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Let Them Do As They Have Promised

Laura Berg*

Foreword

The Honorable Robert C. Belloni

The Northwest Indians lived in a land of plenty. They had game, roots, berries, and especially fish from the Columbia River system in abundance. The first white occupants of the region—Russian traders, French fur trappers, and later American explorers—did not disturb this lifestyle. In the 19th Century, however, it became American policy to obtain more land for white settlers. From its position of strength, the United States treated with the Indians to cede to its vast acreages, reserving to the Indians smaller parcels for living areas. To augment the meager resources of these reservations, the Indians retained certain off-reservation rights. One of these was the right to fish at their "usual and accustomed places in common with the citizens of the Territory." See e.g., Article 3, Yakima Treaty, June 9, 1855.

Substantially identical treaties were signed in 1855 by many Northwest tribes. The Yakimas, Nez Perce, Umatillas, and Warm Springs Indians now hold those treaty rights on the upper Columbia River. At first, the catch of the white fishermen did not prevent the Indians from harvesting sufficient salmon for the traditional uses—subsistence, ceremonial purposes and trade with other tribes. There was no need for an exact interpretation of the treaty language because the fish were plentiful so there were no serious disputes. As more and more settlers arrived, however, they began to farm, mine, and log the land. These activities diverted water and covered river beds with silt which harmed spawning grounds. White commercial fishermen devised mechanical methods of catching vast quantities of salmon. Then came the most damaging change of all, the hydroelectric dams, built to furnish cheap electrical power.

By the early 1960's, the number of salmon returning from the Pacific Ocean to the Indians' upriver fishing sites had so diminished that the Indians' accustomed usage of the fish resource could not be met. Each year the problem became worse. Failing to get help from the state or federal

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governments, fourteen individual members of the Yakima Nation brought a lawsuit in federal court seeking to establish that the 1855 treaties preserved and protected their aboriginal right to fish, a right that could not be impaired by non-Indians. This came to be called the *Sohappy* case, named after the principal plaintiff, David Sohappy.

At the same time, the United States, through the person of George D. Dysart, Assistant Regional Solicitor of the Department of the Interior, was planning legal action against the State of Oregon requiring Oregon to manage the fish resource in a manner that would assure the Indians a fair and equitable share of the salmon and steelhead destined to reach the Indians' "usual and accustomed" fishing places. The Yakimas, Nez Perce, Umatillas, and Warm Springs tribes immediately requested and were granted permission to intervene as plaintiffs, along with the United States. This new litigation sought essentially the same relief as the *Sohappy* case and effectively merged those issues into one lawsuit entitled *United States v. Oregon*. Laura Berg deals with the history of that case in a superb way in this essay.

I was privileged to be the United States District Judge who presided over *United States v. Oregon* from its filing in 1968 to my ruling in favor of the Indians and the United States in 1969. For 12 years thereafter I was responsible for adjudicating many disputes that arose after the initial ruling. At the same time I tried to keep the parties at the negotiating table. They were trying to devise permanent rules for the management of the fish resource which would be in compliance with my ruling. Laura Berg brings home to the reader the difficult position in which both Indians and non-Indians found themselves.

Until now the principal record of this case was written by the newspapers, which were often biased against the Indian position and critical of my decision. The newspaper reports were also frequently inaccurate. The author and her colleagues at the Columbia River Inter-Tribal Fish Commission saw a need for an accurate account. This essay and her forthcoming book are the result.

Laura Berg examined hundreds of court records in the Gus J. Solomon United States Courthouse in Portland, Oregon. She researched all earlier federal cases and conducted in-depth interviews of the participants who are still living and available. Her work includes enlightening quotes from the attorneys who participated in the case and elders and historians of the tribes. I am very pleased that we now have an accurate historical account of the Columbia River fishing cases in this thoughtful, scholarly, and well-written essay and accompanying book.

- Robert C. Belloni, *United States District Court for District of Oregon*, June 1995

Let Them Do As They Have Promised¹

For native people of the Columbia River, salmon is more than a food, more than a natural resource. "My strength is from the fish," Chief Meninick told a local courtroom in 1915. For these tribal people, salmon is lifeblood—a vital part of their culture, their religion, their economic and physical sustenance. They cannot be who they are without salmon.

That is why tribal leaders secured, in 1855, treaties with the United States which established native peoples' rights to take fish at "all usual and accustomed" places whether on- or off-reservation. Federal courts have affirmed those rights numerous times.

Today the Nez Perce, Umatilla, Warm Springs, and Yakama tribes continue their over-a-century-long struggle to maintain their cultural and spiritual way of life and their connection to the salmon. To succeed they have relied on their own laws and those of the United States.

Treaty fishing law and its interpretation is an appropriate place to begin a serious examination of the Pacific salmon story.

IN THE OLD DAYS, there were not date books or pocket calendars. There was the time ball, a long string of hemp knotted to mark the passage of time, then conveniently wound into a small ball. When Lewis and Clark's entourage passed through Columbia River villages during the winter of 1805, the usual occasion was probably marked by a large knot on the string.

Another bulky knot was no doubt tied when, 50 years later in the summer of 1855, leaders of tribes and bands who fished along the mighty Nchiwana or Columbia River, and its tributaries signed treaties with representatives of the United States.

Since the 1840's—about the time of the Oregon Trail—a steady stream of settlers had been making its way to the Washington and Oregon territories. The settlers wanted land. By 1854 the territorial governors had convinced the United States to start negotiating treaties with the region's tribes to acquire title to the land. Through the treaty process, territorial and federal officials also hoped to reduce conflicts between Indians and the non-Indian newcomers. The United States proposed that Indian tribes cede lands near transportation routes and areas where non-Indians wanted to settle.

Before the treaty talks took place, territorial and army officials brought word to Indian leaders about the United States' proposals and its wish to negotiate. Tribal leaders viewed the impending treaty-making with trepidation, but they had few choices.

In fact, when tribal and U.S. government leaders met at the Walla Walla treaty grounds, Washington territorial governor Isaac Stevens was reported to have said, "If they refused to sell, soldiers would be sent to wipe them off the earth."² Whether or not such a statement was made, it was

1. This essay is based on an unpublished manuscript, *As Long As the Rivers Run - A History of United States v. Oregon and Four Tribes' Fight for Columbia River Salmon* by Laura Berg and copyrighted by the Columbia River Inter-Tribal Fish Commission.

2. A. J. Splawn, *Ka-Mi-Akin, The Last Hero of the Yakimas*, 36-37 (1917).

always implied. Previous federal policies and the considerable military presence in Indian country and at the treaty councils suggested the United States' readiness to use force to impose its will on the Indian people.

Treaties of 1855

Treaty-making in the Pacific Northwest officially began in December 1854 when Governor Isaac Stevens and Joel Palmer, the Superintendent of Indian Affairs for Oregon Territory, headed cross-country with their horseback caravan to negotiate agreements with tribes in what are now parts of Washington, Oregon, Idaho and Montana. Stevens and Palmer took with them soldiers, interpreters and a standard treaty form they had developed for the treaty councils. Within seven months, eleven Northwest treaties had been signed.

In May 1855, Stevens and Palmer and tribes and bands associated with the mid-Columbia area met at an encampment in the Walla Walla Valley. After two weeks of negotiations, the United States prevailed. Three treaties were signed;³ two on June 9 and a third on June 11.

The first treaty was made with head chiefs and subchiefs of the Cayuse, Umatilla, and Walla Walla tribes. Today, these are known as the Confederated Tribes of the Umatilla Indian Reservation.

The second treaty was signed with 14 bands and tribes "who are, for purposes of this treaty, to be considered one nation under the name of 'Yakama' with Kamaiakun [sic] as its head chief." According to the treaty, the fourteen were the "Yakima, Palouse, Pisuose, Wenatchapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wishram, Shyiks, Oche-choetes, Kah-milt-pah, and Se-ap-cat." Today these fourteen are known as the Confederated Tribes and Bands of the Yakama Indian Nation.

Two days later, the third treaty was made with the Nez Perce bands, now the Nez Perce Tribe.

From the Walla Walla treaty grounds, Stevens and Palmer went separate ways. Stevens eventually headed east to treat with other Indian nations. Palmer headed south into Oregon territory, meeting along the Columbia at Wasco with four bands of Tenino or Warm Springs (mistakenly called Walla Wallas in the treaty)—Tygh, Wyam, Tenino, and John Day, and with three bands of Wascos—Hood River, Dalles, and Kigal-twal (Cascade). On June 25, a treaty was signed with them under the name of the Middle Tribes of Oregon.⁴ Today these are the Confederated Tribes of the Warm Springs Reservation of Oregon.

In less than a month, over 35 million acres of the Columbia River basin had been ceded to the United States in four treaties. Sticcas (or variously, Steachus and Stickus), a Cayuse chief, probably best expressed the Indians'

3. Treaty with the Walla Walla, Cayuse and Umatilla, 1855, 12 Stat. 945; Treaty with the Yakama, June 9, 1855, 12 Stat. 951; Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957.

4. Treaty with the Middle Tribes of Oregon, June 25, 1855, 12 Stat. 963.

deep sorrow at having to give up most of their homeland: "If your mother were here in this country who gave you birth, and suckled you, and while you were sucking, some person came . . . and sold your mother, how would you feel then? This is our mother, this country . . ."⁵

Despite this incredible loss, Indian leaders had signed the treaties intending that their culture and religion endure. During treaty negotiations, Old Chief Joseph had advised, "Think for year after year, for a far away ahead."⁶ The leadership had. In the agreements, they had reserved for themselves and for future generations rights that are crucial to their way of life.

[T]he exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same; also the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens, is secured to them.⁷

Much distrust remained after treaties were signed. More and more whites were coming into Indian country. How would the Indians be protected? Would the newcomers be prevented from driving the Indians away from their customary fishing and hunting grounds?

At The Dalles council, Kuck-up of the Tygh Band voiced this concern: "We do not wish to have our garden joining to the white man's. I wish now to do as you have said, to live aside from the whites."⁸ In the treaties the United States had obligated itself to protect the Indians and their reserved lands from settlers.

Stevens and Palmer had made reassurances—about the abundance of and access to salmon, game, roots and berries, and about peace and protection as well.

"[W]e came here to talk to you like men and to make such arrangements as to preserve peace and protect you," said General Palmer at Walla Walla. "If we enter into a treaty now we can select a good country for you; but if we wait till the country is filled up with whites, where will we find such a place? My heart [says] that it is better for you to enter into a treaty now with us. . . . If we

5. Quoted in Hazard Stevens, *The Life of Isaac Ingalls Stevens*, II 39 (1900).

6. Quoted in David L. Nicandri, *Northwest Chiefs: Gustav Sohon's Views of the 1855 Stevens Treaty Councils*, 15 (1986) (from Edward G. Swindell, "Report on the Source, Nature and Extent of the...Rights of Certain Tribes in Washington and Oregon..." (1942).

7. Treaty with the Middle Tribes of Oregon, June 25, 1855, art. 1. The other three treaties contain virtually the same language.

8. Quoted in Cynthia Stowell, *Faces of a Reservation: A Portrait of the Warm Springs Indian Reservation*, 108 (1987).

make a treaty with you and our Great Chief and his council approves it, you can rely on all its provisions being carried out strictly."⁹

The next day of the treaty talks, Chief Kamiaken of the Yakama had responded: "Your chiefs are good, perhaps you have spoken straight, that your children will do what is right. Let them do as they have promised. That is all I have to say."¹⁰

In Defense of the Right to Fish

Virtually as soon as the treaties were signed—and before they were ratified—conflicts between Indians and non-Indians erupted, many involving violence. During the following decades, disputes over land and fishing were commonplace. In 1905, an important case challenging treaty fishing reached the Supreme Court. In *United States v. Winans*,¹¹ the Court, finding for the Yakama tribe, ruled that the treaty fishing right required private property owners along the Columbia River to allow Indian fishers access to their "usual and accustomed" fishing places.

In another challenge, *Seufert Bros. v. United States*,¹² the Court agreed with the Yakama tribe's contention that usual and accustomed fishing places may indeed be located outside the area ceded by the tribe in its 1855 treaty. In 1942, the Court found in *Tulee v. Washington*¹³ that the state of Washington could not require members of the Yakama tribe to buy state fishing licenses.

Despite these Supreme Court affirmations and the Yakama tribe's defense of treaty reserved rights, other factors continued to erode tribal fishers' ability to take salmon, a right Justice McKenna had described in *Winans* as "not much less necessary to the existence of the Indians than the atmosphere they breathed."¹⁴

By 1968, environmental degradation, non-Indian interception of salmon runs before they reached tribal fishing grounds and state fishing regulations conspired to deny Columbia River tribes the right to harvest the salmon and the other fish they had reserved in treaties.

In July 1968, fourteen members of the Yakama Indian Nation filed *Sohappy v. Smith*¹⁵ in the Federal Court for the District of Oregon in Portland. In their suit, the plaintiffs asked the court to define the treaty fishing right

9. James Doty, "Record of the Official Proceedings at the Council in the Walla Walla Valley, May 29-June 11, 1855," reprinted in *1855 Yakima Treaty Chronicles*, Yakima Nat'n Rev. 8 (1978).

10. *Id.* at 9.

11. 198 U.S. 371 (1905).

12. *Seufert Bros. v. United States ex rel. Sam Williams*, 249 U.S. 194 (1919).

13. 315 U.S. 681 (1942).

14. 198 U.S. at 381.

15. 302 F. Supp. 899 (D. Or. 1969), remanded, 529 F.2d 570 (9th Cir. 1976).

and the extent of Oregon's regulatory authority over Indian fishing. Defendants in the case were Oregon officials.

Meanwhile, the federal government was looking into bringing a federal action. Assistant Regional Interior Solicitor George Dysart had been helping defend tribal fishers who had exercised their rights in defiance of state laws. He had found that defending individual tribal members in state courts was, he said, "a rather unproductive way to get at the problem."

"First, you're in state court and treaty fishing is a federal question, so it ought to be in federal court," recalled Dysart, who is now retired. "Second, you were limited to the specifics of the individual situation."¹⁶

"That's when we started looking into bringing a federal action for declaratory and injunctive relief ahead of time rather than waiting till somebody had committed a particular violation and we were on the defensive," he said. Dysart was in the process of convincing the Justice and Interior departments when the fourteen Yakama members filed their case.

The United States could have simply intervened in *Sohappy v. Smith*, but bringing a federal suit against the state of Oregon was more forceful. Because of state sovereign immunity, the fourteen individual Yakama plaintiffs could only sue individual state officials. The United States, on the other hand, could bring suit directly against the state and, if the suit were successful, bind the actions of state government.

Dysart and other federal officials decided to bring a separate U.S. action, but not without first having to contend with opposition from several Justice and Interior department attorneys who Dysart said, believed that states had almost complete discretion in regulating treaty Indian fishing. But a tenacious Dysart prevailed. On September 13, 1968, *United States v. Oregon*¹⁷ was filed. Joining the United States as plaintiffs in *United States v. Oregon* were the four tribes with 1855 treaty reserved fishing places on the Columbia River: the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon and the Confederated Tribes and Bands of the Yakama Indian Nation.

The district court's chief judge, Gus J. Solomon, assigned the fishing cases to a young and recently appointed federal judge, Robert C. Belloni.

The Belloni Decision

"There is no question in my mind that this was the case that had the most impact on me personally of any case that I've had, and I have been a judge for over 30 years now," Federal District Judge Robert Belloni said in 1989.¹⁸

16. Interview with George Dysart (Dec. 6, 1989).

17. Civil No. 68-513 (D. Or.).

18. Interview with Judge Robert C. Belloni (Dec. 18, 1989).

On April 24, 1969, Judge Belloni announced his decision in *Sohappy v. Smith* and *United States v. Oregon*; he had consolidated the two cases (referred to here as *Sohappy/Oregon*). Belloni's 1969 decision concluded that Oregon's restrictions on the treaty Indian fishery were invalid and discriminatory because, among other things, the state could not prove that they were necessary for conservation.

In his July 8, 1969 written opinion and decree of October 10, 1969, Belloni affirmed that in the 1855 treaties, these four Indian tribes had reserved "the right of taking fish at all usual and accustomed places" and as a consequence, their members must be accorded "a fair share" of the fish resource.¹⁹

Indian treaty fishing rights at "usual and accustomed" places were distinct from the fishing rights of others.²⁰ The state had argued that treaty Indians have "only the same rights as given to all other citizens," the judge wrote.²¹

Belloni ruled that while the state may regulate the treaty Indian off-reservation fishery, the state does not have the same latitude as it does in managing non-Indian fisheries.²² When off-reservation treaty Indian fisheries are involved, state regulatory powers are limited and bound by certain conditions and standards. In his opinion and then in his decree, Belloni spelled them out:

- Regulations must be "reasonable and necessary for conservation."
- The state must offer proof that particular regulations are necessary to accomplish conservation needs.
- Regulations must not discriminate against the Indians.
- Regulations must be the least restrictive.
- Fisheries cannot be managed so that little or no harvestable fish reach the upstream areas where most of the Indian fishing takes place.
- Treaty fishing rights may not be subordinated to some other state objective or policy.
- The protection of treaty fishing rights must be a state regulatory objective, coequal with its fish conservation objectives.
- State police powers may be used only if the continued existence of the fish resource is threatened.
- Indians may be permitted to fish at places and by means prohibited to non-Indians.
- The tribes must have an opportunity for meaningful participation in the rule-making process.
- Hearings must be held prior to regulation-setting.²³

19. 302 F. Supp. at 911.

20. *Id.* at 907.

21. *Id.*

22. *Id.* at 908, 912.

23. *Id.* at 908-912; *Sohappy v. Smith* No. 68-409/*United States v. Oregon* No. 68-513 Judgment Order (D. Or. 1969).

In the opinion, Belloni rejected Oregon's argument that statehood and Congress' 1918 decision to create the Washington/Oregon Columbia River Compact for joint regulation of the river's commercial fisheries had somehow diminished the tribes' treaty fishing rights.²⁴ The judge reminded state officials that they were bound to observe the Indian treaties because, like international treaties, they were the law of the land.²⁵

In what turned out to be a critical aspect of the decision, Judge Belloni continued the court's jurisdiction in the *Sohappy/Oregon* case. Thus, if the plaintiff tribes believed state regulations did not comply with the court's decree, they could "seek timely and effective judicial review."²⁶ The tribes would not have to institute a new case to challenge a particular season's fishing regulations.

As a result of his ruling, Belloni predicted in 1969 that "[t]he only effect will be that 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."²⁷

Non-Indian fishers, however did not want to share. They protested the decision. State officials and politicians were caught off-guard.

Yet Belloni's ruling was not a radical one in terms of the law. His opinion was consistent with previous decisions of the Supreme Court, such as *Tulee v. Washington* and *Puyallup Tribe v. Department of Game of Washington*.²⁸ Belloni drew from these decisions and from *Confederated Tribes of the Umatilla Indian Reservation v. Maison*,²⁹ a ruling in the Oregon district court that had been upheld by the Ninth Circuit Court of Appeals.

Belloni's decision might have been less controversial if he had simply embraced the Supreme Court's *Puyallup* decision of the previous year. But he did more than that. Where Justice William O. Douglas had been rather vague and even obtuse in his *Puyallup* ruling, Belloni was clear about the nature of state regulatory authority.

In *Puyallup*, Douglas emphasized that the state of Washington had the authority to regulate Indian fisheries in the interests of conservation, but failed to give clear guidance on how to determine what is "reasonable and necessary" for conservation. Belloni, on the other hand, began to define how the conservation standard, first set out in *Tulee*, was to be applied. He defined state responsibilities and set limits on state authority.

While Douglas affirmed treaty fishing rights at usual and accustomed places, he did not indicate if any of these rights were different than rights shared by non-Indians. Belloni stated in no uncertain terms that treaty

24. *Id.* at 912.

25. *Id.* at 905.

26. *Id.* at 911.

27. *Id.*

28. 391 U.S. 392 (1968).

29. 186 F. Supp. 519 (D. Or. 1960), *aff'd* 314 F.2d 169 (9th Cir. 1963).

Indian fisheries were separate and distinct, which he said meant, among other things, that non-Indian fishing at Indian fishing places could be prohibited "without imposing similar restrictions on the treaty Indians."³⁰ In this line of reasoning, Belloni was taking cues from an earlier decision.

"A case that had immense importance to me was the *Maison* case that was written by Judge Solomon, also of this court," Belloni said. "Actually it has been extremely interesting as a case study in how the law is made. Judge Solomon wrote an opinion having to do with subsistence fishing, and set a certain path which logically would be expanded the way I ultimately expanded it. Some five years later, Judge Boldt came along and expanded upon mine. It just shows how the law grows in this or any other field."³¹

In *Maison*, Judge Solomon ruled that the state could not restrict off-reservation fishing without *showing* that such restriction was necessary for conservation. Solomon also noted that the state had not pursued other, less restrictive options for the Indian fishery.³²

When H. G. Maison, Superintendent of Oregon State Police, and other state officials appealed, the Ninth Circuit not only affirmed Solomon's decision, but also ruled that state-imposed restrictions on treaty fishing must be *indispensable*, while restrictions on "the fishing activities of other citizens are valid if merely *reasonable*."³³ The standards for regulating Indian and non-Indian fisheries were different.

In his decree, Judge Belloni specifically provided that "this judgment does not modify or affect in any way the judgment or orders" in the *Maison* case.³⁴ With Belloni's incorporation of the *Maison* conclusions, non-Indian fisheries had to be regulated for conservation before Indian fisheries could be lawfully restricted by the states.

The issues of state versus tribal authority over off-reservation treaty fishing were not argued in the *Sohappy* and *Oregon* cases. The plaintiffs avoided any references to the states having exclusive jurisdiction. Instead they referred to the states as "one class of agents of the public."³⁵

Thus, Belloni did not address tribal self-regulation, but neither did he close the door to it. "That wasn't the point directly before me," Belloni said. The judge's "meaningful participation" requirement, however, would later

30. *Sohappy v. Smith* No. 68-409 (D. Or.) Judgment Order Oct. 10, 1969.

31. Belloni Interview. In 1960 Judge Solomon wrote the opinion in *Confederated Tribes of the Umatilla Indian Reservation v. Maison*. In 1974, with conflict over treaty fishing rights raging in Washington state, Federal District Judge George H. Boldt presided over *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 936 (1975).

32. 186 F. Supp. 519, 520-21 (D. Or. 1960).

33. 314 F.2d 169, 174 (9th Cir. 1963).

34. *Sohappy v. Smith* No. 68-409 (D. Or.) Judgment Order Oct. 10, 1969.

35. Interview with Dysart (Dec. 6, 1989).

help compel what tribal officials called co-management and what state officials preferred to call cooperative management.

Another issue the Belloni decision left unaddressed was a definition of what constituted a "fair and equitable share" of the salmon resource. As history would have it, these were decisions for another case and another judge.

The Boldt Decision

Meanwhile, in western Washington, tribes were also clashing with state fish and game agencies over salmon fishing. The fight intensified during the 1960s as it had on the Columbia. Demonstrations and fish-ins accompanied litigation. However, by 1970 neither Indian protests nor federal court decisions had improved Washington's treatment of Indian fisheries. The tribes were calling for federal assistance. As a solicitor for the Interior Department, George Dysart urged the United States to act. The government hesitated.

According to author Fay Cohen in *Treaties on Trial*, the conflict peaked in the summer of 1970: "Indian protest culminated in the establishment of an encampment along the Puyallup River, which the Indians attempted to protect with their own security force. Police tried to raze the camp and in the ensuing melee, a nearby railway trestle was set ablaze. Officers used tear gas and arrested many Indians."³⁶

That fall, Justice Department attorneys finally filed a complaint against the state of Washington. Fourteen mostly western Washington tribes and the Yakama Indian Nation joined the suit. Shortly thereafter, Dysart, tribal leaders and their attorneys began preparing an in-depth case. On August 27, 1973, after nearly three years of preparation, pretrial motions and hearing, *United States v. Washington* went to trial.

Of the Yakama Nation tribes and bands, the Kittitas, Chelan, Entiat, Columbia, Wenatchee, Klickitat, and Yakima had fished with Puget Sound tribes. Crossing the Cascades by way of Snoqualmie, Naches, and Stevens passes, they fished, traded, married, and conducted diplomacy with the Nisqually, Puyallup, Muckleshoot, and Snoqualmie Indians. At the time *United States v. Washington* was filed, some five Yakamas were still engaged in commercial fishing in the Puget Sound area.

Attorneys for the different parties presented the judge with proposals for over 500 factual and legal conclusions. While the chief issue at the trial, which went six days a week for three weeks, were similar to those in *Sohappy/Oregon*, the questions now included the matter of a specific allocation between the Indian and non-Indian fisheries.

Washington Department of Fisheries acknowledged that the tribes probably had treaty fishing rights and, if so, wanted the court to quantify the Indian share. In contrast, Washington Department of Game argued that the

36. Fay Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* 80 (1986).

tribes' treaty fishing rights were no different than non-Indians' rights. When asked at trial what the Indian allotment should be, a game department official suggested zero.

On the stand, an Indian spokesperson testified that he believed that the treaty entitled them to 100 percent of the harvestable fish because, at the time of the treaty, Indians were catching all of the fish. Using similar logic, the Yakama tribe argued for more than 90 percent. Federal government attorneys suggested "an equal share."

On the touchy subject of regulatory authority, some tribes, including the Yakama tribe, asserted that under the treaties the state had no jurisdiction over Indian off-reservation fishing. A version of that argument was expressed in a law review article by Ralph Johnson, a Washington law professor and one of the attorneys for the *Sohappy* plaintiffs. Professor Johnson contended that the notion that states had authority to regulate Indian fishing was an erroneous interpretation of the treaties that had "crept into early fishing rights cases, without real legal justification."³⁷

The state, of course, hotly refuted any such contention that might permit tribal regulation of Indian fisheries.

On February 12, 1974, after several months of deliberation, Judge Boldt announced his decision, coming to virtually the same conclusions as Belloni had. His lengthy and well-researched opinion expanded on his colleague's earlier decision. Writing to Judge Belloni several years later, Boldt recognized Belloni's legacy and expressed his appreciation for the Oregon judge: "Your *Sohappy* decision led the way and made possible *United States v. Washington* for which I will always owe you a deep debt of gratitude."³⁸

A very important element of Judge Boldt's decision was his quantification of the Indian and non-Indian shares. It also created a public furor, which to this day has not completely subsided. The judge interpreted the treaty language "in common with citizens of the territory," or, as it reads in some of the 1855 treaties, "in common with citizens of the United States," to mean equal sharing. Treaty Indian fisheries were thus, he reasoned, entitled to 50 percent of the harvestable fish passing their "usual and accustomed" fishing places.³⁹

Another important aspect of Boldt's opinion dealt with tribal self-regulation. Reasoning that Congress and the Supreme Court had recognized tribal self-government and that recent federal legislation such as the Indian Education and Self-Determination Act of 1973 encouraged tribal autonomy.

37. Ralph Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 *Wash. L. Rev.* 207 (1972). Preceding the *United States v. Oregon* and *United States v. Washington* decisions, Supreme Court opinions had suggested or discussed a conditioned role for state regulation of off-reservation fishing rights in *Winans*, *Tulee*, and *Puyallup*.

38. Letter from George H. Boldt to Robert C. Belloni (March 3, 1977).

39. *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd* and *remanded* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 936 (1975).

Boldt concluded that *United States v. Washington* presented "an appropriate opportunity . . . to take a step toward applying congressional philosophy to Indian treaty right[s] fishing in a way that will not be inconsistent with [Supreme Court cases] and also will provide ample security for the interest and purposes of conservation."⁴⁰

Judge Boldt ruled "that any one of the plaintiff tribes is entitled to exercise its governmental powers by regulating the treaty right fishing of its members without any state regulation thereof; PROVIDED, however the tribe has and maintains the qualifications and accepts and abides by the conditions stated."⁴¹

The qualifications set by Boldt included having a well-organized tribal government capable of establishing off-reservation fishing regulations that "will not adversely affect conservation;" having effective enforcement of tribal fishing regulations; and having well qualified experts in fishery science and management "who are either on the tribal staff or whose services are readily available to the tribe."⁴²

Some of the conditions for self-regulation required that tribal rules be "discussed in their proposed final form with Fisheries and Game."⁴³ State fish and game enforcement were to be allowed to monitor off-reservation fishing "to the extent reasonable and necessary for conservation."⁴⁴ Tribal catch reports were to be provided when requested by state fish and game officials for "reasonable and necessary conservation purposes."⁴⁴

Judge Boldt also found, based on evidence provided to the court, that the Yakama and Quinault tribes had already been promulgating and enforcing tribal fishing regulations and thus were entitled to exercise tribal self-regulation at "usual and accustomed" fishing places in the Puget Sound area.⁴⁵

Mixed Reviews

"We were in Cascade Locks fishing in 1969, when Belloni made his decision," said Kathryn Brigham, who fishes there with her husband Robert.⁴⁶ Both are Umatilla tribal members. "The fishermen were pleased with the decisions because it was about time the tribes started doing something for us. We'd been sitting on the bank and everybody else had been fishing, and now hopefully we were going to start fishing. So they were pleased that the tribes finally got the guts to do something. That included

40. *Id.* at 340.

41. *Id.* at 340.

42. *Id.* at 341.

43. *Id.*

44. *Id.* at 341.

45. *Id.* at 341, 374-375, 379-382.

46. Interview with Kathryn Brigham (May 22, 1990).

Yakama, Warm Springs, Umatilla, Nez Perce, everybody was pleased," she said. Well, not quite everybody.

"The non-Indians weren't. We thought we got along fairly well with the community in Cascade Locks," said Brigham, who today represents tribes at the Pacific Salmon Commission, the body overseeing the United States-Canada Pacific Salmon Treaty. "But then after the Belloni decision, we would find something done to our tanks, our hoses, and our boats. They would cut cables, steal the tanks, and even put holes in the boat. It happened on the river in '69. Then, in 1974 when it was calming down, it started all over again."

"I was surprised at the extreme strong feelings held by not only the Indians," said Judge Belloni. "Although I knew that the salmon were important to the tribes, the strength of their feeling was to some extent a new experience for me. For example, I was ignorant of the actual religious significance of salmon to the Indian people."

"The reaction of the newspapers was totally adverse, and totally surprised me," the judge continued. "The interest from the person on the street - I thought this was a matter they would read about in the newspapers and then say 'ho-hum' and forget about it. But that's not what happened. Fishermen of all kinds, the sports and commercial fishermen, reacted a lot stronger than I ever thought they would."

Belloni said he was "so doggone unhappy" that news reporters, editors, and even his friends who were commercial fishermen didn't bother to read the opinion.

Judge Belloni remembered that Peterson Seafood, a processing plant in Charleston on the Oregon coast near where he used to fish, "had this big cartoon of two loggers sitting on a bench having their lunch and one logger saying to the other, 'I don't care what Belloni says, I'm not going to give half this tuna fish sandwich to the Indians.'" A bumper sticker with a bolt and a sausage on it read, "Screw Boldt and Slice Belloni." Another popular one made no mistake about its sentiment; it urged, "Save a fish, Can an Indian."

When several non-Indian commercial fishermen lost their lives at sea in the early 1980's, stories in the *Seattle Times* and *The Oregonian* implied that the Belloni and Boldt decisions were responsible. The articles' authors reasoned that non-Indian fishers were having to risk their lives to harvest enough fish now that Indians were allowed to increase their take of salmon. Washington state officials openly defied the federal court decisions. Their refusal to adopt regulations implementing the rulings and the state's counter suits brought the *United States v. Washington* and *Oregon* parties back to court again and again. Statements made to the media and before the legislature and courts inflamed the public. Apparently Belloni's decision *was* radical in terms of the social and political climate of the times.

"The politicians, likewise, even the courts, the state courts reacted a lot more strongly than I ever thought they would," Judge Belloni said. "A person shouldn't use too strong a language, but I think some of the state court actions in the state of Washington as a result of this were almost

disgraceful," he declared. For more than several years after the Boldt decision, Washington state courts attempted to overturn federal court orders.

In a case challenging much of the substance of *United States v. Washington* and *United States v. Oregon*, appeals court judge Alfred T. Goodwin wrote:

The state's [Washington's] extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed this century.⁴⁷

In upholding Boldt's decision, Ninth Circuit Judge James M. Burns also commented: "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 the 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."⁴⁸

It was not only Washington state officials that had trouble reconciling the decisions. Even federal policy makers were confused, among them the director of the U.S. Fish and Wildlife Service. When he was advised of Judge Boldt's ruling that the Indian entitlement was 50 percent of the harvestable fish, his response was that the Fish and Wildlife Service would certainly have appealed *that* decision. The informant had to advise the director that the ruling had been the position of the United States, and that the United States had won.⁴⁹

Some have puzzled over the response to Belloni's 1969 ruling in contrast to the explosion over Boldt's decision five years later. After his ruling, Judge Boldt received hundreds of hate calls and letters berating him. Demonstrators hung him in effigy. "This 'very careful and scholarly judge,' as Belloni referred to him, was vilified for having done the right thing," said James B. Hovis, who for over thirty years was the Yakama Tribal Attorney and is now a federal magistrate.⁵⁰

Timing and economics help explain the different reactions. Between the two decisions, non-Indian challenges to Indian fishing rights had multiplied. Boldt believed that it had become necessary to specifically quantify the treaty Indian entitlement, and when he did so, he enraged a segment of the fishing community and its supporters who held dearly to the

47. *Puget Sound Gillnetters Ass'n v. United States District Court*, 573 F.2d 1123, 1126 (1978).

48. *United States v. Washington*, 520 F.2d 676, 693 (1975) (Burns, J., concurring).

49. Dysart Interview.

50. Interview with James B. Hovis (February 7, 1990).

notion that the salmon resource was all theirs. Moreover, in the 1970s more people and more money were involved in the fish business on the Washington coast and in Puget Sound than were involved on the Columbia River.

Herbert Lundy of *The Oregonian* editorialized in 1974, "Non-Indian fishermen who strung up an effigy of U.S. District Judge George Boldt in a fishnet in front of the federal court in Tacoma, Washington were hanging the wrong man." In what is a fair appraisal of the treaty fishing rights decisions, Lundy wrote that those most responsible were actually Robert Belloni, whose ruling Boldt used as a foundation, and Isaac Stevens, who had agreed to the reservation of fishing rights when he negotiated the 1855 treaties.⁵¹

"The original '69 decision has to be recognized as a real landmark decision in its time," said Nez Perce tribal attorney Doug Nash.⁵² "Judge Belloni came up with rulings and guiding principles that set the stage for an awful lot of law thereafter."

"There were some decisions before his that addressed the nature and extent of treaty reserved fishing rights, and some addressed the scope of state regulation, but I think until that first decision, there weren't as many that affected certainly as many tribes and as many treaties, and on a broad scope that his did. At the time of his decision, none had really jelled the concept of what 'usual and accustomed' might mean. His did. His was the building block for everything after, including *United States v. Washington*," said Nash.

As to Boldt's 50 percent sharing decision, Nash conveyed the sentiment of the Umatillas, who were his clients during the mid-70s: "It was within the realm of acceptance. Trying to get the states to manage it so that tribes got 50 percent was still a pretty uphill battle at the time. It wasn't an easy thing for [the states] to accept, let alone manage and make available to the tribes."

Nez Perce tribal leader Allen Slickpoo confirmed that his tribe, too, "especially the fishermen, hailed the Belloni decision as a big victory for the Nez Perce people. The Boldt decision also strengthened our treaty rights."⁵³

While Warm Springs officials were satisfied with Boldt's decision, they were absolutely delighted with Belloni's. As a result of the *Sohappy/Oregon* case, the tribe's 1865 treaty had been rejected and its 1855 treaty rights affirmed. The Warm Springs would no longer have to wonder whether the federal government believed the tribe still had off-reservation rights. According to tribal fish and wildlife committeeman Delbert Frank, this was when things began to get difficult, now "we had to start managing for the survival of the salmon."⁵⁴

Yakama leaders, in contrast, were disappointed with the *Sohappy/Oregon* decision. "The one problem I've always had with the case was that the states finally got their foot in the door," former tribal chairman Johnson Meninick

51. *The Oregonian* (Portland) April 1, 1974.

52. Interview with Doug Nash (Oct. 17, 1990).

53. Interview with Allen Slickpoo (Oct. 17, 1990).

54. Interview with Delbert Frank (Feb. 22, 1990).

related.⁵⁵ "We were looking for a good case, but not *Sohappy v. Smith*. It was really kind of a bad case to try."

Before the 1969 decision, the Yakama tribe was pursuing a treaty rights strategy that involved tribal regulation. The tribe was fighting off state regulations in state courts, and winning.

In fact, on the day Judge Belloni announced this decision, a wire service story in the *Oregon Journal* confirmed that at least in Wasco County the judicial system was backing off. The article said that Wasco County District Attorney Don Turner was dismissing charges against Indians fishing on the Columbia "on grounds that they are granted such rights based on treaties."⁵⁶

Also, several months before Belloni's initial 1969 ruling, the Washington Court of Appeals in *State v. James* affirmed a Skamania County judge's decision to dismiss charges against a Yakama fisherman. In December 1966, state judge Ross Rakow had concluded that Ernest James was fishing at a "usual and customary" fishing site and that state regulations had not been valid because they were not "reasonable and necessary for conservation."⁵⁷

The Yakama tribe and its attorney were winning legal battles in state courts. "So we weren't a bit interested in going into federal court," said Jim Hovis, who for over 30 years was Yakama tribal attorney and is now a federal magistrate.⁵⁸

"The Yakama Indian Nation did intervene," said Bill Yallup, Sr., Yakama fish and wildlife official and former tribal judge, "because *Sohappy* and the other 13 were saying that they had individual rights. So to clarify the legal question of Indian treaty fishing rights, the tribe had to step in and say, 'These are Yakama treaty rights and we don't want the federal court deciding this issue without the tribe's intervention.'⁵⁹

"We had to be there to protect a resource which our forefathers left for us to live by, not just for certain people or certain tribal members," said Meninick, who now works in cultural resources. "It was the tribe-as-a-whole's resource. The tribe's right was being jeopardized."

He went on to explain that even though the court did nothing to favor individual treaty rights, the *Sohappy/Oregon* case "in a sense, discredited us." The tribe was regulating its own fisheries and trying to gain compliance from all its members, when the court said the state could manage Indian fisheries. "We weren't asleep on the job," Meninick emphasized.

55. Interview with Johnson Meninick (Jan. 6, 1990).

56. *Oregon Journal* (Portland), April 24, 1969.

57. 435 P.2d 521, 524 (1967). Even though Judge Rakow's decision was upheld on appeal, his courageous ruling cost him re-election to the bench.

58. Interview with James B. Hovis (Feb. 7, 1990).

59. Interview with Bill Yallup, Sr. (Jan. 5, 1990).

"Belloni was the foundation," Hovis acknowledged. "If it hadn't been for *United States v. Oregon*, there wouldn't be *United States v. Washington*. The only thing I regretted was that he said the state had the right to regulate."

"The fish committees of these other tribes I don't think wanted the responsibilities [of tribal regulation]," Hovis contended. "They're bright people—they saw how the Yakama fish committees got beat up. They saw what happened politically to the chairmen of the fish committees who were trying to regulate the fishermen. So they didn't give a damn about tribal regulation."

"I think their attorneys felt, 'All we need is to have some kind of a hook on the state. We don't want to get into tribal regulation.'"

"A concept of self-regulation was pretty remote especially in those early days," said Nash, reflecting on his experience in the 1970s. "Most tribes, certainly the Umatillas, just had zero fishery staff and they weren't doing anything in fisheries management, so the concept of actually having some internal tribal process that could affect the Columbia River regulation was probably beyond everyone's wildest dreams at the time."

Other tribes' leaders and attorneys also felt that tribal self-regulation, particularly to the exclusion of state regulation, was an unlikely proposition for several reasons. First, case law had affirmed a role for state authorities "when necessary for conservation." Second, despite the tribes' conservative and prayerful practices on behalf of salmon, non-Indian exploitation of land and water resources had already wiped out some salmon stocks and brought others to dangerous lows. There was, as some termed it, a "conservation situation."

Yakama leaders and their attorneys who had argued for recognition of tribal management in both cases felt that they had been more successful in *United States v. Washington*. But many Yakama leaders were shocked and dismayed by Boldt's decision to give 50 percent of the salmon passing by the tribes' usual and accustomed fishing places to non-Indians.

Yallup explained that the tribe had argued that it was legally entitled, under the treaty, to a 95 percent share of the fish. After all, at the time of the treaty when the tribes reserved their fishing rights, the Indians were catching virtually all the fish. The non-Indians were traders and soldiers.

"Why go out and break your back hauling fish, when you can take a yard of cloth and trade for enough fish to fill a house?" Hovis asked.

"'In common' doesn't mean 50-50? You go out and ask people, 'What does 'in common' mean?' Nobody's going to tell you 50-50," he said. "But that was the only way Boldt could save fisheries for the state."

"Then non-Indians started talking about the 50-50 decision as being immoral, improper, illegal, and they killed off the old gentleman [Judge Boldt]. It was shameful," Hovis paused. "In retrospect, we had such a hell of a time politically holding on to the 50 percent, how would we have done with 90 percent?"

When Boldt divided the harvest 50-50, Delbert Frank said that he and his people weren't disappointed. "The Yakamas thought we should have it all. But I was satisfied with what we got. It was better than nothing, because we always got nothing when we finally got to court," he remarked. Frank said he was more

concerned about getting something done for the resource so that 50 percent could be a meaningful number. "Fifty percent of zero is still zero."

Warm Springs tribal attorney Dennis Karnopp indicated that the allocation could have easily been 33 percent. During the Boldt ruling, some state officials had advocated shares of a third each for the sport, Indian, and non-Indian commercial fisheries, he recalled.⁶⁰

In May 1974, Judge Belloni endorsed Boldt's 50-50 concept for Columbia River harvest sharing. In the years to come, the tribes and their attorneys would learn just how difficult it was going to be to get that 50 percent "fair and equitable share."⁶¹

60. Interview with Dennis Karnopp (Feb. 16, 1990).

61. *Sohappy v. Smith* No. 68-409 (D. Or. May 8, 1974) (Order Dissolving Temporary Restraining Order).

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