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FISH OUT OF WATER: SETTING A SINGLE STANDARD FOR ALLOCATION OF TREATY RESOURCES

Eric Eisenstadt*

I. Introduction

In its sorry history of relations with American Indians, the United States has adopted a variety of approaches in an ongoing attempt to control Indians and their affairs. One such approach, loosely referred to as the treaty era, was marked by formally signed treaties between the Indian tribes and the federal government. This era ended in 1871 when the Congress declared that no tribe would thereafter be recognized as capable of making treaties with the United States, although existing treaties would be honored.¹

Although no longer made, many treaties are still in force, requiring judicial interpretation and enforcement. One particularly intractable problem has been the allocation of natural resources under treaties. Treaties often create a right in the Indian tribe to utilize a resource, a right which may conflict with rights of non-Indians. The treaty may be explicit in granting such a right, such as the right to hunt and fish on off-reservation land. In other cases the treaty is silent, but a judicial doctrine has created a right in a resource, typified by the *Winters* reserved water rights doctrine.² Whatever its source, the Indian right to utilize a resource granted in a treaty may not be absolute, since that resource must be managed or shared with non-Indians.³ This conflict between Indians and non-Indians over resources requires court intervention in order to interpret the treaty and allocate the resource between the parties.

This comment will contrast the two differing standards that have been adopted by the Supreme Court in allocating resources to Indian tribes. The first standard, promulgated in *Arizona v. California*,⁴

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1. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566.

2. *Winters v. United States*, 207 U.S. 564 (1908).

3. For example, it has been held that the Endangered Species Act of 1973, Pub. L. No. 95-632, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C.) preempts treaty hunting rights. *United States v. Dion*, 476 U.S. 734, 745 (1986).

4. 373 U.S. 546 (1963).

provided Indian tribes with water rights equal to "practical irrigable acreage" (PIA), that is, sufficient water to irrigate each acre of the reservation that was irrigable, regardless of whether such land was actually under cultivation.⁵ The second standard came from a fishing rights case, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*.⁶ This standard set a 50% ceiling on the Indian catch of fish caught in special common areas; the Indians catching the fish in the special common areas can earn no more than a "moderate income" from fishing.⁷ This comment first examines the differing standards for allocation of resources. The comment then compares and contrasts the standard that applies to fishing rights with the standard used for water rights and criticizes the moderate income standard advanced in *Washington*. The comment then concludes with a proposal for a unified standard that should apply to all treaty resource allocations.

II. *The Two Standards of Treaty Resource Allocation*

A. *Water Rights — The PIA Standard*

Many, if not all, Indian treaties were silent regarding the Indians' right to water flowing through their reservations. Beginning with *Winters v. United States*⁸ and culminating in *Arizona v. California*,⁹ the Supreme Court created an implied water rights doctrine applying to Indian reservations.¹⁰ In *Winters* the Supreme Court addressed the competing rights of Indians to take water from the Milk River in Montana, which flowed through the reservation, and the rights of non-Indian upstream users. The government sued upstream non-Indians to prevent their diversion of the river for large-scale irrigation projects. These diversions prevented the Indians from irrigating pasture land on the reservation. The non-Indians defended their actions by

5. *Id.* at 600.

6. 443 U.S. 658 (1979).

7. *Id.* at 686-87 & n.27.

8. 207 U.S. 564 (1908).

9. 373 U.S. 546 (1963).

10. *Winters*, 207 U.S. at 564; *Arizona*, 373 U.S. at 546. Although for half a century the *Winters* doctrine applied only to Indian treaty claims, the doctrine has been expanded to include reserved water rights on all federal lands. See, e.g., *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (holding that national park has reserved water right that is superior to later appropriators of water; the park may take as much water from upstream users as needed to fulfill its purpose); *Arizona*, 373 U.S. at 601 (holding that reserved water rights are "equally applicable to other federal establishments such as National Recreation areas and National Forests.").

showing that their diversion of the waters was prior in time to the Indians' use. Montana and most western states followed the prior appropriation water doctrine,¹¹ which holds that the party who first puts waters to beneficial use has the right to continue to divert that amount of water.¹² Thus, under Montana law, the non-Indian users had a valid claim to continue to divert the waters.

The treaties which created the reservation were silent on the question of water rights. Nonetheless, the Court concluded that Indians had an implied right to take water.¹³ The Court reached this conclusion by examining congressional intent in providing water for reservations. Because one of the chief purposes of settling the Indians on reservations was to "civilize" them through agrarian living, the Court found that the federal government must have reserved water for the Indians for that use.¹⁴ Since the creation of the reservation predated the non-Indian diversion, the Indians' claim to water was held to be superior to the non-Indian's claim.

Although *Winters* created the doctrine of an implied water right, the question of how to quantify the Indian water allocation remained unanswered for many years. Finally, in *Arizona*, the Supreme Court heard a massive dispute between several states over rights to the waters of the Colorado River and its tributaries. As part of a comprehensive settlement of entitlement to the waters, the Court also examined the Indians' claims to water from the river system. Applying the *Winters* doctrine, the Court found that the Indians were entitled to water.¹⁵ Additionally, the Court determined the quantity of water by adopting the PIA standard.¹⁶ The Supreme Court appointed a Special Master to make recommendations, and subsequently adopted his finding that the Indians should receive water computed under the PIA standard.¹⁷

11. Two basic systems exist controlling water rights. The eastern states follow the common law riparian rights doctrine. The arid western states use the prior appropriation system. A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 1 (1988).

12. The holder of water rights by prior appropriation may lose these rights either by non-use, abandonment, or forfeiture. *Id.* § 518.

13. *Winters*, 207 U.S. at 576.

14. *Id.*

15. *Arizona*, 373 U.S. at 595.

16. *Arizona* proposed that the water allocation should be equal to satisfy the immediate requirements of the Indians at any particular time. Special Master's Report, *Arizona v. California* 255 (1965) [hereinafter Special Master's Report]. This standard is roughly analogous to the moderate income standard of *Washington*. It would permit the Indians to use water, but only as much as they needed to subsist. Similar to *Washington*, the treaty right is held in gross for the individual Indians, not the tribe, and is subject to revision as the Indian needs change. The criticism of such a scheme is that preventing any growth in agriculture would tend to freeze the Indian reservations in a permanent state of economic underdevelopment.

17. *Arizona*, 373 U.S. at 600.

Since the Court did not advance its own independent rationale, the Special Master's Report provides the clearest explication of the reasoning supporting the PIA.

The Special Master found that, consistent with *Winters*, it was first necessary to consider the intent underlying the creation of the reservation in order to determine the rights of the Indians.¹⁸ The Special Master noted that the creation of the reservation did not entail an assumption that the Indians would eventually wither away and disappear; on the contrary, once "civilized" by agrarian living, the Indians would thrive.¹⁹ The reservations were viewed as the future home for generations of Indians. The Special Master decided that water must be reserved for future uses by the Indians, and implicit in these future uses was expansion.²⁰ The Court's holding in *Arizona* provided the Indians with a generous amount of water, which greatly distressed state authorities in the water scarce west.²¹ Yet despite legal challenge,²² and modifications making the doctrine less beneficial for Indians,²³ the

18. Special Master's Report, *supra* note 16, at 259.

19. *Id.* at 260.

20. *Id.* at 260-61. The Special Master also noted the possibility that other tribes might be relocated to join the original tribe on its reservation land. *Id.* The right to take water is not, however, unrestricted. In addition to the PIA standard, which limits the amount of water that an Indian tribe may divert, the Supreme Court has held that the federal lands are entitled to only enough water to fulfill the intent of the federal reservation. See *United States v. New Mexico*, 438 U.S. 696, 719 (1978). When no clear intent to reserve water can be shown, the Court has been unwilling to find a reserved water right for the federal land. *Id.* at 700.

21. INDIAN RESOURCES INSTITUTE, TRIBAL WATER MANAGEMENT HANDBOOK 4-14 (1988) [hereinafter HANDBOOK].

22. *Wyoming v. United States*, 492 U.S. 406 (per curiam) (mem.) (judgment below affirmed without opinion by an equally divided Court). The Court granted certiorari to consider if the PIA standard should remain the correct standard for Indian water rights cases. The lengthy and expensive litigation undertaken by the state of Wyoming ended in failure when the Court affirmed the lower court and left the PIA standard intact. This result will probably discourage other challenges and accelerate the trend toward state-tribal settlements. See Reid P. Chambers, *Indian Water Rights After the Wyoming Decision* (1989) (symposium paper), in 1989 HARVARD INDIAN LAW SYMPOSIUM 153 (Harvard Law School Publications Center 1990).

23. Although the PIA standard has survived direct challenge, several Supreme Court opinions have weakened some of the advantageous aspects of the standard. In *United States v. District Court*, 401 U.S. 520, 525-26 (1971), the Court held that the McCarran Amendment applies to Indian reserved water cases. The McCarran Amendment, 43 U.S.C. § 666(a) (1988), waives federal sovereign immunity against state attempts to bring the federal government into state court adjudications of water rights, thus allowing state courts to decide general stream adjudications. Hence, while the PIA standard will still be used, it will be a state court that will quantify that amount by determining congressional intent, the minimal needs of the reservation, and other questions. HANDBOOK, *supra* note 21, at 2-21. The right to try Indian water rights cases in state courts was specifically upheld in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1983). Indian access to federal courts was further curtailed when the

PIA standard remains the sole method of determining water allocation.

Although complex and rife with problems,²⁴ the actual computation of the quantity of water under the PIA standard has several positive features from an Indian perspective. The PIA standard depends on the size of the land, not the number of people.²⁵ The resource is held by the tribe for the tribe's use, not held in gross by individuals. As the original signatories of the treaty no doubt viewed the water as a collective tribal resource, the PIA standard is consistent with such an outlook.²⁶ Significantly, the PIA standard, as contrasted with the "moderate income" standard, does not set an economic level that the Indians cannot exceed. Should the PIA standard provide the tribe with

Court held that federal concurrent jurisdiction should normally be dismissed in favor of state court proceedings. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983). The negative impact of these decisions on Indian water rights flows from the assumption that state courts tend to be more hostile to Indian water rights claims.

Indian claims under the PIA standard were further weakened when the Supreme Court applied the doctrine of finality strictly to water rights claims. Thus, when a tribe attempted to have a new determination made of the PIA allocation, claiming that the federal government had omitted irrigable lands in the first determination, the Court rejected any attempt to reopen the issue of the allocation stressing the strong interests in finality. *Arizona v. California*, 460 U.S. 605, 606 (1983). Despite the fact that the tribe had not been a party to the original determination and claimed inadequate representation, the Court rejected the Tribe's claim. This decision was reaffirmed in *Nevada v. United States*, 463 U.S. 110 (1983), when a Tribe which was not a party to the original determination showed in fact there were over 20,000 irrigable acres on the reservation, not 5,875 as the original determination found. Despite the Tribe's claim of a conflict of interest because the federal government was both litigating for the Tribe and acting as administrator of non-Indian water reclamation projects, which stood to lose water to the Indians, the Court allowed the original determination to stand. *Id.* at 135 & n.15.

24. The chief problem with the PIA is that the very phrase "practical irrigable acreage" is not self-defining. What is meant by practical? Does this mean simply that the costs of irrigating the land is less than the expected yield of crops? What role should interest rates, farm prices, and government subsidies have in determining if it is "practical" to irrigate? What if advances in irrigation require less water to irrigate the same acreage? Can the Indians use the PIA allotment for non-agricultural uses? Can the PIA allotment be traded and sold? See generally PETER W. SLY, *RESERVED WATER RIGHTS SETTLEMENT MANUAL* (1988); David S. Brookshire et al., *Economics and the Determination of Indian Reserved Water Rights*, 23 NAT. RESOURCES J. 749 (1983); Carol S. Leach, *Federal Reserved Rights in Water: The Problem of Quantification*, 9 TEX. TECH L. REV. 89 (1977).

25. Allocation based on land could conceivably be detrimental to Indians if a reservation was severely overpopulated. However, the reality is that reservations tend to have very low population densities. On federal reservations, the population density is less than one person per acre. See CARL WALDMAN & MOLLY BRAUN, *ATLAS OF THE NORTH AMERICAN INDIAN* 198 (1985).

26. Courts have generally accepted that the treaties were negotiated by the Indians for the tribe. See *United States v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975) ("Each tribe bargained as an entity for rights that are to be enjoyed communally.").

a surplus of water beyond their own subsistence needs, nothing prevents the tribe from engaging in commercial agriculture to provide income and jobs for their members.²⁷ Thus, the PIA standard, while limiting the Indians' water allocation, provides the maximum amount of that resource for the uses envisioned at the time the reservation was established.

B. Fishing Rights — The Moderate Income Standard

A very different approach to the allocation of resources was adopted by the Supreme Court in *Washington*. *Washington* arose out of a controversy surrounding the treaties²⁸ which created Indian reservations in the Northwest. The Indians, while agreeing to cede 64,000,000 acres of land to the United States government, remained concerned with their continued ability to fish.²⁹ Although the Indians would be allowed to fish on their reservations, some of the most valuable fishing grounds were located off the reservation. To satisfy these fears, the Indians obtained a provision in the treaties guaranteeing "[t]he right to taking fish at all usual and accustomed grounds and stations . . . in common

27. A remaining controversy is whether the Indians may lease unused portions of the PIA allocation to off-reservation users. See generally Lee H. Storey, Comment, *Leasing Indian Water Rights Off the Reservation*, 76 CAL. L. REV. 179 (1988).

28. The treaties in question are a series of treaties negotiated by Isaac Stevens and the various Indian tribes. The language of the treaty was standardized and varied little from tribe to tribe. In all, over 15 tribes were covered by the *Washington* decision. These tribes, treaties, and dates of proclamation of the treaties in *Washington* are as follows:

(a) Hoh, Quileute, Quinault Tribes; Treaty of Olympia, U.S.-Quinalt et al., July 1, 1855 & Jan. 25, 1856, 12 Stat. 971.

(b) Lummi, Muckleshoot, Sauk-Suiattle, Stillaguamish, Upper Skagit Tribes; Treaty of Point Elliott, Jan. 22, 1855, U.S.-Dwamish et al., 12 Stat. 927.

(c) Makah Tribe; Treaty of Neah Bay, Jan 31, 1855, U.S.-Makah, 12 Stat. 939.

(d) Nisqually, Puyallup, Skokomish, Squaxin Tribes; Treaty of Medicine Creek, Dec. 26, 1854, U.S.-Nisqually et al., 10 Stat. 1132.

(e) Skokomish Tribe; Treaty of Point No Point, Jan. 26, 1855, U.S.-S'Klallams, 12 Stat. 933.

(f) Yakima Nation; Treaty with the Yakimas, June 9, 1855, U.S.-Yakima Nation, 12 Stat. 951.

29. The culture and livelihood of the native peoples of the northwest coast of North America were heavily dependent on fish. In particular the controversy in these cases centered around four species of salmon: Chinook salmon, *Oncorhynchus tshawytscha*; Pink salmon, *O. gorbuscha*; Coho salmon, *O. kisutch*; and the Steelhead trout, *Salmo gairdneri*. The Indians relied heavily upon the seasonal runs of these anadromous fish (fish that develop in fresh water, migrate to complete their development in the ocean, and return to their natal streams to spawn). FAY G. COHEN, TREATIES ON TRIAL 18-30 (1986) [hereinafter TREATIES ON TRIAL]. The diet of the tribes reflected this dependence. It is estimated that at the time the treaties were signed, the Indians ate approximately one pound of salmon a day per person. John V. Byrne, *Salmon is King — Or Is It?*, 16 ENVTL. L. 343 (1986).

with all citizens of the Territory. . . .'³⁰ This permitted the Indians to have continued access to the off-reservation traditional fishing locations. The exact meaning of these off-reservation fishing rights was argued before the Supreme Court on several different occasions.³¹ In 1974 the district court in *United States v. Washington*, after an exhaustive review of the record, reached a controversial decision defining the extent of the Indians' treaty right to fish off the reservation.³² The court found that the treaty not only granted the Indians access to the fishing grounds and an opportunity to catch fish at these off-reservation sites, the treaty also established the Indians' right to catch an actual portion of fish that passed through those locations. The court decided that in those traditional fishing areas, the Indians were entitled to a 50% share of the fish. This decision set off a storm of protest in Washington, leading to widespread local disregard of the district court's ruling. The Court of Appeals for the Ninth Circuit affirmed the lower court.³³ The Supreme Court of Washington ordered the state government *not* to comply with the federal court orders.³⁴ Faced with the open disregard of a federal court's rulings by a state supreme court, the Supreme Court granted certiorari to review the lower court's opinion.

In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,³⁵ the Supreme Court essentially upheld the lower court's ruling.³⁶ The Court agreed that the treaties provided more than mere

30. Treaty of Medicine Creek, Dec. 26, 1854, U.S.-Nisqually et al., art. 3, 10 Stat. 1132, 1133. The full text of article 3 reads as follows:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purposes of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

Id. (emphasis supplied). All of the other treaties had essentially the same text.

31. Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977) (*Puyallup III*); Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44 (1973) (*Puyallup II*); Puyallup Tribe v. Washington Game Dep't, 391 U.S. 392 (1968) (*Puyallup I*); Tulee v. Washington, 315 U.S. 681 (1942); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); United States v. Winans, 198 U.S. 371 (1905).

32. 384 F. Supp. 312 (W.D. Wash. 1974).

33. United States v. Washington, 520 F.2d 676, cert. denied, 423 U.S. 1086 (1976).

34. Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373 (Wash. 1977); Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151 (Wash. 1977).

35. 443 U.S. 658 (1979).

36. The Court upheld the 50-50 split in the fish, but differed from the district court's determination that fish caught for subsistence, religious ceremonies, and on the reservation did not count toward the 50% limit. *Washington*, 443 U.S. at 687-88.

access to the traditional fishing sites and upheld the 50% division. The court found this case consistent with the same underlying principle as *Arizona*: when determining the Indians' right to a scarce resource which was once exclusively and thoroughly exploited by the Indians, the Indians should be entitled to enough of the resource that they can make a moderate living from that resource.³⁷ In the Court's view, the 50% figure was a ceiling that could be reduced depending upon the specific needs of the Indian tribes.³⁸

C. *One Standard or Two?*

This comment views the two standards as conceptually distinct and competing methods of resource allocation. Yet it is possible to question whether *Washington* and *Arizona* in fact set forth two distinct standards. The apparent overlap between the standards stems from the Supreme Court's suggestion that in adopting the moderate income standard in *Washington*, its actions were in conformity with previous cases, including *Winters* and *Arizona*.³⁹ Evidence of this blending of the standards is provided by the *Washington* Court notation that the decision to limit Indians to a moderate income is derived directly from *Arizona*.⁴⁰ If this is true, then it would be incorrect to conclude that the PIA standard exists separate from the moderate income standard. Thus, one could argue that the Court seems to have accepted *sub silentio* that these two phrases are one and the same.⁴¹ Despite the blurring of the standard, such a contention is hard to maintain in light of the fundamental differences between the two standards.⁴²

III. *The PIA Standard and the Moderate Income Standard Contrasted*

One apparent distinction between the two standards is that the moderate income standard is derived from an explicit treaty provision

37. *Id.* at 686.

38. *Id.* at 685.

39. *Id.* at 684.

40. *Id.* at 686.

41. "As in [*Arizona*] . . . Indian treaty rights . . . secure so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say a moderate living." *Id.*

42. See *infra* notes 43-59 and accompanying text. In any event it is hard to see how the PIA standard only provides for a moderate income, when one of the chief objections to the PIA standard is that it provided more water to the Indians than they could use for subsistence. Thus when the state of Wyoming unsuccessfully sought to challenge the PIA standard they urged the Court to reconsider the PIA standard on the basis of *Washington*. In effect Wyoming wanted the new standard to provide enough water to the Indians to maintain a moderate income for the tribes. Chambers, *supra* note 22, at 162. This reinforces the idea that there is a distinction between applying the PIA standard and the moderate income standard of *Washington*.

requiring that fishing be shared. The precise meaning of this requirement was heavily litigated⁴³ and turns on the definition of "sharing in common."⁴⁴ In contrast, the *Winters*' water rights doctrine created a formula for allocation "from whole cloth," without any basis in specific treaty provisions.⁴⁵ This distinction suggests that the *Arizona* Court had greater freedom in creating its formula for allocation. However, in reality the treaties under examination in *Washington*, beyond requiring some form of sharing, gave no specific guidance on how to allocate the fish. For all practical purposes, the Court in *Washington* was equally as free as the Court in *Arizona* to formulate a solution.

There are, however, two major differences between the two standards. First, the moderate income standard enforces a fifty-fifty split in the resource even before the Indians are permitted to remove their share. By contrast, the PIA standard, while also limiting the Indians right to a resource, computes the Indian water allotment solely on tribal needs, without reference to other stream users. Second, the moderate income standard, as its name implies, further limits the 50% share of fish harvested by the Indians.⁴⁶ The PIA standard, on the other hand, provides the tribe with water up to the practical ability of the Indians to utilize the resource. Thus, while both decisions limit the Indians' right to a resource, *Washington*'s moderate income standard provides for an economic limitation, while the PIA limit is set to the maximum feasible exploitation of the resource. This section will examine the differences between the standards, highlighting the arguments' weaknesses in advancing the moderate income standard.

A. *The Fifty-Fifty Split*

The most significant distinction between the two methods of allocation is the fifty-fifty split mandated by *Washington*. The *Arizona* formulation of the PIA does not limit the Indians to a fixed percentage, but rather attempts, albeit imperfectly, to assess the needs of the tribe, irrespective of competing needs of other stream users. Since the fifty-fifty split is the essence of what is wrong with *Washington*, it is important to examine the reasons for departing from a needs-based approach, in favor of a percentage division.

The district court in *Washington* first concluded that the treaty requires that both Indian and non-Indians be allowed to fish in the off-reservation fishing grounds.⁴⁷ The court based this holding on the

43. See *supra* note 31 and accompanying text.

44. See *supra* note 31 and accompanying text.

45. *Winters v. United States*, 207 U.S. 564, 577 (1908).

46. *Washington*, 443 U.S. at 685.

47. *Washington*, 384 F. Supp. at 333.

clear language of the treaty: "the right of taking fish at all usual and accustomed places, in *common* with citizens of the Territory."⁴⁸ It is undisputed that such language envisions both Indian and non-Indian being allowed to fish at these locations. Furthermore, the court noted that the treaties created exclusive, unrestricted fishing rights for the Indians on their reservations, hence implying that their rights off the reservation were less than exclusive.⁴⁹ The court then concluded that a division must be made between the fishing rights of Indians and non-Indians at these sites. Relying on the definition found in the dictionary,⁵⁰ and the phrase "as intended and used in . . . treaties," the court then concluded that "in common with" means sharing equally.⁵¹

In upholding the lower court's opinion, the court of appeals advanced several arguments supporting the fifty-fifty split. First, the court analogized from the two sides of this dispute and cotenants of a piece of property.⁵² The court reasoned that when cotenants are unable to agree on the utilization of the property, a court may order the division of the property. Second, the court of appeals reasoned that the tribes and the United States negotiated the treaties as formal equals, and as a result the present day partition must reflect that initial equality.⁵³ Third, the judge's broad equitable discretion supports the imposition of an equal division.⁵⁴ Fourth, such a split "best effectuates what the Indian parties would have expected if a partition of fishing opportunities had been necessary at the time of the treaties."⁵⁵

When the Supreme Court upheld the fifty-fifty division, the Court expanded upon these rationales but did not advance any new formulations or theories. The Court cited past decisions, including *Arizona*, as support for a proposition that both Indians and non-Indians must share a disputed resource.⁵⁶ After recognizing that none of its past decisions mandated a fifty-fifty division, the Court declared that the solution of equal division was an equitable solution.⁵⁷ The Court

43. Treaty of Medicine Creek, *supra* note 30, at 1138 (emphasis added).

49. *Washington*, 384 F. Supp. at 333.

50. *Id.* at 342. Reliance on the dictionary to provide meaning to words in a legal dispute has been severely criticized. See generally James L. Weis, Note, *Jurisprudence by Webster's: The Role of the Dictionary in Legal Thought*, 39 MERCER L. REV. 961 (1988).

51. *Washington*, 384 F. Supp. at 343.

52. *Washington*, 520 F.2d at 685.

53. *Id.* at 688.

54. *Id.* at 687.

55. *Id.*

56. *Id.* at 684. Needless to say, *Arizona*, while broadly supporting the need for division of a resource, does not provide for a 50-50 split. Similarly, the other case cited, *Antoine v. Washington*, 420 U.S. 194 (1975), does not hold that an equal split is required.

57. *Washington*, 443 U.S. at 685.

explained the reasoning of the fifty-fifty allocation in a footnote:

The logic of the 50% ceiling is manifest. For an equal division — especially between parties who presumptively treated each other as equals — is suggested, if not necessarily dictated, by the word “common” as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances.⁵⁸

An analysis of the arguments advanced by the Supreme Court and the Court of Appeals reveals that the justification of the fifty-fifty split is supported by the following: (1) the treaty language requires that both sides share, to some degree, the fishing in the traditional fishing areas; (2) the courts are empowered to equitably divide a resource that was once plentiful and now scarce; (3) equity requires an even division; (4) the Indians and United States bargained for the treaties as equals, suggesting an equal division of the resource; (5) the original parties to the treaty would have agreed to an equal division had they been confronted with the present scarcity; and (6) analogies to the law of cotenancy support an equal division.

It is clear that the first two premises of the Court's argument are true. There is no reasonable interpretation of the phrase “in common with citizens of the Territory” that does not allow non-Indian fishing.⁵⁹ Neither can the present relative scarcity of fish be denied, nor the broad powers of a court of equity. However, the remaining arguments are highly questionable and deserve careful analysis.

1. *The Equity Argument*

The broadest reason a court can give for any solution is that amorphous term “equity.” The courts in *Washington* claimed that the solution was an equitable division, conforming to notions of fairness deeply rooted in our culture and property law.⁶⁰ Such a claim contains

58. *Id.* at 686 n.27 (citing, e.g., 2 AMERICAN LAW OF PROPERTY § 6.5 (A. James Casner ed., 1952) [hereinafter LAW OF PROPERTY]; E. HOPKINS, HANDBOOK ON THE LAW OF REAL PROPERTY § 209 (1896)).

59. Transcending the actual treaty language, it is inconceivable that the United States intended to exclude non-Indians from these areas. More importantly, in light of the canons of construction, it is difficult to believe that the Indians, who enjoyed a surfeit of fish in a vast underpopulated land, contemplated that they alone could fish these areas.

60. *Washington*, 443 U.S. at 686.

two components: first, that a scarce item should be shared between equals; and second, that the parties should share evenly.

The first strand of the argument suggests that since salmon are now scarce, sharing is required. But implicit in that statement is the assumption that neither party had any responsibility for the present scarcity. Such an assumption cannot be maintained. The Indians agreed to the treaties at a time when they constituted 75% of the population of the Territory of Washington.⁶¹ The fish were abundant and more than enough to meet all Indian needs, including religious purposes, subsistence, and commerce.⁶² The present scarcity of fish can be squarely blamed upon the triple attacks on fishing — *all created by non-Indians* — of overfishing, damming of rivers,⁶³ and destruction of fish spawning habitats by logging and pollution.⁶⁴ These non-Indian actions created a scarcity of fish that forced judicial intervention to determine how to divide the remaining catch between the Indians and non-Indians.⁶⁵ Why then does equity require the Indian, who relied on fishing for livelihood, whose rights to maintain that livelihood are guaranteed by solemn treaty, and who bears no responsibility for the scarcity, be forced to split evenly the remaining fish in their traditional areas? The equities of the situation are clear and one-sided: without the specific treaty language to the contrary, there would be no compelling reason for the Indians to share with non-Indians in these common areas.

The second strand of the equity argument postulates that if the resource must be shared, then the equitable solution is a fifty-fifty

61. *Id.*

62. *Id.* at 676.

63. Dams have reduced the salmon habitat in the Columbia Basin by over 90,000 square miles, representing 55% of the original area. Byrne, *supra* note 29, at 344.

64. JAMES A. CRUTCHFIELD & GUILIO PONTECORVO, *THE PACIFIC SALMON FISHERIES* 125 (1969). The decrease in the numbers of salmon in the Puget Sound area, the location of most of the tribes in the *Washington* litigation, is astounding. It is estimated that between 1860 and the turn of the century the total number of salmon in the area declined by 50%. RUSSEL BARSH, *THE WASHINGTON FISHING RIGHTS CONTROVERSY: AN ECONOMIC CRITIQUE* 18 (1977). In 1913 nearly forty million salmon were caught. By 1964 that number had plummeted to slightly more than one million. CRUTCHFIELD & PONTECORVO, *supra*, at 208-09.

However, recent intensive efforts, including the largest effort at biological restoration in the world, give hope that the salmon decline can be arrested and that fishing stocks will increase. Presently over \$100 million a year is dedicated to salmon recovery. Kai N. Lee & Jody Lawrence, *Restoration Under the Northwest Power Act*, 16 ENVTL. L. 430, 436 (1986). The centerpiece of this recovery is the Northwest Power Act, 16 U.S.C. §§ 839a-839h (1988), which attempts to mitigate the disastrous impact of hydroelectric dams on migrating salmon.

65. Clearly, if the fish were abundant and ample to meet both Indian and non-Indian needs, there would be no reason for parties to be concerned with the exact meaning of these treaties.

split in fishing. Yet despite the superficial gloss of schoolyard fairness, the fifty-fifty split is anything but fair to the Indian fisherman. The fifty-fifty figure has no basis in any treaty provision, and nothing in the history surrounding the treaties suggests such a split. Why then is the court imposing this particular ratio? Returning to the footnote in *Washington* that purports to explain the equity of the fifty-fifty split, the court states: "Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances."⁶⁶

As an initial consideration, it cannot be seriously suggested that the famous tale of King Solomon and the baby provides any guidance for the complex question of deciding the correct allocation between competing parties in a treaty dispute.⁶⁷ Such a tale provides, at best, reinforcement of the intuitive notion that fair means fifty-fifty split. But even assuming that equal division is enshrined in our law as the only solution from Solomon's day on, there must be a stronger reason than ancient precedent to apply such a solution today. In a famous passage, then-Judge Holmes said, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."⁶⁸ If this is true, then how much more revolting to blindly follow precedent from the days of Solomon.

Indeed, if the equity argument is to be taken seriously, then general principles of equity should be applied to the case. What exactly a court means by an equitable solution is difficult to discern. As presently applied, equity suggests merely a rubric for a court to justify a solution that tends to depart from precedent, or has weak support in the case law, and offers a proscriptive remedy to a problem.⁶⁹ The courts tend to ignore the traditional body of equity jurisprudence when invoking equity as a rationale. Ignoring these general principles of equity may be unwise, since they provide some restraints on the courts in fashioning equitable relief. Without any restraints, equity becomes a powerful judicial tool that frees a court from conforming to precedent.⁷⁰

Examining the general equitable principles, one finds that while equity often in fact does mean equality, a party who invokes equity

66. *Washington*, 443 U.S. at 686 n.27 (citing, e.g., 2 LAW OF PROPERTY, *supra* note 58, § 6.5; HOPKINS, *supra* note 58, § 209.).

67. One obvious weakness with such an analogy is that the essence of the Solomon story is not that an equal division of the baby was truly just, but rather the wisdom of Solomon was revealed by his threat to harm the baby in order to discover the true mother. MARTHA L. MINOW, *STRUCTURE OF PROCEDURE* 447 (Robert M. Cover & Owen M. Fiss eds., 1979).

68. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

69. GARY L. McDOWELL, *EQUITY AND THE CONSTITUTION* 9 (1982).

70. *Id.* at 3.

must come before the court with clean hands.⁷¹ Furthermore, equity looks to the intent of the parties, not the form.⁷² These principles suggest that the non-Indians, who have a long record of violating the treaties and of denying the Indians their rights,⁷³ cannot be the recipients of equitable relief, for the non-Indians' hands are not clean. By looking to intent over form, the courts should be required to look to the intent of the parties in the creation of the treaty. It is just this analysis of intent that is lacking in *Washington*. Had the Court examined the intent of the parties, no doubt they would not have utilized an equal division.⁷⁴

71. HENRY L. MCCLINTOCK, *PRINCIPLES OF EQUITY* 52 (2d ed. 1948).

72. *Id.*

73. In *United States v. Winans*, 198 U.S. 371 (1905), the Court found that the state was interfering with Indian fishing rights. This pattern of interference and denial of Indian treaty rights continued almost unabated until the original *Washington* decision. Although the federal courts were receptive to Indian claims, state courts were openly hostile. Washington State Supreme Court Justice Bausman wrote:

The premise of Indian sovereignty we reject. The treaty is not to be interpreted in this light. At no time did our ancestors in getting title to this continent ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. . . . Only that title was esteemed which came from white men.

The Indian was a child, and a dangerous child of nature, to be protected and restrained. In his nomadic life, he was to be left, as long as civilization did not demand his region. When it did demand his region, he was to be allotted a more confined area with permanent subsistence. . . .

These arrangements were but the announcement of our benevolence which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes.

State v. Towessnote, 154 P. 805, 807 (Wash. 1916). Although the above quotation is over 70 years old, the hostility of the State of Washington toward Indian fishing claims continues to the present day. The initial attempt to implement the *Washington* decision led to acts of violence and vandalism against Indian fishermen and their gear. H.R. REP. No. 1243, 96th Cong., 2d Sess. 1, 2 (1980), reprinted in 1980 U.S.C.C.A.N. 6793, 6808. In affirming the district court opinion in *Washington*, Judge Burns concurred, noting:

The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.

Washington, 520 F.2d at 693 (Burns, J., concurring). The Ninth Circuit also remarked that, with the exception of school desegregation, a district court had never met such a concerted public and official efforts to frustrate the rulings of a federal court. *Puget Sound Gillnetters Ass'n v. District Court*, 573 F.2d 1123, 1125 (9th Cir. 1978), vacated *sub nom.* *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

74. It is this examination of intent that forms the central tenet of this comment's

The thrust of these equity arguments is not that the Indians should share the fishing; on the contrary, equity suggests that further reductions, or even total elimination of non-Indians' percentage of the catch may be required. However, a total exclusion of non-Indian fishing cannot be reconciled with the treaty language, which requires sharing in common. Nonetheless, the fact that a strong argument based on equity could support such a contention highlights the weakness of argument that equity requires a fifty-fifty division.

2. Cotenancy Analogies

The footnote in *Washington*⁷⁵ also advanced a cotenancy argument, stating, "Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances."⁷⁶ The Court is quite correct that the treaties are silent as to any specific ratio. But it is noteworthy that the Court supports this statement with citations to property law, in particular the law on cotenancy. The cited proposition that follows the above quote states that, "[t]hrough each tenant in common may have a share greater or smaller than the shares of the other, if their shares are not fixed in deed or will creating the tenancy in common, they take in equal shares."⁷⁷ By citing to the substantive law of cotenancy, the court implies that such an analogy has application in determining allocations under the treaty. That quotation, by itself, does support the equal division of the property. But reaching that conclusion ignores other salient components of the cotenancy relationship. To illustrate the weakness of relying of cotenancy as a justification for a fifty-fifty split it is necessary to flesh out the cotenancy analogy.

Although unstated, in order to utilize the cotenancy argument, the Court is suggesting that the Indians and the non-Indians share a common estate in the fish that existed at the time of the treaty. Now, years later, the cotenants are petitioning the Court for a partition of the estate. The Court then cites with approval the proposition that when no specific split is suggested by the treaty, the law favors an equal division. But such an analysis ignores another factor that affects the final division of cotenant property, the doctrine of waste:

Cotenants stand in a fiduciary relationship one to the other.
Each has the right to full enjoyment of the property, but

proposed unified standard. Therefore, the examination of intent will be discussed more thoroughly in that section. See *infra* notes 116-29 and accompanying text.

75. *Washington*, 443 U.S. at 686 n.27 (citing, e.g., 2 LAW OF PROPERTY, *supra* note 58, § 6.5; HOPKINS, *supra* note 58, § 209.).

76. *Id.*

77. 2 LAW OF PROPERTY, *supra* note 58, § 6.5.

must use it as a reasonable property owner. A cotenant is liable for waste if he destroys the property or abuses it so as to permanently impair its value. A court will enjoin the commission of waste.⁷⁸

Waste may be defined as destructive permanent damage to the common property.⁷⁹ Continuing the cotenancy analogy, since the Indians and the non-Indians share the common fishing grounds, the non-Indians, as the party who possessed and controlled the estate,⁸⁰ would be accountable for any permanent destruction of the fishing "estate." Since the non-Indians caused the reduction of the fish runs in these common grounds measured from their historic levels at the creation of the fish "estate,"⁸¹ the non-Indian fishermen are arguably guilty of waste. Accepting that non-Indian fishermen have permanently destroyed a portion of the fishing estate,⁸² a court dividing the estate today would be required to compensate the Indians for the waste. Such compensation could take the form of monetary payments, known as owelty,⁸³ or an unequal division of the remaining estate.⁸⁴ Since the property in question is not a tangible area, but rather an estate of fish, an unequal division of the estate would be granting the Indians more than 50% of the fish runs.⁸⁵

78. *Washington*, 520 F.2d at 685.

79. 2 WILLIAM F. WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 131 (1947). A subsidiary question arises if there can be waste of a renewable resource. A cotenant is not responsible to other cotenants for profits which did not reduce the permanent value of the property. If the resource is renewable, then there cannot be a claim for waste. *Puget Sound Gillnetters Ass'n v. United States*, 573 F.2d 1123, 1135 n.4 (9th Cir. 1978) (Kennedy, J., concurring), *vacated sub nom. Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979). Thus, it could be argued that waste would only exist "up to the point where fishing activity reduces the quantity of fish in future runs." *Id.*

80. Although Indian access to the common grounds continued during the entire period of the treaty, numerous lawsuits were required to maintain these rights. The non-Indians clearly dominated the common areas, leading to ever-smaller Indian fish catches. Furthermore, Indian access alone would not mitigate the fact that the non-Indians were responsible for the environmental damage that caused damage to the "fishing estate."

81. *See supra* note 64-65.

82. Although it can be argued that over-fishing is only a temporary reduction in the yield, the damming of rivers and destruction of breeding habitat would constitute a permanent reduction.

83. Owelty is a financial payment imposed by a court to correct the imbalance in the value of the parcels allocated to former cotenants. ROGER A. CUNNINGHAM, WILLIAM B. STOEUBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 5.13 (1984).

84. *Id.* § 5.12.

85. The argument that the Indians should receive a greater than 50% share of the present fish runs goes as follows: If the initial fish estate represents 100%, the Indians upon partition, are entitled to 50% of the initial amount of fish that ran in the common areas. This follows from accepting the argument that since the terms of the agreement

It could be maintained that the above arguments extend the cotenancy analogy beyond its original meaning. Yet the above results flow directly from a full application of the relevant property law. Perhaps for this perceived weakness, use of the cotenancy analogy has not met with universal approval.⁸⁶ In a concurring opinion, then-Circuit Judge Kennedy criticized the majority's adoption of cotenancy as a rationale for upholding the fifty-fifty split in the fish:

Most importantly, the concept of cotenancy does not help the court determine what share of the disputed rights should be allocated to each of the parties. By relying so heavily upon the theory, the court seems to imply that an even apportionment follows from creation of a cotenancy; but, of course, it does not. *Cotenancy is not synonymous with entitlement to equal shares.*⁸⁷

3. *The Formal Equals Argument*

Another questionable rationale, suggested by the Supreme Court to support an equal division, is the argument that since the two parties dealt as equals in the bargaining of the treaty, they must now accept an equal division of a resource. Although this argument possesses a certain appealing legal logic, such a contention should be rejected. This argument is rooted in the recognition that the Indian tribes who negotiated with the United States were treated as a kind of sovereign entity.⁸⁸ While superficially valid, a holding that the Indians were the formal equals of the United States in their treaty negotiations openly

were silent as to division, an equal division of the property is required. The present runs of fish are considerably less due to non-Indian waste of the common estate relative to when the treaties were signed. Thus, to give the Indians their 50% of the initial fish runs would allow them far more than 50% of the present runs.

86. The Supreme Court has taken a dim view of using property law to justify one's position in this controversy. The Court noted that non-treaty fishermen could not rely on property law concepts in excluding Indians. *Washington*, 443 U.S. at 84. Although the context of the opinion was that the Court was referring to excluding Indians from their traditional fishing grounds by refusing them the right to transit adjoining private property, it does suggest limited strength of property analogies.

87. *Puget Sound Gillnetters Ass'n v. United States*, 573 F.2d 1123, 1135-36 (9th Cir. 1978) (Kennedy, J., concurring), *vacated sub nom. Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (emphasis added). Despite his strong attack on the cotenancy analogy when sitting on the Court of Appeals, Justice Kennedy was silent when the Supreme Court adopted the cotenancy analogy to support the equal division.

88. The complex issue of Indian sovereignty is beyond the scope of this note. Although the exact status of Indians has remained in flux, over the years tribes have almost consistently been viewed as some kind of sovereign entity. See generally RUSSEL L. BARSH & JAMES Y. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* (1980).

ignores the widely recognized disparity between the parties.⁸⁹ The vast difference in understanding, including the significance, content, and effect of a treaty gave rise to the "pro-Indian" canons of treaty construction.⁹⁰ These canons provide that treaties with the Indians are to be liberally construed in favor of the Indians and as the Indians would have understood them.⁹¹ Additionally, ambiguous terms are to be resolved in favor of the Indians.⁹² These canons have been repeatedly adopted by the Supreme Court in interpreting Indian treaties.⁹³ Why the "formal equality" of the parties should have any practical significance is difficult to grasp. The entire thrust of the canons of construction is that indeed, Indian equality is only "formal," and that a court should not draw too much from the actual wording or legal setting. Even accepting that the Indians were the formal equals of the United States in the treaty process, it does not follow that such an "equality" must be translated into the mathematical equality of a fifty-fifty division.

4. Equal Division Would Have Been Supported by Treaty Signatories

A final reason given for the even distribution is the argument that the parties to the treaty would have agreed to an even distribution, had they envisioned the present scarcity of fish.⁹⁴ Of course such historical second-guessing can never be disproved, but it is alarming that the courts which have made this statement have failed to offer any proof or argument to support this notion. In fact, all the evidence concerning the Indian tribes seemingly points to the opposite conclusion.

As previously mentioned, fishing was integral, indeed fundamental, to the northwest tribes. Their culture, lifestyle, religion, even the names

89. One typical problem in interpretation of treaties is that the Indians rarely had any understanding of the formal wording and legal nuances of the treaty language. This problem was further compounded in the *Washington* case by the fact that the treaties were negotiated without any direct translation from English to the Indian languages. Rather, the negotiations were conducted in a common Chinook trading jargon. *Washington*, 384 F. Supp. at 356. This jargon contained a limited 300-word commercial vocabulary and did not include many of the terms used in the treaty. *Id.*

90. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 221-25 (Rennard Strickland et al. eds., 1982).

91. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 337 (9th Cir. 1939).

92. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 567-77 (1908).

93. *Id.*

94. *Washington*, 443 U.S. at 685.

of the months of the year, all revolved around salmon.⁹⁵ The Indians demanded that any treaty provide for the continued taking of fish for all the Indians' needs. It stretches the imagination to suppose that a foreign invading people could obtain an agreement from these Indians which provided that should the non-Indian profligate ways to reduce the number of fish that the Indians could no longer catch sufficient fish for their needs, the Indians must split the remaining fish equally with the non-Indians.⁹⁶ Instead, a more likely scenario would have the Indians insisting that their needs be met fully, before the newcomers could take any fish. That the Indians were amenable to sharing the immense bounty of fish which historically existed cannot be distorted into a suggestion that the Indians would have engaged in altruism.

Interesting results flow from the hypothesis that the original Indian signatories, confronted with scarcity, would have demanded their share of the fish first. As mentioned previously, one such use of the fish, already developed before the non-Indians, was commerce.⁹⁷ Thus, in addition to securing fish for subsistence, and religious reasons, the Indians would have demanded fish to maintain their commercial relations. This suggests that rather than supporting an even allocation of the fish, the original signatories, had they been confronted with scarcity, would have demanded an appropriate amount of fish for the Indians to engage in commercial enterprise.

B. Income Limitation

The second fundamental difference between the PIA standard and the moderate income standard is the imposition of a predetermined economic level that limits the Indians' ability to exploit the resource.

95. One of the litigants in *Washington*, the Quileute Tribe, had named four months of the year after different salmon runs: January, beginning of the spawning of the steel head salmon; February, strong spawning time of the salmon; September, the time of the black salmon; October, the time of the silver salmon. *TREATIES ON TRIAL*, *supra* note 29, at 23.

96. Even the initial treaties generated much opposition among the Indians. As one chief said against the Stevens' treaties:

If your mothers were here in this country who gave you birth, and suckled you and while you were suckling some persons came and took away your mother and left you alone and sold your mother, how would you feel then? This our mother country as if we drew our lives from her.

COURTLAND L. SMITH, *SALMON FISHERIES OF THE COLUMBIA* 14 (1979).

In fact, if it wasn't for the threat that failure to sign the treaty would lead to their lands being overrun by white settlers, it is questionable if the original treaties would have been signed at all. *Id.* Thus, it is even more unlikely had these same parties agreed to greater reductions in the right to fish.

97. The Indians would dry and the pulverize the salmon and place the ground dried salmon in baskets lined with salmon skin. The resulting product, which was extremely long lasting, was then traded with other tribes. The trade was quite complex, involving tribes as far away as the Plains Sioux. *See id.*

While PIA provides no restriction or cut off of water once the Indians reach a moderate level of income, the moderate income standard clearly does.⁹⁸ The reasons advanced for this limitation are difficult to reconcile with the rationale underlying the PIA standard.

In one sense, however, the entire question may be of more theoretical than practical relevance. At present the Indians take nearly 50% of the total catch in the common areas, yet this provides them with only a moderate income at best.⁹⁹ In 1979, for example, the median family income in Washington was \$21,635, while the median income for a Indian fishing household was \$11,024.¹⁰⁰ Since the Indian fishing incomes are unlikely to grow so high as to invite challenge, courts may never be forced to define the phrase "moderate-income." Hence it does not appear that the moderate income restriction will have much impact on the amount of fishing done by the Indians. However, the absence of such an impact alone does not justify the adoption of this standard.

One potential danger of the "moderate-income" standard is that it will serve as a precedent in cases where the impact will not be so slight. In a recent case, *Lac Courte Oreilles Band v. Wisconsin*,¹⁰¹ the court adopted the moderate income standard of *Washington* in a case involving hunting and trapping rights. Following *Washington*, the court restricted the Indians to 50% of the total catch of animals, with a "moderate income" cap. Again Indian treaty rights are being subject to a potential downward revision by the limitation of "moderate income."¹⁰² However, similar to *Washington*, the income derived from

98. Indeed the Court in *Washington* stressed that the Indians were entitled to no more than enough fish to provide a moderate income:

Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submission to the District Court, be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.

Washington, 443 U.S. at 686-87.

99. In 1983 Indian fishermen caught 2,145,373 fish, representing 43.5% of the total catch. Pre-*Washington* Indian fish catches averaged 5% of the total catch. TREATIES ON TRIAL, *supra* note 29, at 155.

100. *Id.* at 162. The Lummi Tribe was one of the larger tribes affected by the *Washington* decision. Over the period of 1981-84, out of 622 Lummi tribal fishermen, 85% had gross earnings of less than \$10,000 a year from fishing. As of 1985, 90% of all Lummi fishermen earned a net income below the federal poverty line. DANIEL BOXBERGER, TO FISH IN COMMON 173-75 (1989).

101. 740 F. Supp. 1400 (W.D. Wis. 1990).

102. *Id.* at 1417-18. As with the fishing income, income derived from hunting and trapping by the Chippewa Indians does not approach the moderate income cap placed on these activities. *Id.* at 1418.

hunting and fishing is so meager there seems to be little practical danger that Indian hunting will actually have to be reduced to meet this standard.

An additional problem posed by the moderate income standard is its potential to conflict with the fifty-fifty allocation. The court in *Washington* noted the fifty-fifty split was a ceiling.¹⁰³ However, the moderate income standard may be interpreted to constitute both a ceiling and a floor. Under this view the Indians would be allowed to take enough fish to obtain a moderate income even if this requires catching more than 50% of the fish in the common areas. In *United States v. Adair*,¹⁰⁴ the Ninth Circuit was required to determine whether a tribe has the reserved water rights to maintain water flows through the reservation to permit the continuance of hunting and fishing rights granted by the treaty. Finding support in *Washington*, the court held that the Indians did have the right to appropriate as much water as was needed to maintain hunting and fishing.¹⁰⁵ The court noted:

[The *Washington* court] stated "that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living. Implicit in this "moderate living" standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interests in the resource, unless, of course *no lesser level will supply them with a moderate living*."¹⁰⁶

This suggests that the fifty-fifty allocation would have to be altered to meet the moderate income needs of the Indians.

Perhaps the greatest danger in the imposition of the moderate income standard is its implication for the concepts of Indian economic development and self-sufficiency. A growing body of legislation¹⁰⁷ and case law¹⁰⁸ supports the premise that a chief goal of congressional activity concerning Indians is the economic development of the tribe. Thus the

103. *Washington*, 443 U.S. at 685.

104. 723 F.2d 1394 (9th Cir. 1983).

105. *Id.* at 1415.

106. *Id.* (citations omitted) (emphasis added).

107. Indian Minerals Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1988); Indian Self-Determination and Education Assistance Act of 1974, 25 U.S.C. §§ 450-450n (1988); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1453 (1988).

108. *Iowa Mut. Ins. Co. v. Laplante*, 480 U.S. 9, 14 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

Supreme Court's imposition of an earnings limitation seems a curious cross purpose. Of course, if the moderate income standard were part of the text of the treaty, or clearly derived from the treaty language, then the Supreme Court would be bound to interpret the treaty with such a limitation. But, as noted above, the moderate income standard is a pure invention of the Court, with no grounding in the treaty language.¹⁰⁹

Perhaps the reasoning behind the inclusion of this standard can be gleaned from the dissents' argument in the *Washington* opinion. The dissent feared that the fifty-fifty split "is likely to result in an extraordinary economic windfall to Indian fishermen in the commercial fish market by giving them a substantial position in the market."¹¹⁰ The majority may have been sensitive to this criticism and perhaps included the moderate income standard as a way of limiting the economic windfall.¹¹¹ Whatever the reason for its inclusion, the moderate income standard stands in stark contrast to the PIA standard. PIA offers the tribes an ability to expand their agricultural activity free of any restrictions. The moderate income standard sets up a barrier that the Indians cannot cross.

IV. Harmonizing the Standard — Intent of the Treaty

Despite the Supreme Court's suggestion that the two decisions, *Arizona* and *Washington*, are in harmony,¹¹² the foregoing analysis has demonstrated that serious differences exist between the two standards. Having two standards, one for water and the other for other resources, leads to a basic injustice. Water rights receive a relatively favorable treatment, while other treaty rights are subjected to a moderate income cap. Rather than having two competing standards governing resource allocation, one unified standard should be applied. Although canons of treaty construction govern questions of treaty interpretation,¹¹³ such canons cannot provide a solution for resource

109. "[The Supreme Court] unearthed the moderate income standard." Robert C. Lothrop, *The Misplaced Role of Cost-Benefit Analysis in Columbia River Basin Fishery Mitigation*, 16 ENVTL. L. 517, 545 (1986). "The Court confused the question of the appropriate allocation of fish by stating in dicta [the moderate income standard]." Peter C. Mason, Comment, *United States v. Washington*, (Phase II): *The Indian Fishing Conflict Moves Upstream*, 12 ENVTL. L. 469, 482 (1982).

110. *Washington*, 443 U.S. at 705-06 (Powell, J., dissenting). The dissent failed to explain what exactly would be so awful if, in fact, the *Washington* decision did grant an economic windfall to the poorest and most disadvantaged citizens of the state.

111. In any event, the reality of the economics of the salmon fishery show that even without the moderate income limitation, the Indian fisherman, while definitely improving their economic lot, would have not reached an extremely high income level. See *supra* notes 95-99 and accompanying text.

112. See *supra* notes 99-100 and accompanying text.

113. See *supra* notes 89-92 and accompanying text.

allocation because the treaty may be silent as to the question of allocation. While the proposed standard relies on the established canons of treaty construction, it is not strictly a proposal for a new canon of construction.

The proposed standard assumes that the treaty itself is silent on the question of resource allocation. If the resource is mentioned in the treaty, then the established rules of treaty interpretation should be applied to that provision. Yet as illustrated by *Washington*, a treaty can mention a resource, and even attempt to allocate a resource, but do so in a manner so ambiguous as to require later interpretation.

The new standard is stated as follows: resources should be allocated based on the importance of the resource in fulfilling the intent of the treaty. This requires two separate determinations: first, the broad intent or the goal of the treaty vis-a-vis the Indians must be ascertained; second, the focus of this inquiry is limited to what both parties thought the treaty was to accomplish for the Indians.

The exclusive focus on the intent as it regards the Indians is suggested by the accepted canons of construction of Indian treaties. These canons have an exclusive focus on Indians. They direct attention to the concerns of Indians, the impact upon the Indians, and the intent of treaties as they regarded Indians. A resource allocation dispute, which is often closely related to treaty construction, should likewise center exclusively on Indian interests and understandings.

This does not mean that both parties' intent should not be examined. Rather, the proposed standard also examines what the non-Indians thought the treaty would accomplish as it regarded the fate of the Indians. For example, in *Arizona*, the intent of the non-Indians in settling the Indians on reservations was crucial to determining that the United States reserved water.¹¹⁴

Once the intent of the parties has been established, a separate determination must be made to assess the importance of the disputed resource in the furtherance of this intent. If the resource plays a fundamental role in the realization of that intent, then the allocation between Indians and non-Indians should reflect that importance. In *Arizona*, for example, the Court noted that the lands upon which the Indians were settled were arid.¹¹⁵ The Court also found that the intent of the treaty was to settle the Indians on agricultural settlements. Since the rainfall was insufficient to permit agriculture, irrigation and diversions of water from the river was required. The absolute necessity of water to fulfill the intent of the treaty justified the creation of the

114. *Arizona v. California*, 373 U.S. 546 (1963).

115. "It can be said without overstatement that when the Indians were put on the reservations they were not considered to be located in the most desirable area of the Nation." *Id.* at 598.

reserved water rights doctrine. The Court, having determined that water was vital to accomplish the intent, adopted a standard of allocation that would insure that this resource would be allocated in sufficient quantities.

This section of the comment first examines why intent should be the key to resource allocation. The section then applies this new standard to the *Washington* conflict.

A. Intent of Treaties and Resource Allocation

Treaties between the United States and the Indians have often been viewed as a contract between two sovereign nations.¹¹⁶ As in other contract disputes, the intention of the parties to the contract controls any attempt to interpret that contract.¹¹⁷ Accepted canons of construction require that in cases of dispute, the Indians' intention in the treaty is to be favored.¹¹⁸

The primacy of intent in determination of reserved water rights was established in *United States v. New Mexico*,¹¹⁹ where the Court held that "[e]ach time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."¹²⁰ This requirement of showing the intent of the treaty has become a regular feature of water rights litigation.¹²¹ Nor is the concept restricted to reserved water rights cases. In other contexts as well, courts have examined the intent of both parties to a treaty in interpreting the treaty language.¹²² Under the proposed standard, intent of both parties will be examined.

Emerging from Indian treaties is a broad intent by the non-Indians

116. *Washington*, 443 U.S. at 675; *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

117. *Washington*, 443 U.S. at 675.

118. See *supra* notes 89-92 and accompanying text.

119. 438 U.S. 696 (1978).

120. *Id.* at 700.

121. In *Wyoming v. Owl Creek Irrigation Dist.*, 753 P.2d 76 (Wyo. 1988), *aff'd sub nom.* *Wyoming v. United States*, 492 U.S. 406 (1989), the court examined no less than 348 separate exhibits offered by Wyoming to show the intent and purpose of the treaty.

122. *Lac Courte Oreilles Band v. Wisconsin*, 740 F. Supp. 1400, 1416 (W.D. Wis. 1990); *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676 (1977) (intent of U.S. to provide tribe with permanent home gives tribe right to regulate resources); *Moore v. United States*, 157 F.2d 760, 762 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947) (intent of treaty to encourage Indian economic independence requires inclusion of valuable riverbed and tidal area within reservation); *Alaska Fisheries v. United States*, 248 U.S. 78, 140 (1918) (intent of treaty to allow Indians to become industrious, independent and self-supporting requires support of Indian industrial and commercial fishing).

of "civilizing of the savage."¹²³ Applying this broad intent, courts have construed treaties in a manner promoting these values. For example, in *United States v. Finch*,¹²⁴ the Supreme Court upheld the right of the Crow Tribe to maintain a fishery. Despite the fact the Crow were not a traditional fishing people, the Court found that the fishery was consistent with the broad goal that attempted to reorient the tribe to agricultural and other pursuits.¹²⁵ Significantly, this suggests that the intent need not be interpreted narrowly to include only the actually mentioned terms and concepts of the treaty. Clearly in the *Finch* situation neither party "intended" that the Crow would develop a fishery. Nor did the treaty mention in any way the creation of a fishery. But since self-sufficiency was consistent with the general intent of the treaty, the Court found intent to support the Crow fishing activity in the treaty.¹²⁶

Another example of this broad interpretation of intent is found in the further refinements given to the reserved water rights doctrine. The *Winters* reserved water rights doctrine depends on an examination of the intent in the formation of the reservation.¹²⁷ Yet while the agricultural intent found in the treaties forms the rationale for the reservation of water, the case law does not limit the use of water to only agricultural uses.¹²⁸ Indian tribes have utilized the reserved water calculated under the PIA standard for a variety of uses including mining, industry, and recreation.¹²⁹ Thus, while the treaty's agricultural intent provided the general rationale for the reservation of water, it did not narrowly limit the tribe to only those uses that would be consistent with that intent.

This tends to illustrate that intent has traditionally played a crucial role in determining treaty rights, and should, as the new standard suggests, remain at the heart of any attempt to allocate resources under treaties. Perhaps the utility of such a new standard can be seen by its application to *Washington*.

B. Application of the New Standard to Washington

Applying the proposed standard to the situation in *Washington* first

123. FRANCIS P. PRUCHA, *THE GREAT FATHER* 135-36 (1986).

124. 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676 (1977) (per curiam).

125. *Id.* at 833-34.

126. *Id.* at 832.

127. See *supra* notes 13-14 and accompanying text.

128. Lee H. Storey, *Leasing Indian Water Off the Reservation: A Use Consistent with the Reservation's Purpose*, 76 CAL. L. REV. 179, 198 (1988).

129. *Id.* at 182. By statute, tribal lands and related water can be leased by non-Indians for a variety of purposes. 25 U.S.C. § 415 (1988).

requires that the intent of the treaty be determined. From the Indian perspective one overriding factor emerges — the importance of fishing rights to meet the needs of the tribe. The non-Indian intent of the treaty was more complex. An obvious objective was to secure vast tracts of land and to regulate the activities of the Indian tribes.¹³⁰ Another element of the non-Indian intent that runs through the treaty is the attempt to assimilate and civilize the Indians. The treaty expresses this intent in several locations by fostering Indian economic activity. In article 5 of the treaty, the United States agreed to pay the Indians money to assist in the agricultural settlement of the land.¹³¹ But this intent was not limited to agriculture alone; the United States expressed concern for general economic development. For example, article 10 of the treaty set up agricultural and trade schools.¹³² This strongly suggests that the intent of the United States was to provide the Indians with the tools needed for economic self-sufficiency.

After finding that the intent broadly supports Indian economic development, the next question asks what role the disputed resource should play in that development. Clearly fishing is the obvious resource that the Indians could use to advance their economic position. The central and crucial role of fishing in the life and economy of the tribes is clear. Since the role of Indian fishing is central, the allocation must now be made from that perspective. The exact allocation may not be made by the court, considering, as always, the specific provisions of the treaty in light of the treaties' intent.¹³³

The intent of the treaties in the *Washington* case may be summarized as encouragement of Indian economic development, while preserving the primacy of fishing. This suggests that the central feature of the allocation would be to allow the development of a commercial fishery in the common areas. Such a feature would necessarily require a great increase of the share of fish caught by Indians to the detriment of the share caught by non-Indian commercial fishermen.

In fact, that was the exact result under the *Washington* decision, for it was the non-Indian fishermen who were required to reduce their share of fish. Before the *Washington* decision, Indian fishermen were taking less than 20% of the fish in the common areas, whereas presently the Indians have reached the 50% figure. This expansion of

130. Not only did the treaties require cession of lands, but they also imposed a series of restrictions on Indian dealings with non-Americans. Treaty of Medicine Creek, *supra* note 30, art. 12.

131. *Id.* art. 3.

132. *Id.*

133. This proposal does not suggest that specific treaty provisions should not be honored, only that the entire treaty be interpreted in light of the intent of the treaty. Specific provisions must still be enforced, although they may have to be reinterpreted in order to accomplish the general intent of the treaty.

Indian fishing has come at the expense of the non-Indian fishermen whose catch was reduced proportionally to the Indians' increase.

Reduction of non-Indian fishing was a controversial course. Recognition that the *Washington* decision would result in such a reduction was, of course, the reason for its violent rejection by non-Indian fishermen. Furthermore, the dissent criticized the majority in *Washington* for unfairly singling out and burdening non-Indian fishermen.¹³⁴ This suggests that an even greater reduction in non-Indian fishing would be an intensely unpopular solution.

Although it is true that non-Indian fishermen have been forced to reduce the amount of fish caught, it does not follow that further reductions may not be appropriate. First, if the courts intend to be serious about fairly interpreting treaties, then non-Indian fishermen's catch may have to be reduced further. Second, preferential treatment of the Indians is not unfair when considered under concepts of present value. Had the Indians been allowed to exercise their legitimate legal rights for the years preceding *Washington*, they would have earned additional substantial income. This income could have accrued interest and would have a greater value today than its face value at the time the money was earned. Because they were deprived of this income, the Indians are arguably now entitled to a greater share of the fish to redress the imbalance.¹³⁵ Third, simply because the non-Indian fisherman caught the majority of the fish in the past does not enshrine that apportionment. Before the treaties, the Indians caught 100% of the fish in the disputed waters, and for a period of time thereafter the Indians continued to catch the majority of fish.¹³⁶ Yet these facts alone would not entitle the Indians to take that same amount of fish today. Similarly, the fact that non-Indian fishermen once took far more fish does not justify maintenance of that percentage of the catch. Allocation of the resource must be made by reference to the treaty, interpreted by the accepted canons of construction, rather than historic statistics.

However great the reduction in non-Indian fishing may be required under the new proposal, it could not be an absolute ban on non-Indian fishing. Since non-Indians must be allowed access to fish in common areas, some accommodation must be made. One way which might accommodate the competing interests is to bar all non-Indian commercial fishing, limiting non-Indians to sport fishing only.¹³⁷

134. *Washington*, 443 U.S. at 706 (Powell, J., dissenting).

135. This argument has been made to justify preferential treatment of Indians in water rights disputes. Michael R. Moore, *Native American Water Rights: Efficiency & Fairness*, 29 NAT. RESOURCES J. 763, 775 (1989).

136. *Washington*, 384 F. Supp. at 334.

137. The reaction to such a decision could only be imagined in light of the howl of protest that the 50-50 split created. Nonetheless, the courts must be willing to interpret and enforce Indian treaties, regardless of how unpopular their decisions might be to others.

V. Conclusion

This new standard is not a formula, and does not produce an exact apportionment between Indians and non-Indians. The details of any particular settlement would necessarily be so fact-driven as to preclude prediction of how exactly the resource will be divided. Such details are properly left to the trial court. But if the standard is faithfully applied, it should provide a more just and reasonable settlement of the problems, fulfilling this nation's sacred word given to the Indian nations.

This comment has shown the basic incompatibility between the two standards that are now presently in use in determining the allocation of resources under treaties. It is hoped that the greater fairness and wider applicability of the principles that support the PIA standard suggest that standard is a better path to pursue. The continued application of the *Washington* standard can only lead to continued injustice to the Indians by incorrectly allocating their fair share of resources under treaties.