to the treaties as real estate transactions were destined to become central issues in the 1970's. Indeed, the question of whether state regulations under the rubric of conservation were, in fact, interest group accommodations was also a matter of increasing importance in the continuing controversy.

Commentary on this decision was severely critical. Professor Johnson summed up the situation after *Puyallup* as follows:

> Confusion and anger among state officials and the Indians are the rule of the day. The Court's decisions have put both sides in an impossible position. The states are told that while they cannot charge Indians license fees for fishing at their usual and accustomed fishing sites they can otherwise regulate the Indians, but only when "necessary for conservation," and only if the regulations meet appropriate standards and do "not discriminate against the Indians." Neither the "appropriate standards" nor the guides for non-discrimination are revealed. Nor is the phrase "necessary for conservation" defined. The Indians, on the other hand, believe they should not be regulated at all by the states and, with the states, are equally confused by the other conflicting and ambiguous rulings handed down by the courts. It is understandable that the Indians and the states still fight. Neither side is sure of its legal status. Neither wishes to give any ground under these circumstances.[19]

While there was a need for consistency between federal and state enforcement, *Puyallup* was open to contradictory interpretation. For example, in *People v. Jondreau,*[20] an appeals court of Michigan upheld the conviction of a Chippewa Indian for illegal trout fishing off the reservation. The court stated that, "[t]he treaties evidently established a servitude of the right to hunt and fish on the ceded land in favor of the Indians and against the exclusive dominion of private ownership, but they provided no immunity from operation of game laws, as against the State."[21]

Conversely, in *Sohappy v. Smith,*[22] a federal district judge in Oregon inter-

18 *Id.* at 398 (emphasis added).
19 Johnson, *The States versus Indian Off-Reservation Fishing: A United States Supreme Court Error,* 47 WASH. L. REV. 207, 227 (1972). Reprinted with the permission of Professor Ralph W. Johnson, the *Washington Law Review,* and Fred B. Rothman and Company.
20 15 Mich. App. 169, 166 N.W.2d 293 (1968).
21 *Id.* at —, 166 N.W.2d 295.
22 302 F. Supp. 899 (D. Ore. 1969).

preted *Puyallup* in a manner which was favorable to the treaty Indians:

> The Supreme Court had said that the right to fish at all usual and accustomed places may not be qualified by the state. . . . I interpret this 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. . . . In prescribing restrictions upon the exercise of Indian treaty rights the state may adopt regulations permitting the treaty Indians to fish at their usual and accustomed places by means which it prohibits to non-Indians.[23]

Consequently, "Some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago."[24]

In reaching this conclusion, Judge Belloni sought first to identify the standards that were to govern state regulation of matters covered by the Indian treaties. These included: the necessity for fish conservation; the absence of discrimination; and congruence with "appropriate court determined standards." In *Sohappy,* several tribes and bands along the Columbia River sought a decree clearly defining their treaty rights and the permissible scope of state regulation. Judge Belloni addressed himself directly to the realities of the relevant state regulatory program. His summation of this finding was a strong critique of the discriminatory thrust of Oregon's regulatory program:

> . . . [Oregon] has divided the regulatory and promotional control between two agencies—one concerned with the protection and promotion of fisheries for sportsmen (O.R.S. 496.160) and the other concerned with protection and promotion of commercial fisheries (O.R.S. 506.036). The regulations of these agencies, as well as their extensive propagation efforts, are designed not just to preserve the fish but to perpetuate and enhance the supply for their respective user interests. . . . There is no evidence in this case that the defendants have given any consideration to the treaty rights of Indians as an interest to be recognized or a fishery to be promoted in the state's regulatory and developmental program. . . .
> . . . In determining what is an "appropriate" regulation one must consider the interests to be protected or objective to be served. In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users.[25]

Judge Belloni's treatment of these issues in *Sohappy* represented a considerable departure from that of earlier federal judges. In *Tlingit and Haida Indians of Alaska v. United States,*[26] plaintiffs had sued the United States for failing to prevent the development of white-owned canneries using Chinese labor in Indian lands, for depriving the tribes of much of their land holdings on the coast, and for employing Navy gunboats to destroy Indian villages and subdue the tribes.

23 *Id.* at 911.
24 *Id.*
25 *Id.* at 909-910, 911.
26 177 F. Supp. 452 (Ct. Cl. 1959).

The United States Court of Claims admitted that, "[t]he amount of salmon and other fish taken from the streams and waters by the new white fishing industries and canneries left hardly enough fish to afford bare subsistence for the Tlingits and Haidas and nothing for trade or accumulation of wealth."[27] The tribes, however, recovered compensation only for loss of fish in island streams; an additional Tlingit and Haida suit, alleging that fishing rights in navigable waters were violated, was denied by the Court of Claims.[28]

Similarly, in *State v. Satiacum*,[29] judicial notice of the economic importance of non-Indian fishing interests was taken:

> The Washington Department of Fisheries, in its 1953 report, placed the capitalized value of fish and shell fish resources in this state at $679,150,000. To this value must be added the contribution of salmon as a recreational asset. In recent years from 150,000 to 200,000 fishermen have participated in saltwater sport angling. . . . They spend $8,500,000 annually on fishing trips. There are 160 boathouses and resorts with an investment value of $12,000,000.[30]

The United States Supreme Court had, in an earlier decision relating to coastal Indians, ruled adversely to a Department of Interior directive establishing a reservation for an Alaskan Indian fishing tribe. Because the waters off the proposed reservation were known as an excellent salmon fishing region, the administrative order was revoked because it was held to discriminate against white canneries in favor of the Karlup Indians. Again the monetary interest of the white canneries was cited as important. "The canners' investment is substantial, running from two to five hundred thousand dollars respectively. . . . These packers employ over four hundred fishermen, chiefly residents of Alaska, and over six hundred cannery employees, chiefly nonresidents."[31] In light of these emphases upon non-Indian commercial and sports interests, the positions taken by Judge Belloni in *Sohappy* were significant departures. Consequently, his rulings underscored the necessity for a definitive reinterpretation of the scope and significance of the Indian treaties.

This came in *United States v. State of Washington*,[32] where Judge Boldt clearly enunciated the superior position of Indian treaty fishing rights and established a judicial policy designed to provide the treaty Indians with 50 percent of each annual salmon run. Judge Boldt's fundamental premise that "the treaty was not a grant of rights to the treaty Indians, but a grant of rights from them, and a reservation of those not granted," became the focal point for a renewed legal struggle between the treaty tribes and the state regulatory agencies and the non-Indian commercial and sports fishermen.

In 1975, the Ninth Circuit affirmed the district court's opinion in *United States v. State of Washington*[33] and provided a definitive analysis of the fishing

27 *Id.* at 467.
28 389 F.2d 778 (Ct. Cl. 1968).
29 50 Wash. 2d 513, 314 P.2d 400 (1957).
30 *Id.* at —, 314 P.2d 411 (Rosellini, J., concurring).
31 Hynes v. Grimes Packing Company, 337 U.S. 86 (1948).
32 384 F. Supp. 312 (W. D. Wash. 1974).
33 520 F.2d 676 (9th Cir. 1975).

rights guaranteed by treaty to the Pacific Northwest Indians. The Ninth Circuit provided a detailed study of every important aspect of this more than century old controversy. It gave significant attention to the historical circumstances surrounding the transfer of Indian lands to the Territory of Washington under federal jurisdiction during the period of change in the 1850's. The first territorial governor was extremely persuasive; the treaty negotiations were conducted in English, which few Indian negotiators spoke or read; and Chinook, a trade medium of some 300 words, was "inadequate to express more than the general nature of the treaty provisions." Overall, the treaties permitted settlement and avoided a possible "bloody war of conquest."[34]

The Ninth Circuit had interpreted the decision of the lower court to be that the state of Washington could not apply its existing fishing regulations to the treaty tribes, that Washington could only enforce those regulations necessary for conservation, and that treaty Indians were to have the opportunity to take up to 50 percent of the available harvest at their "usual and accustomed grounds and stations." The state must also provide advance judicial scrutiny of all future state regulations affecting Indian treaty fishing rights. The state must also show that the regulations do not discriminate against treaty Indians and that the conservation objective cannot be attained by restricting only citizens other than treaty Indians. Treaty tribes meeting certain qualifying requirements (and keeping the state informed) may regulate fishing by their own members totally free of state regulation. It was determined that the Yakima nation and Quinault tribe were qualified for self-regulation.[35]

The district court's determination to assure the treaty tribes an opportunity to take up to 50 percent of the available harvest did not include fish taken on treaty tribe reservations. Treaty Indians therefore are eligible for 50 percent of the annual non-reservation harvest, but non-Indians are not eligible to share the treaty Indian on-reservation fish harvest. Similarly, the court may adjust fish allocations in order to compensate the treaty Indians for fish taken by non-Indian Washington citizens under regulations issued by the International Pacific Salmon Fisheries Commission. The court rejected the argument that the international agreement establishing this commission abrogated the original treaties with the Indians.[36] Most importantly, the court of appeals held, as had the district court, that "the state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and the Indian nations."[37]

The concurring opinion of Judge Burns is instructive with respect to the realities of an alleged pluralistic society for traditionally powerless groups. Burns specifically replied to allegations concerning the supervisory role of district judges:

> As was suggested at oral argument, any decision by us to affirm also involves ratification of the role of the district judge as a "perpetual fishmaster."

34 *Id.* at 682-83.
35 *Id.* at 683.
36 *Id.* at 689.
37 *Id.* at 684.

> Although I recognize that district judges cannot escape their constitutional responsibilities, however unusual and continuing [these] duties imposed upon them, I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, police departments, and so on. The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.[38]

The strong decision upholding the most significant Indian treaty claims was appealed to the Supreme Court of the United States. In January of 1976, the Supreme Court denied certiorari, thus upholding the decision of the Court of Appeals.[39]

IV. The Anticipated Consequences of *United States v. State of Washington*

Technically, denial of certiorari may be interpreted as nothing more than a denial to hear the case, and does not necessarily mean that the Supreme Court concurs with the decision of the lower court. But the practical effect of such denials has been, in most instances, de facto affirmation of the relevant lower court decision. Consequently, the decision is yet another situation in which federal judges assumed a continuing oversight and policy management role in an arena marked by tension and occasional incidents of violence. Judge Burns' concurring opinion in the Court of Appeals decision accurately highlighted the circumstances that necessitated such judicial policy-making. The impact of the decision is likely to be far-reaching; an anticipated consequence is the assumption by the federal judiciary of greater policy and managerial responsibility in matters involving Indian treaty rights.

With respect to the implementation of the district court decision, several factors make prediction of the long range consequences of the decision difficult and uncertain. Although the federal courts are committed to implementing the holding, the assurance of an opportunity to catch 50 percent of each annual salmon and steelhead harvest does not guarantee that such a catch will actually be made. The traditional practices of most treaty Indians place them at a distinct disadvantage when competing with non-Indian commercial and sports fishermen. This was cogently expressed by Professor Johnson:

> If salmon were harvested only at the mouths of their spawning streams then the state could easily assure that a certain, substantial percent were allowed to proceed up the river to the Indians' fishing sites.
>
> State programs [prior to the Boldt decision] are also designed to allocate the salmon among various user groups. There are two principal means of accomplishing this: by a "zoning" system under which the state determines where fishing can take place, and by regulations determining the type of

38 *Id.* at 693.
39 96 S. Ct. 877 (1976).

> fishing gear that can be used. As for the zoning system, unfortunately the Indians find themselves in the worst possible zone. Under the zone system, generally only sports fishermen and commercial trollers are permitted to fish at sea, beyond the three-mile territorial limit. Gill netters, reef netters, and purse seiners are permitted in the Straits of Juan de Fuca. Sportsmen and gill netters can fish in Puget Sound, with each type of fisherman excluded from certain areas and all fishermen excluded from waters near the river mouths. Most of the Indians' usual and accustomed fishing sites are on or very near the rivers. As the fish move toward the river each of the non-Indian groups take part of the run. The zoning system permits the non-Indian commercial and sports fishermen to get the first crack at the fish. By the time the fish enter the rivers and move toward the Indian fishing sites, there are few left to catch; those remaining are needed for spawning.[40]

Although the above description was made prior to the *Washington* decision, it still remains generally accurate with respect to treaty Indian fishing practices. (There are, of course, exceptions, such as some of the Makah on the Olympic Peninsula.) Presumably, as the treaty Indians adjust their practices to more fully realize the opportunities afforded them, their share in the annual harvest will increase.

The bitterness and occasional violence which have characterized non-Indian commercial and sports fishermen's reaction to *Washington* remain. The Bureau of Indian Fisheries reported six shooting incidents in a ten day period shortly after the lower court handed down its decision.[41] Indian leaders have sought to make common cause with non-Indian fishermen against what both groups consider a serious threat to fisheries' resources—the resource-depleting foreign fishing fleets, particularly those of the Soviet Union and Japan. However, the treaty Indians still are very much aware of the hostile reaction of non-Indians to Indian efforts to obtain a fair share of the annual catch. Forrest Kenley, a leader of the Lummi tribe, and chairman of a board (Northwest Fisheries Commission) set up by 16 tribes and bands to negotiate with the federal and state governments, provided some factual data concerning nearly one year of experience after the *Washington* decision.

Kenley estimated that the treaty Indians actually caught only about 5.5 percent of the 1974 harvest. At the outset, most tribes did not have the types of boats necessary. As Kenley put it, "[t]he Lummi tribe, for example, has 150 16-foot skiffs, only 25 gill netters, and two purse seine boats. That's no competition for 1,900 gill netters and 300 purse seiners registered in the state to commercial fishermen." In a newspaper interview Kenley was asked whether it was fair for non-Indian fishermen to lose a livelihood in order to better the conditions of a smaller number of Indians. Kenley's reply was direct:

> This is the white man's civilization. Fishing is ours. They can mold back into their civilization a lot easier than the Indians. We're the most economically deprived people in the United States. When the fishing season closes here, unemployment among Indians goes up to 40%.[42]

40 Johnson, *supra* note 19, at 234.
41 Los Angeles Times, November 25, 1974, at 18.
42 *Id.* at 18-19.

Kenley, in fact, underestimated Indian unemployment considerably. In 1970, Donald L. Burnett provided a more grim analysis and also reiterated the intimate relationship of fishing and economic and cultural life of the treaty tribes:

> The availability of fish or game as a food item is often of great importance to Indian families, estimates of whose current annual income range from $1500 to $2000. The significance of salmon fishing, for example, as an economic enterprise is especially great in view of the need for viable indigenous industries, serving both as sources of development capital and as social anchors for the tribes. Such industries are also needed to reduce the extremely high levels of Indian unemployment. Among employable Yakima males, for instance, unemployment was last measured at 41%. In the Lummi tribe the comparable rate was 81%. Both are fishing tribes in Washington. Unemployment among Indians generally ranges from 40% to 75%. In light of these conditions, construction of the "reasonable and necessary" rule in favor of the states, allowing the Indian no substantial rights beyond those of whites, would be a very stern measure.[43]

V. Conclusion

Despite the compelling evidence that fishing is not only economically important but serves as an integral cultural factor in Pacific Northwest Indian social life, the opposition of non-Indian fishing interests and state agencies nevertheless remains strong. One commentator suggested, as one possible solution to the controversy generated by *Washington,* that the fishing interests of the treaty tribes might be purchased by the federal government.[44] Such a resolution of the controversy could be more destructive of the cultural integrity of what remains of this unique Indian civilization than the direct pressure and contemporary antagonism of the competing non-Indian commercial sports fishermen. Ultimately, the future resolution of this problem of cultural integrity will indicate the tolerance and sense of humanity of our own civilization.

43 Burnett, Jr., *Indian Hunting, Fishing, and Trapping Rights: The Record and the Controversy,* 7 IDAHO L. REV. 70 (1970). Reprinted with the permission of the *Idaho Law Review.*

44 *See* Finnigan, *Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study,* 51 WASH. L. REV. 61 (1975).