American Indian Law Review

Volume 38 | Number 1

2013

State v. Jim: A New Era in Washington's Treatment of the Tribes?

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STATE V. JIM: A NEW ERA IN WASHINGTON'S TREATMENT OF THE TRIBES?

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I. Introduction

A recent case from the Washington Supreme Court may mark a change in the attitude that the state has historically held toward Native Americans and their treaty rights. In *State v. Jim*,[1] the Washington Supreme Court, in a 6-3 decision, denied the assertion of the state's criminal jurisdiction in a congressionally designated treaty fishing site. Acting in the absence of clear congressional intent, the court resolved the ambiguity in favor of the tribes, ruling that tribal reservations extend to certain exclusively reserved fishing

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1. 273 P.3d 434, 441 (Wash. 2012).

sites.[2] This conclusion, far from unavoidable, could signal a much welcome change in the relationship between the state of Washington and the Northwest tribes.

Prior to the arrival of European settlers, Native Americans in the Pacific Northwest enjoyed an abundance of natural resources, most notably anadromous fish.[3] Many of these tribes made a "seasonal round" throughout the year, moving from one harvest to the next.[4] For the Columbia River Treaty tribes, fish were, and arguably still are, the most important natural resource.[5] The fish are a cornerstone of their culture and identity.[6]

During the years "1854 and 1855, the United States executed nine treaties with twenty-three tribes" [7] in the Pacific Northwest to foster rapid non-Native development. In exchange for ceding vast areas of land, these treaties reserved the right of treaty tribes to harvest fish "at all usual and accustomed stations."[8] Due to the incredible importance of fish to the Native American lifestyle, they would not have signed the treaties without this promise.[9] But the implications of such a promise by the United States federal government are still not fully understood.[10]

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2. *Id.* at 437-38.

3. 1 COLUMBIA RIVER INTER-TRIBAL FISH COMM'N (CRITFC), WY-KAN-USH-MI WA-KISH-WIT, SPIRIT OF THE SALMON: THE COLUMBIA RIVER ANADROMOUS FISH RESTORATION PLAN OF THE NEZ PERCE, UMATILLA, WARM SPRINGS, AND YAKAMA TRIBES 3-1 (1995), *available at* http://docs.stream netlibrary.org/CRITFC/trpv1_full.pdf.

4. *Id.* at 2-7.

5. William Fisher, Note, *The Culverts Opinion and the Need for a Broader Property-Based Construct*, 23 J. ENVTL. L. & LITIG. 491, 510 (2008).

6. COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 3, at 2-4.

7. Vincent Mulier, *Recognizing the Full Scope of the Right to Take Salmon Under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 AM. INDIAN L. REV. 41, 41 (2006-2007).

8. *Id.* at 42 (citing Treaty Between the United States and the Yakama Nation of Indians, arts. I-III, June 9, 1855, 12 Stat. 951).

9. CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 12 (2000).

10. *See* Fisher, *supra* note 5, at 494; *see also* Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The* Martinez *Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RESOURCES J. 653, 704-05 (2009); Ruth Langridge, *The Right to Habitat Protection*, 29 PUB. LAND & RESOURCES L. REV. 41, 41 (2008); O. Yale Lewis III, Comment, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281, 281 (2002-2003).

Native American tribes have generally faced an uphill battle in enforcing these treaty fishing rights, and throughout history the states have been the tribes' worst enemies. The state of Washington and the Washington Supreme Court have been no exception.[11] When it comes to honoring tribal rights to salmon, Washington has been reluctant to say the least.[12] The state's treatment of the tribes has necessitated strong federal rulings vindicating tribal rights, and even federal "fishmasters" to intervene in state fishing activities on behalf of the tribes.[13]

Though the exact contours of the fishing rights guaranteed in the Stevens treaties are still unclear, the most fundamental right involved is a right of access to traditional fishing spots.[14]

Still, Washington State has been slow even to recognize this right.[15] More significantly, even where access to these sites was recognized and not inhibited, it has rarely been thought that the State lacked criminal jurisdiction in these areas. These sites were considered to lie outside of the established Indian reservations and therefore within state jurisdiction.

Through Public Law 280, Congress gave several states the ability to assume jurisdiction over Indian Country, which was later amended to require Indian consent.[16] Before the amendment, Washington lawfully asserted criminal jurisdiction over Indian land, with the exception of Indians on tribal lands or allotted lands within an established reservation, and held in trust by the United States government.[17]

On June 25, 2008, Lester Ray Jim was cited by the State of Washington for unlawful use of a net and unlawfully retaining undersized sturgeon, which he caught incidentally with a gill net while commercial fishing.[18] Jim, a citizen of the Yakama Nation, was fishing at the Maryhill Treaty Fishing Access Site, which Congress set aside exclusively for use by the

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11. *See* discussion *infra* Part II.

12. *See* discussion *infra* Part II.

13. Blumm & Steadman, *supra* note 10, at 669-70.

14. Brian E. Schartz, Student Article, *Fishing for a Rule in a Sea of Standards: A Theoretical Justification for the Boldt Decision*, 15 N.Y.U. ENVTL. L.J. 314, 316 (2007).

15. *See generally* WILKINSON, *supra* note 9.

16. State Jurisdiction Over Offenses Committed by or Against Indians in the Indian Country, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2012); 25 U.S.C. §§ 1321-1326 (2012); 28 U.S.C. § 1360 (2012)).

17. Indians--Criminal and Civil Jurisdiction of State, 1957 Wash. Sess. Laws 941; *see also* Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 499, 502 (1979) (holding that WASH. REV. CODE § 37.12.010 complies with Public Law 280 and is constitutional).

18. State v. Jim, 273 P.3d 434, 435 (Wash. 2012).

Columbia River Treaty tribes in 1988, as an exercise of the tribe's treaty fishing rights.[19] Though his act violated state law, it was not a violation of Yakama Nation tribal law.[20] Jim claims that he was in Indian Country and on an established reservation, and therefore tribal fishing law should apply.[21] The State claimed criminal jurisdiction over the fishing site under Public Law 280 and section 37.12.010 of the Revised Code of Washington, but the Washington Supreme Court, perhaps departing from its traditional stance on tribal rights, ruled that the State lacked criminal jurisdiction.[22]

In light of the State's history, this liberal interpretation of tribal power--limiting the State's criminal jurisdiction in Treaty Fishing Access Sites (TFASes)--may be significant. In fact, it marks a departure from the court's historical treatment of Native American rights, one that simultaneously extends tribal jurisdictional authority.

Northwest tribes have been dealt a harsh hand by state governments since the arrival of white settlers. Of particular interest is the difficulty tribes have had in securing their most important natural resources--fish. The road toward fully recognized fishing treaty rights has been a slow and painful one, and the charge has almost always been led by Federal courts.[23] The State's regulation of fishing activities has often clashed with tribal treaty rights, and the state (with the help of its courts) has often succeeded in making life difficult for Indian fisherman.[24] In the midst of this clash, the State's criminal jurisdiction has always been thought to cover traditional fishing spots. Usual and accustomed fishing sites were not thought of as being part of any Indian reservation.[25]

In the middle of a long struggle to have their fishing rights fully recognized and their tribal sovereignty honored, the tribes have received a much welcomed, and perhaps unexpected, helping hand from the

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19. *Id.*

20. *Id.* at 676 ("While both state and tribal law restrict the retention of undersized sturgeon, only state statute makes it unlawful to '[f]ail[] to return unauthorized fish to the water *immediately*.' Tribal law allows '[a]ll Yakama members . . . a *reasonable opportunity* to release alive any sturgeon of prohibited length incidentally caught in authorized fisheries.'" (alteration in original) (citations omitted)).

21. Supplemental Brief of Respondent at 7-8, *Jim*, 273 P.3d 434 (No. 84716-9).

22. *Jim*, 273 P.3d at 437.

23. Schartz, *supra* note 14, at 316 ("The Boldt decision's 50% rule was the culmination of almost seventy years of federal case law that slowly expanded the scope of Indian fishing rights.").

24. *See* discussion *infra* Part II.

25. *See, e.g.*, United States v. Winans, 198 U.S. 371, 381 (1905) (allowing access over private property in order to gain access to fish).

Washington State Supreme Court. Simply put, the Washington Supreme Court would not have produced a ruling like this one thirty years ago, and it may mark a welcome change in the strained relationship between Washington State and the Northwest tribes.

Part II explains the history leading up to the treaty between the United States government and the Yakama Nation, and how the treaty has been interpreted. Part III outlines the historic relationship between Washington and the Yakama nation as it relates to fishing rights, and introduces *State v. Jim*. Part IV traces the criminal jurisdiction on Indian lands, and how the court applied relevant statutes to the Maryhill site at issue in *Jim*. Part V explains possible future implications of the *State v. Jim* decision, and in conclusion the author states that this ruling has major positive implications for the future of tribal governments in the State of Washington.

II. Background

It is difficult to summarize or even describe the effect that European arrival has had on Native Americans. Indians have "long suffered under the cultural oppression of European and American societies."[26] Among the greatest cultural differences were the differing ways of viewing land and natural resources.[27]

Native Americans were largely hunter-gatherer societies with some cultivation activities.[28] The world-view of many tribes, prior to white contact, was premised on an usufructuary view of the universe.[29] Indian villages often moved from place to place "to find maximum abundance through minimal work" and "reduc[ing] their impact on the land"; the English "required permanent settlements" and had a different perspective on how to relate to their environment.[30] These clashing views were still prevalent in the 1800s when white settlement began to accelerate in the Northwest.[31]

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26. Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 166 (2000-2001).

27. WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 167 (1983).

28. *See* Dean R. Snow, *The First Americans and the Differentiation of Hunter-Gatherer Cultures*, *in* 1 THE CAMBRIDGE HISTORY OF THE NATIVE PEOPLES OF THE AMERICAS 125 (Bruce G. Trigger & Wilcomb E. Washburn eds., 1996).

29. JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 5 (2d ed. 2008).

30. CRONON, *supra* note 27, at 53.

31. *Id.* at 168.

The Lewis and Clark expedition of 1804 to 1805 sparked the Great Migration along the Oregon Trail, which began in 1843.[32] In the Pacific Northwest, white settlers encountered an Indian culture that was highly dependent on the abundance of salmon and steelhead trout.[33] "The regular salmon runs provided eighty to ninety percent of the diet of many of the tribes[,]" and "[a]nadromous fish have [always] been an integral part of Northwest Indian life . . . ."[34]

In the nineteenth century, the United States federal government offered non-Native settlers free land, abundant resources, and safety in exchange for inhabiting the West, while simultaneously "assur[ing] Indians that they would be able to live on their lands in peace."[35] The population of white settlers in the Northwest grew rapidly in the 1800s. For example, the non-Native population of Oregon grew from 50,000 in 1860, to 400,000 by 1900.[36] "By the turn of the century 1.1 million people lived in the [Northwest] states of Oregon, Washington, and Idaho."[37] In stark contrast, only 20,000 Natives lived in this same area, as their populations had experienced a 95 percent decline.[38]

The "invasion of [white] settle[ment]" often divested Indian people of all their "means of subsistence."[39] White settlers appeared unsympathetic to the Native inhabitants, who some assumed "must soon be swept from the face of the earth."[40] And the government did not keep its promises that Indians would be allowed to live peacefully on their lands.[41]

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32. ROYSTER & BLUMM, *supra* note 29, at 495.

33. Joe Robinson, *Catching Salmon by Court Order: Treaty Fishing Rights in Puget Sound*, ENVIRONS, Aug. 1986, at 1, http://environs.law.ucdavis.edu/issues/10/1/environs.pdf; *see also* Mulier, *supra* note 7, at 43 (discussing "the abundance of salmon, sturgeon, and lamprey that migrated annually through the region's rivers and streams").

34. Robert J. Miller, Comment, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 551-52 (1991) (saying that "From the earliest known times, these migrating fish figured prominently in Indian religious life, trade, and culture . . . ." (footnotes omitted)).

35. *In re* Adjudication of All Rights to Use Water in Gila River Sys. & Source, 35 P.3d 68, 75 (Ariz. 2001) [hereinafter *Adjudication*].

36. MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 65-67 (2002).

37. *Id.*

38. *Id.*

39. S. REP. NO. 102–133, at 2 (1991).

40. *Id.*

41. *In re* Adjudication of All Rights to Use Water in Gila River Sys. & Source, 35 P.3d 68, 75 (Ariz. 2001).

Facing growing pressure from incoming settlers, the Northwest Indians entered into a series of treaties with the United States. "In the early 1850s, [(after Washington was organized as a territory)], an increasing flow of American settlers poured into the lowlands of Puget Sound and the river valleys north of the Columbia."[42] Isaac Stevens, the superintendent of Indian affairs and the first man to serve as governor of Washington,[43] was commissioned to negotiate with the Natives.[44] In 1854, Stevens began to hold treaty councils with tribes across the state, eventually meeting eight different times with tribes from the Puget Sound to Great Falls, Montana.[45] Steven's goal was to "smooth the way for settlement by inducing the Indians of the area to move voluntarily onto reservations."[46]

A. The Treaty

To achieve westward expansion, "Congress chose treaties rather than conquest as the means to acquire vast Indian lands."[47] In fact, in just two years alone (1854 and 1855), "the United States executed nine treaties with twenty-three tribes and confederations of tribes and bands indigenous to the Columbia Basin and northwestern Washington."[48] The United States's strategy "in negotiating treaties with American Indian tribes was to gain land cessions and guarantees of peace so that American 'manifest destiny' and settlement of the American continent could proceed as peaceably as possible."[49] One of the tribes' purposes in negotiating the treaties was to reserve access to fisheries, which their lifestyle depended upon.

Treaties with tribes are "essentially . . . contract[s] between two sovereigns[,]"[50] and "[l]ike any treaty between the United States and

42. United States v. Washington, 520 F.2d 676, 682 (9th Cir. 1975).

43. BLUMM, *supra* note 36, at 57. Stevens was not only the government's treaty negotiator, but also "a surveyor of a potential transcontinental railroad." *Id.* He was "a young and ambitious politician . . . determined to facilitate rapid white settlement." *Id.* at 59.

44. *Washington*, 520 F.2d at 682.

45. Kent Richards, *The Stevens Treaties of 1854-1855: An Introduction*, 106 OR. HIST. Q. 342 (2005).

46. *Washington*, 520 F.2d at 682.

47. United States v. Washington, 384 F. Supp. 312, 330 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

48. Mulier, *supra* note 7, at 41.

49. Miller, *supra* note 26, at 189. The United States operated under the doctrine of discovery when exercising manifest destiny. *Id.* at 189 n.122.

50. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979); State v. Buchanan, 978 P.2d 1070, 1077 (Wash. 1999); *see also* Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 86 (2007) ("The powers vested in Indian tribes are inherent powers of a limited

another sovereign nation, [they are] the supreme law of the land and binding on the State until Congress limits or abrogates the treaty."[51]

Under the treaties, the tribal groups ceded approximately sixty-four million acres of land to the United States, achieving "one of the largest peaceful real estate transfers in the history of the world . . . ."[52] The treaties all had the same "essential elements," and reserved for the tribes small reservations as homelands.[53] Despite ceding "their nomadic lifestyle and most of their territory[,] [the tribes] were unwilling to give up the right to fish,"[54] reserving for themselves "the exclusive right of taking fish in the streams and rivers flowing through or bordering these reservations, and the right of taking fish 'in common with' non-Indians at off-reservation 'usual and accustomed' fishing sites."[55] Many of the Stevens treaties had provisions similar to that found in the Yakama Nation treaty,[56] which reserved a number of rights for the tribes, including:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.[57]

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sovereignty that has never been extinguished.").

51. *Buchanan*, 978 P.2d at 1077; *see also* U.S. CONST. art. VI, cl. 2 (mandating that "all Treaties 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."); United States v. Dion, 476 U.S. 734, 740 (1986) (requiring "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."); Antoine v. Washington, 420 U.S. 194, 201-03 (1975) (holding that Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so).

52. Blumm & Steadman, *supra* note 10, at 655.

53. Mulier, *supra* note 7, at 41.

54. Miller, *supra* note 34, at 552.

55. Mulier, *supra* note 7, at 41. Some tribes also exchanged land in treaties for "free medical care, schools, occupational training, and annuity payments." United States v. Washington, 157 F.3d 630, 638 (9th Cir. 1998).

56. United States v. Washington, 520 F.2d 676, 683 (9th Cir. 1975).

57. Treaty Between the United States and the Yakama Nation of Indians, *supra* note 8, at art. III.

Appearing "substantially the same in all of the Stevens Treaties, [the language of this paragraph] has been the subject of extensive litigation in both state and federal court during much of the last century."[58] Exactly what these treaties establish is still open to debate.[59]

These treaties were written in English and read aloud in English for the tribal members' commentary and endorsement, despite the fact that few Indians understood the language.[60] Negotiators attempted to translate the treaties into trade jargon common to the Northwest tribes,[61] at times translating it a second time into the specific language of the tribe involved.[62] Multiple translations only made the treaties' meaning more obscure.[63] Although Governor "Stevens had on his staff people who could interpret the Indians' native tongue . . . instead he chose to use Chinook."[64] The resulting translation could only convey "the basic nature of the treaty promises."[65]

Despite the treaties' ambiguity, "Indian tribes were mostly aware of what business was being conducted in treaty negotiations and generally they insisted on retaining in the treaties various rights that were crucial to their cultures and religions."[66] Before the treaties were signed, Columbia Basin Natives moved unrestrained throughout the basin, following the seasonal abundance.[67] The promise of permanent fishing rights was absolutely

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58. State v. Buchanan, 978 P.2d 1070, 1076-77 (Wash. 1999) (footnote omitted).

59. *See generally* Lewis, *supra* note 10, at 281 (suggesting that although many courts have tried to examine the elements of the fishing right, its meaning is still open to interpretation).

60. United States v. Washington, 384 F. Supp. 312, 330-31 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

61. Miller, *supra* note 34, at 553 (stating that the treaties were translated using Chinook jargon, which contained only 300 words and failed to convey complex concepts, causing dissension among legal scholars' interpretations).

62. Miller, *supra* note 26, at 191.

63. *Id.*

64. *Id.* at 553 n.70 (quoting Dumawish v. United States, 79 Ct. Cl. 530, 536-37 (1934)); *see also* WILKINSON, *supra* note 9, at 11.

65. Fisher, *supra* note 5, at 498 (citing United States v. Washington, 520 F.2d 676, 683 (9th Cir. 1975)). One interpreter, when asked by Stevens "whether he could get the Indians to sign" the treaties, went so far as to say, "I can get these Indians to sign their death warrant," leaving little doubt that much of the true meaning of the treaties was lost in translation. Alex Tizon, *25 Years After the* Boldt *Decision: The Fish Tale That Changed History*, SEATTLE TIMES (Feb. 7, 1999, 8:24 PM), http://community.seattletimes.nwsource.com/archive/?date=19990207&slug=2943039.

66. Miller, *supra* note 26, at 189.

67. COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 3, at 2-7.

essential to entering into a treaty with the United States,[68] and "[n]egotiators for the United States found they could not get the Indian tribes to cede their land without allowing the Indians to retain the right to fish."[69]

To the tribes, the right of taking fish was the most important clause in the treaty[70] because access to traditional fishing spots was "not much less necessary to the existence of Indians than the atmosphere they breathed."[71] The clause retained tribal freedom to leave the reservations and gain access to this vital resource at their accustomed locations.[72] Without the "promise of perpetual access to this . . . resource," it is doubtful that the Indians would have signed over such vast tracks of land.[73]

The sincerity with which Stevens and the United States government regarded their obligations in the midst of these negotiations remains questionable. In its somber history of negotiating with Native Americans, the United States government has subsequently broken treaty promises.[74] As for Native fishing rights, it is unclear whether Washington State's government officials ever really recognized this treaty right.[75] This attitude likely finds its roots in anti-Native sentiment that has been present from the United States's impetus.

From the birth of the nation, "[m]ost Americans believed that Indian tribes would just slowly disappear and die off as the American pioneers and settlers expanded the frontier and built new farms and cities . . . ."[76] The founding fathers assumed that Indians would not be on the continent for long.[77] In fact, the disappearance of Indian people was "both hoped for and

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68. United States v. Washington, 873 F. Supp. 1422, 1437 (W.D. Wash. 1994), *rev'd in part on other grounds*, United States v. Washington, 135 F.3d 618 (9th Cir. 1998).

69. Miller, *supra* note 34, at 543.

70. United States v. Washington (*Phase II Trial*), 506 F. Supp. 187, 190 (W.D. Wash. 1980), *rev'd in part on other grounds*, 694 F.2d 1374 (9th Cir. 1982).

71. United States v. Winans, 198 U.S. 371, 381 (1905).

72. Fisher, *supra* note 5, at 498.

73. *Id.* at 510.

74. *See generally* RUPERT COSTO & JEANNETTE HENRY, INDIAN TREATIES: TWO CENTURIES OF DISHONOR (1977); VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974).

75. WILKINSON, *supra* note 9, at 52-54.

76. Inst. for Tribal Gov't, Government-to-Government Desk Guide for Native American & Alaska Native Tribal Governments and the U.S. Department of Defense 47 (2007), *available at* http://www.denix.osd.mil/cr/upload/05-254_Desk-Guide_final_DENIX.pdf. This attitude was exemplified in George Washington's infamous "savage as wolf" letter in 1783. *Id.*

77. *See* Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 559 (2007); Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the*

legislated for by the United States Congress for over 150 years."[78] State and local governments often made every effort to force Native Americans to leave.[79] At the time the treaties were signed, salmon were thought to be inexhaustible, and Stevens likely believed that Native American peoples would disappear before the salmon did.[80]

However, more than 150 years after the Stevens treaties, the populations of most Indian tribes have experienced a period of growth,[81] and the Columbia River Treaty tribes are returning to pre-1855 population levels.[82] While much of the traditional culture of Indian life has disappeared, the role of salmon in modern Indian life has assumed an even greater significance,[83] placing continued importance on treaty fishing rights. Even today, fishing provides a vital part of the subsistence, livelihood, and remaining culture for many Indians in the Northwest.[84] "Without salmon returning to [their] rivers and streams," some believe that they would "cease to be Indian people."[85]

The Stevens Treaties' fishing rights were essential to the Native way of life, and were the central consideration for treaties that allowed non-Indian settlement.[86] "What Isaac Stevens could never have foreseen is that, more than a century later, courts would be confronted with vibrant Indian societies and his opaque phraseology about Indian fishing rights."[87] The process of interpreting these rights continues today.

21st Century, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 280 (1993).

78. Fletcher, *supra* note 50, at 79. *See generally* CHRISTINE BOLT, AMERICAN INDIAN POLICY AND REFORM: CASE STUDIES OF THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS (1st ed. 1987); *see also* Arthur S. Miller, *Myth and Reality in American Constitutionalism*, 63 TEX. L. REV. 181, 201 (1984) (book review) ("The founders wrote that 'all men are created equal,' but they did not believe their own rhetoric; they were the same men who began the systematic genocide of [N]ative Americans . . . .").

79. *See generally* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005).

80. Tizon, *supra* note 65.

81. *American Indians by the Numbers*, INFOPLEASE, http://www.infoplease.com/spot/aihmcensus1.html (last visited Apr. 19, 2014).

82. COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 3, at 2-4.

83. AM. FRIENDS SERV. COMM., UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 71 (1970).

84. *Id.*

85. COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 3, at 2-4.

86. *See generally* ROYSTER & BLUMM, *supra* note 29.

87. WILKINSON, *supra* note 9, at 12, 14.

B. Treaty Interpretation

Aside from being the most important clauses in the treaty, the reserved fishing right clauses are "also the most heavily litigated treaty clauses in the entire record of treaties between the United States and indigenous peoples . . . ."[88] Reserved fishing rights have been litigated seven times before the United States Supreme Court[89] and countless times before lower courts.

There were many troubling aspects of the treaties negotiated with the Northwest tribes. While the United States had legal representation, the tribes had none.[90] The government often used "sharp tactics, threats, fraudulent practices, and gifts and alcohol as coercion in the negotiations."[91] Also when two non-warring nations sign a treaty it is usually assumed that they bargained "at arm's length"[92]; realistically, however, rather than arms-length transactions, many treaties were essentially imposed on tribes with no choice but to consent.[93] There is evidence that some Stevens Treaty tribes had "complete understanding of the situation" and that "tribal negotiators were sophisticated and . . . made their arguments precisely and ably."[94] The general understanding, however, is that Stevens viewed the treaty negotiation as a "command-and-obey

88. Mulier, *supra* note 7, at 42; *see also* Blumm & Steadman, *supra* note 10, at 673-74 ("[T]he primary purpose of the treaties was to reserve fish in order to preserve an economic and cultural way of life.").

89. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup III*), 433 U.S. 165 (1977); Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44 (1973); Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392 (1968); Tulee v. Washington, 315 U.S. 681 (1942); Seufert Bros. v. United States, 249 U.S. 194 (1919); United States v. Winans, 198 U.S. 371 (1905).

90. Miller, *supra* note 26, at 191.

91. *Id.*

92. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979).

93. Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970) ("The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent.").

94. Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 IDAHO L. REV. 435, 438 (1998) ("[T]he stereotype of Indian leaders at treaty talks as being passive and overmatched intellectually is wrong.").

process, not a negotiation."[95] He "had his script" and stuck to it, often dictating terms.[96]

Federal courts have recognized these issues and, consequently, have interpreted Indian treaties in a manner favorable to tribes.[97] Because of the troubling aspects of the treaties between the United States and tribes and also the fiduciary relationship between the two,[98] "[c]ourts have uniformly held that treaties . . . must be liberally construed in favor of establishing Indian rights."[99] Courts have developed "canons of construction," interpreting the treaties favorably to the tribes when encountering "coercive conduct and unfair treaty making by the United States."[100] These canons dictate that treaties must "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians,"[101] and that any ambiguities in treaty language or the surrounding negotiations must be resolved in favor of the tribe.[102]

Another key principle of treaty interpretation is known as the "reservation of rights doctrine." First described in *United States v. Winans*,[103] a case involving interpretation of a Stevens Treaty made with Yakama Nation, the "reservation of rights doctrine" stands for the proposition that a treaty between the federal government and a tribal government is not a grant of rights to the Indians, but rather a grant from them such that any right not specifically given away in a treaty is assumed to remain with the tribe.[104] The reservation of rights doctrine has consistently been applied to the fishing and hunting provisions of the Stevens Treaties[105]--rights, which the Indians are said to have enjoyed from time immemorial.

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95. WILKINSON, *supra* note 9, at 11.

96. *Id.* at 11-12. These abrasive tactics resulted in several violent post-treaty rebellions. *Id.* at 11.

97. Miller, *supra* note 26, at 192.

98. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992).

99. Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334, 340 (9th Cir. 1996).

100. Miller, *supra* note 26, at 192.

101. Jones v. Meehan, 175 U.S. 1, 11 (1899).

102. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 n.17 (1978); Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

103. 198 U.S. 371 (1905).

104. *Id.* at 381.

105. *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,

C. Fishing Sites and the Right of Access

> At the time the treaty was made the fishing places were part of Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands and to define rights outside of them.[106]

For the tribes negotiating treaties with Stevens, the right to access fishing sites outside of the reservation was considered the most important treaty right; because "[t]he salmon fed them physically and spiritually" and economically, "[a]ccess to the rivers meant everything."[107]

Today, this right of Native Americans to access their traditional fishing spots is the foundation of an important and evolving right for the treaty tribes.[108] The full scope of this right and the government's duties under it have not been fully recognized or delineated yet.[109] A primary concern of the Native Americans "was that they have freedom to move about to gather food, particularly salmon."[110] Consequently, "[t]he earliest right recognized by the courts was a 'right of access' that permitted Indians to continue their fishing activities . . . in traditional locations."[111] The Yakama Nation successfully fought for this right in *United States v. Taylor*,[112] before Washington had even become a state. Courts, in the face of intense controversy, have affirmed the tribes' right to take fish at customary fishing sites, recognizing that this requires access to those sites.[113] Though the fishing clause was meant to protect much more than simply a right of access to customary fishing sites, even this was met with opposition.[114]

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443 U.S. 658, 679-81 (1979); Seufert Bros. v. United States, 249 U.S. 194, 196 (1918).

106. *Winans*, 198 U.S. at 379.

107. Tizon, *supra* note 65; *see also* COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 3, at 4-2; Lewis, *supra* note 10, at 289.

108. Fisher, *supra* note 5, at 494; *see also* Schartz, *supra* note 14, at 316 ("The *Boldt* decision's 50% rule was the culmination of almost seventy years of federal case law that slowly expanded the scope of Indian fishing rights.").

109. Fisher, *supra* note 5, at 494.

110. *Id.* at 501 (quoting United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974).

111. Schartz, *supra* note 14, at 316; *see also* Blumm & Steadman, *supra* note 10, at 653 ("[T]racing the evolution of the treaty fishing right in federal courts--from a right of access, to a right to a fair share of the salmon harvest, to a right of habitat protection.").

112. 13 P. 333 (Wash. Terr. 1887).

113. Mulier, *supra* note 7, at 42.

114. *See id.* at 41-42. In the mid-1800s, off reservation activity by Native Americans was not welcome in many parts of the country, and was viewed with suspicion. S. REP. NO. 102–

Despite this early ruling in their favor, "the tribes' right of access to customary fishing sites was routinely denied by Washington landowners and state officials in subsequent decades."[115]

When Washington residents claimed the pre-statehood *Taylor* ruling no longer applied post-statehood, the Yakama Nation was again forced to take its treaty rights to court.[116] In *United States v. Winans*,[117] Washington residents again wished to exclude Indians from their lands, reducing their right to access fishing spots to that of any non-Indian who did not own the property at issue.[118] The circuit court agreed, holding that "the treaty . . . did not require private property owners to give access and use rights to Yakama [treaty fisherman]."[119] The U.S. Supreme Court eventually ruled in favor of the Indians. The Supreme Court held that the reserved rights "imposed a servitude upon" certain private lands, regardless of future land ownership.[120] This important usufructuary right[121] was in the nature of both an easement[122] (a right to cross private land to reach the fishing places) and "a piscary profit a prendre" (the right to go onto another's land and remove a resource, in this case, fish).[123] This reserved to the tribal members non-possessory interests in the land, but not the fish themselves, which restrains "unreasonable interferences" with the exercise of the profit.[124]

133, at 3 (1991) (citing a 1852 treaty between the United States and the Apache Nation authorizing a reservation for the Native people and representing a change in federal Indian policy to the reservation era as a "protective" measure).

115. Mulier, *supra* note 7, at 46.

116. *Id.* (citing United States v. Taylor, 44 F. 2 (C.C.S.D. Wash. 1890)).

117. 198 U.S. 371 (1905).

118. *Id.* at 379.

119. Mulier, *supra* note 7, at 47.

120. *Winans*, 198 U.S. at 381.

121. *See* Michael R. Newhouse, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: the Mille Lacs Case*, 21 PUB. LAND & RES. L. REV. 169 (2000).

122. *Winans*, 198 U.S. at 381, 384 (holding that tribal members whose tribes signed treaty possessed easement rights to reach fishing spots over private property).

123. 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. RESOURCES J. 489, 540 (2006).

124. *See* 3 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND § 839, at 429 (3rd ed. 1939); *see also* Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 811 (D. Idaho 1994) (holding that "the Tribe does not have a vested property interest in a certain fixed quantity of fish in the annual fish runs . . . ."); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 4.1, 4.3, 4.9 (2000).

Though the technical meaning of these property rights could not have been conveyed during treaty negotiations,[125] courts have properly looked beyond the written words to the larger context that framed the treaty, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties."[126] Examination of the historical record provides insight into how the parties to the treaty understood the terms of the agreement.[127] During the negotiations Governor Stevens said:

> This [treaty] is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . *This paper secures your fish.* Does not a father give food to his children?[128]

Stevens understood the intent of the treaties and wrote that "[i]t never could have been the intention of Congress that the Indians should be excluded from their ancient fisheries."[129] Furthermore, Stevens wrote that it was "inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish."[130]

"The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished."[131] "Negotiators specifically assured the tribes that they could continue to fish notwithstanding the changes that the impending westward expansion would certainly entail,"[132] but *Winans* would not be the last time that Washington State challenged the Indians' right to fish under their treaties. Tribal fishing rights would soon become the center of a long and passionate battle between Washington and the Northwest tribes.

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125. Miller, *supra* note 34, at 553-54; *see also* United States v. Washington, 384 F. Supp. 312, 330, 355-56, 381 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) (stating that the Chinook Jargon dictionary prepared by George Gibbs, Stevens' staff attorney, shows the total absence of adequate words to convey the meaning of the treaties).

126. Choctaw Nation v. United States, 318 U.S. 423, 432 (1943).

127. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195 (1999).

128. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 n.11 (1979) (emphasis added).

129. *Id.* at 666 n.9 (quoting Letter from Isaac Stevens to the Commissioner of Indian Affairs (Sept. 16, 1854)).

130. *Id.* at 676.

131. United States v. Washington, 873 F. Supp. 1422, 1435 (W.D. Wash. 1994).

132. United States v. Washington, 506 F. Supp. 187, 204 (W.D. Wash. 1980).

III. Enemy of the State: A History of Washington and Its Tribes

> *Because of the local ill feeling, the people of the states where [Indian communities] are found are often their deadliest enemies.*
>
> -Justice Miller[133]

In Indian affairs, the United States has "charged itself with moral obligations of the highest responsibility and trust" and the federal government's conduct is "judged by the most exacting fiduciary standards."[134] The states owe no such duty. In fact, the states and the tribes found within their borders have often operated on a "deadliest enemies model,"[135] which finds its roots in "age-old, intergenerational enmity between the people of Indian communities and the non-Indians who live on or near Indian Country."[136] This animosity "arose out of the often violent conflict over limited resources" resulting from "westward migration . . . in the 19th and early 20th centuries."[137] The "deadliest enemies" "model of mutual animosity forms the" foundation "of tribal-state relations to this day."[138] States and their citizens were engaged in an unrelenting effort "to take Indian land and resources," and eliminate Indian people altogether.[139] These disputes, often erupting between states (or more appropriately, their citizens) and the tribes, sometimes turned deadly.[140] "State and local governments on or near Indian Country . . . use[d] apparent legal authority and simple force to dispossess Indian people of land and property," even using "taxing and police powers to exploit [the] tribes."[141]

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133. United States v. Kagama, 118 U.S. 375, 384 (1886).

134. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

135. "Much of the early history of federal Indian law and policy is framed by the designation of states as the 'deadliest enemies' of Indians and Indian tribes." Fletcher, *supra* note 50, at 77.

136. *Id.* at 73.

137. *Id.*

138. *Id.* at 74.

139. *Id.* at 77.

140. *Id.* at 78.

141. *Id.*; *see also* JAMES A. CLIFTON ET AL., PEOPLE OF THE THREE FIRES: THE OTTAWA, POTAWATOMI AND OJIBWAY OF MICHIGAN 34 (1986); JAMES M. MCCLURKEN, GAH-BAEH-JHAGWAH-BUK, THE WAY IT HAPPENED: A VISUAL CULTURE HISTORY OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA 79 (1991); JAKE PAGE, IN THE HANDS OF THE GREAT SPIRIT: THE 20,000-YEAR HISTORY OF AMERICAN INDIANS 277-78 (2003); JOHN TEBBEL & KEITH JENNISON, THE AMERICAN INDIAN WARS 24 (2001); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21, 24-28 (2005).

Until recently, the tribes and states "competed in a vigorous . . . zero-sum game of civil regulation, taxation, and criminal jurisdiction," and some state still engage in such "legal and political warfare."[142] "[L]ocal non-Indians and the states were . . . overwhelmingly hostile to tribal interests," and even state congressmen and justices were not spared from the political pressure. Those who supported the tribes sometimes risked losing their jobs.[143] Consequently, state courts were, and arguably are, a "potentially hostile forum," and Congress has recognized the hesitancy of tribes to use state courts.[144] Washington State has been no exception.

A. Washington, Tribes, and Fish

Washington's hostility toward the tribes is apparent when it comes to treaty fishing rights and regulations. When the treaties were signed, and in the decades following, the "'right of taking fish' was not a controversial issue" due to a lack of non-Indian fisheries, declining Native American populations, and abundant fish.[145] "There is no evidence that [either party to the treaty] considered the possibility" of a collapse in the region's anadromous fish.[146] But in the following decades, the state was pressured "to come down harder on the Indians" as the number of commercial fishermen in the state exploded.[147] "Stevens [had] anticipated that the right to fish 'would not in any manner interfere with the rights of citizens, and was necessary for the Indians to obtain a subsistence," but this turned out not to be the case.[148]

As fisheries developed and fish populations fell, Washington State, with the support of the Washington State Supreme Court,[149] began regulating

142. Fletcher, *supra* note 50, at 78.

143. *See* Tizon, *supra* note 65 ("[Congressman] Meeds . . . once highly popular [in Washington], saw his constituency turn against him for his early support of the [tribal fishing rights]. He decided not to run for a seventh term when it became clear he would lose. Other lawmakers felt similar pressure.").

144. Judith V. Royster, *A Primer on Indian Water Rights*, 30 TULSA L.J. 61, 100-01 (1994) ("[State courts are] a potentially hostile forum, [which] ha[s] led to increasing use of negotiated settlements."); Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 572 (1983) (Marshall, J., dissenting) (Title 28, section 1362 of the United States Code "reflects a congressional recognition of the 'great hesitancy on the part of the tribes to use State courts'" (citation omitted)).

145. Robinson, *supra* note 33, at 1.

146. Mulier, *supra* note 7, at 43.

147. Tizon, *supra* note 65.

148. Miller, *supra* note 34, at 555.

149. *See, e.g.*, State v. Towessnute, 154 P. 805 (Wash. 1916) (upholding the right to regulate Native Americans).

off-reservation fishing despite the Stevens Treaties.[150] No sooner than Washington became a state, it began to close down Indian fishing grounds, eventually outlawing "net fishing in all rivers, except the Columbia."[151] By the 1940s, it became clear that the tribes would not enjoy any unique fishing rights under Washington's authority.[152] Though the U.S. Supreme Court in 1942 limited Washington State's ability to regulate treaty fishing rights to those regulations "necessary for the conservation of fish,"[153] this did not stop the State from interfering significantly with Indian fishing rights. As a result, the conflict reached its peak in the 1960s and 1970s.[154]

In the early 1960s, the State mounted raids on tribal fishermen that would last for over a decade.[155] Washington State applied its fishing regulations to treaty Indians, and "when Indian fishermen continued to fish as normal, the State followed up with a law enforcement campaign consisting mostly of 'raids and stings' designed to catch tribal fishermen" on the rivers,[156] frequently seizing "Indian nets and equipment."[157] The Indians cited the Stevens Treaties in support of their position, however, the state continued to regulate tribal fishing.[158] Washington viewed "Indian fishermen as lawless, perverse, and as the causal reason for the decrease in salmon runs."[159] While "[n]on-Indian commercial fishers caught salmon by the millions of tons in the Pacific and Puget Sound . . . the state blamed declining fish runs on Indian netting and lawlessness," which in reality accounted for "less than 5 percent" of the total harvest.[160] "[A]ll Indians who dared defy the state" were viewed as "outlaws."[161] "To survive [and] continue their culture, [they] had to become an underground society."[162]

Washington increasingly allocated seasonal takes of fish to non-Indians, effectively preserving the tribes' right of access, while at the same time ensuring that it was meaningless because most of the permissible catch went to non-Indian fisherman. In the decades that followed, Indians faced

150. Robinson, *supra* note 33, at 1.
151. Tizon, *supra* note 65.
152. Fisher, *supra* note 5, at 499.
153. Tulee v. Washington, 315 U.S. 681, 684 (1942).
154. Miller, *supra* note 34, at 561.
155. WILKINSON, *supra* note 9, at 30-31.
156. Fisher, *supra* note 5, at 499-500.
157. Robinson, *supra* note 33, at 1.
158. Tizon, *supra* note 65.
159. Fisher, *supra* note 5, at 500.
160. Tizon, *supra* note 65.
161. *Id.*
162. *Id.* (internal quotation marks omitted).

endless harassment, threats, racist attacks, loss of property, and even violence, in "what has become one of the most drawn out treaty disputes in American history."[163] For most of the twentieth century, non-Native society "viewed [Indians] as a nuisance, a hindrance to progress."[164] "In the Northwest, tribes were widely seen as poaching communities - lawless, primitive, skulking around in the dark."[165] In 1916, one Washington state Supreme Court justice wrote, "The Indian was a child and a dangerous child . . . . Neither Rome nor 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."[166]

One U.S. Congressman from Washington equated the plight of the Native Americans to the African American Civil Rights Movement, stating that "[t]he fishing issue was to Washington state what busing was to the East . . . . It was frightening, very, very emotional."[167] A lack of communication led to a "deep distrust" among the parties.[168] Eventually, "Northwest Indians . . . began staging 'fish-ins,' in which protesters would openly fish in defiance of state laws," challenging the state's ability to regulate their treaty fishing rights.[169] State officials "responded to the fish-ins with a military-style campaign, using surveillance planes, high-powered boats and radio communications . . . [while] game wardens resorted to tear gas . . . billy clubs," and firearms.[170]

Many "treaty fishing rights of [N]ative Americans have often been preserved in the courts against violent opposition."[171] Curbing executive overstepping, "[f]ederal courts, applying special rules of construction, have steadfastly upheld treaty promises against state recalcitrance."[172] The famous "Boldt Decision" of 1974,[173] was a major victory for the treaty tribes of Washington state, allocating fifty percent of harvestable fish to the

163. Fisher, *supra* note 5, at 500.

164. Tizon, *supra* note 65.

165. *Id.*

166. *Id.* (internal quotation marks omitted).

167. *Id.* (internal quotation marks omitted).

168. United States v. Washington, 384 F. Supp. 312, 329 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

169. Tizon, *supra* note 65.

170. *Id.*

171. Miller, *supra* note 34, at 543.

172. *Id.* at 563.

173. United States v. Washington (*Boldt Decision*), 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd in part sub nom.* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

Native Americans, who made up just one percent of the state's population.[174] Such victories "did not come without widespread resistance."[175]

When the Ninth Circuit affirmed Judge Boldt in 1975,[176] non-Indian harvesters engaged in "widespread noncompliance" with the federal court's orders.[177] The Washington Supreme Court supported this defiance by ruling that "the state lacked authority to implement [the equal] sharing formula"–-collaterally attacking the Boldt decision.[178] "State agencies relied upon the authority of the State court" to regulate fisheries in non-compliance with the new federal guidelines established by Judge Boldt.[179] The State of Washington refused to accept the Boldt decision until the Supreme Court reviewed the decision and affirmed in 1979.[180]

It was one of "the most concerted official and private efforts to frustrate a decree of a federal court" of the twentieth century.[181] Washington's unprecedented resistance "forced the [federal] district court to take over a large share of the management of the state's fishery in order to enforce its decrees."[182] As a last resort, Judge Boldt eventually took on the role of "judicial 'fishmaster.'"[183] He managed the Puget Sound and coastal Washington fisheries himself, policing them via court orders, criminal contempt citations, and federal marshals.[184] "The ruling shocked the region,

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174. Robinson, *supra* note 33, at 2. The Boldt decision also "established the locations of the Tribes' usual and accustomed grounds and stations . . . ." United States v. Washington, 157 F.3d 630, 640 (9th Cir. 1998).

175. Blumm & Steadman, *supra* note 10, at 669.

176. United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

177. *See* BLUMM, *supra* note 36, at 81. Washington residents "hung" Judge Boldt in effigy, created "Can Judge Boldt--Not Salmon" bumper stickers, and gathered 80,000 signatures on a petition supporting his impeachment. *See* Schartz, *supra* note 14, at 332.

178. BLUMM, *supra* note 36, at 81; *see also* Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151 (Wash. 1977), *vacated*, 443 U.S. 658 (1979); Wash. State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373 (Wash. 1977), *vacated*, 443 U.S. 658 (1979).

179. Robinson, *supra* note 33, at 2.

180. *Id.*

181. Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123, 1126 (9th Cir. 1978), *vacated sub nom.* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

182. *Puget Sound Gillnetters Ass'n*, 573 F.2d at 1126.

183. Blumm & Steadman, *supra* note 10, at 699.

184. Fronda Woods, *Who's in Charge of Fishing?*, 106 OR. HIST. Q. 412, 432 (2005).

and . . . resentment[] [over the case] continue[s]" today.[185] And so continues the court's jurisdiction.[186]

Overt anti-Native sentiment declined during the latter portion of the twentieth century.[187] Legal developments have "stabilized the relations between the states and Indian tribes, the federal government does just enough to protect Indian tribes from state intervention, and there simply is not much more Indian land and resources to acquire."[188] But there is still competition for jurisdictional and regulatory authority, and disputes can sometimes be hard-fought. Jurisdiction and the tribal fishing rights again became the center of conflict in *State v. Jim.*

B State v. Jim

The Yakama Tribe has been at the center of several of the most significant court cases interpreting Indian treaty reserved fishing rights and state jurisdiction in Indian Country,[189] and in *State v. Jim*, the tribe again found itself in the middle of a significant case outlining its reserved treaty fishing rights and tribal jurisdictional authority.

On June 25, 2008, Lester Ray Jim ("Jim") "was cited by the State [of Washington] for unlawfully retaining [five] undersized sturgeon," which he "incidentally caught [with] his gill net when fishing commercially," and "for unlawful use of a net" to take fish.[190] Jim was fishing at the Maryhill

185. Tizon, *supra* note 65.

186. "The district court in *Washington I* reserved jurisdiction to hear future unresolved issues arising out of the Treaties." United States v. Washington, 157 F.3d 630, 641 (9th Cir. 1998).

187. Fletcher, *supra* note 50, at 81.

188. *Id.*

189. *See* Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) (Yakima challenged Washington's use of Public Law 280); Tulee v. Washington, 315 U.S. 681 (1942) (Supreme Court overturned Washington conviction of Yakima tribal member for fishing without a state license); United States v. Winans, 198 U.S. 371 (1905) (discussing the Yakima Nation's right to access traditional fishing spots in Washington); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1034 (9th Cir. 1985) (interpreting rights of the Yakima Nation to fisheries water pursuant to a federal consent decree awarding non-Indian irrigation rights); Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969) (arrests of Yakima fishers prompted court to order the state to recognize Indian fishing rights and allow tribes to "participate meaningfully in the rule-making process").

190. State v. Jim, 273 P.3d 434, 435 (Wash. 2012). Title 77, section 15.580 of the Revised Code of Washington forbids the type of net fishing Jim engaged in. Brief of Petitioner at 15, *Jim*, 273 P.3d 434 (No. 84716-9). Sturgeon are anadromous fish, which, along with salmon and steelhead, are of particular interest to the Columbia River treaty tribes. COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, *supra* note 3, at v-vi.

Treaty Fishing Access Site ("Maryhill"), which Congress set aside for use by the Columbia River Treaty tribes, "to exercise their treaty fishing rights."[191] The state claimed criminal jurisdiction over the fishing site, but the Washington Supreme Court, perhaps departing from its traditional stance on tribal rights, ruled that the State lacked criminal jurisdiction.[192]

After catching the sturgeon (which can survive for several hours out of water), "Jim took [them] ashore at Maryhill," where "officers from the Washington State Department of Fish and Wildlife issued [him] a citation."[193] "Jim describe[d] it as the usual practice among Yakama fishers" to bring sturgeon ashore, as they can survive for several hours out of the water, and "that he planned to release [them]."[194] While "[t]ribal law allows '[a]ll Yakama members . . . a *reasonable opportunity* to release alive any sturgeon of prohibited length incidentally caught in authorized fisheries,'"[195] Washington State law requires the "'return [of] unauthorized fish to the water *immediately*.'"[196] In order to determine which law would govern Jim's case, the court had to first decide if Washington had criminal jurisdiction at the Maryhill site.

When the Bonneville Dam was constructed on the Columbia, it "devastated" many of the accustomed fishing grounds of the Columbia River tribes, including the Yakama.[197] In response, Congress set aside several "in-lieu" fishing sites in 1945.[198] "Then, in 1988, Congress provided for . . . improvement of existing in-lieu sites" and also set aside six new treaty fishing access sites.[199] Maryhill was one of these sites.[200]

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191. *Jim*, 273 P.3d at 435. The Columbia River Treaty Tribes include the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Indian Nation. *Member Tribes Overview*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, http://www.critfc.org/member_tribes_overview (last visited Aug. 2, 2014).

192. *Jim*, 273 P.3d at 435.

193. *Id.* Jim was cited for violating title 77, section 15.580(1)(b) of the Revised Code of Washington and former Washington Administrative Code section 220–32–05100W. *Id.*

194. *Jim*, 273 P.3d at 435.

195. *Id.* (quoting REVISED LAW & ORDER CODES OF YAKAMA NATION § 32.18.07(D) (2009)).

196. *Jim*, 273 P.3d at 435 (quoting WASH. REV. CODE § 77.15.580(1)(b)(2013)).

197. *Jim*, 273 P.3d at 438 (citing State v. Sohappy, 757 P.2d 509 (Wash. 1988)).

198. "'[S]uch lands . . . shall be subject to the same conditions, safeguards, and protections as the treaty fishing grounds submerged or destroyed.'" *Sohappy*, 757 P.2d at 510 (quoting River and Harbor Act of 1945, ch. 19, § 2, 59 Stat. 10, 22).

199. *Jim*, 273 P.3d at 438 (citing Indian Reorganization Act Amendments, Pub. L. No. 100–581, § 401, 102 Stat. 2938 (1988)). These new sites were also set aside in response to the loss of accustomed sites due to dam construction on the Columbia and a resulting lawsuit

"Jim challenged the State's jurisdiction to prosecute him . . . at Maryhill," which federal regulations state is reserved exclusively for the Columbia River tribes.[201] The Klickitat County District Court agreed with Jim, but on appeal the "superior court concluded that the state ha[d] jurisdiction because [t]he Maryhill. . . site [was] not within the boundary of the Yakama reservation."[202] The Court of Appeals reversed, finding no state jurisdiction, and in a 6-3 decision the Washington Supreme Court affirmed.[203] Considering the history between Washington State and the tribes and the statutes that govern criminal jurisdiction in Indian Country this ruling by the Washington State Supreme Court is significant.

IV. Criminal Jurisdiction in Indian Country

Congress has recognized that "[t]he tribes in the Northwest have a unique place in the legal and regulatory scheme of natural resource management[,]" due in part to "tribal sovereignty, treaty-reserved rights, [and the] trust responsibility."[204] Federal Indian law is said to be "sui generis, or unlike any other area of the law," and it is "new" "in the Anglo-American context," with no real equivalent and relatively "little guiding precedent."[205] Additionally, Indian tribes are a political and legal anomaly, what Justice Kennedy calls "extraconstitutional"—being outside the structure of the constitution yet within U.S. borders.[206] Criminal jurisdiction in Indian Country is complex and is informed by the relationship between the tribes, the states, and the federal government.

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filed by the Umatilla tribe. *Jim*, 273 P.3d at 438 (citing S. REP. NO. 100–577, at 44 (1988)).

200. *Jim*, 273 P.3d at 436.

201. *Id.* (citing 25 C.F.R. §§ 247.2(b), 247.3 (2014)).

202. *Jim*, 273 P.3d at 436 (internal quotation marks omitted).

203. *Id.* at 436, 441.

204. *Salmon in the Columbia River Basin: Review of the Proposed Recovery Plan: Hearing on the Proposed Decision by the Federal Government to Recover Endangered Salmonid Stocks in the Columbia River Basin Before the S. Subcomm. on Fisheries, Wildlife, and Drinking Water*, 106th Cong. 453 (1999) (Goals and Objectives of Tribal Fish Restoration), *available at* http://bulk.resource.org/gpo.gov/hearings/106s/59375.txt.

205. Fisher, *supra* note 5, at 514, 517-18; see also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1498.

206. United States v. Lara, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring).

A. The Federal/Tribal Relationship

The tribes have had a unique relationship with the U.S. federal government since the birth of the nation.[207] Through their ongoing interaction with, and subjugation of,[208] the tribes, there is an "undisputed existence of a general trust relationship between the United States and the Indian people"[209] and the federal government owes a strong fiduciary duty to the tribes.[210] "This principle has long dominated the Government's dealing with the Indians,"[211] and is referred to as "one of the primary cornerstones of Indian law."[212]

The federal government has not always embraced its trust obligations, straining the limits of the trust responsibility in the modern era, and even attempting to eliminate tribes.[213] "Indian tribes have [often] suffered at the

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207. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823) (Under the doctrine of discovery, tribes continued to have a use and occupancy right, but their sovereignty was restricted in that they could only alienate their lands to the discovering European nation.).

208. Morton v. Mancari, 417 U.S. 535, 552-55 (1974).

209. United States v. Mitchell, 463 U.S. 206, 225 (1983); *see* Morton v. Ruiz, 415 U.S. 199, 236 (1974) (emphasizing "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people" (internal quotation marks omitted)). For general support and description of Federal trust relationship, see Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship after* Mitchell, 31 CATH. U. L. REV. 635 (1982).

210. *See* Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555 (10th Cir. 1984); *see also Mitchell*, 463 U.S. at 225 ("[A] fiduciary relationship necessarily arises when . . . [a]ll of the necessary elements of a common-law trust are present"); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

211. *Mitchell*, 463 U.S. at 225.

212. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 221 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN'S HANDBOOK, 1982 ED.].

213. The Termination Act of 1945 "was by its terms 'to provide for orderly termination of Federal supervision over the property and members' of the tribe." Menominee Tribe of Indians v. United States, 391 U.S. 404, 408 (1968). Beyond the so-called "Termination Era," the United States continued to strain the trust relationship in more modern cases. *See* United States v. Navajo Nation, 537 U.S. 488, 501, 514 (2003) (explaining that despite the overt breach of a common-law trustee's duties, the Secretary's action did not constitute a breach of trust.); *see also* Cobell v. Babbitt, 37 F. Supp. 2d 6, 16, 18, 38 (D.D.C. 1999) (describing federal treatment of the tribes as "breathtaking," "egregious," and "a shocking pattern of deception" in light of its trust responsibility); Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 101-02 (2004) (The "Interior's . . . agencies have frequently been accused of sacrificing tribal interests in favor of competing agency priorities," engaging in behavior that "borders on the shocking." (internal quotation marks omitted)); Ezra Rosser, *Ahistorical Indians and*

hands of their 'guardian,' the United States government," and many treaty promises have been broken.[214] But the federal government is still more often seen as an ally of the tribes,[215] especially as compared to the states in which the tribes are found.

The federal government assumed very early on that it should control Indian affairs, and consequently the state-tribal relationship should be limited where possible, in order to enhance federal power and avoid the violent conflict that often erupted between states and tribes.[216] A trust responsibility arose from the plenary power Congress was granted in Indian affairs in the U.S. Constitution,[217] the many treaties made between the U.S. and the Indian tribes, state enabling acts,[218] and the Trade and Intercourse Act.[219]

Due to the extent of "exclusive federal and tribal control in Indian Country," federal courts have created a "presumption . . . that state laws have no force in Indian Country."[220] Additionally, the purpose and history of Trade and Intercourse Act[221] and the Indian Commerce Clause[222] provide

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Reservation Resources, 40 ENVTL. L. 437, 463-64 (2010).

214. Miller, *supra* note 34, at 544.

215. For example, "[t]hroughout the four decade-long *United States v. Washington* proceedings, the federal government and the tribes [were] close allies." Blumm & Steadman, *supra* note 10, at 701.

216. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586-87 (1823). Felix Cohen further emphasized a "bright-line rule that tribes and states could not mix." Fletcher, *supra* note 50, at 83 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 121 (1941)).

217. U.S. CONST. art. I, § 8, cl. 3 (Congress was granted the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). This has been cited in recent cases as support for federal power in Indian affairs. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); United States v. Doherty, 126 F.3d 769, 778 (6th Cir. 1997). *But see* United States v. Kagama, 118 U.S. 375, 378-79 (1886) (Commerce clause did not give Congress additional powers over the tribes); Miller, *supra* note 26, at 216 ("[T]he federal government owes a fiduciary/trust responsibility to American Indian tribes and . . . voluntarily took on this duty by negotiating treaties with tribes . . . .").

218. Many western states, including Washington, had clauses in their enabling acts stating that Indian lands within the borders of the state "shall remain under the absolute jurisdiction and control of the Congress of the United States." Washington Enabling Act, ch. 180, § 4, 25 Stat. 676, 677 (1889).

219. 25 U.S.C. § 177 (2012); *see also* Fletcher, *supra* note 50, at 83-84.

220. Fletcher, *supra* note 50, at 78 (citing Williams v. Lee, 358 U.S. 217, 221-22 (1959)).

221. *Id.* at 77 ("The first Congress' enactment of the Trade and Intercourse Acts, prohibiting all forms of trade and interaction between Indians and others without federal consent, is strong evidence of the intent to keep states away from Indian tribes").

222. Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of*

strong support for this conclusion. This rule was later articulated in *Worcester v. Georgia*,[223] where Justice Marshall restated the original understanding "that state law can have no force in Indian Country."[224] As a result, "absent congressional authorization," state laws and regulations generally do not have effect inside of Indian Country.[225]

Additionally, Washington State's enabling act reserves from Washington any right to control lands owned or held by any Indian or Indian tribe.[226] "Treaty rights are not impliedly terminated upon statehood,"[227] and in the Washington enabling act, Congress did not impliedly abrogate Indian treaty rights.[228]

Furthermore, through the treaty process, the federal government has taken on certain responsibilities. These include the obligation to recognize and preserve tribal hunting, fishing, and other usufructuary rights,[229] such as the ones at issue in *State v. Jim*.

B. Federal Criminal Statutes

The federal criminal justice framework in Indian Country is based largely on three federal statutes.[230] "The first . . . is 18 U.S.C. § 1151, which defines no offenses but merely . . . defin[es] the term 'Indian [C]ountry,'" delineating federal jurisdiction.[231] The second and third in this "series of

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Tribal-Federal Cooperation, 36 ARIZ. ST. L.J. 1, 22 n.54 (2004) (This constitutional clause "was clearly and demonstrably intended to eliminate any claims of state authority to negotiate with Indian tribes or to manage Indian affairs, even for tribes located within the borders of that state.").

223. 31 U.S. (6 Pet.) 515 (1832).

224. Fletcher, *supra* note 50, at 81 (citing *Worcester*, 31 U.S. (6 Pet.) at 540).

225. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[2], at 501 (Nell Jessup Newton et al. eds., LexisNexis 2005).

226. Washington Enabling Act, ch. 180, § 4, 25 Stat. 676, 677 (1889). Eleven western states have provisions in their enabling acts that relinquish all jurisdiction over Indian land to the federal government. Kurt Sommer, *Ninth Circuit Rules That Disclaimer States Lack Jurisdiction over Indian Water Rights Under the McCarren Amendment*, 23 NAT. RESOURCES J. 255, 255 (1983).

227. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999) (citations omitted).

228. State v. Buchanan, 978 P.2d 1070, 1083 (Wash. 1999). *But cf.* State v. McCoy, 387 P.2d 942 (Wash. 1963) (the treaty fishing rights of Indians who were parties to the Treaty of Point Elliott were impliedly abrogated by Washington's admission to the Union).

229. United States v. Washington, 384 F. Supp. 312, 401 (W.D. Wash. 1974).

230. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 715 (2006).

231. *Id.*

Congressional enactments . . . extend[ing] federal criminal jurisdiction into Indian [C]ountry, without eliminating concurrent tribal jurisdiction," are the Indian Country Crimes Act (18 U.S.C. § 1152) and the Major Crimes Act (18 U.S.C. § 1153).[232]

Sections 1151 and 1152 of title 18 are the most relevant for purposes of *State v. Jim*, as the statutory definition of "Indian Country" determines the scope of federal jurisdiction. Section 1152 provides that "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian [C]ountry."[233] And section 1151 defines "Indian Country" as:

> (a) all land *within the limits of any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[234]

Prior to 1953, Indians engaged in unlawful activity within Indian Country were generally free from state jurisdiction.[235] Federal or tribal law governed these offenses.[236] But since that date, which signifies the enactment of Public Law 280,[237] "Congress and the [Supreme] Court have imposed a number of restrictions on tribal jurisdiction, sometimes by expanding state and federal jurisdiction into Indian [C]ountry."[238]

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232. McCarthy, *supra* note 213, at 46-47.

233. Indian Country Crimes Act, 18 U.S.C. § 1152 (2012).

234. 18 U.S.C. § 1151 (2012) (emphasis added). "Indian allotments" and "dependent Indian communities" are federally defined and do not apply to the Maryhill TFAS at issue in *State v. Jim*. Supplemental Brief of Respondent, *supra* note 21, at 8.

235. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 470 (1979).

236. *Id.*

237. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2012), 25 U.S.C. §§ 1321-1326 (2012), & 28 U.S.C. § 1360 (2012)).

238. McCarthy, *supra* note 213, at 46; *see also* Duro v. Reina, 495 U.S. 676, 696-98

C. State Jurisdiction and Public Law 280

In 1953, "Congress extended state jurisdiction into Indian [C]ountry with the passage of Public Law 280, which gave [five] states extensive criminal and civil jurisdiction over Indian Country" and authorized other states, including Washington, to enact laws asserting jurisdiction.[239] "Public Law 280 was later amended by Congress [in the Indian Civil Rights Act of 1968] to require tribal consent to state jurisdiction in Indian [C]ountry."[240] But by the time of the Public Law 280 amendment, Washington had legitimately assumed some nonconsensual criminal and civil jurisdiction over Indian Country under section 37.12.010 of the Revised Code of Washington ("RCW").[241]

In 1963, Washington revised section 37.12.010 and assumed criminal jurisdiction:

> over Indians and Indian territory, reservations, country, and lands . . . but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States . . . .[242]

"While a tribe can consent to greater state jurisdiction,"[243] "the Yakama Nation has never given its consent and is therefore only subject to the nonconsensual jurisdiction asserted by the [s]tate in RCW 37.12.010."[244] In

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(1990) (holding that tribes have no criminal jurisdiction over nonmembers); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209-12 (1978) (stating tribes cannot criminally prosecute non-Indians). "The Supreme Court has also recognized far-reaching limitations on tribal jurisdiction . . . including the lack of criminal jurisdiction over non-Indians . . . [and the] ability to prohibit hunting and fishing by non-Indians on reservation fee lands . . . ." McCarthy, *supra* note 213, at 48.

239. McCarthy, *supra* note 213, at 46; *see also* 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a).

240. State v. Jim, 273 P.3d 434, 437 (Wash. 2012); *see also* McCarthy, *supra* note 213, at 47; 25 U.S.C. §§ 1321(a), 1322(a).

241. 1963 Wash. Sess. Laws 346-47 (codified as amended at WASH. REV. CODE § 37.12.010 (2013)); *see also* Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 449, 502 (1979) (holding that WASH. REV. CODE § 37.12.010 complies with Public Law 280 and is constitutional).

242. 1963 Wash. Sess. Laws 346-47 (codified as amended at WASH. REV. CODE § 37.12.010 (2013)).

243. *Jim*, 273 P.3d at 437 (citing WASH. REV. CODE § 37.12.021 (2013)).

244. *Jim*, 273 P.3d at 437; *see also Yakima Indian Nation*, 439 U.S. at 465–66; For a more detailed history of the Yakama's opposition to Public Law 280 jurisdiction, see James

State v. Jim, the state argued that RCW 37.12.010 can validly be read to say that nonconsensual state jurisdiction extends to Indians unless they act:

(1) "within an established Indian reservation"; *and*

(2) "on their tribal lands or on allotted lands"; *where*

(3) such lands are "held in trust by the United States or subject to restriction against alienation imposed by the United States."[245]

Thus, the main issue in *State v. Jim* was whether the Maryhill Fishing Access Site met one of these exceptions. If the court decided it did, Washington would have no criminal jurisdiction at the site and Jim could not be subjected to state regulation, but if it did not, Washington would have criminal jurisdiction over the site and could prosecute Jim.

The Washington Supreme Court decided a similar issue before in *State v. Sohappy*,[246] ruling that Washington had no jurisdiction at a similar "in-lieu" fishing site.[247] The *Sohappy* court relied on a U.S. Supreme Court decision that defined "Indian reservation" as land "validly set apart for the use of the Indians as such, under the superintendence of the Government,"[248] and concluded that although the "in-lieu" fishing site was not part of the Yakama Reservation under the original 1855 treaty, it was "part of a reservation for purposes of application of our state jurisdiction statute."[249] The appellate court in *State v. Jim* relied solely on *Sohappy* in reaching the conclusion that Maryhill was essentially an "in-lieu" fishing site, and therefore, a "reservation" for the purposes of RCW 37.12.010–-putting it beyond the state's jurisdiction.[250]

However, the *Sohappy* opinion failed analyze and apply the controlling language of RCW 37.12.010 and thus to address the statute's scope and limits as to state criminal jurisdiction.[251] Jim argued that "[u]nder the principle of *stare decisis*, *Sohappy* controls."[252] The state argued that *Sohappy* had been superseded by two other cases--*Cooper* and *Boyd*

A. Bamburger, *Public Law 280: The Status of State Legal Jurisdiction Over Indians After* Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 15 GONZ. L. REV. 133, 149-61 (1980).

245. Supplemental Brief of Petitioner State of Washington at 7-8, *Jim*, 273 P.3d 434 (No. 84716-9).

246. 757 P.2d 509 (Wash. 1988).

247. Brief of Petitioner, *supra* note 190, at 1; *Sohappy*, 757 P.2d at 512.

248. *Sohappy*, 757 P.2d at 511 (internal quotation marks omitted).

249. *Id.* at 511-12.

250. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 4.

251. *Id.* at 4, 17.

252. Brief of Petitioner, *supra* note 190, at 16.

(discussed below)--and that it "should be overruled" for failure to address the statutory criteria.[253]

Though the state argued that none of the statutory criteria for exempting a tribal member's activity from state jurisdiction was met, the Washington Supreme Court stretched the conventional understanding of each of these criteria. The court ruled that each of the criteria discussed above was present--a holding supported by Bureau of Indian Affairs ("BIA") regulations setting these sites aside for "exclusive use" by the tribes.[254] Departing from a century of state resistance, the court expanded tribal government and protected Indian fishing rights by finding that all three criteria had been met.

1. Tribal Lands or Allotted Lands?

The Maryhill TFAS is not allotted land.[255] Therefore, the site must be "tribal land" in order to meet this criterion. The state challenged Jim's assertions that Maryhill is "Indian Country," but conceded that Maryhill is tribal land, making this the least controversial criterion for the RCW 37.12.010 exception in this case.[256] Even absent the state's admission, the court found that the Maryhill site is tribal land because it was "reserved exclusively for tribal members" pursuant to Bureau of Indian Affairs regulations.[257] However, the court went on to analyze the other two criteria.

2. Held in Trust or a Restriction Against Alienation?

According to the state, the next criterion that Maryhill had to meet in order to qualify for the RCW 37.12.010 exception required that the tribal land be "held in trust by the United States or subject to restriction against alienation imposed by the United States."[258] In a 2001 case, a Washington appellate court concluded that the state has jurisdiction over crimes occurring *within* an Indian reservation, unless the land is also one of the

253. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 17.

254. State v. *Jim*, 273 P.3d 434, 440 (Wash. 2012). These findings are explained in detail in the following three subsections.

255. Allotments of land "were deeded to individuals . . . under the provisions of various treaties and the Dawes Act" from 1887-1934. State's Response Brief at 24, *Jim*, 273 P.3d 434 (No. 84716-9); *see also* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 142 (1972) (an allotment is "a selection of specific land awarded to an individual allottee from a common holding").

256. State of Washington's Response Brief to Amici Curiae at 18, *Jim*, 273 P.3d 434 (No. 84716-9); *Jim*, 273 P.3d at 437.

257. *Jim*, 273 P.3d at 437, 440.

258. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 8.

types described in the statute–i.e., lands held in trust or subject to a restraint against alienation.[259]

Furthermore, "off-reservation fishing access sites [have always been] owned in fee by the federal government or private landowners . . . ."[260] "[L]ands held in fee are not lands 'held in trust by the United States or subject to a restriction against alienation imposed by the United States . . .'"[261] This means that RCW 37.12.010 gave Washington jurisdiction over fee lands even when they are within Indian reservations.[262] Even if the tribes could show that Maryhill is a collective Indian reservation for the four tribes, the state argued that it would still lack the remaining necessary characteristics: it is not land held in trust, and it is not subject to a restraint on alienation.[263]

The legislature never defined "held in trust" for purposes of RCW 37.21.010.[264] But the state argued that *none* of the fishing access sites were acquired with congressional direction that it be placed in trust, nor was the land subject to a restraint against alienation at any point in time.[265] The federal government did not assume trust responsibility over the access sites because doing so would have required express language by statute.[266] Furthermore, "Public Law No. 100-581, the statute [that] authorized federal acquisition and management of the site," contained no such language, and therefore Maryhill was not under the federal government's trust responsibility.[267] Nor did anything in the BIA federal regulations state that the land would be held in trust for any of the tribes.[268]

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259. *See* State v. Boyd, 34 P.3d 912, 916 (Wash. Ct. App. 2001); *see also* State v. Flett, 699 P.2d 774, 777 (Wash. Ct. App. 1985) (Washington State has jurisdiction over an Indian committing a crime on reservation land that was not held in trust by the federal government or restricted from alienation).

260. State of Washington's Response Brief to Amici Curiae, *supra* note 256, at 2.

261. State v. Cooper, 928 P.2d 406, 408 n.4 (Wash. 1996).

262. *Id.*

263. State of Washington's Response Brief to Amici Curiae, *supra* note 256, at 18.

264. Supplemental Brief of Respondent, *supra* note 21, at 14.

265. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 13.

266. Statement of Supplemental Authority at 1, State v. Jim, 273 P.3d 434 (Wash. 2012) (No. 84716-9) (citing United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2325 (2011)).

267. *Id.* (citing Act of Nov. 1, 1988, Pub. L. No. 100-581, § 401(a), 102 Stat. 2938, 2944); *see also* Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 13.

268. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 13 n. 10 (citing 25 C.F.R. pt. 247 (treaty fishing access sites) & 25 C.F.R. pt. 248 (in-lieu fishing sites)).

In contrast, Jim argued that TFASs are "owned and controlled exclusively by the United States in trust" and emphasized that non-Indians were denied access.[269] Congress directed the Army Corps of Engineers "to improve . . . the . . . sites and then transfer them to the Department of Interior to be held in trust for the benefit of the tribes."[270] These tribes included *State v. Jim*'s amici curiae tribes,[271] who described themselves as the "beneficial owners" of the Maryhill site.[272] Jim further argued that "all . . . necessary elements of an Indian trust [were] present" for purposes of RCW 37.12.010, including "the trustee (United States), the beneficiaries (the four Columbia River treaty tribes), and the trust corpus (Indian treaty fishing sites, i.e. 'trust property')."[273] These necessary trust elements were enumerated in *United States v. Mitchell*,[274] where the U.S. Supreme Court noted that federal control or supervision of tribal properties normally creates a "fiduciary relationship . . . *even though nothing is said expressly* in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection."[275] The 1988 statute, Jim argued, created a "trust" even though it did not use express language.[276] He further argued that this trust gives the tribes only "beneficial use," creating a restraint on alienation.[277]

The Washington Supreme Court agreed with Jim, ruling that "Maryhill is more like trust land or land with a restriction against alienation than fee land."[278] Again, the court based its "trust" holding on the fact that the land was set aside "for exclusive use and benefit of the tribes . . . ."[279] The court agreed that a trust relationship can exist absent express words, and that all the *Mitchell* elements of a trust were present.[280] Thus, the "in trust or

269. Brief of Petitioner, *supra* note 190, at 23.

270. *Id.* at 6 (citing Pub. L. No. 100-581, § 401(b)(2), 102 Stat. at 2944).

271. The amici tribes included all four of the Columbia River treaty tribes with rights to Maryhill—the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Nez Perce Tribe, and the Confederated Tribes and Bands of the Yakama Nation. Brief for Confederated Tribes of the Umatilla Indian Reservation et al. as Amici Curiae Supporting Respondent at 1, *Jim*, 273 P.3d 434 (No. 84716-9).

272. *Id.*

273. Supplemental Brief of Respondent, *supra* note 21, at 10.

274. 463 U.S. 206 (1983).

275. *Id.* at 225 (emphasis added) (citation omitted).

276. Supplemental Brief of Respondent, *supra* note 21, at 11.

277. *Id.*

278. State v. Jim, 273 P.3d 434, 441 (Wash. 2012).

279. *Id.*

280. *Id.*

subject to restraint on alienation" element of the RCW 37.12.010 exception was present to prevent Washington from asserting jurisdiction.

However, the status of Maryhill as tribal land constructively held in trust and with a restraint against alienation did not decisively remove it from the state's criminal jurisdiction. The Washington Supreme Court had previously ruled that "Washington assumed full nonconsensual civil and criminal jurisdiction over *all Indian [C]ountry outside established Indian reservations*."[281] The U.S. Supreme Court similarly described Washington's jurisdictional exclusion as one that applies to lands *within* Indian reservations.[282] And even "[a]llotted or trust lands are not excluded from full nonconsensual state jurisdiction unless they are 'within an established Indian reservation.'"[283] Ultimately, the "case turn[ed] . . . on whether Maryhill is an established reservation."[284]

3. Is Maryhill a Reservation?

The federal definition of "Indian Country" is somewhat flexible and open to debate.[285] The tribes claimed that they have jurisdiction over Maryhill because it is Indian Country, but the state refused to concede this issue.[286] However, the state did admit that "the Maryhill site may be Indian [C]ountry" because it was "arguably set aside for the use of Indians" and it is "under the superintendence of the federal government."[287] Based on that admission, Jim argued that the state had "conceded that [Maryhill] is within Indian Country," and "[b]ecause . . . 'Indian [C]ountry' is defined by federal statute and case law, the [s]tate [could not] logically maintain that the site is not an 'Indian reservation.'"[288]

But even if Maryhill is "Indian Country," that does not automatically place it beyond Washington's jurisdiction under the express terms of the statute.[289] The state argued a straightforward application of RCW 37.12.010 would grant it jurisdiction.[290] The court of appeals ruled that Maryhill is

281. State v. Cooper, 928 P.2d 406, 408 (Wash. 1996) (emphasis added); *see also* WASH. REV. CODE § 37.12.010.

282. Cooper, 928 P.2d at 409 (emphasis added) (citing Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 475 (1979)).

283. *Cooper*, 928 P.2d at 408 (quoting Wash. Rev. Code § 37.12.010).

284. *Jim*, 273 P.3d at 437.

285. *See* Washburn, *supra* note 230, at 715.

286. State of Washington's Response Brief to Amici Curiae, *supra* note 256, at 18.

287. *Id.* at 16.

288. Supplemental Brief of Respondent, *supra* note 21, at 7.

289. State of Washington's Response Brief to Amici Curiae, *supra* note 256, at 18.

290. *Id.* at 1.

"entitled to reservation status," apparently because it is within "Indian Country."[291] But the Washington Supreme Court had already held in *Cooper* that it was "not appropriate to utilize federal conceptions of 'Indian [C]ountry' to construe a portion of a [s]tate statute placing a limitation on the otherwise broad assertion of [s]tate jurisdiction over all of Indian [C]ountry."[292]

The very purpose of RCW 37.12.010 is to assert Washington's broad jurisdiction over certain portions of Indian Country, with a narrow exception.[293] The exception requires that the land, among other requirements, be tribal land or allotted land. But Washington's assumption of jurisdiction excluded only narrow portions of "tribal lands" and "allotted lands" (the second criterion listed in RCW 37.12.010)--those "*within* [an] established . . . reservation[]."[294] Despite the Washington Supreme Court's holding, "[t]he Maryhill site meets none of these criteria."[295]

"The term 'Indian reservation' is not defined by statute"[296] and is a term of art that first appeared in the Major Crimes Act, later to be replaced by the "statutorily defined term 'Indian [C]ountry.'"[297] "At one point . . . 'Indian reservation' referred to land tribes reserved for themselves . . . by treaty," and to "which they never extinguished title."[298] The tribes argued that modern definitions include "federally protected Indian land regardless of origin," and that "land . . . held in trust . . . is a reservation for purposes of criminal jurisdiction."[299] Thus, the courts were left to determine whether Congress intended to make the Maryhill site an Indian reservation, and if so, which definition would be most appropriate.[300]

In 1945, in response to the devastation of many of the "usual and accustomed places" for the Yakama and other Indian treaty fishing tribes,

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291. State v. Jim, 230 P.3d 1080, 1083 (Wash. Ct. App. 2010).

292. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 19 (citing State v. Cooper, 928 P.2d 406, 407 (Wash. 1996)).

293. *Id.* at 15.

294. *Id.* at 8-9; State of Washington's Response Brief to Amici Curiae, *supra* note 256, at 16.

295. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 9.

296. State v. Sohappy, 757 P.2d 509, 511 (Wash. 1988) (quoting United States v. Sohappy, 770 F.2d 816, 822 (9th Cir. 1985)) (internal quotation marks omitted).

297. Brief for Confederated Tribes of the Umatilla Indian Reservation et al. as Amici Curiae Supporting Respondent, *supra* note 271, at 10.

298. *Id.* (citing Donnelly v. United States, 228 U.S. 243, 269 (1913)).

299. *Id.* at 11 (citing United States v. John, 437 U.S. 634, 649 (1978)).

300. Supplemental Brief of Respondent, *supra* note 21, at 6.

Congress first created several "in-lieu" fishing sites.[301] These lands were set aside "subject to the same conditions, safeguards, and protections as the [original] treaty fishing grounds submerged or destroyed."[302] Then, in 1988, Congress provided for the establishment of at least six additional treaty fishing access sites, as well as the improvement of existing in-lieu sites.[303] Maryhill is one such treaty fishing access site. Congress indicated that these newer "treaty fishing access sites" (TFASs) were to be created and treated consistently with the existing in-lieu sites and that they were "for the *permanent* use and enjoyment of the Indian tribes."[304]

The Maryhill site is designed to function like any pre-existing "in-lieu" site, which were designed to have the same protections as the original usual and accustomed fishing sites. But the term "usual and accustomed fishing spots" has been used almost synonymously with "*off reservation* fishing sites." "[T]he tribes reserved [for] themselves . . . the right of taking fish 'in common with' non-Indians at *off-reservation* 'usual and accustomed' fishing sites" or "customary off-reservation fishing sites."[305] As far back as *Winans*, courts recognized an "exclusive right of fishing reserved within certain boundaries" (i.e. the reservations), and "[t]here was a right outside of those boundaries reserved 'in common with citizens of the territory.'"[306] *Winans* recognized an imposed servitude over *private* lands in order to fulfill the reserved treaty right to fish, but with the limitation that the fishing clause could only be understood to reserve a "right to use customary off-reservation fishing sites in [a similar] manner [as] they had always enjoyed."[307]

Furthermore, "every fishing location where members of a tribe customarily fished . . . is a usual and accustomed ground or station at which

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301. *See Sohappy*, 757 P.2d at 510. These sites were flooded during construction of dams, which have enjoyed a special status in the Northwest, although highly disruptive to Native American fishing rights. *See generally* Michael C. Blumm & Hallison T. Putnam, *Imposing Judicial Restraints on the "Art of Deception": The Courts Cast A Skeptical Eye on Columbia Basin Salmon Restoration Efforts*, 38 ENVTL. L. 47 (2008).

302. *Sohappy*, 757 P.2d at 510 (citing River and Harbor Act of 1945, Pub. L. No. 79–14, § 2, 59 Stat. 10, 22 (1945)).

303. S. REP. NO. 100–577, at 30-31, 43 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3908, at 3920-21, 3933.

304. *Id*. at 43, 1988 U.S.C.C.A.N. at 3933(emphasis added).

305. Mulier, *supra* note 7, at 41-42.

306. United States v. Winans, 198 U.S. 371, 381 (1905).

307. Mulier, *supra* note 7, at 48-49. In *Winans*, the Supreme Court upheld the Indians' right of access over private property in order to fish in the Columbia River. *See Winans*, 198 U.S. at 384.

the treaty tribe reserved, and its members presently have, the right to fish."[308] Because this includes land outside of their "ceded territory,"[309] historically the fear was that Indians would be able to claim that any spot on the river was a usual and accustomed fishing place, essentially creating an *easement* on the whole river–-not just the reservation.[310] The "Indians were given a right in the land[]--the right of crossing it to the river[]--the right to occupy it to the extent and for the purpose mentioned."[311] "The federal development of fee owned lands as mitigation for the inundation of fee owned access sites utilized by multiple tribes with off-reservation fishing rights," the state argued, "does not constitute the establishment of an Indian reservation . . . ."[312] "[T]he Yakama treaty distinguishes between fishing within the reservation and fishing 'at all usual and accustomed places,' which are clearly not within the reservation."[313]

This distinction between reservation land and off-reservation "usual and accustomed" fishing spots is important because within their reservations tribal members have a heightened "interest in being free of state police power."[314] But "[c]ongressional reports explicitly recognize state and local jurisdiction at . . . federally owned [access fishing] sites."[315]

These fishing sites were historically thought to be outside of Indian Country, or at the very least off reservation.[316] And the Washington Supreme Court, in *State v. Cooper*,[317] had rejected the argument that land held in trust "is functionally an established Indian reservation,"[318] an "interpretation [that] would render the phrase 'within an established Indian

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308. United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash. 1974).

309. Mulier, *supra* note 7, at 50 (citing Seufert Bros. v. United States, 249 U.S. 194 (1919)).

310. *Id.* at 46.

311. *Id.* at 49.

312. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 13.

313. State v. Jim, 273 P.3d 434, 443 (Wash. 2012) (Wiggins, J., dissenting); *see also* Treaty with the Yakima Nation, *supra* note 8, at 954.

314. Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 502 (1979).

315. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 14 (citing S. REP. NO. 100-577, at 3935 (1988)). But when the BIA made regulations governing TFASs they stated that "States do not have regulatory jurisdiction or authority over the in-lieu fishing sites." 62 Fed. Reg. 50866, 50867 (Sept. 29, 1997) (codified at 25 C.F.R. pt. 247).

316. *See, e.g.*, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) (recognizing tribal water rights for fisheries purposes even though the protected fishing places were located outside Indian Country).

317. 928 P.2d 406, 409-10 (Wash. 1996).

318. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 11.

reservation' totally meaningless."[319] In rejecting that argument, the *Cooper* court said that "[i]f the term 'reservation' in RCW 37.12.010 included all Indian lands *outside the formal boundaries of established reservations*, then the exception would swallow the rule."[320] Then, 14 years later, in the *State v. Jim* litigation, even the court of appeals, which ruled that Maryhill was part of Indian Country and "entitled to reservation status," still acknowledged that the site is "not on an Indian reservation" and "not on Yakama reservation land."[321]

If the Maryhill site does not appear to meet the criteria of a "reservation," it would appear that Washington State would have jurisdiction over the site, as only tribal land or allotted land on a reservation would be reserved for tribal jurisdiction. The Washington Supreme Court disagreed.

4. Exclusive Use

The "exclusive use" analysis was complicated by the regulations, which the BIA promulgated to regulate the new fishing sites, including Maryhill. When Congress provided for the creation of Maryhill TFAS and other sites in 1988, it "directed the [Army] Corps of Engineers to . . . improve the[] . . . sites . . . [and then] transfer [them] to the [BIA] for continued maintenance."[322] The BIA regulates use of Columbia River treaty fishing access sites, in-lieu fishing sites, and off-reservation treaty fishing.[323] The primary purpose of Public Law 100-577 (creating Maryhill) was to fulfill treaty obligations by authorizing "acquisition of additional sites from willing sellers" in order to improve Indian access, "ease tensions" with the non-Indian fisherman, and to "ease overcrowding of access sites by fishermen and recreationists along the Columbia River . . . ."[324] The congressional legislation did not state that the lands are to be managed exclusively for the tribes.[325] However, in 1997 the BIA promulgated

319. *Cooper*, 928 P.2d at 410.

320. Id. (emphasis added).

321. State v. Jim, 230 P.3d 1080, 1081-83 (Wash. Ct. App. 2010), *aff'd*, 273 P.3d 434 (Wash. 2012).

322. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 3. This same arrangement was established for the "in-lieu" fishing sites, where the Corps acquired over 400 acres of land to ultimately be administered by the BIA for the "permanent use and enjoyment of the tribes." S. REP. NO. 100-577, at 43 (1988).

323. 25 C.F.R. pt. 241 (2014); *id.* pt. 247 (access sites); *id.* pt. 248 (in-lieu sites); *id.* pt. 249 (off-reservation fishing).

324. S. REP. NO. 100-577, at 22.

325. *See* Act of November 1, 1988, Pub. L. No. 100-581, § 401(a), 102 Stat. 2938.

regulations stating that the use of the land was reserved *exclusively* for enrolled members of the treaty tribes.[326]

This exclusivity is important. The original fishing sites lost to dam construction were "usual and accustomed places," which were to be enjoyed "in common with [all] citizens[] of [the] Washington Territory."[327] But creating exclusive treaty fishing access sites does not appear to be justified or required based on the 1855 treaty language itself. The words "in common with" should theoretically limit the rights enjoyed at in-lieu sites, and therefore, at Maryhill. Even where fishing rights are reserved, "any tribal right to fish on the ceded, off-reservation lands can no longer be 'exclusive.'"[328]

But the fact that these sites are set aside exclusively for the tribes left the door open for a different interpretation.[329] The court in *State v. Jim* noted that "[t]here is something fundamentally different about land that is set aside for the exclusive use of tribes . . . ."[330] In fact, where fishing or hunting rights are reserved in an area exclusively for Indians, courts have sometimes assumed they are being exercised on a reservation, because "no exclusivity would be possible on lands open to non-Indians."[331] Indian tribes possess inherent sovereign powers, including the authority to exclude.[332] "A tribe's power to exclude nonmembers entirely or to condition their presence *on the reservation* is . . . well established."[333] Though a tribe's power to exclude exists independently of its general jurisdictional authority,[334] the Washington Supreme Court found it was strong evidence that Congress intended Maryhill to be a reservation.

The tribes argued that because Maryhill is managed by the federal government "to fulfill treaty obligations," it should be a reservation by definition, despite the fact that the treaty right being supported is an off-reservation fishing right.[335] The state argued that to be an "established

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326. 25 C.F.R. §§ 247.2(b), 247.3 (2014.

327. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398-99 (1968).

328. Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 768-69 (1985).

329. State v. Jim, 273 P.3d 434, 440 (Wash. 2012) ("Maryhill is different from other usual and accustomed fishing sites because it is reserved exclusively for tribal use and *not* shared in common with other citizens.").

330. *Id.*

331. *See, e.g.*, *Klamath Indian Tribe*, 473 U.S. at 767.

332. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-45 (1982).

333. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) (emphasis added).

334. *See* Duro v. Reina, 495 U.S. 676, 696-97 (1990).

335. Brief for Confederated Tribes of the Umatilla Indian Reservation et al. as Amici

Indian reservation" the land must be communal tribal land established as tribal reservation homeland.[336] The U.S. Supreme Court's definition of "Indian reservation" is land "validly set apart for the use of the Indians as such, under the superintendence of the government."[337] Federal decisions have also noted that reservations include not just aboriginal lands set aside in treaties, but also lands "set apart as an Indian reservation out of the public domain, and not previously occupied by . . . Indians."[338] Jim argued that the Maryhill TFAS met this definition of a reservation, and because the Major Crimes Act extended federal jurisdiction into "Indian Country" (which includes "all lands within the limits of any Indian reservation"), the site was under federal and not state control.[339]

Ultimately, the court concluded that Maryhill is an "established Indian reservation[,] held in trust" for the tribe's benefit, and that state criminal jurisdiction was therefore excluded.[340] To the court's credit, the original treaty with the Yakama said that land

> shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.[341]

The court stated that the "principal test" for determining reservation status is "whether the land in question had been validly set apart for the . . . Indians as such, under the superintendence of the Government"[342] and that a "plain reading of the statute and consideration of the character of the land

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Curiae Supporting Respondent, *supra* note 271, at 1, 14-15.

336. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 11, 13.

337. United States v. Pelican, 232 U.S. 442, 449 (1914).

338. *See, e.g.*, Donnelly v. United States, 228 U.S. 243, 268-69 (1913).

339. Supplemental Brief of Respondent, *supra* note 21, at 7-8 (citing 18 U.S.C. § 1151(a) (2012)).

340. State v. Jim, 273 P.3d 434, 441 (Wash. 2012).

341. Treaty Between the United States and the Yakama Nation of Indians, *supra* note 8, at 953.

342. *Jim*, 273 P.3d at 439 (quoting United States v. John, 437 U.S. 634, 649 (1978)) (internal quotation marks omitted). But the fact that the lands in *John* were clearly held in trust, and later declared a reservation by proclamation did not seem to factor into the court's analysis.

indicates that Maryhill is a reservation."[343] In order to arrive at the conclusion that Maryhill is a reservation, the court cited to several broad dictionary definitions for "reservation," including "[a] tract of public land that is not open to settlers but is set aside for a special purpose; esp., a tract of land set aside for use by indigenous peoples"[344] and "a tract of public land set aside for a particular purpose (as schools, forest, or the use of Indians)."[345]

Despite the lack of express language, the court ruled that Maryhill was a reservation.[346] This holding was based largely on the fact that "[b]y law, the [Maryhill access] land must 'be administered to provide access to usual and accustomed fishing areas' for four tribes,"[347] and more importantly that "[f]ederal regulations make clear that the right of use is reserved *exclusively* for the named tribes."[348] According to the court, this was enough to indicate that Congress had, more than a century after the treaty, "clearly" and effectively extended the Yakama reservation when it established Maryhill:[349]

> While the treaty between the federal government and the Yakama Nation reserves and defines the boundaries of one large tract of land, there is no indication in the law that "reservation" means only a specific tribe's original treaty reservation. The [s]tate jurisdictional statute does not specify how or when the reservation of land must be established.[350]

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343. *Jim*, 273 P.3d at 438.

344. *Id.* (quoting BLACK'S LAW DICTIONARY 1422 (9th ed. 2009)) (internal quotation marks omitted).

345. *Jim*, 273 P.3d at 438 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1930 (2002)) (internal quotation marks omitted).

346. *Jim*, 273 P.3d at 437-38.

347. Id. at 436 (quoting Act of Nov. 1, 1988, Pub. L. No. 100-581, § 401(a)-(b), 102 Stat. 2938, 2944).

348. *Jim*, 273 P.3d at 436 *(citing* 25 C.F.R. §§ 247.2(b), 247.3 (2014)). Recall that the "exclusive" aspect was only added after the fact via BIA regulations, not congressional mandate. *See* 25 C.F.R. §§ 247.2(b), 247.3 (2014). But the BIA had created similar "exclusivity" requirements in 1967 for the "in-lieu" sites, of which Congress presumably had notice before creating the TFASs. *See* 25 C.F.R. § 248.2. In *Jim*, the court implied that this signaled congressional intent to set the new sites aside for exclusive tribal use. *See* 273 P.3d at 437, 440.

349. *Jim*, 273 P.3d at 438.

350. *Id.*

"[L]and constitutes [the] single most valuable economic asset" for most Indian tribes,[351] and "one of the most controversial aspects of federal policy with respect to Indian lands is that of acquiring lands for tribes."[352] Land can be taken into trust for Native Americans through several methods.[353] The primary method for taking land into trust for tribes is through general discretionary authority of the Secretary of the Interior, who may also "proclaim that lands acquired in trust for a tribe become part of that tribe's reservation."[354] The "BIA land acquisition policy states: Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress."[355] However, "[u]nlike other federal legislation" acquiring lands for the tribes, "Congress did not direct that the [Maryhill access site (and other sites established in 1988)] be placed in trust for any tribe, nor have any sites been designated a[s] part of any established Indian reservation" for any of the tribes involved.[356] Nevertheless, the court in *State v. Jim* reasoned that "Maryhill would be considered a reservation for purposes of federal jurisdiction," because it was meant to have the same legal status as the "in-lieu" sites, which the *Sohappy* court had concluded qualified as a "reservation."[357]

"[T]he fishing clause [in the 1855 Treaty] was meant to accommodate the tribe's fishing-based economies and cultures to the new circumstances unfolding around the Yakama people," including the arrival of millions of American settlers into ceded tribal territories.[358] "[I]t is accordingly inconceivable that either [Stevens or the tribes] deliberately agreed to

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351. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 807 (9th Cir. 2011) (internal quotation marks omitted).

352. McCarthy, *supra* note 213, at 57.

353. Note that land can also lose its trust status, such as through disestablishment or diminishment. "Disestablishment" refers to termination of the entire reservation. *See* Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1017 (8th Cir. 1999). "Diminishment" occurs when only a discrete portion of a reservation loses its reservation status. *See id.* Congressional intent to diminish a reservation can be inferred by the court. McCarthy, *supra* note 213, at 48.

354. McCarthy, *supra* note 213, at 57-58 (citing 25 U.S.C. §§ 465, 467 (2012)). "Most appeals from [these] decisions . . . come from [states] that fear a loss of jurisdiction . . . ." *Id.* at 61. "Federal courts have frequently been asked to find that 25 U.S.C. § 465 is an unconstitutional delegation of legislative authority," but the United States Supreme Court has upheld it as constitutional. *Id.* at 58.

355. *Id.* at 59.

356. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 3.

357. State v. Jim, 273 P.3d 434, 440 (Wash. 2012)

358. Mulier, *supra* note 7, at 49.

authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish."[359] This would presumably include inundation of traditional fishing spots from dam construction, as well as crowding by non-Indian fisherman. The Maryhill site was established to address both of these issues.[360] But to claim that Congress intended the fishing sites to be a reservation is a stretch; the Washington Supreme Court was not forced to arrive at this conclusion.

In theory, the Maryhill site should be of the same nature as the original "usual and accustomed fishing places," none of which were within the four tribes' communal Indian reservations.[361] Instead, the court cited to broad dictionary definitions of "reservation" and the notion of exclusive use, ruling that "while Maryhill is not *the* Yakama Indian Reservation, it is nonetheless an area of land reserved for the exclusive use of four named tribes, making it *an* Indian reservation."[362] Thus, the BIA regulations effectively made Indian reservations where none had existed before. Though this falls in line with federal canons of construction, state courts have historically been more likely to find no ambiguity at all in order to support state interests. The three justices that dissented in *State v. Jim* found that there was no ambiguity because there was only one reasonable interpretation of the statute at issue.[363]

Additionally, policy considerations seem to cut against exclusive tribal criminal jurisdiction at these fishing sites. For example, the Supreme Court had previously ruled that the federal government had jurisdiction over Indians committing crimes on land patented in fee to non-Indians within reservations,[364] reasoning that conditioning criminal jurisdiction on land ownership would create an "impractical pattern of checkerboard jurisdiction," which would be unworkable.[365] Though not directly applicable in *State v. Jim*, this reasoning would seem to cut against tribal jurisdiction because excluding state criminal jurisdiction at the many

359. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979).

360. S. REP. NO. 100–577, at 44 (1988) (sites were set aside in response to dam construction on the Columbia); S. REP. NO. 100-577, at 22 (one of the purposes for the new sites was to ease overcrowding).

361. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 9.

362. State v. Jim, 273 P.3d 434, 438 (Wash. 2012).

363. *Id.* at 442 (Wiggins, J., dissenting).

364. Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962).

365. *Id.*

TFASs would create a similar checkerboard problem—one compounded by the fact that no one tribe has exclusive jurisdiction at any site.[366]

The Washington Supreme Court, while stretching to find the three criteria that the state's statutory interpretation demanded, also indicated that there may be an alternative interpretation that would lead to the same conclusion. Jim had argued throughout that RCW 37.12.010 was not as straightforward as the state claimed, and that the ambiguity must be resolved in favor of the tribes.[367] The statute, Jim urged, should be construed "liberally" and "broadly" for the tribes consistent with federal Indian law principles."[368]

The Washington Supreme Court seemed to agree, stating its belief that RCW 37.12.010 was open to a very different reading than that which the state had given it. The court stated that another "potentially legitimate, plain reading" of the statute was that state "assumption of jurisdiction shall not apply to Indians when on their tribal lands *or* [on] allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States."[369] Under this reading, any Indian on his/her tribal lands would be outside the state's criminal jurisdiction, and that would be the end of the inquiry. Because of the "exclusive use" aspect, Maryhill is considered tribal land and would be outside the state's jurisdiction. Since the court reached the same conclusion based on the state's reading of the statute, this alternative interpretation was not necessary.[370] In either case, the court found that Washington had no criminal jurisdiction over these tribal fishing sites. This ruling marks a strong departure from the anti-Indian fishing campaign that dominated the last 100 years of Washington's tribal relations.

D. Washington Fishing Regulations and Conservation Necessity

Even if Washington had criminal jurisdiction over the Maryhill site under RCW 37.12.010, it would still have additional hurdles to overcome before it could successfully regulate Jim's sturgeon fishing. According to an order of the U.S. District Court for the Western District of Washington,

366. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 15-16.

367. Supplemental Brief of Respondent, *supra* note 21, at 9-10.

368. *Id.* at 10.

369. State v. Jim, 273 P.3d 434, 437 n.3 (Wash. 2012) (emphasis added) (citing WASH. REV. CODE § 37.12.010 (2013)).

370. *Jim*, 273 P.3d at 437 n.3.

> Because the right of each [t]reaty [t]ribe to take anadromous fish arises from a treaty with the United States, that right is preserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the [s]tate.[371]

Both Public Law 280 and RCW 37.12.060 recognize this limit on Washington's regulatory power, and expressly state that nothing in the statute:

> shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.[372]

But where the tribe "expressly reserved" the right to fish "on the ceded lands," it does not eliminate "the [s]tate's power to reasonably and evenhandedly regulate such activity."[373] Indian treaty fishing rights are not irreconcilable with state management. While the "tribes ha[ve] a special treaty right to fish on and off the reservation . . . a state can regulate the manner of fishing in the interest of conservation."[374] This principle finds its roots in the state sovereignty context, allowing state regulation of Indian treaty rights even though states do not otherwise possess Congress's authority to qualify treaty rights.[375] Though only Congress can abrogate or diminish treaty rights,[376] which it must do clearly and explicitly, exclusive tribal jurisdiction would not make sense where, as here, the right to fish was reserved "in common with" citizens of the territory–-implicating state and federal interests.[377] Commonly known as the "conservation necessity" standard, this principle "accommodates both the [s]tate's interest in management of its natural resources and the [tribe's] federally guaranteed treaty rights."[378] The state argued in *State v. Jim* that the "savings

371. United States v. Washington, 384 F. Supp. 312, 407 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

372. 18 U.S.C. § 1162(b) (2012); WASH. REV. CODE § 37.12.060 (2013); *see also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 410-11 (1968).

373. Or. Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 768-69 (1985).

374. *Miller*, *supra* note 34, at 561; *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999).

375. *See Mille Lacs Band of Chippewa Indians*, 526 U.S. at 205.

376. *Menominee Tribe*, 391 U.S. at 412-13.

377. United States v. Sohappy, 770 F.2d 816, 818-19 (9th Cir. 1985).

378. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 205.

provisions in [Public Law 280 and RCW 37.12.060] do not preempt state regulation;" instead, they simply preserve the existing balance between conservation necessity and tribal fishing rights.[379]

Assuming that Washington had criminal jurisdiction, "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated *by the [s]tate* in the interest of conservation, provided the regulation meets appropriate standards . . . ."[380] Essentially the "conservation necessity" standards require that (1) state laws must be "reasonable and necessary" for the conservation of species; (2) "conservation . . . cannot be achieved by reasonable regulation of non-Indian activities" alone; (3) the law at issue is the "least restrictive alternative . . . to achieve the . . . conservation purpose[s]"; (4) it "does not discriminate against Indian activities"; and (5) "voluntary tribal [conservation] measures are [in]adequate to achieve the . . . conservation purpose."[381]

"While Indian tribes must face some regulation of their treaty rights," state regulations face "close judicial scrutiny."[382] "[T]he [s]tate simply cannot by its own statute assume criminal jurisdiction to enforce state fishing laws against enrolled Yakama members exercising their treaty fishing rights."[383] Treaty fishing rights are a valid defense to prosecution.[384] Consequently, the state was eager to frame *State v. Jim* as a criminal jurisdiction case, and "not a fishing rights case."[385] The state asserted that *State v. Jim* required the same jurisdictional analysis as a "property crime,

379. State's Response Brief, *supra* note 257, at 9 (citing *Sohappy*, 770 F.2d 816).

380. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968) (emphasis added).

381. *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*, U.S. DEP'TS OF COMMERCE AND INTERIOR, 6 (Secretarial Order No. 3206, June 5, 1997), https://www.fws.gov/endangered/esa-library/pdf/appendix_f-j.pdf; Charles F. Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights–Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1071-72 (1997); *see also* State v. Buchanan, 978 P.2d 1070, 1081 (Wash. 1999).

382. *Miller*, *supra* note 34, at 563 (emphasizing that the Washington Supreme Court held that the state courts have no jurisdiction to regulate fishing activities on the reservation, and that, in any event, the limitation on the steelhead catch is not a necessary conservation measure); *see also* Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 174-75 (1977).

383. Brief of Petitioner, *supra* note 190, at 28.

384. *See* State v. Courville, 676 P.2d 1011, 1014 (Wash. Ct. App. 1983) (emphasizing that Indian fisherman may assert treaty rights as a defense in game violation prosecution).

385. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 3 n.2. In fact, Jim challenged the state regulations under conservation necessity at the trial court level, but the state failed to file any brief in response to this challenge. Supplemental Brief of Respondent, *supra* note 21, at 2 n.1.

an assault, or a drug crime" occurring at the same site.[386] Although Jim alleged that the "state was preempted from regulating" his fishing activity, the state claimed that this was "an affirmative defense to state criminal charges," and that it should not be considered outside of "a trial on the merits."[387] The Washington Supreme Court agreed.[388]

Though the Yakama Treaty preempts some state fishing regulations, nondiscriminatory fishing regulations necessary for the conservation of fishery resources can be applied against treaty Indians at their "usual and accustomed fishing sites."[389] Because the Yakama Nation also has the right to regulate fishing by its members,[390] a system has been developed for federally supervised joint regulation per *United States v. Oregon*.[391] The regulation that Washington sought to enforce against Jim was a result of this collaborative process,[392] but the court never reached the question of its validity under the conservation necessity standard.

One of the most surprising aspects of this case was not that Jim's activities were ultimately found to be beyond state regulatory authority, but rather that the Washington Supreme Court seemed to bend over backwards to meet the criteria advanced by the state for the jurisdictional exception. The court could have easily ruled for the state, as one might have predicted based on its precedent, allowing the prosecution to move forward, and forcing the state to prove conservation necessity. It also could have based its ruling on its own "potentially legitimate" reading of RCW 37.12.010–-resting its decision simply on Maryhill's status as "tribal land." But instead, by basing its ruling on broad jurisdictional interpretations, the court ruled definitively in favor of the tribes. The ruling is not only a victory for tribal treaty fishing rights, but also a victory for tribal sovereignty.

386. Supplemental Brief of Petitioner State of Washington, *supra* note 245, at 3 n.2.

387. *Id.*

388. State v. Jim, 273 P.3d 434, 437 n.2 (Wash. 2012).

389. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398-99 (1968); Sohappy v. Smith, 302 F. Supp. 899, 910 (D. Or. 1969).

390. Settler v. Lameer, 507 F.2d 231, 236 (9th Cir. 1974).

391. State's Response Brief, *supra* note 257, at 14-15.

392. *Id.* at 14-15. The Yakama Nation is a signatory to the 2008 *United States v. Oregon* Management Agreement acknowledging that state and tribes have overlapping jurisdiction in this area. *Id.* at 15 n.8.

V. Future Implications

"[T]he treaty rights of Northwest Indian tribes are [the] stronge[st]" they have been in the past 100 years.[393] After *State v. Jim*, the tribes are even more secure in their right to fish and self-regulate. In ruling for the tribes, the Washington Supreme Court has upheld—and in fact expanded—tribal sovereignty. The Washington court would not have produced a ruling like this one thirty years ago, and it is questionable whether the U.S. Supreme Court would have ruled so clearly in the tribe's favor.[394] The court's pro-tribal ruling may represent another step in the changing tides of the Washington State-Tribal relationship.

State v. Jim is a clear and welcomed departure from the "states as enemies" model, which historically has dominated Washington's relationship with the tribal governments. This recent victory, combined with the growing trend of tribal self-determination supported by both federal and state governments, leaves new room for increased tribal autonomy and self-regulation.[395] The U.S. Supreme Court has upheld "the right of reservation Indians to make their own laws and be ruled by them,"[396] and the designation of hundreds of additional acres as "reservation land" has numerous implications for tribal sovereignty.

The designation of Maryhill and other fishing sites as "reservations" has implications for state water rights and water quality, the Endangered Species Act ("ESA"), and state fishing regulations.[397] But among the most

393. *Miller*, *supra* note 34, at 563.

394. *See* Matthew L.M. Fletcher, *The Supreme Court's Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 102 (2007).

395. Black Hills Inst. of Geological Research v. S.D. Sch. of Mines & Tech., 12 F.3d 737, 744 n.7 (8th Cir. 1993).

396. Williams v. Lee, 358 U.S. 217, 220 (1959).

397. *See* United States v. New Mexico, 438 U.S. 696, 717-18 (1978) (holding that water is impliedly reserved to the extent necessary to meet the primary purposes for which a reservation is made); United States v. Orr Water Ditch Co., 309 F. Supp. 2d 1245, 1253 (D. Nev. 2004) (holding that fishing is a purpose to which the tribes may apply reserved water rights); United States v. Gila Valley Irrigation Dist. 920 F. Supp. 1444, 1454-55 (D. Ariz. 1996) (upholding tribes' rights to water *quality* and not just water quantity for reserved water rights on their reservations). "The Fish and Wildlife Service of the [Department of the Interior], in particular, is required to consult with tribes prior to designating reservation lands as critical habitat under the Endangered Species Act." McCarthy, *supra* note 213, at 101. States may impose environmental regulations on tribes if they meet the "conservation necessity" test, which includes as a necessary element that "(1) the sovereign . . . has jurisdiction in the area where the activity occurs . . . ." United States v. Fryberg, 622 F.2d 1010, 1015 (9th Cir. 1980); *see also* Tulee v. Washington, 315 U.S. 681, 683 (1942) ("The state does not claim power to regulate fishing by the Indians in their own reservation.").

notable impacts is the role this ruling plays in the trend of increased tribal sovereignty. The tribes argued that state criminal jurisdiction at Maryhill would negatively affect their "ownership interests and sovereign powers," and *State v. Jim* protects tribes from that result.[398]

A. Changing Tides, States and Tribes

The modern-day official Indian policy is one of "fostering tribal self-government,"[399] and "Congress delegates more and more of its exclusive Indian affairs authority to tribes . . . ."[400] The federal government is slowly and intentionally getting out of Indian affairs.[401] Additionally, tribes today are much more competent at looking out for their own interests than they were several decades ago, lessening the need for the "guardian" to look after its "ward."

A positive federal relationship may not be anything new; however, what is noteworthy is the growing cooperation between states and tribes. "American Indian law is transforming."[402] "The political relationship between the United States and Indian tribes remains, but a new and more dynamic relationship between states and Indian tribes is growing."[403] Though the *State v. Jim* ruling may be a big step for Washington, it is not the first state to move in this direction. The "new approaches [to tribal sovereignty are] focusing more on tribal participation, partnerships, and increased control during the modern era of self-determination."[404]

According to one American Indian law scholar,

States and Indian tribes are beginning to smooth over the rough edges of federal Indian law--jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority--through cooperative agreements. In effect, a new political relationship is pringing up

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398. Brief for Confederated Tribes of the Umatilla Indian Reservation et al. as Amici Curiae Supporting Respondent, *supra* note 271, at 1.

399. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5 (1982) (citing Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980)).

400. Fletcher, *supra* note 50, at 82.

401. *Id.*

402. *Id.* at 74.

403. *Id.*

404. Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1067-68 (2008).

all over the nation between states, local units of government, and Indian tribes.[405]

Violence and racism no longer form the basis of the tribal and state relationship.[406] In fact, in many areas "states and tribes are moving toward [increased] intergovernmental cooperation."[407] These changing relationships are also reflected in the federal statutes, which require state and tribal cooperation,[408] and even in Washington State regulations, which require tribal consultation for certain state projects.[409] Most states, including Washington, "now recognize Indian tribes as legitimate governments," as well as "*de facto* political sovereigns."[410] In short, "tribal-state cooperation and agreement is growing."[411]

Intergovernmental agreements have become a great tool for "settling . . . jurisdictional dispute[s]," such as the one at issue in *State v. Jim*, because they can provide certainty in a field of Indian law, which often "offers nothing more than gray areas."[412] These tribal-state agreements have in some cases "extended [tribal] jurisdiction outside of the[ir] reservation[s] . . . ."[413] Some tribes "continue to be reluctant to engage" states in these negotiations,[414] but that may change should tribal-state relations continue to improve. In fact, the increase in negotiated settlements was due in part to the recognized potential for state courts to be a "hostile forum."[415] Washington's highest court has proven to be anything but hostile. The ruling in *State v. Jim* may be indicative of a shifting policy and improved relationship between the state and the tribes.

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405. Fletcher, *supra* note 50, at 74.

406. *Id.* at 86.

407. Royster, *supra* note 406, at 1094 n.170.

408. Fletcher, *supra* note 50, at 82 (stating "the Indian Child Welfare Act and the Indian Gaming Regulatory Act[] authorize and even mandate cooperation between Indian tribes and states.").

409. *See, e.g.*, WASH. REV. CODE § 90.82.080(3) (2013) (requiring "government-to-government consultation with affected tribes" before setting minimum instream flows).

410. Fletcher, *supra* note 50, at 79, 83 (emphasis added). "Many states (including Washington) now require their agencies to deal with Indian tribes on a 'government to government' basis." *Id.* at 83.

411. *Id.* at 74.

412. *Id.* at 84 (citing Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 19-20 (2004)).

413. Fletcher, *supra* note 50, at 84.

414. *Id.* at 83.

415. Royster, *supra* note 146, at 100-01.

B. Criminal Enforcement

Part of the state's reluctance to concede jurisdiction may be due in part to legitimate interests in criminal enforcement. Historically the tribal criminal justice system has been subpar. It tends to suffer from a lack of enthusiasm by federal prosecutors, insufficient federal resources, and limited tribal authority.[416] Reports show that while certain aspects of the tribal law enforcement programs are in good shape,[417] others are far below their state or federal counterparts. "[F]indings by the U.S. Commission on Civil Rights indicate that[] [a]ll three components of law enforcement--policing, justice, and corrections--are substandard in Indian Country as compared with the rest of the nation."[418] Though in many respects Native American sovereignty is on the rise, criminal justice in Indian Country has experienced resistance to the "self-determination" movement.[419] This may be due in large part to questions of legitimacy and enforcement capacity–-the same concerns at issue in *State v. Jim*.[420]

In the *State v. Jim* litigation, the Columbia River treaty tribes asserted that they are "stepping up efforts to curb criminal activity" at their fishing sites.[421] But this claim is unsupported by the record and "the stepped up tribal enforcement activity" appears to only have begun after Jim was cited in 2008.[422] Additionally, although the Columbia River Inter-Tribal Fish Commission ("CRITFC") has enforcement officers, the "Yakama ha[ve] not commissioned CRITFC . . . [o]fficers since 2003."[423] Consequently, "CRITFC . . . officers cannot cite Yakama [citizen] fishers," who make up

416. McCarthy, *supra* note 213, at 46-47. For example, tribal systems have typically suffered from an insufficient number of federal prosecutors and investigators to perform the tasks. There are disproportionately few law enforcement officers in Indian Country. In 2000, the BIA and tribal agencies employed officers composing less than 3% of federal officers and less than 1% of state officers. *Id.* at 53. Tribes have some enforcement authority, but "[o]ften, tribal law enforcement officers are limited to restraining . . . perpetrators until a county, [s]tate, or [f]ederal officer arrives." *Id.*

417. "In 2002, [Department of the Interior's] Inspector General conducted a department-wide review of law enforcement programs, and cited the BIA as a model for personnel and training standards, operations manuals, staffing redeployment, records systems, and incident reporting." *Id.* at 53.

418. *Id.* at 56.

419. Washburn, *supra* note 230, at 714.

420. For a more detailed analysis of tribal criminal justice systems, see *id.* at 713-14.

421. Brief for Confederated Tribes of the Umatilla Indian Reservation et al. as Amici Curiae Supporting Respondent, *supra* note 271, at 19.

422. State of Washington's Response Brief to Amici Curiae, *supra* note 256, at 18-19.

423. *Id.* at 19 n.12.

"75% of tribal fishers on the Columbia River . . . ."[424] In fact, Washington Department of Fish and Game increased patrols precisely to compensate for the lack of enforcement presence provided by CRITFC.[425] The state pointed out that with "four Indian tribes [being] equally entitled" to the land, "it is doubtful that any of the four tribal governments" could enforce against the other three, because the basis for prosecuting non-member Indians has been the tribe's ownership of the land.[426]

In addition to lack of enforcement for crimes committed by tribal members, relevant tribal courts do not have jurisdiction over non-Indians.[427] "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ."[428] "[L]and ownership 'may sometimes be a dispositive factor' in establishing a tribal court's regulatory jurisdiction over non-Indians" as well.[429] But generally tribes have limited jurisdiction and authority over non-Indians.[430]

Because non-Indians frequent fishing access sites, the criminal jurisdictional gap is cause for state concern.[431] Without the jurisdiction granted by Public Law 280 and "similar federal statutes, states [(including Washington)] have no jurisdiction over Indian [C]ountry,"[432] and the resulting "jurisdictional vacuum" would leave room for more than just unprosecuted criminal fishing violations.[433] The state's concerns about crimes such as domestic violence[434] at these sites are not unfounded. Indians are statistically far more likely to become victims of violent crime,

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424. *Id.*

425. *Id.*

426. State's Response Brief, *supra* note 257, at 27.

427. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that tribes cannot criminally prosecute non-Indians).

428. United States v. Mauzurie, 419 U.S. 544, 557 (1975).

429. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813 (9th Cir. 2011).

430. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A–1 Contractors, 520 U.S. 438, 446 (1997); Montana v. United States, 450 U.S. 544, 549 (1981). The right to exclude non-Indians from tribal land includes the power to regulate them. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (stating "[t]ribal authority over activities in non-Indian land is an important part of tribal sovereignty.").

431. State of Washington's Response Brief to Amici Curiae, *supra* note 256, at 19.

432. Brief for Confederated Tribes of the Umatilla Indian Reservation et al. as Amici Curiae Supporting Respondent, *supra* note 271, at 18 (citing State v. Cooper, 928 P.2d 406, 407 (Wash. 1996)).

433. State's Response Brief, *supra* note 257, at 26.

434. *Id.*

including rape/sexual assault, than any other racial class.[435] Additionally, sexual offenses against women and children-–such as those at issue in *Cooper*[436]–-are very serious problems in Indian Country.[437] Just how the state and tribes will respond to the "significant vacuum"[438] of criminal enforcement authority is yet to be determined.

Though the tribal criminal justice system may be in need of improvement, tribal natural resource management generally appears to be in far better condition. "Tribes [already] play the leading role in management of their own fish and wildlife resources[, and] [t]hey have formed a number of inter-tribal organizations to assist in the administration of fish and wildlife programs."[439] "[I]t is widely recognized that tribal governments and inter-tribal fish and wildlife management organizations have been amongst the most effective stewards of natural resources, both on tribal lands and off . . . ."[440] Though the state's concerns about criminal enforcement may be legitimate, tribes have proven themselves to be competent and capable stewards of their natural resources, including salmon, for thousands of years.

VI. Conclusion

The vindication, and expansion, of reserved treaty fishing rights has been a long, slow, painful, and often passionate ordeal. Washington State has historically operated in line with the "deadliest enemies" model that has characterized many tribal and state relationships. Tribal fishing rights were often ignored by the state, as Indian populations declined along with tribal self-governance rights. To this day, "fishing remains an important aspect of tribal life, providing food, employment, and . . . cultural identity."[441] Also, with tribal populations on the rise and many anadromous fish species in a

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435. Steven W. Perry, *American Indians and Crime: A BJS Statistical Profile, 1992-2002*, U.S. DEP'T OF JUSTICE, 5 (Dec. 2004), http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.

436. *See generally Cooper*, 928 P.2d 406.

437. Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, U.S. DEP'T OF JUSTICE, 21-23 (Nov. 2000), https://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

438. State's Response Brief, *supra* note 257, at 26.

439. McCarthy, *supra* note 213, at 100.

440. *Id.* (quoting *Status of Tribal Fish and Wildlife Management Programs: Oversight Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. 1 (2003) (opening statement of Vice Chairman Inouye)) (internal quotation marks omitted).

441. United States v. Washington, 520 F.2d 676, 683 (9th Cir. 1975)

vulnerable state, the right to fish is one of increasing importance for the Northwest treaty tribes.

State courts were historically very severe toward Native Americans. Even though the canons of construction demand that ambiguity be resolved in favor of the tribes, state courts generally preferred to find no ambiguity at all, ruling in favor of state interests. Washington's Supreme Court would have been justified in doing the same in *State v. Jim*. Though states and their courts have historically created a hostile environment for Native American treaty fisherman, there may now be momentum for a new tribal-state relationship.

In *State v. Jim*, the Washington Supreme Court broke from the historical "deadliest enemies" model and ruled strongly in the tribe's favor. The Maryhill TFAS, the "in-lieu" sites, and all other "usual and accustomed" fishing sites were generally thought to be within the state's criminal jurisdiction. By ruling that Maryhill is tribal land held in trust with a restraint against alienation, and even more surprisingly, that while it is "not *the* Yakama Indian Reservation, it is nonetheless . . . *an* Indian reservation,"[442] the court approved a major limitation on the criminal jurisdictional power of its state. This ruling goes beyond simply protecting treaty fishing rights, instead expanding tribal criminal jurisdiction in all areas and leaving the tribe's with increased sovereignty and ability to self-govern.

This trend is not uncommon in the unique distribution of power between the federal government and the tribes, but it is new for states. How this ruling will play out has yet to be determined. The TFAS "reservations" are held in common for four different tribes, each of which has limited ability to regulate the others. Additionally, although tribal management of natural resources, including anadromous fish, may be exemplary, tribal criminal justice and enforcement has typically lagged behind its state and federal counterparts. To make matters worse, Native Americans are far more likely than other racial groups to be victims of violent crime, and the remote locations of the various fishing sites will not make supervision and enforcement any easier.

Though some are still skeptical of tribes' ability to self-govern, "[r]etiring the 'deadliest enemies' model of tribal-state relations would be a powerful step in the right direction."[443] *State v. Jim* may be an important part of this movement toward improved tribal-state relations. The *State v.*

442. State v. Jim, 273 P.3d 434, 438 (Wash. 2012).

443. *See* Fletcher, *supra* note 50, at 87.

Jim decision is not just a victory for tribal fishing rights, which have long suffered attack in Washington State, but it also notes a shift in the Washington Supreme Court's tone toward sovereignty in general. Perhaps this opinion can be seen as part of greater change that is occurring in the Northwest. With increasing strength in treaty fishing rights, increased jurisdictional power, and increasing cooperation between states and tribes, perhaps the treaty tribes of the Northwest will have a brighter future ahead of them.