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

BY

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Fifty years ago, Judge Robert Belloni handed down an 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 the years. Today, the Columbia River

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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 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 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.

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[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 MAGAZINE, SPECIAL EDITION (n.d.).

[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. REPORT R40169, ENDANGERED SPECIES ACT LITIGATION REGARDING COLUMBIA BASIN SALMON AND STEELHEAD 2 (2016). CONG. RESEARCH SERV. REPORT 43287, COLUMBIA RIVER TREATY REVIEW 2 (2018).

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]

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

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[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. 489, 494–96 (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 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
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> . . . 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.

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 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*—in its fourth Stevens Treaty decision—seemed to sanction a large role for state regulation of treaty rights.[12] 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 against tribal harvesters.[13] The Belloni decision would prove to the turning point in judicial interpretation of treaty fishing rights, leading to two important Supreme Court decisions.[14]

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[8] *See id.* at 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, 12 Stat. 945 (June 9, 1855).

[10] United States v. Adair, 723 F.2d 1394, 1415(9th Cir. 1983) (upholding a tribe's "time immemorial" fishing rights); SACRIFICING THE SALMON, *supra* note6, at 60-63.

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

[12] *See* Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969); Puyallup Tribe v. Dep't of Game (Puyallup I), 391 U.S. 392 (1968), discussed *infra* notes 69–94 and accompanying text.

[13] 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).

[14] The first was Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685–87, *modified sub nom.* Washington v. United States, 444 U.S. 816 (1979) (affirming Judge Boldt's 50% allocation of fish run harvests). The second was Washington v. United States, 584 U. S. ____, 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); *see infra* notes 120–139 and accompanying text (for discussions of Judge Boldt's and Judge Martinez's decisions and their affirmations by the Supreme Court). Two 2019 decisions of the Supreme Court reaffirmed the off-reservation rights contained in the Stevens Treaties. Washington State Dept. of Licensing v. Cougar Den, 586 U.S. ___, 139 S.Ct. 1000 (2019) (concerning off-reservation rights on public highways), discussed

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.[15] His prescription for doing so was to require the state to begin to treat the tribal fishery separate from the non-treaty fishery.[16] 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.[17]

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 recreations fishers.[18] Eventually, Belloni would call for a comprehensive plan to ensure a fair allocation.[19] That call would not be consistently met over the ensuing years,[20] but in recent years the tribes and states have successfully negotiated two consecutive ten-year plans, which have governed harvest management since 2008.[21] Judge Belloni's successors have continued to

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infra notes 121, 227-233 and accompanying text; Herrera v. Wyoming, __ U.S. __, 139 S.Ct. __ (2019) (concerning off-reservation hunting rights similar to those reserved in the Stevens Treaties), discussed *infra* notes 63.

[15] *Sohappy*, 302 F. Supp. at 911.i

[16] *Id.*

[17] 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, 713 (1986). *See also infra* notes 151–152 (discussing the conservation burden imposed on tribes).

[18] 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 was Mancur Olsen's THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (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 908–909 (explaining that regulation of the Oregon's Fish Commission and Game Commission, "as well as their extensive propagation efforts, aimed 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).

[19] *See infra* notes 153–157

[20] *See infra* notes 156–176.

[21] *See infra* notes 170–177.

oversee the development and implementation of revised plans that reflected changed conditions over time, and there is a judicially approved plan in effect today.[22]

This article considers the significance and legacy of the Belloni decision a half-century later. Section 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 section 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. 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. Section IV examines the legacy of the decision throughout the Pacific Northwest, while an Appendix 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 section explains some of the important early interpretations of the treaty right "of taking fish . . . in common with" others. It then turns to focus on the Supreme Court's important decision in its 1942 decision *Tulee v. Washington*, 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

[22] *See infra* note 181. Judge Belloni's successors included Judges James Burns, Walter Craig, Edward Leavy, Macolm Marsh, Garr King, and Michael Mossman.

right to continue fish on the lands they ceded at all "usual and accustomed" fishing sites "in common with" the settlers.[23] 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.[24] 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.[25] Fences led to the first major appellate decision interpreting the Stevens Treaties.[26]

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.[27] 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*.[28] *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 as the unlettered Indians would have understood.[29] *Taylor* also advanced an early version of what became known as that reserved rights doctrine—that treaties

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

[24] *See id.* at 63-65.

[25] *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 33.

[26] *See id.* at 511-14 (discussing an earlier case involving tribal exclusion, *Spedis v. Simpson,* but that case did not generate appellate review).

[27] *See id.*, at 510-11. 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 20th 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 that they breathed." United States v. Winans, 198 U.S. 371, 381 (1905). However, in 1957, the federal government's The Dalles Dam flooded the falls and wiped out nearby tribal villages. *See* Columbia River-Inter-tribal Fish Comm'n, *Celilo Falls* (last visited Mar. 3, 2019) https://www.critfc.org/salmon-culture/tribal-salmon-culture/celilo-falls/.

[28] United States v. Taylor, 13 P. 333 (Wash. Terr. 1887).

[29] *Id.* at 334-35; *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 37 and accompanying text.

should be understood to conveyances of rights granted from the tribes to the federal government, while reserving to the tribes all rights not expressly conveyed.[30] 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.[31] He therefore had no right to fence out the tribal fishers.

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.[32] 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.[33] 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.[34] The federal government appealed the dissolution of the injunction directly to the Supreme Court.[35]

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."[36]

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[30] *Taylor*, 13 P. at 335 ("the Indians in making the treaty . . . more likely . . . granted only such rights as they were to part with, rather than . . . conveyed all . . . .").

[31] *Id.* at 335-36.

[32] *See* Blumm & Brunberg, *supra* note 4, at 521-22.

[33] *See id.* at 522. 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*, OREGON HISTORY PROJECT (last visited Mar. 3, 2019) https://oregonhistoryproject.org/articles/historical-records/columbia-river-fish-wheel/#.XHykOIhKjIU. 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. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679, *modified sub nom*. Washington v. United States, 444 U.S. 816 (1979).

[34] *See* Blumm & Brunberg, *supra* note 4, at 528-29.

[35] *See id.* at 529.

[36] United States v. Winans, 198 U.S. 371, 380 (1905).

Ratifying the rule of interpretation that Indian treaties be construed as the tribes' would understand, McKenna described the nature of the treaty fishing right in eloquent, almost poetic terms: "[t]he right to resort to the 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."[37] 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."[38] This servitude, a property right, ran against both the federal government and its grantees like the Winans brothers.[39] Thus, the brothers could not fence out the tribes from fishing at Celilo Falls.[40] 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."[41]

A decade and a half after *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. Oregon landowners attempted 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.[42] The Court would not have any of it, invoking the rule of construction requiring courts to interpret treaties as

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[37] *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.

[38] *Id.* at 381-82.

[39] *Id*.

[40] 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." Citing Shively v. Bowlby, 152 U.S. 1, 48 (1894), the Court upheld federal authority to recognize treaty rights on federal territory pre-statehood. *Winans,* 198 U.S. at 382-83. *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."

[41] *Winans*, 198 U.S. at 384.

[42] Seufert Bros. v. United States, 249 U.S. 194 (1919).

the Indians would understand, and noting that they fished on both sides of the falls both before and after the treaty.[43]

Some two decades later, the Supreme Court again took up the Stevens Treaties in a case involving the issue of whether the state of Washington could charge a license fee to tribal fishers. A state court convicted Sampson Tulee, a Yakama tribal member, of violating state law by selling salmon without a state dipnet license.[44] 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.[45] 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.[46] Consequently, the Court rejected the state's defense that the fee was necessary for conservation, a claim which no doubt undercut by the state's exempting non-Indian recreational hook-and-line fishers from license fees.[47]

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.[48] 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 its fishing regulations that restricted its members fishing to "one pole and line with two

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[43] *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.").
[44] Tulee v. Washington, 315 U.S. 681, 682 (1942).
[45] State v. Tulee, 7 Wash. 2d 124, 125 (1941), *rev'd sub nom.* Tulee v. Washington, 315 U.S. 681 (1942).
[46] *Tulee*, 315 U.S. at 684–85.
[47] *Id.* at 682 n.1, 684.
[48] *Id.* at 685.

single hooks or one artificial bait per person" at certain traditional river fishing grounds.[49] 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."[50]

The federal district court dismissed the tribe's complaint, and the tribe appealed.[51] 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. 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. 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.[52] 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."[53] The court consequently ordered the district court to enjoin the state from enforcing its regulations against the tribe.[54]

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

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[49] Makah Indian Tribe v. Schoetter, 192 F.2d 224, 225 (9th Cir. 1951).

[50] *Id.* at 225. The Makah's treaty is the only one of the Stevens Treaties including a right to whale. *See* Michael C. Blumm & Olivier Jamin, *Indigenous Rights in the U.S. Marine Environment: The Stevens Treaties and their Effects on Harvests and Habitat* 300-01, in INDIGENOUS RIGHTS IN THE MARINE ENVIRONMENT (Nigel Bankes, ed., Hart Pub. Co., 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3176105.

[51] *Makah,* 192 F.2d at 225.

[52] *Id.* at 226, citing *Tulee v. Washington*, 315 U.S. 681, 684 (1942).

[53] *Id.* at 225.

[54] *Id.* at 226

"taking fish" off-reservation "'in common with citizens of the United States"[55]—resulted in another Ninth Circuit decision. 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. The tribes responded by suing, seeking both declaratory and injunctive relief against state enforcement of its regulations. [56]

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.[57] The Ninth Circuit affirmed in *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, relying on the reserved rights doctrine first laid down in *Winans,* that the "'treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.'"[58]

As in *Makah*, the *Maison* court concluded that the state had failed to meet the conservation necessity test established by *Tulee*.[59] 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. 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.[60] 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.[61] In contrast, the treaties did not reserve rights for non-Indians; therefore,

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[55] Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169, 170 (9th Cir. 1963), *disapproved of by* Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968).
[56] *Maison*, 314 F.2d at 170–71.
[57] *Id.* at 171.
[58] *Id.* at 171–74 (quoting United States v. Winans, 198 U.S. 371, 381 (1905)).
[59] *Id.* at 172 (citing *Tulee v. Washington*, 315 U.S. 681, 684 (1942)).
[60] *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, 225 (1972) (explaining that the state in *Maison* "failed to carry the burden of proving that its regulations were necessary for conservation").
[61] *Maison,* 314 F.2d at 171–73. *See infra* notes 129-30 and accompanying text (discussing the Belloni decision).

the court held that the state could exclude sports fishermen from the fishing grounds in question, but not tribal harvesters.[62]

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,* 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."[63] The lower 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. The lower court consequently enjoined state regulations that prohibited Indian off-reservation hunting.[64]

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.[65] 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.[66] The district court found that the deer population was healthy enough to support both sportsmen hunting and Indian

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[62] *Id.* at 171–174. 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.*

[63] Holcomb v. Confederated Tribes of Umatilla Indian Reservation, 382 F.2d 1013, 1013 (9th Cir. 1967); *see* State v. Miller, 102 Wash. 2d 678, 685 (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, 12 Stat. 945 art. I (1855). 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 (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 1703.

[64] Confederated Tribes of Umatilla Indian Reservation v. Maison, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd sub nom.* Holcomb v. Confederated Tribes of Umatilla Indian Reservation, 382 F.2d 1013 (9th Cir. 1967). The Supreme Court's recent *Herrera* decision, discussed *supra* note 63, would justify the result in *Holcomb.*

[65] *Holcomb,* 382 F.2d at 1014. That result was ordained by United States v. Winans, 198 U.S. 371, 382 (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).

[66] *Holcomb,* 382 F.2d at 1014.

hunting, and that the state possessed alternative methods of conservation.[67] 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.[68]

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 Tribe v. Department of Game* (*Puyallup I*) was making its way through state courts to the United States Supreme Court.[69] The suit began in Washington state courts as two separate suits.[70] 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.[71] Representatives of both tribes had signed the Treaty of Medicine Creek, a Stevens Treaty which recognized the tribes' "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[72] The state claimed that the tribes' treaty rights contained no exemption from state regulations, and a Washington superior court agreed.[73]

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. 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.[74]

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[67] *Confederated Tribes of Umatilla v. Maison*, 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.

[68] *Holcomb,* 382 F.2d at 1015.

[69] 391 U.S. 392, 394 (1968).

[70] Dep't of Game v. Puyallup Tribe, Inc., 70 Wash.2d 245 (1967), *aff'd sub nom*. Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968); Dep't of Game v. Kautz, 70 Wash. 2d 275, 275, 422 P.2d 771, 772 (1967), *aff'd sub nom.* Puyallup Tribe v. Dep't of Game, 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 (1968).

[71] *Puyallup I,* 391 U.S. at 398.

[72] *Puyallup Tribe*, 70 Wash.2d at 247; *Kautz,* 70 Wash. 2d at 276.

[73] *Id.* at 246–47; *Kautz,* 70 Wash. 2d at 276; *Puyallup I,* 391 U.S. at 394.

[74] *Puyallup Tribe*, 70 Wash.2d at 247; *Kautz,* 70 Wash.2d at 276, 279, citing State v. McCoy, 63 Wash. 2d 421, 438 (1963) ("The treaty secured to the Indians an interest in land, consisting of an easement, which secured to them the

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.[75] 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*[76]—the brief advocated use of the *Schoettler-Maison* rule that states may regulate off-reservation treaty fishing when "necessary" for conservation.[77]

The federal brief laid an unfortunate foundation that the led the Supreme Court to affirm the Washington Supreme Court's decision.[78] A unanimous Court did recognize that the tribes' treaties reserved the tribes' right to fish off-reservation at "all usual and accustomed" places.[79] 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' manner," nor did it specify the purpose for which the Indians fished.[80] 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.[81]

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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.").

[75] Johnson, *supra* note 60, at 225; Brief for the United States as Amicus Curiae at 7–8, *Puyallup I*, 391 U.S. 392.

[76] Tulee v. Washington, 315 U.S. 681, 684 (1942); *see supra* note 48 and surrounding text (discussing the Court's indispensability test).

[77] Brief for the United States, *supra* note 75, at 8.

[78] *See* Johnson, *supra* note 60, at 226.

[79] *Puyallup I,* 391 U.S. at 398, citing United States v. Winans, 198 U.S. 371, 381 (1905).

[80] *Puyallup I,* 391 U.S. at 398.

[81] *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. U S, 248 U.S. 78, 89 (1918); *see also* Tulee v. Washington, 315 U.S. 681, 684 (1942) ("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

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." 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.[82] 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."[83] As Johnson noted, because Indian treaties are the "supreme law of the land," they can be abrogated only by Congress.[84] 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.'"[85] 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.[86]

Ignoring rules of treaty interpretation, the *Puyallup* 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 State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[87] 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.'"[88] The *Puyallup* decision made no

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and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.").

[82] *Puyallup I,* 391 U.S. at 398.

[83] Johnson, *supra* note 60, at 208.

[84] 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 60, at 208.

[85] 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).

[86] Johnson, *supra* note 60, 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 be abrogated only with a clear statement of congressional intent").

[87] *Puyallup I,* 391 U.S. at 398.

[88] *Puyallup I,* 391 U.S. at 398–99, citing Tulee v. Washington, 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

mention of the burden *Tulee* imposed on the state to prove that its regulation be "indispensable to the effectiveness of a state conservation program."[89] Instead, it deferred to the Washington Supreme Court's "reasonable and necessary" standard.[90] 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.[91]

Although the *Puyallup* decision decided that the state could regulate off-reservation treaty fishing, it declined to rule on the state's ban on net fishing the in 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.[92] Justice Douglas' opinion did direct the state courts to address the matter of equal protection implicit in the treaty language "in common with."[93] 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,[94] deference to state regulation amounted to discrimination against treaty rights.

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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.").

[89] *Tulee,* 315 U.S. at 685.

[90] *Puyallup I,* 391 U.S. at 399–401.

[91] Getches, *supra* note 86, 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).

[92] *Puyallup I,* 391 U.S. at 398, 401–02.

[93] *Puyallup I,* 391 U.S. at 403. In *Department of Game of Washington v. Puyallup Tribe* (*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.

[94] Johnson, *supra* note 60, at 228.

III. THE BELLONI DECISION

This section examines the fishing conflict that led to the *Sohappy* 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 Intensifiying Conflict in the 1960s

The decades-old conflict that led to *Sohappy v. Smith* 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.[95] Tribes also closed their fisheries in response to this data. In 1966, Oregon ordered state police to strictly enforce commercial fishing regulations and impose closures on the Columbia River. However, many treaty fishermen ignored both state and tribal closures, believing that their treaty rights exempted them from all regulation.[96] 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.[97] As a result, Oregon arrested many tribal harvesters.[98]

One such fisherman was Richard Sohappy, a Yakama Indian tribal member and decorated army veteran. 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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[95] *See* Honorable Robert C. Belloni, *Foreword to* Berg, *Let Them Do as They Have Promised*, *supra* note 4, at 312 (2008); *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 17, at 711.

[96] *See* Gartland, *Eight Years of Litigation, supra* note 95, at 685.

[97] ALVIN J. ZIONTZ, A LAWYER IN INDIAN COUNTRY: A MEMOIR 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. 2, 1963) https://www.sos.wa.gov/_assets/archives/campusmarch1964.pdf. Hundreds of non-native university students, civil rights activists, professors, and others joined protests across the nation.

[98] *See, e.g.,* Cohen, *supra* note 11, at 76.

regulations. 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.[99] Professor Johnson and two other attorneys, David Hood and Fred Nolan, volunteered to litigate the case for the fourteen individuals. 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.[100]

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 20th 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.[101] Moreover, many of the Secretaries of Interior during the 1950s were champions of tribal termination.[102] 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

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[99] Sohappy v. Smith, 302 F. Supp. 899, 890 (D. Or. 1969); *see* Cohen, *supra* note 11, at 78.

[100] *See* Cohen, *supra* note 11, at 78; CHARLES F. 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, NY TIMES (Nov. 15, 1999) https://www.nytimes.com/1999/11/15/us/robert-c-belloni-80-judge-who-upheld-indian-fishing-rights.html. 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.

[101] *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).

[102] *See* Cohen, *supra* note 11, at 452. 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, 149–153 (1977) (discussing the federal termination policy).

Dysart, who had a great deal of expertise in Indian law by the 1960s.[103] Dysart would play a pivotal role in protecting tribal treaty fishing rights in the coming decades.

As the fishing controversy in the Pacific Northwest increased during the 1960s, Dysart and United States Attorney Sidney Lezak became increasingly concerned about the tribes' fishing problems.[104] 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.[105] The federal government began supplying that support in April 1966, when the Department of Justice authorized United States Attorneys to represent individual treaty fishermen whom the state was arresting and charging with violations its fishing regulations.[106]

Later in 1966, the Department of Justice issued a report on the treaty fishing conflict. 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."[107] 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.[108]

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

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[103] 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 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"].

[104] Olson interview, *supra* note 103.

[105] *Id.*; *see also* Cohen, *supra* note 11, at 76–78.

[106] 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).

[107] *Id.* at 306, quoting *Tulee,* 315 U.S. at 384.

[108] *Id.*

court battles on behalf of a single treaty fishermen in state court was inefficient and unproductive.[109] 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.[110]

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 federal suit for declaratory and injunctive relief that would prove more efficient than defending individual treaty fishermen accused of crimes in state court. [111]

Dysart and Lezak faced an uphill battle to convince the Justice and Interior attorneys to pursue the case, as many federal attorneys thought that states had largely unfettered discretion to regulate treaty fishing. [112] 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."[113] 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 v. Smith.*[114]

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

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[109] Berg, *supra* note 4, at 317 (quoting an interview with George Dysart (Dec. 6, 1989)).
[110] *Id.* at 317 (quoting Dysart interview); Chambers, *supra* note 101, at 439.
[111] Berg, *Let Them Do as They Have Promised, supra* note 4, at 317 (quoting Dysart interview); Olson Interview, *supra* note 103.
[112] Berg, *Let Them Do as They Have Promised, supra* note 4, at 317; Olson Interview, *supra* note 103.
[113] Ziontz, *supra* note 97, at 94.
[114] Berg, *Let Them Do as They Have Promised, supra* note 4, at 317.

against state officials, not the state itself.[115] 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. 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."[116]

Dysart's efforts paid off. In September 1968, the United States filed its complaint in *United States v. Oregon*.[117] 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.[118] Given the overlap of treaty rights issues, Judge Belloni consolidated the two cases, *Sohappy v Smith* and *United States v. Oregon,* into a single proceeding in 1969.[119]

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* decision, it had the same authority to regulate tribal harvests as it did to regulate non-Indians. The state argued that the Indians' fishing rights did not warrant separate protection or treatment. 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

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[115] The 11th Amendment of the U.S. Constitution prevents citizens from bringing suit against it without federal consent. *See, e.g.,* Hans v. Louisiana, 134 U.S. 1, 10 (1890).

[116] Berg, *Let Them Do as They Have Promised, supra* note 4, at 317; *Belloni*, *in Let them do as they have promised, supra* note 95, at 312.

[117] Berg, *Let Them Do as They Have Promised, supra* note 4, at 317. Because Dysart had 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 U.S. v. Oregon. Olson Interview, *supra* note 103.

[118] 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.

[119] Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). The court severed *United States v. Oregon* and *Sohappy v. Smith* 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 17, at 708 n.16 (1986).

the intention of the parties to the treaty were to be ignored."[120] 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 treaties to be interpreted as the tribes understood.[121] 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 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."[122] 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 protected.[123] 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.*[124] But Belloni saw two limitations on state regulation in *Puyallup*, 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,* meet

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[120] *Sohappy,* 302 F. Supp. at 904–05, 907.

[121] *Id.* The Supreme Court recently reaffirmed the validity of the Indian canons of construction in Washington State Dept. Licensing v. Cougar Den, 586 U. S. __, 139 S.Ct. 1000 (2019). *See infra* notes 227-233 and accompanying text; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (Nell Jessup Newton, et al. eds., 2017) (discussing the canons).

[122] *Sohappy*, 302 F. Supp. at 905 (emphasis added) (quoting Tulee v. Washington, 315 U.S. at 684).

[123] *Id.* at 905.

[124] *Id*. at 906. *See Puyallup I,* 391 U.S. at 398 (1968) (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 (the state can regulate the time and manner of treaty fishing outside of the reservation when the restrictions are necessary for conservation of fish).

"appropriate standards."[125] Because he concluded that the state's claim to an unfettered right to regulate treaty fishing had already been repeatedly rejected in *Puyallup, Tulee, Holcomb, Maison,* and *Makah,* Judge Belloni rejected the state's position.[126]

To ascertain whether the state's regulations were "necessary for the conservation of the fish," Belloni analyzed *Puyallup* 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."[127] 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.[128]

Belloni was clear that the conservation necessity principle did not allow the state to subordinate treaty fishing rights to other state objectives or policies. Instead, the state could regulate treaty fishing rights only when necessary for the *conservation of the species*. Additionally, the regulations must be the least restrictive method possible for meeting conservation requirements. 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 fishing. He thus reinstated the high bar for state regulation of tribal exercise of treaty fishing rights.[129] To prove the conservation necessity of a regulation, the state had to demonstrate that 1) a limit on tribal treaty taking 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.[130]

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[125] *Sohappy,* 302 F. Supp. at 907 (quoting *Puyallup I,* 391 U.S. at 399).
[126] *Id.* at 907–08, (citing *Puyallup I,* 391 U.S. at 398–399; *Tulee,* 315 U.S. at 684–85; *Holcomb*, 382 F.2d at 1013–15; *Maison*, 314 F.2d at 171–74; *Makah Indian Tribe*, 192 F.2d at 226).
[127] *Sohappy,* 302 F. Supp. at 908 (interpreting *Puyallup I,* 391 U.S. at 398–399).
[128] *Id.* at 908.
[129] *Id*. 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).
[130] *Sohappy,* 302 F. Supp. at 908, restating the *Maison* interpretation of *Tulee* that *Puyallup I* ignored. *See Maison,* 314 F.2d at 172.

Restrictions on both the time and manner of treaty fishing, including the type of gear the treaty fishermen use, had to meet those requirements. Belloni also reiterated *Maison's* holding that the treaties reserved no rights for non-Indians.[131] 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. Belloni determined that the state failed to meet these standards in *Sohappy*; consequently, the state's regulation unlawfully discriminated against treaty rights.[132]

The *Puyallup* Court had 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."[133] 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. 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.[134] This combination effectively prohibited treaty fishermen from harvesting, imposing the full conservation burden on the tribes. 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.

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[131] *Sohappy,* 302 F. Supp. at 909, 911 (citing *Maison,* 314 F.2d at 174).

[132] *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).

[133] *Id.* at 911 (citing *Puyallup I,* 391 at 398).

[134] *See* Harrison, *supra* note 17, at 708; *see also Sohappy,* 302 F. Supp. at 908–911 (noting that the state set escapement goals (i.e., fish that "escaped" harvest) for 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 infra* notes 151–152 and accompanying text.

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.[135] He then dismissed the state's contention that statehood diminished treaty fishing rights.[136] 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. 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.'[137]

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.[138] Judge Belloni promptly amended his 1969 order to apply that allocation to the Columbia.[139] 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.[140] The Ninth Circuit emphasized that the 1974 order simply defined the amount required by the 1969 "fair share" ruling, which was necessary given the states' failure to manage their resources in a manner that complied with Belloni's 1969 decree.[141] With the "fair share" tied to a specific percentage of

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[135] *Sohappy,* 302 F. Supp. at 912, citing *Makah Indian Tribe*, 192 F.2d at 225.
[136] *Sohappy,* 302 F. Supp. at 912, citing *Puyallup I,* 391 U.S. at 400; *Holcomb,* 382 F.2d at 1014.
[137] *Sohappy,* 302 F. Supp. at 911.
[138] United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).
[139] 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).
[140] *Id.* at 573.
[141] *Id.*

fish, Belloni ensured that the treaty fishermen had a more substantial, concrete harvest share to measure whether the state fairly allocated fish runs.

The Belloni decision marked a turning point in the courts' recognition of treaty fishing rights. 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* decision seemed to undermine the previous year.[142] Judge Belloni 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.[143] 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.[144]

IV. The Effect of the Belloni Decision

This section 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.[145] The decision effectively required Oregon to completely change its management of salmon harvests on the Columbia River.[146] 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

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[142] *See supra* notes 82–93 and accompanying text.
[143] *See supra* notes 129-130 and accompanying text.
[144] *See infra* notes 153-77 and accompanying text.
[145] *Sohappy,* 302 F. Supp. at 911.
[146] *See* Harrison, *supra* note 17, at 708.

participate meaningfully" in the regulation of the fishery,[147] 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.[148] 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.[149] Not until 1977 did the states actually develop a plan incorporating the principles Belloni established in his 1969 degree. 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.[150]

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. In contrast, the non-Indian sport and commercial fisheries were primarily below the dam. 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-

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[147] *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."); *see* Harrison, *supra* note 17, at 713.

[148] *See* Weaver, *supra* note 129, at 681; Harrison, *supra* note 17, at 709; Gartland, *supra* note 95.

[149] *Sohappy,* 302 F. Supp. at 912; *see* Harrison, *supra* note 17, at 713 (describing Belloni's continual efforts to encourage the parties to cooperate over the next decade).

[150] *See* Harrison, *supra* note 17, 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 at 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 (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 (1984) (analyzing the ensuing restoration plan). *See also infra* note 178.

treaty fishermen.[151] 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.[152]

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. 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. Judge Belloni grew weary of waiting for the states to develop a more comprehensive management plan that involved tribal cooperation to ensure a fair share allocation of the harvests.[153] Therefore, in 1975 he ordered the tribes and states to cooperate on developing a comprehensive fish management plan. His 1975 order reflected the importance of tribal sovereign control over natural resources in which they possessed reserved rights.[154] 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."[155] 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 used to resolve fishing conflicts for decades.

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[151] *See* Harrison, *supra* note 17, at 714; A Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries above Bonneville Dam (1977) (entered into pursuant to *Sohappy v. Smith,* 302 F. Supp. 899 (D. Or. 1969) [hereinafter "1977 Management Plan"].

[152] *See* Gartland, *supra* note 95, at 695.

[153] *See* Harrison, *supra* note 17, at 709, 716.

[154] Sohappy v. Smith, No. 68-513 (D. Or. Aug. 20, 1975) (Order at 5); discussed in Harrison, *supra* note 17, at 716; *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 (2000), discussing Settler v. Lameer 507 F.2d 231, 238 (9th Cir. 1974) (recognizing the Yakama Tribe's right exercise police powers at off-reservation usual and accustomed fishing grounds with respect to tribal members exercising treaty rights); 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).

[155] Goodman, *supra* note 154, at 336; *see infra* notes 156–78 and accompanying text.

After nearly a decade of more litigation and extensive negotiations, the tribes and states finally adopted a five-year co-management plan in 1977. The plan called for joint management and fair allocation of the harvestable fish.[156] 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. Nor did the plan address regulation of ocean harvest or fishing locations, times, or quotas.[157] 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–80s, Alaska and British Columbia fishers harvested a majority of Columbia River harvests.[158]

The 1977 plan expired in 1982. The next year, the parties were back in court, litigating the same conservation issues over which the parties struggled since the 1969 *Sohappy* decision.[159] 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.[160] 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.[161] District Judge Walter Craig—one of Judge Belloni's successors[162]—determined that the states' regulations failed to

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[156] Columbia River Inter-Tribal Fish Comm'n, *Columbia River Fish Management Plan* (last visited Mar. 3 2019), https://plan.critfc.org/vol1/tribal-restoration-plan/legal-institutional-overview/the-institutional-context/the-columbia-river-fish-management-plan/; *see* Gartland, *supra* note 95, at 700. *See also* 1977 Management Plan, *supra* note 151.

[157] *See* United States v. Oregon, 699 F. Supp. 1456, 1459 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990); discussed in Harrison, *supra* note 17, at 709, 717–18.

[158] Interview with Laurie Jordan, Columbia River Inter-tribal Fish Commission (Feb. 28, 2019) [hereinafter "Jordan Interview"]. On the salmon harvests of Columbia River-origin fish off the coasts of British Columbia and Alaska, which eventually led Canada and the U.S. to agree to the Pacific Salmon Treaty in 1985 and amendments in 1999, see SACRIFICING THE SALMON, *supra* note 6, at 161-72.

[159] *See* Harrison, *supra* note 17, at 709, 720.

[160] Oregon and Washington have shared concurrent jurisdiction over the Columbia River since 1853. Act of Mar. 2, 1853, 10 Stat. 172 (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).

[161] United States v. Oregon, 769 F.2d 1410, 1413 (9th Cir. 1985).

[162] 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

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. Consequently, the court enjoined the states from enforcing the 1983 regulations and ordered the tribes and states to negotiate a new management plan.[163] 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, U.S. v. Oregon,* and *Sohappy,* and therefore violated the tribes' treaty rights.[164]

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.[165] 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.[166]

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.[167] The plan also called upon

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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.

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

[164] Idaho intervened in *United States v. Oregon* in 1983. 745 F.2d 550 (9th Cir. 1984); 769 F.2d 1410, 1413 (9th Cir. 1985) (citing Puyallup I, 391 U.S. 392, 398 (1968).

[165] The five tribes are the four mentioned *supra* note 119, 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* Columbia River Inter-Tribal Fish Comm'n, *Columbia River Fish Management Plan* (last visited Mar. 3 2019) https://plan.critfc.org/vol1/tribal-restoration-plan/legal-institutional-overview/the-institutional-context/the-columbia-river-fish-management-plan. *See also* Goodman, *supra* note 154, at 349.

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

[167] Summary of *U.S. v. Oregon* and the Columbia River Fish Management Plan 2 (1988); Columbia River Fish Management Plan 2 (Oct. 7, 1988).

both the tribes and states to construct new hatcheries on some of the Columbia River tributaries in order to increase salmon run sizes,[168] 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. These dispute resolution procedures reflected the parties' growing sophistication in how to cooperatively manage the fishery.[169]

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.[170] The 2008 plan reestablished a co-management framework that reduced the need for court resolution of disputes.[171]

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.[172] Because the state and tribes have differing views on the effect of hydropower operations,[173] this new agreement was basically a continuation

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[168] *Id*. 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 109-28.

[169] Jordan Interview, *supra* note 158; *see also* Goodman, *supra* note 154, at 350 (describing the plan's provisions for dealing with disputes and the changing circumstances of the fish runs).

[170] Jordan Interview, *supra* note 158; United States v. Oregon, 3:68–cv–00513–KI (# 2545, # 2546) (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) [hereinafter Tribes' Joint Memorandum in Support], at 5, United States v. Oregon, Order Dismissing Case Without Prejudice, No. 3:68-cv-0513-MO (D.C. Ore. May 21, 2018).

[171] Defendant State of Oregon's Response to Joint Motion to Reconsider, Alter or Amend March 19, 2018 Orders, at 2[“hereinafter Oregon's Response to Joint Motion"], *United States v. Oregon*, No. 3:68-cv-0513-MO.

[172] *United States v. Oregon*, Order Approving 2018–2027 *United States v. Oregon* Management Agreement, No. 3:68-cv-0513-MO.

[173] *See* Tribes' Joint Memorandum in Support, *supra* note 170, at 6. One disagreement concerned to 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 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).

of the 2008 agreement.[174] 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.[175] The plan does, however, provide the parties a procedural framework within which to attempt to resolve hydropower versus conservation goals in the future.[176]

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.[177] Although they have often 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.[178] Considering the decades of tribal-state

[174] Jordan Interview, *supra* note 158; Tribes' Joint Memorandum in Support, *supra* note 170, at 6.

[175] Those issues have been left to Endangered Species Act litigation before another federal judge in the district court of Oregon, Michael Simon. *See, e.g.,* Michael C. Blumm, Julianne Fry & Olivier Jamin, *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 (2017) (examining the failure of the federal 2014 biological opinion to satisfy the Endangered Species Act); 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 the Ninth Circuit's affirmation of the district court's injunction that required federal agencies to spill water at federal dams to facilitate downstream salmon migration).

[176] Columbia River Fish Management Plan, *supra* note 167, at 2 (discussing the dispute resolution procedures laid out to help parties resolve conflicts); Tribes' Joint Memorandum in Support, *supra* note 169, at 6, 23 (discussing the benefits of the "continuing procedural framework" allowing the parties to resolve continuing disputes).

[177] United States' Memorandum in Support of Joint Motion to Reconsider, Alter, or Amend this Court's March 19, 2019 Orders Pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6) [hereinafter "U.S. Memorandum in Support"], *United States v. Oregon*, No. 3:68-cv-0513-MO; Oregon's Response to Joint Motion, *supra* note 171, at 2 (recognizing the "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 158; Harrison, *supra* note 17, 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) [hereinafter "Washington's Response to Joint Motion"], at 3; United States v. Oregon, No. 3:68-cv-0513-MO (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").

[178] Columbia River Fish Management Plan, *supra* note 167, at 2; *see* Harrison, *supra* note 17, at 713–15. 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.A. §§ 839–839h (1980). Although that program is not a co-management plan, tribes have an important consultative role in its development and implementation. *See* Northwest Info. Center v. Northwest Power Planning Council, 35 F.3d 1371 (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,

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 represented 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 of elements of the plans throughout the last fifty years, and the reviewing court has been essential to resolving these disputes.[179]

So it was quite a surprise when, in March 2018, District Judge Michael Mosman—another of Judge Belloni's successors[180]—in approving the 2018 plan, unexpectedly dismissed the case without prejudice.[181] 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.[182]

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'

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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 Endangered Species Act concerning 13 listed salmon species. *See, e.g.,* Blumm & DeRoy, *supra* note 175, 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).

[179] Jordan Interview, *supra* note 158 (explaining that the parties have often disagreed on whether and how to implement methods of conserving endangered fish species in the face continued hydropower operations).

[180] Judge Mosman was assigned the case in 2018.

[181] United States v. Oregon, Order Approving 2018–2027 *United States v. Oregon* Management Agreement, No. 3:68-cv-0513-MO (D.C. Ore. March 19, 2018); United States v. Oregon, Order Dismissing Case Without Prejudice, No. 3:68-cv-0513-MO at 2 (D.C. Or. Mar. 19, 2018).

[182] 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, 2019 Orders Pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6) [hereinafter "Plaintiff's Joint Motion"], *United States v. Oregon*, Order Dismissing Case Without Prejudice, No. 3:68-cv-0513-MO (D.C. Or. May 21, 2018); U.S. Memorandum in Support, *supra* note 177; State of Idaho's Memorandum in Support of Joint Motion (Ecf 2617) to Reconsider, Alter, or Amend this Court's March 19, 2018 Orders Pursuant to Fed. R. Civ. P. 59(E) and 60(B)(6) [hereinafter "Idaho's Response to Joint Motion"], *United States v. Oregon*, No. 3:68-cv-0513-MO (D.C. Ore. May 21, 2018); Oregon's Response to Joint Motion, *supra* note 171; Washington's Response to Joint Motion *supra* note 177.

negotiations.[183] 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 plan."[184] 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.[185]

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.[186] The federal government responded to Judge Mossman'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 restrictions should such review become necessary."[187] 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.[188]

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[183] U.S. Memorandum in Support, *supra* note 177, at 4; Tribes' Joint Memorandum in Support, *supra* note 170, at 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); United States v. Oregon, 718 F. 2d 299 (9th Cir. 1983) (upholding an injunction against a Compact regulation that restricted the geographical area of a treaty fishery).

[184] Tribes' Joint Memorandum in Support, *supra* note 170, at 5.

[185] U.S. Memorandum in Support, *supra* note 177, at 14; Oregon's Response to Joint Motion, *supra* note 171, at 2 (recognizing the "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 158.

[186] U.S. Memorandum in Support, *supra* note 177, at 15; *see also* Tribes' Joint Memorandum in Support, *supra* note 170*,* at 5, 15–19 (stating that the court's continuing jurisdiction assists the parties in resolving disputes before the disputes reach the court).

[187] U.S. Memorandum in Support, *supra* note 177, at 13, quoting Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969).

[188] U.S. Memorandum in Support, *supra* note 177, at 5; Tribes' Joint Memorandum in Support, *supra* note 170, at 25–26.

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.[189] What this means is not quite clear going forward in terms of the continuing jurisdiction established in Judge Belloni's 1969 decision. The parties expressed the unanimous sentiment that the court maintain a continuing role interpreting the effect of treaty rights on long-term fish harvests and conservation issues.[190]

One factor that distinguishes this case from others is that all the parties in *U.S. 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.[191] The court's continuing jurisdiction thus provides a forum on which to resolve disagreements without running into sovereign immunity obstacles. A half-century after Judge Belloni retained continuing jurisdiction over the case, all parties in the case opposed a judicial dismissal.[192] 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 interpretation[193] to dismiss the state's allegation its facially nondiscriminatory regulation was as unsupportable,[194] as it was inconsistent with "history, anthropology, biology,

[189] *United States v. Oregon*, Order Granting Parties Request for Clarification and Amending the Order Approving 2018-2027 *United States v. Oregon* Management Agreement, No. 3:68-cv-0513-MO at 2 (Dist. Ct. Ore. May 21, 2018).
[190] *See, e.g.,* U.S. Memorandum in Support, *supra* note 177, at 9, 10; Tribes' Joint Memorandum in Support, *supra* note 170, at 5–6, 12.
[191] *See supra* note 115 and accompanying text.
[192] U.S. Memorandum in Support, *supra* note 177, at 5; Tribes' Joint Memorandum in Support, *supra* note 170, at 25–26; Oregon's Response to Joint Motion, *supra* note 171; Idaho's Response to Joint Motion, *supra* note 182; Washington's Response to Joint Motion, *supra* note 177.
[193] *See supra* notes 121-23 and accompanying text.
[194] *See supra* notes 124-26 and accompanying text.

prior case law, and the intention of the parties to the treaty."[195] Despite the Supreme Court's cursory treatment of the state regulation at issue in *Puyallup I*,[196] he insisted that the state demonstrate that its regulation was both nondiscriminatory and required for the perpetuation of the species.[197]

Belloni's interpretation of the conservation necessity defense required the state to treat the tribal fishery separate from the non-Indian fishery,[198] 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.[199] 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 substantive fairness, has stood the test of time.[200] The Supreme Court, in its recent *Wyoming v. Herrera* decision, reaffirmed the centrality of the conservation necessity defense.[201] Future interpretations of the application of conservation necessity will likely start with the Belloni's interpretation of the defense.

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 that the tribes' "meaningful participation" in the regulatory process.[202] 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 urged the court to

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[195] *See supra* note 120 and accompanying text.
[196] *See supra* notes 79-93 and accompanying text.
[197] *See supra* note 127 and accompanying text.
[198] *See supra* text between notes 119 and 120 (rejecting the state's argument that it need not treat the tribal fishery separately).
[199] *See supra* text following note 128.
[200] *See infra* notes 215 (discussing *People v. Le Blanc*), 216-222 (discussing *La Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin),* 223-226 (discussing the lower court decision in *Mille Lacs Band of Chippewa Indians v. Minnesota*) and accompanying text.
[201] *See supra* notes 63-64 and accompanying text.
[202] *See supra* notes 144, 179 (continuing jurisdiction), 147 (meaningful participation) and accompanying text.

restrain the state's regulatory discretion.[203] 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.[204]

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,[205] 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.[206] 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 Supreme Court.[207] Going forward, the Belloni decision's effect on other judges will be its chief legacy.

VII. CONCLUSION

The Belloni decision altered the trajectory of state regulation of treaty fishing rights. Only the year before, the Supreme Court's *Puyallup* decision seemed to lower the bar for the requirements state regulations had to meet in order to restrict treaty fishing rights.[208] 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

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[203] *See supra* notes 103, 109-16 and accompanying text.
[204] *See infra* note 210.
[205] *See* CRITFC's website, https://www.critfc.org/.
[206] *See supra* note 178 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 evaluation 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).
[207] *See infra* notes 227-233, 236 and accompanying text (discussing *Cougar Den v. Dept of Licensing* and *Washington v. Buchanan*) and accompanying text.
[208] *See supra* notes 75-93, discussing *Puyallup I's* apparent erosion of treaty rights.

bar for state regulation by requiring that the regulations be the least restrictive means possible for ensuring that conservation needs are met.[209]

In a larger sense, the Belloni decision is a reminder of the critical role that federal courts can play a counterweight to democratic decisionmaking—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.[210] Official resistance was widespread: as the Ninth Circuit recognized in affirming Judge Boldt's 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."[211] So, while the Belloni decision came over eight decades after federal courts first began to interpret the meaning of the Stevens Treaties,[212] 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.[213] The surprising metamorphosis of those state courts is a product of federal court decisions like Judge Belloni's.

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.[214] 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.

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[209] *See supra* notes 129-130 and accompanying text.

[210] For example, 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* Thomson Reuters, *United States v. Washington*, 1974-85 (vol. 1), 1985-2012 (vol. 2) (2015).

[211] Puget Sound Gillnetters v. U.S. District Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

[212] *See supra* notes 28-31 and accompanying text (discussing *United States v. Taylor*).

[213] *See supra* note 229.

[214] *See supra* notes 181-189 and accompanying text (discussing Judge Mossman's curious "administrative closure" of the case).

The evolution and implementation of these plans may serve as examples for other natural resources in need of co-management, and they almost certainly would not exist without the prodding and patience of a wise federal judge.

Judge Belloni well understood the educative and meditative roles that a federal court can play concerning longstanding and controversial issues like state regulation of treaty fishing rights. His example is one that has, so far, endured.

APPENDIX: THE INFLUENCE OF THE BELLONI DECISION IN OTHER COURTS

Judge Belloni's decision has influenced other courts' interpretation of treaty-reserved usufructuary rights.[215] For example, in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, after the Seventh Circuit ruled that the tribe's treaty rights to hunt, fish, trap and gather off-reservation survived Public Law 280—which required transfer of federal law enforcement authority within certain tribal nations to state governments in six states—the Western District of Wisconsin considered whether state regulation met appropriate standards.[216] The state argued that it could regulate treaty usufructuary rights for both conservation necessity purposes and "[for] any other permissible purpose.'"[217] The court rejected this interpretation and, relying on *Sohappy,* held that the state could regulate off-reservation treaty rights only if the regulation was non-discriminatory and necessary for conservation of the resource.[218] According to the court, "conservation" meant "the perpetuation of a species or resource as well as measures designed to ensure a reasonable margin of safety against extinction," while "necessary" required

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[215] In addition to cases that rely heavily on *Sohappy* (discussed *infra* notes 194-208 and accompanying text), a couple of other cases reference *Sohappy*. *See* Great Lakes Inter-Tribal Council, Inc. v. Voigt, 309 F. Supp. 60, 64 (W.D. Wis. 1970) (citing *Sohappy* for its holding that state sovereign immunity under the Eleventh amendment did not bar the action against state officials); Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (1974) (holding that the Eleventh Amendment bars the tribes action against state officials for money damages and cited *Sohappy* only for its recognition that there are certain circumstances in which suit against a state official is not barred.); People v. Le Blanc, 399 Mich. 31, 248 N.W.2d 199 (1976) (citing *Sohappy* as support for its holding that the state can only regulate treaty fishing if necessary for the conservation of the fish, and that the state cannot subordinate the treaty fishermen's rights to those of other citizens).

[216] 668 F. Supp. 1233, 1235 (W.D. Wis. 1987) (interpreting 18 U.S.C. § 1162, saving treaty and statutory hunting, trapping, and fishing rights from state regulation).

[217] *Id.* at 1237.

[218] *Id.* at 1235–1236.

the state to show that limiting the taking of the species in question was needed, and there was no alternative of accomplishing conservation than limiting tribal harvests.[219]

The court cited *Sohappy* in announcing that treaty rights "may not be subordinated to every state objective or policy."[220] However, because the tribe's usufructuary rights encompassed hundreds of resources rather than just fish, the court ruled that the state could regulate to preserve public safety,[221] breaking ground not trod by Judge Belloni. The court then reiterated *Sohappy's* limitation on state regulatory powers in holding that the state could not regulate "treaty rights for any purpose."[222]

Another case relying on *Sohappy* was the district court decision in *Mille Lacs Band of Chippewa Indians v. Minnesota* ("*Mille Lacs III*),[223] an off-reservation treaty rights case in which the Supreme Court eventually upheld the lower court's determination that the treaty rights survived a series of congressional and executive actions.[224] The court discussed *Sohappy* in some depth, rejecting the state's claim that Judge Belloni's statement that tribal consent was not required for state regulation of treaty rights meant that the state's determinations were

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[219] *Id.* at 1235-36 (citing *Sohappy*, 302 F.Supp. at 908).

[220] *Id*. at 1237 (quoting *Sohappy,* 302 F.Supp. at 908) ("'The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource.'").

[221] *Id.* at 1238.

[222] *Id*. (suggesting the example of tourism as a legitimate state interest that nonetheless did not justify regulation of treaty usufructurary rights).

[223] 952 F. Supp. 1362 (D. Minn. 1997), *aff'd,* 124 F.3d 904 (8th Cir. 1997), *aff'd sub nom.* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999). The district court had earlier decided, in Phase I of the case, that the Mille Lacs Band's treaty rights ("the privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians"), survived a number of congressional and executive actions, and therefore continued to exist. *Mille Lacs Band of Chippewa Indians*, 864 F.Supp. 102, 105–106 (D. Minn. 1994). In Phase II of the litigation, addressing issues of resource allocation and the validity of state regulation measures the exercise of the treaty rights, the court ruled that under the standard established by *Puyallup, Lac Courte Oreilles Band,* and *Mille Lacs*, the state's regulation of treaty usufructuary rights must be non-discriminatory and reasonably necessary for conservation or necessary for public health and safety. *Mille Lacs Band of Chippewa Indians*, 952 F.Supp. at 1366, 1369.

[224] *Id.* at 1369 (citing Puyallup Tribe v. Dept. of Game, 391 U.S. 392, 398 (1968); Lac Courte Oreilles Band v. Wisconsin, 668 F.Supp. 1233, 1241–42. (W.D.Wis.1987); Mille Lacs Band of Chippewa Indians v. Minn. [*"Mille Lacs II*"], 861 F. Supp. 784, 838–839 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd sub nom*. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)).

unreviewable.[225] The court instead pointed to Belloni's ruling that "[t]he state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource."[226] The *Mille Lacs* court thus fully endorsed *Sohappy*'s recognition of the limits that treaty rights impose on state police power regulation.

The Supreme Court recently decided a case in which the Court reiterated the validity of the canons of construction to interpret treaty rights. In *Washington State Dept. of Licensing v. Cougar Den*, the 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.[227] The Yakama treaty expressly reserved to the tribe the "right, in common with citizens of the United States, to travel upon all public highways."[228] 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.[229] Incorporating the same canons of treaty construction as invoked in *Winans, Tulee, Seufert Brothers,* and *Fishing Vessel*, the Court majority declared that the treaty language "in common with" must be interpreted as the Yakama would have understood it.[230] As a result, the Court decided that the Yakama treaty, which reserved to Yakama members

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[225] *Mille Lacs III*, 952 F. Supp. at 1372–75.

[226] *Id.* at 1373.

[227] 586 U. S. __, 139 S.Ct. 1000 (2019).

[228] Yakama Nation Treaty of 1855, U.S.-Yakama Nation, art. 3, June 9, 1855, 12 Stat., 951: "If necessary for the public convenience, roads may be run through the 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 upon all public highways."

[229] Cougar Den v. Dept of Licensing, No. 14-2-03851-7, 2015 WL 13762927 (Wash. Super. Aug. 18, 2015), *aff'd,* Cougar Den, Inc. v. Dep't of Licensing, 188 Wash. 2d 55 (2017), *aff'd*, 139 S. Ct. 1000 (2019). The Supreme Court majority consisted of a three-justice plurality penned by Justice Breyer (joined by Justices Sotomayor and Kagan) and a two-member concurrence written by Justice Gorsuch (joined by Justice Ginsberg). The result was surprising, since the Court does not often review an Indian law decision in which the lower court favored the tribe and affirm that result.

[230] *Cougar Den*, 139 S. Ct. at 1012, citing United States v. Winans, 198 U.S. 371, 380 (1905); Tulee v. Washington, 315 U.S. 681 684–85 (1942); Seufert Bros. v. United States, 249 U.S. 194, 198 (1919); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76, *modified sub nom*. Washington v. United States, 444 U.S. 816 (1979). The opinions in *Cougar Den* cited *Winans* more than a dozen times.

the right to travel on highways off-reservation, enabled the tribes to sell fuel on-reservation exempt from state taxation.[231]

A potentially revealing aspect of *Cougar Den* concerned the fact that the case was initially decided by a Washington state court and affirmed by the Washington Supreme Court.[232] Both courts recognized the validity of treaty rights and of the Indian canons of construction.[233] Given the sorry racist history of treaty fishing rights in Washington during the 20th century,[234] especially the Washington state courts' treatment of fishing rights in *Puyallup I*,[235] the *Cougar Den* case is a measure of how far the state courts have come in recognizing the validity of treaty

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[231] *Cougar Den*, 139 S. Ct. 1000 (2019). Justice Gorsuch's concurrence, which may show that a tribal advocate has ascended to the Court, was telling:

> Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakimas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dis-satisfied 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.

[232] Cougar Den Inc. v Dept. of Licensing, No. 14-2-03851-7, 2015 WL 13762927; 188 Wash. 2d 55 (2017).

[233] Id. at *2; 188 Wash. 2d at 61. Consider, for example, this statement from the Washington Supreme Court in State v. Towessnnute, 154 P.805, 807 (Wash. 1916):

[234] Consider, for example, this statement from the Washington Supreme Court in *State v. Towessnute*, 154 P. 805, 807 (Wash. 1916):

> 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. . . .
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> 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.

[235] *See supra* notes 73-74 and accompanying text; *see also* Dep't of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 247 (1967) (state restrictions on Indian fishing rights at usual and accustomed grounds and stations must be reasonable and necessary for preservation of the fishery), *aff'd sub nom*. Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968) (although Indian fishing rights at usual and accustomed places could not be qualified by the state, but the state could regulate the manner of fishing and the size of take and impose restrictions on commercial fishing); Dep't of Game v. Kautz, 70 Wash. 2d 275, 275 (1967) (upholding a temporary reduction of Indian fishing rights for conservation purposes), *aff'd sub nom.* Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968).

fishing rights.[236] That too may be counted as a legacy of the foresight displayed in Judge Belloni's historic opinion a half-century ago.

[236] For a similarly sensitive treatment of treaty hunting rights by the Washington Supreme Court, see Washington v. Buchanan, 978 P.2d 1070 (Wash. 1999) (deciding that the treaty hunting right could extended to land not expressly ceded in a treaty if they were historically used by tribal members).