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

Matthew Deisen

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

Matthew Deisen*

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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

1 273 P.3d 434, 441 (Wash. 2012).
sites.\textsuperscript{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.\textsuperscript{3} Many of these tribes made a “seasonal round” throughout the year, moving from one harvest to the next.\textsuperscript{4} For the Columbia River Treaty tribes, fish were, and arguably still are, the most important natural resource.\textsuperscript{5} The fish are a cornerstone of their culture and identity.\textsuperscript{6}

During the years “1854 and 1855, the United States executed nine treaties with twenty-three tribes”\textsuperscript{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.”\textsuperscript{8} Due to the incredible importance of fish to the Native American lifestyle, they would not have signed the treaties without this promise.\textsuperscript{9} But the implications of such a promise by the United States federal government are still not fully understood.\textsuperscript{10}

\textsuperscript{2} Id. at 437-38.
\textsuperscript{4} Id. at 2-7.
\textsuperscript{6} COLUMBIA RIVER INTER-TRIBAL FISH COMM’N, supra note 3, at 2-4.
\textsuperscript{8} Id. at 42 (citing Treaty Between the United States and the Yakama Nation of Indians, arts. 1-III, June 9, 1855, 12 Stat. 951).
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. When it comes to honoring tribal rights to salmon, Washington has been reluctant to say the least. 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.

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. Still, Washington State has been slow even to recognize this right. 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. 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.

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. 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.
15. See generally Wilkinson, supra note 9.
Columbia River Treaty tribes in 1988, as an exercise of the tribe’s treaty fishing rights. Though his act violated state law, it was not a violation of Yakama Nation tribal law. Jim claims that he was in Indian Country and on an established reservation, and therefore tribal fishing law should apply. 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.

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. 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. 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.

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

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 ‘fail[]’ 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)).
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.” Among the greatest cultural differences were the differing ways of viewing land and natural resources.

Native Americans were largely hunter-gatherer societies with some cultivation activities. The world-view of many tribes, prior to white contact, was premised on an usufructuary view of the universe. 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. These clashing views were still prevalent in the 1800s when white settlement began to accelerate in the Northwest.

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.\(^{41}\)

\(^{32}\) 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].


\(^{37}\) Id.

\(^{38}\) Id.


\(^{40}\) 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.” Isaac Stevens, the superintendent of Indian affairs and the first man to serve as governor of Washington, was commissioned to negotiate with the Natives. 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. Steven’s goal was to “smooth the way for settlement by inducing the Indians of the area to move voluntarily onto reservations.”

A. The Treaty

To achieve westward expansion, “Congress chose treaties rather than conquest as the means to acquire vast Indian lands.” 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.” 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.” 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[,]” and “[l]ike any treaty between the United States and

42. United States v. Washington, 520 F.2d 676, 682 (9th Cir. 1975).
43. B LUMM, 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.
46. Washington, 520 F.2d at 682.
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.
another sovereign nation, [they are] the supreme law of the land and binding on the State until Congress limits or abrogates the treaty."

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 . . . .” The treaties all had the same “essential elements,” and reserved for the tribes small reservations as homelands. Despite ceding “their nomadic lifestyle and most of their territory[,] [the tribes] were unwilling to give up the right to fish,” 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.” Many of the Stevens treaties had provisions similar to that found in the Yakama Nation treaty, 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.

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


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).


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.

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,\textsuperscript{68} and “\textquotedblleft negotiators 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.\textquotedblright”\textsuperscript{69} To the tribes, the right of taking fish was the most important clause in the treaty\textsuperscript{70} because access to traditional fishing spots was “not much less necessary to the existence of Indians than the atmosphere they breathed.”\textsuperscript{71} The clause retained tribal freedom to leave the reservations and gain access to this vital resource at their accustomed locations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{74} As for Native fishing rights, it is unclear whether Washington State’s government officials ever really recognized this treaty right.\textsuperscript{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 . . . .”\textsuperscript{76} The founding fathers assumed that Indians would not be on the continent for long.\textsuperscript{77} In fact, the disappearance of Indian people was “both hoped for and
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.

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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 . . . .”).


80. Tizon, supra note 65.


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


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 Court89 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”; 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.").
90. Miller, supra note 26, at 191.
91. Id.
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.").
process, not a negotiation." He “had his script” and stuck to it, often dictating terms.

Federal courts have recognized these issues and, consequently, have interpreted Indian treaties in a manner favorable to tribes. Because of the troubling aspects of the treaties between the United States and tribes and also the fiduciary relationship between the two, “[c]ourts have uniformly held that treaties . . . must be liberally construed in favor of establishing Indian rights.” 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.” 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,” and that any ambiguities in treaty language or the surrounding negotiations must be resolved in favor of the tribe.

Another key principle of treaty interpretation is known as the “reservation of rights doctrine.” First described in United States v. Winans, 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. The reservation of rights doctrine has consistently been applied to the fishing and hunting provisions of the Stevens Treaties—rights, which the Indians are said to have enjoyed from time immemorial.

95. Wilkinson, supra note 9, at 11.
96. Id. at 11-12. These abrasive tactics resulted in several violent post-treaty rebellions.
97. Miller, supra note 26, at 192.
100. Miller, supra note 26, at 192.
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{108} The full scope of this right and the government’s duties under it have not been fully recognized or delineated yet.\textsuperscript{109} A primary concern of the Native Americans “was that they have freedom to move about to gather food, particularly salmon.”\textsuperscript{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.”\textsuperscript{111} The Yakama Nation successfully fought for this right in United States v. Taylor,\textsuperscript{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.\textsuperscript{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.\textsuperscript{114}

\textsuperscript{106} Winans, 198 U.S. at 379.
\textsuperscript{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.
\textsuperscript{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.”).
\textsuperscript{109} Fisher, supra note 5, at 494.
\textsuperscript{110} Id. at 501 (quoting United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974).
\textsuperscript{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.”).
\textsuperscript{112} 13 P. 333 (Wash. Terr. 1887).
\textsuperscript{113} Mulier, supra note 7, at 42.
\textsuperscript{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.”

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. In United States v. Winans, 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. The circuit court agreed, holding that “the treaty . . . did not require private property owners to give access and use rights to Yakama [treaty fisherman].” 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. This important usufructuary right was in the nature of both an easement (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). 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.
Though the technical meaning of these property rights could not have been conveyed during treaty negotiations, 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.” Examination of the historical record provides insight into how the parties to the treaty understood the terms of the agreement. 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?

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.” 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.”

“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.” “Negotiators specifically assured the tribes that they could continue to fish notwithstanding the changes that the impending westward expansion would certainly entail,” 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.

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).
129. Id. at 666 n.9 (quoting Letter from Isaac Stevens to the Commissioner of Indian Affairs (Sept. 16, 1854)).
130. Id. at 676.
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

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." 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," 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." This animosity "arose out of the often violent conflict over limited resources" resulting from "westward migration . . . in the 19th and early 20th centuries." The "deadliest enemies" "model of mutual animosity forms the" foundation "of tribal-state relations to this day." States and their citizens were engaged in an unrelenting effort “to take Indian land and resources,” and eliminate Indian people altogether. These disputes, often erupting between states (or more appropriately, their citizens) and the tribes, sometimes turned deadly. “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.”

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.
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.”

“[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. Consequently, state courts were, and arguably are, a “potentially hostile forum,” and Congress has recognized the hesitancy of tribes to use state courts. 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. There is no evidence that [either party to the treaty] considered the possibility of a collapse in the region’s anadromous fish. 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. “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.

As fisheries developed and fish populations fell, Washington State, with the support of the Washington State Supreme Court, 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.”).
145. Mulier, supra note 7, at 43.
146. Miller, supra note 34, at 555.
147. Tizon, supra note 65.
off-reservation fishing despite the Stevens Treaties. 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.” By the 1940s, it became clear that the tribes would not enjoy any unique fishing rights under Washington’s authority. 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,” 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.

In the early 1960s, the State mounted raids on tribal fishermen that would last for over a decade. 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, frequently seizing “Indian nets and equipment.” The Indians cited the Stevens Treaties in support of their position, however, the state continued to regulate tribal fishing. Washington viewed “Indian fishermen as lawless, perverse, and as the causal reason for the decrease in salmon runs.” 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. “[A]ll Indians who dared defy the state” were viewed as “outlaws.” “To survive [and] continue their culture, [they] had to become an underground society.”

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.
154. Miller, supra note 34, at 561.
156. Fisher, supra note 5, at 499-500.
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.”\(^\text{163}\) For most of the twentieth century, non-Native society “viewed [Indians] as a nuisance, a hindrance to progress.”\(^\text{164}\) “In the Northwest, tribes were widely seen as poaching communities - lawless, primitive, skulking around in the dark.”\(^\text{165}\) 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.”\(^\text{166}\)

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.”\(^\text{167}\) A lack of communication led to a “deep distrust” among the parties.\(^\text{168}\) 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.\(^\text{169}\) 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.\(^\text{170}\)

Many “treaty fishing rights of [N]ative Americans have often been preserved in the courts against violent opposition.”\(^\text{171}\) Curbing executive overstepping, “[f]ederal courts, applying special rules of construction, have steadfastly upheld treaty promises against state recalcitrance.”\(^\text{172}\) The famous “Boldt Decision” of 1974,\(^\text{173}\) 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).
\(^{169}\) Tizon, supra note 65.
\(^{170}\) Id.
\(^{171}\) Miller, supra note 34, at 543.
\(^{172}\) Id. at 563.
Native Americans, who made up just one percent of the state’s population.\textsuperscript{174} Such victories “did not come without widespread resistance.”\textsuperscript{175}

When the Ninth Circuit affirmed Judge Boldt in 1975,\textsuperscript{176} non-Indian harvesters engaged in “widespread noncompliance” with the federal court’s orders.\textsuperscript{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.\textsuperscript{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.\textsuperscript{179} The State of Washington refused to accept the Boldt decision until the Supreme Court reviewed the decision and affirmed in 1979.\textsuperscript{180}

It was one of “the most concerted official and private efforts to frustrate a decree of a federal court” of the twentieth century.\textsuperscript{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.”\textsuperscript{182} As a last resort, Judge Boldt eventually took on the role of “judicial ‘fishmaster.’”\textsuperscript{**183} He managed the Puget Sound and coastal Washington fisheries himself, policing them via court orders, criminal contempt citations, and federal marshals.\textsuperscript{184} “The ruling shocked the region,
and . . . resentment[] [over the case] continue[s]” today. And so continues the court’s jurisdiction.

Overt anti-Native sentiment declined during the latter portion of the twentieth century. 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.” 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, 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. Jim was fishing at the Maryhill

185. Tizon, supra note 65.
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." 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.

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." "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]." 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," Washington State law requires the "return [of] unauthorized fish to the water immediately." 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. In response, Congress set aside several "in-lieu" fishing sites in 1945. "Then, in 1988, Congress provided for . . . improvement of existing in-lieu sites" and also set aside six new treaty fishing access sites. Maryhill was one of these sites.
“Jim challenged the State’s jurisdiction to prosecute him . . . at Maryhill,” which federal regulations state is reserved exclusively for the Columbia River tribes.\textsuperscript{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.”\textsuperscript{202} The Court of Appeals reversed, finding no state jurisdiction, and in a 6-3 decision the Washington Supreme Court affirmed.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{206} Criminal jurisdiction in Indian Country is complex and is informed by the relationship between the tribes, the states, and the federal government.

\textsuperscript{200.} Jim, 273 P.3d at 436.
\textsuperscript{201.} Id. (citing 25 C.F.R. §§ 247.2(b), 247.3 (2014)).
\textsuperscript{202.} Jim, 273 P.3d at 436 (internal quotation marks omitted).
\textsuperscript{203.} Id. at 436, 441.
\textsuperscript{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.
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

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.).


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 Act221 and the Indian Commerce Clause222 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

\(^{223}\) 31 U.S. (6 Pet.) 515 (1832).


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


\(^{228}\) 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).


\(^{231}\) Id.

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

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

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, ruling that Washington had no jurisdiction at a similar “in-lieu” fishing site. 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,” 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.”

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.

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. Jim argued that “[u]nder the principle of stare decisis, Sohappy controls.” The state argued that Sohappy had been superseded by two other cases—Cooper and Boyd.
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


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.

types described in the statute—i.e., lands held in trust or subject to a restraint against alienation.\footnote{259}

Furthermore, “off-reservation fishing access sites [have always been] owned in fee by the federal government or private landowners . . . .”\footnote{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 . . . .’”\footnote{261} This means that RCW 37.12.010 gave Washington jurisdiction over fee lands even when they are within Indian reservations.\footnote{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.\footnote{263}

The legislature never defined “held in trust” for purposes of RCW 37.21.010.\footnote{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.\footnote{265} The federal government did not assume trust responsibility over the access sites because doing so would have required express language by statute.\footnote{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.\footnote{267} Nor did anything in the BIA federal regulations state that the land would be held in trust for any of the tribes.\footnote{268}

\footnote{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).

\footnote{260. State of Washington’s Response Brief to Amici Curiae, supra note 256, at 2.}


\footnote{262. Id.}

\footnote{263. State of Washington’s Response Brief to Amici Curiae, supra note 256, at 18.}

\footnote{264. Supplemental Brief of Respondent, supra note 21, at 14.}

\footnote{265. Supplemental Brief of Petitioner State of Washington, supra note 245, at 13.}


\footnote{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.}

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. 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.” These tribes included State v. Jim’s amici curiae tribes, who described themselves as the “beneficial owners” of the Maryhill site. 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’).” These necessary trust elements were enumerated in United States v. Mitchell, 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.” The 1988 statute, Jim argued, created a “trust” even though it did not use express language. He further argued that this trust gives the tribes only “beneficial use,” creating a restraint on alienation.

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.” Again, the court based its “trust” holding on the fact that the land was set aside “for exclusive use and benefit of the tribes . . . .” The court agreed that a trust relationship can exist absent express words, and that all the Mitchell elements of a trust were present. 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.
275. Id. at 225 (emphasis added) (citation omitted).
276. Supplemental Brief of Respondent, supra note 21, at 11.
277. Id.
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]lotted 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

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)).
284. Jim, 273 P.3d at 437.
285. See Washburn, supra note 230, at 715.
287. Id. at 16.
290. Id. at 1.
“entitled to reservation status,” apparently because it is within “Indian Country.” But the Washington Supreme Court had already held in Cooper that it was “not appropriate to utilize federal conceptions of ‘Indian Country’ 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 Country.”

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. 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[].” Despite the Washington Supreme Court’s holding, “[t]he Maryhill site meets none of these criteria.”

“The term ‘Indian reservation’ is not defined by statute” 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.’” “At one point . . . ‘Indian reservation’ referred to land tribes reserved for themselves . . . by treaty,” and to “which they never extinguished title.” 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.” 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.

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

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).


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


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

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.
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.
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).
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).
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).
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.”\(^{327}\)\(^{326}\) 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).
\(^{329}\) 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.
\(^{335}\) 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. 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.” 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.” 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.

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. 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.

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” 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.
339. Supplemental Brief of Respondent, supra note 21, at 7-8 (citing 18 U.S.C. § 1151(a) (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.\footnote{343 Jim, 273 P.3d at 438.} 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”\footnote{344 Id. (quoting BLACK'S LAW DICTIONARY 1422 (9th ed. 2009)) (internal quotation marks omitted).} and “a tract of public land set aside for a particular purpose (as schools, forest, or the use of Indians).”\footnote{345 Jim, 273 P.3d at 438 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1930 (2002)) (internal quotation marks omitted).}

Despite the lack of express language, the court ruled that Maryhill was a reservation.\footnote{346 Jim, 273 P.3d at 437-38.} 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,”\footnote{347 Id. at 436 (quoting Act of Nov. 1, 1988, Pub. L. No. 100-581, § 401(a)-(b), 102 Stat. 2938, 2944).} and more importantly that “[f]ederal regulations make clear that the right of use is reserved exclusively for the named tribes.”\footnote{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.} 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:\footnote{349 Jim, 273 P.3d at 438.}

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.\footnote{350 Id.}
“[L]and constitutes [the] single most valuable economic asset” for most Indian tribes, and “one of the most controversial aspects of federal policy with respect to Indian lands is that of acquiring lands for tribes.” Land can be taken into trust for Native Americans through several methods. 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.” 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.” 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 as part of any established Indian reservation” for any of the tribes involved. 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.”

“[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. “[I]t is accordingly inconceivable that either [Stevens or the tribes] deliberately agreed to

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.
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

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

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.
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).
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.
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. 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.” The Washington Supreme Court agreed.

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.” Because the Yakama Nation also has the right to regulate fishing by its members, a system has been developed for federally supervised joint regulation per United States v. Oregon. The regulation that Washington sought to enforce against Jim was a result of this collaborative process, 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.
390. Settler v. Lameer, 507 F.2d 231, 236 (9th Cir. 1974).
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] strong[e]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).

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.  

A. Changing Tides, States and Tribes

The modern-day official Indian policy is one of "fostering tribal self-government," and "Congress delegates more and more of its exclusive Indian affairs authority to tribes..." The federal government is slowly and intentionally getting out of Indian affairs. 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.” “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.” 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.”

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 pring up

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400. Fletcher, supra note 50, at 82.
401. Id.
402. Id. at 74.
403. Id.
Violence and racism no longer form the basis of the tribal and state relationship. In fact, in many areas “states and tribes are moving toward [increased] intergovernmental cooperation.” These changing relationships are also reflected in the federal statutes, which require state and tribal cooperation, and even in Washington State regulations, which require tribal consultation for certain state projects. Most states, including Washington, “now recognize Indian tribes as legitimate governments,” as well as “de facto political sovereigns.” In short, “tribal-state cooperation and agreement is growing.”

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.” These tribal-state agreements have in some cases “extended [tribal] jurisdiction outside of the[ir] reservation[s] . . . .” Some tribes “continue to be reluctant to engage” states in these negotiations, 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.” 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.

405. Fletcher, supra note 50, at 74.
406. Id. at 86.
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.


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, 424. Id.
425. Id.
426. State’s Response Brief, supra note 257, at 27.
429. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813 (9th Cir. 2011).
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)).
434. Id.
including rape/sexual assault, than any other racial class. Additionally, sexual offenses against women and children—such as those at issue in Cooper—are very serious problems in Indian Country. Just how the state and tribes will respond to the “significant vacuum” 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.” It 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 . . . . 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.” Also, with tribal populations on the rise and many anadromous fish species in a


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


439. McCarthy, supra note 213, at 100.


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,” 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.” *State v. Jim* may be an important part of this movement toward improved tribal-state relations. The *State v.*

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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.