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FISHING RIGHTS: INDIAN FISHING RIGHTS AND CONGRESS: THE SALMON AND STEELHEAD CONSERVATION AND ENHANCEMENT ACT OF 1980

Joseph P. Mentor, Jr.

Congress enacted the Salmon and Steelhead Conservation and Enhancement Act of 1980¹ to prevent the depletion of the salmon and steelhead resource of the Pacific Northwest.² The region's fishery problems result from a combination of disjointed management,³ environmental pressures, and competing uses among commercial fishermen, sports fishermen, and Indians. The construction of hydroelectric generating dams on the Columbia, Snake, and other river systems has interfered with the maturation of the salmon and steelhead, resulting in a serious depletion of the resource.⁴ Increases in the size and mechanization of the non-

1. Act of Dec. 22, 1980, Pub. L. No. 96-561, 94 Stat. 3275 (1980).

2. *Id.* at § 102, 94 Stat. at 3275. Salmon and steelhead are anadromous species of fish, hatching in fresh water and migrating to the ocean where they spend most of their adult lives. Two to six years later the salmon return to the stream of their origin to spawn and to die. Steelhead, an anadromous variety of the rainbow trout, may complete the spawning cycle several times during their lifetimes. Because, unlike salmon, steelhead continue to feed after returning to fresh water, they are a highly prized sportfish. A. NETBOY, SALMON OF THE PACIFIC NORTHWEST 3-9 (1958).

3. Pub. L. No. 96-561, § 102, 94 Stat. 3275 (1980). The following groups are involved in the management of the Pacific Northwest salmon and steelhead stocks:

1. Oregon Department of Fish and Wildlife
2. Idaho Department of Fish and Game
3. Washington Department of Fisheries
4. Washington Department of Game
5. Alaska Department of Fish and Game
6. Federal Courts
7. U.S. Fish and Wildlife Service
8. National Marine Fisheries Service
9. Numerous Indian tribes
10. Pacific Fishery Management Council
11. North Pacific Fisheries Management Council
12. Canadian Department of Fisheries
13. International Pacific Salmon Fisheries Commission

Status and Conservation of Washington State Salmon and Steelhead Stocks: Hearings Before the Senate Comm. on Commerce, Science & Transportation, 96th Cong. 1st Sess. 1, 19 (1979) [hereinafter cited as *1979 Senate Hearings*] (statement of Dayton L. Alverson).

4. H.R. REP. NO. 1243, pt. I, 96th Cong., 2d Sess. 1, 19, reprinted in [1981] U.S. CODE CONG. & AD. NEWS 11072, 11080 [hereinafter cited as H.R. REP. NO. 1243, pt. I]. Hydroelectric development of the Columbia and Snake rivers began with the construction of the Rock Island Dam in 1933. Since then, ten dams have been built on the Columbia River and nine on the Snake River. Today, only 50 miles of free-flowing stream remain in

Indian commercial fishing fleet has reduced further the stock of salmon and steelhead.⁵ The diminished stock has heightened competition and controversy among commercial fishermen, sportsmen, and Indians for a share of the salmon and steelhead catch. Generally, the Act is an appropriate response by Congress to a serious regional and national problem. The Act, however, leaves unresolved the status of commercial fishing for steelhead, and thus does little to ease the tension between Indians and non-Indian sports fishermen.⁶ Furthermore, the Act does not preclude future abrogation of Indian treaty fishing rights.⁷

Indian fishermen claim a guaranteed share of the salmon and steelhead resource. The claims derive from treaties negotiated with the Indian tribes in the Oregon and Washington territories in 1854 and 1855.⁸ In the treaties, the Indians ceded their lands to

the Columbia River, near Pasco, Washington. The Snake River has also been impounded, and presently only 100 miles of natural stream remain between the Lower Granite and Hells Canyon dams. *Id.*

5. See 1979 Senate Hearings, *supra* note 3, at 28 (statement of Kenneth A. Henry, discussing development of non-Indian commercial fishery).

6. Although steelhead trout represents a small fraction of the anadromous fish harvested each year in the Pacific Northwest, the species is at the center of the storm of controversy over the fishery resource. Thousands of sports fishermen pursue the steelhead every year. Additionally, several tribes have a special economic dependence on steelhead trout because of the unavailability of adequate alternative fish resources. H.R. REP. NO. 1243, pt. 1, *supra* note 4, at 28.

7. Congress can enact legislation affecting Indian fishing rights. In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1902), the United States Supreme Court defined congressional power over Indian treaty fishing rights as follows: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one . . . [b]ut as with treaties made with foreign nations [citations omitted], the legislative power might pass laws in conflict with treaties made with the Indians . . . The power exists to abrogate the provisions of an Indian treaty . . ." *Id.* at 565-66.

Congress may not, however, take the property of Indians without paying just compensation. *E.g.*, *United States v. Creek Nation*, 295 U.S. 103, 110 (1935). Fishing rights in particular have been found to be a form of compensable property. See *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (deciding that fishing rights had not been abrogated by Menominee Indian Termination Act of 1954, 25 U.S.C. §§ 891-902 (repealed 1973)).

8. Treaty of Medicine Creek, Dec. 6, 1854, United States - Nisqually Tribe, 10 Stat. 1132, 2 C. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 661 (1904) [hereinafter cited as Treaty of Medicine Creek]; Treaty of Point Elliot, Jan. 22, 1855, United States-Dwamish and Suquamish Tribes, 12 Stat. 927, KAPPLER, *supra*, at 669 [hereinafter cited as Treaty of Point Elliot]; Treaty of Point No Point, Jan. 26, 1855, United States-S'Klallams Tribe, 12 Stat. 933, KAPPLER, *supra*, at 674 [hereinafter cited as Treaty of Point No Point]; Treaty of Neah Bay, Jan. 31, 1855, United States-Makah Tribe, 12 Stat. 939, KAPPLER, *supra*, at 682; Treaty with the Walla Walla, June 9, 1855, United States-Walla Walla,

the federal government in return for a few small reservations and other benefits.⁹ Each tribe also reserved the right to continue fishing outside the reservation at all their customary locations.¹⁰

For several decades after the treaties became effective, the Indian tribes harvested most of the fish taken from the waters of Puget Sound and the Columbia River systems. Non-Indian commercial fishing enterprises were rudimentary and largely unsuccessful because of the inadequate preservation techniques of the time and slow transportation facilities.¹¹ As early as the mid-nineteenth century, however, major technological developments in canning and processing occurred which allowed for the large-scale development of non-Indian commercial fisheries.¹² Because of the technological developments and the sharp decline in the

Cayuse and Umatilla Tribes, 12 Stat. 945, KAPPLER, *supra*, at 694 [hereinafter cited as Treaty with the Walla Walla]; Treaty with the Yakimas, June 9, 1855, United States-Yakima Nation, 12 Stat. 951, KAPPLER, *supra*, at 698 [hereinafter cited as Treaty with the Yakimas]; Treaty with the Nez Perce, June 11, 1855, United States-Nez Perce Tribe, 12 Stat. 957, KAPPLER, *supra*, at 702; Treaty with the Tribes of Middle Oregon, June 25, 1855, United States-Tribes of Middle Oregon (now known as the Warm Springs Tribe), 12 Stat. 963, KAPPLER, *supra*, at 714; Treaty of Olympia, July 1, 1855, United States-Quinalt and Quil-leh-ute Tribes, 12 Stat. 971, KAPPLER, *supra*, at 719; Treaty with the Flathead, July 16, 1855, United States-Flathead, Kootenay and Upper Pend d'Oreilles Tribes, 12 Stat. 975, KAPPLER, *supra*, at 722. The treaties were negotiated under authority of Congress by an Act of June 5, 1850, ch. 16, 9 Stat. 437.

9. See, e.g., Treaty of Medicine Creek, *supra* note 8, at art. I, II; Treaty of Point Elliot, *supra* note 8, at art. I, II; Treaty of Point No Point, *supra* note 8, at art. I, II. See text accompanying note 8 *supra*.

In addition to provisions for reservations, the federal government gave the Indians other benefits including small annuities and the services of a physician and agricultural and industrial instructors. *Id.*

10. See, e.g., Treaty of Medicine Creek, *supra* note 8, at art. III; Treaty of Point Elliot, *supra* note 8, at art. III; Treaty of Point No Point, *supra* note 8, at art. III. Each of the treaties has the same or similar provisions as are found in the Treaty of Medicine Creek, *supra* note 8, at art. III: "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 purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands." 12 Stat. at 1133.

11. *United States v. Washington*, 384 F. Supp. 312, 352 (W.D. Wash. 1974). In the 1840s and 1850s salmon was packed and shipped from the Columbia River to such distant places as New York, San Francisco, the Hawaiian Islands, South America, and China. The salmon usually reached the markets in unsatisfactory condition, however, and obtained a bad reputation among the dealers. Consequently, a statistically measurable commercial fishery did not exist at the time the treaties were signed. *Id.* For a detailed description of the history of fishing in the Pacific Northwest, see *id.* at 350-98.

12. *Id.* The first salmon cannery on Puget Sound began operation in 1877 at Mukilteo, Wash. Already several canneries were operating on the Columbia River. *Id.*

area's Indian population, non-Indians began to dominate the fishery and eventually excluded most Indians from participation.¹³

In the early decades of the twentieth century, the state of Washington promulgated regulations that encouraged the trend to exclude the Indians from the fishery.¹⁴ Except for exemption from license fees when fishing on the reservation, the state adopted the position that the Indian treaties did not grant Indian citizens or tribes privileges or immunities greater than those enjoyed by non-Indians.¹⁵ Many years of state enforcement actions against treaty Indians exercising their claimed right to fish caused Indians to discontinue fishing at several of their usual places.¹⁶

Beginning with *United States v. Winans*,¹⁷ in 1905, the federal government challenged repeatedly the state of Washington's position regarding Indian rights to fish for salmon and steelhead. In *Winans* the United States Supreme Court held that the Treaty with the Yakimas,¹⁸ which included the rights of the Indians to fish in common with the territory's citizens, reserved the Indians' access to all their customary fishing grounds.¹⁹ Therefore, the state could not license methods of fishing that denied the Indians access to their accustomed places.²⁰ In *Tulee v. Washington*²¹ the Supreme Court held that, although the state of Washington could

13. *Id.* at 352. It has been estimated that Indian populations in the Puget Sound region declined by approximately 50 percent between 1780 and 1840. The decline in population continued during the decades following the signing of the treaties. *Id.*

14. *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 669 (1979). See e.g., *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44, 48 (1973) (striking down state regulations banning net fishing on certain rivers on grounds that such regulations allowed non-Indian hook-and-line fishermen to preempt entire run).

15. 384 F. Supp. at 394.

16. *Id.* at 358. The first significant challenge to a state law regulating off-reservation fishing of treaty Indians came in *Tulee v. Washington*, 315 U.S. 681 (1942). The United States Supreme Court reversed a lower court conviction of a Yakima Indian on a charge of catching a salmon with a net without first having obtained a license as required by state law. 315 U.S. at 685.

17. 198 U.S. 371 (1905).

18. Treaty with the Yakimas, *supra* note 8.

19. 198 U.S. 371, 381 (1905). See Treaty with the Yakimas, *supra* note 8, at art. III.

20. 198 U.S. at 384. In *Winans* the Court affirmed the contention that the federal government could create rights binding on the states. *Id.* at 383. In dicta, however, the Court stated that the treaties did not unreasonably restrain the states from regulating the Indians' treaty fishing rights. According to the *Winans* Court, the treaties merely created easements in the land favoring the treaty Indians. *Id.* at 384. Other courts have cited the *Winans* dictum as firm authority for the proposition that states have jurisdiction to regulate off-reservation treaty fishing. See note 22 *infra*.

21. 315 U.S. 681 (1942).

regulate the Indians' time and manner of off-reservation fishing when necessary for conservation, it could not require them to pay a license fee in order to catch fish with a net.²² The Court noted that charging a fee would be penalizing the Indians for exercising the rights which their ancestors intended to reserve.²³

In the late 1960s the federal government brought suit on behalf of four Columbia River tribes²⁴ against the state of Oregon seeking a declaration of the manner and extent to which the state could regulate Indian fishing. In *Sohappy v. Smith*²⁵ the district court found that the state does have limited authority to regulate Indian fishing, but that the state's authority differed from its authority to regulate non-Indians.²⁶ The court held that the state may use its police power to regulate treaty fishing only to the extent necessary to prevent the decimation by overfishing of the salmon and steelhead resource.²⁷ Significantly, the district court also found that the Columbia River tribes are entitled to a "fair share" of the fish produced by the Columbia River system.²⁸

The United States District Court for the Western District of Washington defined more precisely the extent of the Indians'

22. *Id.* at 684. The *Tulee* Court reached its decision by balancing the Indians' treaty rights with the state's inherent power under *Geer v. Connecticut*, 161 U.S. 519 (1896), to regulate wildlife within its borders. The Court concluded the treaty right to fish could be regulated when it conflicted with the sovereign state power over conservation. 315 U.S. at 684. One commentator has criticized this approach, arguing that the decision erroneously finds a basis for the exercise of state power over off-reservation Indian fishing in the *Winans* dictum. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 221 (1972).

23. 315 U.S. at 685.

24. The tribes were the Confederated Tribes of the Warm Springs Reservation of Oregon, Confederated Tribes and Bands of the Yakima Nation, Confederated Tribes of the Umatilla Reservation, and the Nez Perce Tribe of Idaho. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).

25. 302 F. Supp. 899 (D. Or. 1969). *Sohappy* consists of two separate cases which the court consolidated for trial. *Sohappy v. Smith*, Civ. No. 68-498, was brought by fourteen individual Yakima Indians against Oregon State Fish and Game officials. Shortly thereafter, the federal government filed *United States v. Oregon*, Civ. No. 68-513 (consolidated with *Sohappy*). The four Columbia River treaty tribes, note 24 *supra*, intervened subsequently as additional plaintiffs in the latter case. For a discussion of *Sohappy*, see Note, *Sohappy v. Smith: Eight Years of Litigation over Indian Fishing Rights*, 56 OR. L. REV. 680 (1977).

26. 302 F. Supp. 899, 908 (D. Or. 1969).

27. *Id.*

28. *Id.* at 911. The *Sohappy* court's mention of the Indians' "fair share" of the harvestable salmon and steelhead is the earliest reference to a quantification of the extent of the treaty fishing right.

"fair share" of fish in *United States v. Washington*.²⁹ The *Washington* court held that the Indians should be given an opportunity to harvest a specified proportion of the salmon and steelhead resource at the tribes' customary fishing grounds.³⁰ The court developed a formula that provided the Indians with the opportunity to take up to 50% of the harvestable numbers of fish.³¹

The United States Supreme Court explained further the scope of Indian fishing rights in three cases involving the Puyallup Tribe.³² In *Puyallup Tribe v. Department of Game (Puyallup I)*,³³ the Court held that the Treaty of Medicine Creek³⁴ did not preclude state regulation of the Indians' manner of fishing when the purpose of such regulation was conservation.³⁵ In *Department of Game v. Puyallup Tribe (Puyallup II)*,³⁶ the Court ruled that the state's regulation against net fishing discriminated against the Indians by giving the entire run of steelhead on the Puyallup River to sports fishermen, thus contravening the Treaty of Medicine Creek.³⁷ The Court declared that the state's regulation scheme must accommodate the rights of Indians under the treaty and ordered the trial court to apportion the annual catch between Indian net fishermen and non-Indian sports fishermen.³⁸ In *Puy-*

29. 384 F. Supp. 312 (W.D. Wash. 1974) (commonly known as the Boldt decision after its author, District Judge George H. Boldt), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). In reaching his decision, Judge Boldt performed an exhaustive study of Indian fishing rights. The decision is recognized by historians to be a foremost work in the field of American Indian history. *E.g.*, M. MORGAN, *PUGET'S SOUND* 340 (1979). For a discussion of the Boldt decision, see Comment, *Indian Treaty Analysis and Off Reservation Rights: A Case Study*, 51 WASH. L. REV. 61 (1975-76).

30. 384 F. Supp. 312, 343 (W.D. Wash. 1974).

31. *Id.* Judge Boldt found that the term "in common with" as used in the treaties meant sharing equally the opportunity to take fish off the reservations. Therefore, he concluded that the treaty fishermen should have the opportunity to take up to 50 percent of the harvestable number of fish. Because of the importance of taking fish for consumption and religious purposes, the court excluded these uses from the Indians' share. *Id.*

32. *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Puyallup Tribe v. Department of Game (Puyallup III)*, 433 U.S. 165 (1977).

33. 391 U.S. 392 (1968).

34. Treaty of Medicine Creek, *supra* note 8.

35. 391 U.S. 392, 399 (1968). In its holding the Court expanded the test enunciated in *Tulee v. Washington*, 315 U.S. 681 (1942), and ruled that state regulations must not only be necessary for conservation but must also not discriminate against the Indians. 391 U.S. at 398.

36. 414 U.S. 44 (1973).

37. Treaty of Medicine Creek, *supra* note 8.

38. 414 U.S. at 48.

allup Tribe v. Department of Game (Puyallup III),³⁹ the Court upheld the trial court's allocation of 45% of the annual steelhead run available for harvest⁴⁰ to the Puyallup Tribe.⁴¹

The apportionment approach developed in the *Puyallup* trilogy, *Sohappy v. Smith*, and *United States v. Washington* met with strong and bitter criticism from non-Indian commercial and sports fishermen, and some state authorities.⁴² Acts of violence and vandalism, including damage to boats and nets, increased with the implementation of the decisions.⁴³ The recalcitrance of the non-Indian parties led the Ninth Circuit to comment that, except for some desegregation cases, the district courts have faced the most concerted official and private efforts to frustrate federal court rulings in this century.⁴⁴

The Washington state congressional delegation asked President Carter to appoint a federal task force to find ways of resolving the controversy.⁴⁵ The regional team of the presidential task force made its report in June of 1978.⁴⁶ The task force recommended increasing the number of fish available for harvest, reducing the

39. 433 U.S. 165 (1977). For a discussion of the *Puyallup* trilogy, especially *Puyallup III*, see Comment, *State Regulation of Indian Treaty Rights: Putting Puyallup III into Perspective*, 13 GONZ. L. REV. 140 (1977).

40. The number of fish available for harvest are the total number in a particular run less those which must escape for spawning. See 384 F. Supp. 312, 343 (W.D. Wash. 1974).

41. 433 U.S. 165, 177 (1977) (rev'd on other grounds). The Washington State Supreme Court affirmed the trial court's allocation in *Department of Game v. Puyallup Tribe*, 86 Wash. 2d 664, 667, 548 P.2d 1058, 1063 (1976). The allocation was based on the decision in *United States v. Washington*, discussed at notes 29, 31 *supra*, which generally prescribed a 50% allocation to the Indian fishermen. 433 U.S. at 177.

42. S. REP. NO. 667, 96th Cong., 2d Sess. 1, 2 1980 U.S. CODE CONG. & AD. NEWS 6793 [hereinafter cited as S. REP. NO. 667]. The fervor of non-Indian reaction, particularly to the Boldt decision, has been extreme. Shortly after Judge Boldt's decision was handed down, sportsmen hung him in effigy, using a fishing net, outside the federal courthouse in Tacoma, Washington. Comment, *Indian Treaty Analysis and Off-Reservation Rights: A Case Study*, 51 WASH. L. REV. 61, 92 n.168 (1975-76).

43. S. REP. NO. 667, *supra* note 42, at 2.

44. Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F.2d 1123, 1125 (9th Cir. 1978), cited in *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.30 (1979). *Gillnetters Association*, reviewed by the United States Supreme Court in *Fishing Vessel Ass'n*, involved challenges to the injunctions issued pursuant to the Boldt decision. See note 29 *supra*. For a discussion of *Fishing Vessel Ass'n*, see Comment, *Fishing Vessel Association: Resolution of Indian Fishing Rights Under Northwest Treaties*, 16 WILLAMETTE L. REV. 931 (1980).

45. S. REP. NO. 667, *supra* note 42, at 3.

46. *Id.*

size of the non-Indian fishing fleet, and increasing the Indians' harvest capability.⁴⁷

In response to executive communications sent by the Department of Interior to Congress,⁴⁸ bills were introduced in both houses to carry out the task force's recommendations. On December 20, 1979, Congressmen John M. Murphy of New York and John B. Breaux of Louisiana introduced H. R. 6225.⁴⁹ Senator Warren G. Magnuson of Washington on behalf of himself and Senators Jackson of Washington and Packwood and Hatfield of Oregon, introduced S. 2163.⁵⁰ Although based on the administration's proposal, Senator Magnuson's bill incorporated modifications in a number of respects.⁵¹

Besides providing for the enhancement and conservation of the salmon resource, Senator Magnuson proposed to resolve the steelhead controversy within the context of the bill. To minimize commercial fishing for steelhead, the senator suggested that salmon enhancement projects be planned to minimize adverse impact on steelhead stocks and that the benefits of any steelhead enhancement projects accrue only to sports fishermen.⁵² Furthermore, he proposed encouraging the tribes to limit or to forego the treaty right to nonrecreational steelhead fishing in return for salmon enhancement benefits.⁵³ The Senate version, including the Magnuson steelhead decommercialization provision, passed the Senate unanimously on May 6, 1980.⁵⁴

47. *Id.*

48. Exec. Communication No. 3045, *cited in* H.R. REP. No. 1243, pt. 1, *supra* note 4, at 12.

49. H.R. 6225, 96th Cong., 1st Sess., 125 CONG. REC. H12451 (1979).

50. S. 2163, 96th Cong., 1st Sess., 125 CONG. REC. S19455 (1979).

51. S. 2163, 96th Cong., 2d Sess., 126 CONG. REC. S4590 (1980). The Magnuson version shifted responsibility for carrying out the Act's provisions from the Department of Interior to the Department of Commerce. *Id.* at § 2, 126 CONG. REC. at S4590. The Secretary of Commerce was to establish an advisory committee composed of all interested Pacific management groups to further study the various management proposals. *Id.* at § 102, 126 CONG. REC. at S4590. The area covered by the Act was enlarged to include the Columbia River basin. *Id.* at §§ 301-305, 126 CONG. REC. at S4591-92. The state of Washington received credit for the money that it had spent for enhancement projects in the determination of the state's required match of funds. *Id.* at § 203, 126 CONG. REC. at S4591. The states and the tribes were given deadlines to agree on an enhancement plan. *Id.* at § 201, 126 CONG. REC. at S4590. The Senate version increased the amount authorized for buy-back of non-Indian commercial fishing gear and licenses. *Id.* at § 406, 126 CONG. REC. at S4593. Finally, Title IV of the Administration bill providing appropriations for tribal gear purchase was eliminated. *See generally* S. REP. No. 667, *supra* note 42.

⁵² S. 2163, 96th Cong., 2d Sess. § 201(f), 126 CONG. REC. at S4591.

53. *Id.*

54. *Id.* 126 CONG. REC. at S4590.

In the House of Representatives, the Fisheries and Wildlife subcommittee held hearings on H. R. 6225 on October 15 and 16, 1979.⁵⁵ As an outgrowth of the hearings, Congressman Joel Pritchard of Washington, on behalf of himself and Congressmen Bonker, Dicks, Swift, and Foley of Washington and AuCoin of Oregon, introduced H. R. 6959 as a substitute bill.⁵⁶ Except for differences in funding levels, H. R. 6959 was similar to the Senate proposal.⁵⁷

On May 28, 1980, the Fisheries and Wildlife subcommittee held hearings on H. R. 6959 and S. 2163, as passed by the Senate.⁵⁸ As ordered reported by the subcommittee, H. R. 6959 included many of the amendments suggested by the witnesses testifying at these hearings.⁵⁹ The subcommittee bill made enhancement funding in each area contingent upon the approval and effective implementation of a management plan.⁶⁰ The management plan would have to be approved unanimously by the management parties for the area. The management parties for the Washington conservation area would be the Pacific Fishery Management Council,⁶¹ the state of Washington, and a representative of the Indian tribes with fishing rights in the area.⁶² The management parties for the Columbia River conservation area

55. *Northwest Salmon Enhancement Program—H.R. 6959, S. 2163: Hearings Before the House Subcomm. on Fisheries & Wildlife Conservation and the Environment of the Comm. on Merchant Marine & Fisheries*, 96th Cong., 2d Sess. 1 (1979-1980) [hereinafter cited as *House Hearings*].

56. H.R. 6959, 96th Cong., 2d Sess., 126 CONG. REC. H2320 (1980).

57. *Id.* H.R. 6959 would have provided authorizations totaling \$157.5 million. Of this amount, \$72.5 million would have been used for salmon and steelhead enhancement in the state of Washington, \$30 million for salmon and steelhead enhancement in Oregon (in the Columbia River basin), \$50 million for a buy-back program in Washington, and \$5 million for research and coordination. Staff of House Comm. on Merchant Marine & Fisheries, 96th Cong., 2d Sess., H.R. 6959, 96th Cong., 2d Sess. § 205 (Prelim. Print 1980) [hereinafter cited as Prelim. Print]. All funds would be used for outright grants, with the exception of enhancement funds, which would require a 50 percent state match. *Id.* at § 203(b), Prelim. Print at 14. Both Washington and Oregon would, however, be given credit for state funds committed to salmon enhancement projects since 1977. *Id.*

58. *House Hearings*, *supra* note 55.

59. 126 CONG. REC. H12011 (1980) (remarks of Rep. Forsythe).

60. Staff of House Comm. on Merchant Marine & Fisheries, 96th Cong., 2d Sess., H.R. 6959, 96th Cong., 2d Sess. § 121 (Comm. Print No. 2) (1980) [hereinafter cited as Comm. Print No. 2].

61. Comm. Print No. 2, *supra* note 60, at § 2(15)(C). The Pacific Fishery Management Council was established by section 302 of the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1852 (1976), to manage offshore salmon fisheries. *House Hearings*, *supra* note 55, at 411 (statement of John Martinis).

62. Comm. Print No. 2, *supra* note 60, at § 2(15).

would consist of the states of Washington and Oregon, the Pacific Fishery Management Council, and a representative of the Indians living in the Columbia River basin.⁶³ The subcommittee also deleted the steelhead decommmercialization provisions of the Senate version, and rejected efforts by Congressmen Pritchard and Bonker to insert alternative steelhead decommmercialization proposals into the bill.⁶⁴ The House passed the measure on September 23, 1980.⁶⁵ S. 2163 was also returned to the Senate

63. *Id.* at § 2(2).

64. Interview with William K. Bakamis, Chief Legislative Assistant to Rep. Norman Dicks, Member of Congress (Feb. 26, 1981).

65. H.R. 6959, 96th Cong., 2d Sess., 1980 U.S. CODE CONG. & AD. NEWS 6793. The Merchant Marine and Fisheries Committee filed its report on Aug. 21, 1980, and, on the same date, the bill was sequentially referred to the Interior Committee for consideration. H. REP. NO. 1243, pt. 2, 96th Cong., 2d Sess. 1, 12 (1980) [hereinafter cited as H.R. REP. NO. 1243, pt. 2].

Although the full Merchant Marine and Fisheries Committee adopted the Fisheries and Wildlife subcommittee bill, the full committee also adopted a series of five amendments offered by Congressman Paul McCloskey, Jr., of California. The amendment introduced by Congressman McCloskey established a California conservation area and a state conservation area for any state, other than California, Oregon, or Washington that has salmon and steelhead resources and which has a recognized Indian tribe with fishing rights to those resources. H.R. REP. NO. 1243, pt. 1, *supra* note 4, at 5. The California management committee would consist of five members—three to be appointed by the governor of California, one by the Pacific Fishery Management Council, and one by the California Indian tribes. *Id.*

While the subcommittee's version of the management plan required unanimous approval of the various management committees, under the McCloskey amendments the decisions of the California management committee and of any state committee other than Oregon or Washington would be by majority vote. *Id.* at 7. Therefore, in the case of the California committee, the three members appointed by the governor could approve a management plan and submit that plan to the Secretary of Commerce for final approval, regardless of whether the Pacific Council or the California tribes even became actual members of the management committee. H.R. REP. NO. 1243, pt. 1, *supra* note 4, at 62.

The Interior Committee was generally satisfied with the treatment of Indian fishing rights in the bill as amended by the Fisheries and Wildlife subcommittee. H. REP. NO. 1243, pt. 2, at 12. The Interior Committee, however, was seriously alarmed by the McCloskey amendments adopted by the full Merchant Marine and Fisheries Committee. *Id.* According to the Interior Committee's report, the McCloskey amendments, if enacted, would have the effect of destroying Indian fishing rights in the state of California and, except for Oregon and Washington, the rest of the nation. *Id.*

The Interior Committee modified the Merchant Marine and Fisheries bill by eliminating the McCloskey amendments and by including provisions for the establishment of a conservation or management committee for the Klamath River basin in California. *Id.* at 16. Except for the differing membership of the Klamath River Committee, its functions, purpose, and powers were the same as established for the Washington and Oregon committees. *Id.* at 17.

The Interior Committee completed its work on H.R. 6959 on Sept. 19, 1980, and

with the language of the House-passed version inserted as a substitute to its own provisions.⁶⁶

When the Senate considered the House amendments to S. 2163, it added to the bill the language of S. 1656, the American Fisheries Promotion Act.⁶⁷ This proposal was designed to assist in the development of the United States fishing industry, to promote the sale of domestically produced fisheries products, and to provide assistance in the form of loans to American fishermen who are about to default on mortgages on their vessels.⁶⁸ The Senate also attached the Portuguese GIFA (Governing International Fisheries Agreement) as a rider to the Act.⁶⁹ The Senate approved the entire package on December 3, 1980.⁷⁰ The House concurred the following day.⁷¹ President Carter signed the bill into law on December 22, 1980.⁷²

In its final form, the Salmon and Steelhead Conservation and Enhancement Act of 1980 provides for the enhancement, conservation, and improved management of the salmon and steelhead resource.⁷³ The Act establishes a coordinated, comprehensive management entity, the Salmon and Steelhead Advisory Commission,⁷⁴ provides funding for both state and tribal enhancement projects,⁷⁵ and provides for the purchase of non-Indian commercial fishing and charter vessels and their licenses by the state.⁷⁶

committed the bill to the full House for consideration. *Id.* at 1. By mutual consent, however, the California and Washington delegations and the members of the Interior and Merchant Marine committees agreed to drop the California portions of the bill entirely, with the understanding that California's fishery problems would be addressed on a priority basis during 1981. 126 CONG. REC. H12011 (1980) (remarks of Rep. Clausen).

66. S. 2163, 96th Cong., 2d Sess., 126 CONG. REC. H9389 (1980).

67. S. 2163, 96th Cong., 2d Sess., 126 CONG. REC. S15433 (1980).

68. 126 CONG. REC. H12013 (1980) (remarks of Rep. Ashley).

69. S. 2163, 96th Cong., 2d Sess. § 145, 126 CONG. REC. S15433 (1980). The usual procedure for congressional approval of a Governing International Fisheries Agreement (GIFA) is to let the agreement lay on the table for sixty days. 126 CONG. REC. H12011 (1980) (remarks of Rep. Forsythe). Congress affirmatively approved the Portuguese GIFA to expedite a proposed joint venture by which Portuguese processing vessels would purchase fish harvested by American fishermen. *Id.*

70. S. 2163, 96th Cong., 2d Sess., 126 CONG. REC. S15433 (1980).

71. S. 2163, 96th Cong., 2d Sess., 126 CONG. REC. H12015 (1980).

72. 16 Weekly Comp. of Pres. Doc. 2842 (Dec. 29, 1980).

73. Pub. L. No. 96-561, 94 Stat. 3275 (1980).

74. *Id.* at § 100, 94 Stat. at 3277. The Salmon and Steelhead Advisory Commission's function is to make recommendations for the development of a comprehensive management structure to coordinate research, enhancement, and enforcement policies for the entire Pacific Northwest. *Id.*, 94 Stat. at 3278.

75. *Id.* at § 124, 94 Stat. at 3283. See text accompanying notes 78-82 *infra*.

76. *Id.* at §§ 130-35, 94 Stat. at 3283-85. See text accompanying note 84, *infra*.

The Act's most significant contribution is to provide for the adoption of a comprehensive management plan. Any real solution to the region's problems must include a coordination of the many management entities concerned with the fishery resource. As an incentive to the implementation of a coordinated management plan, the Act conditions funding of enhancement projects upon the participation and approval of all the different management entities.⁷⁷

After the approval and effective implementation of a coordinated management plan, the enhancement provisions of the Act can significantly contribute to increased runs of salmon and steelhead. The Act provides authorizations totaling \$70 million for salmon enhancement projects.⁷⁸ Of this amount, \$45 million is allocated to the Washington conservation area,⁷⁹ and \$25 million to the Columbia River basin area.⁸⁰ Additionally, \$14 million is authorized for steelhead enhancement projects, to be divided equally between the two conservation areas.⁸¹ The presidential task force estimated that based on current estimates of the production opportunities in Washington state waters alone, the current annual landings of 7.5 million fish could be increased to as much as 15 to 20 million annual landings by the effective implementation of enhancement programs.⁸²

Finally, the fleet adjustment program will help reduce the fishing vessel pressure on the salmon and steelhead resources. The overcapacity of the salmon fishing fleet today is especially acute because of the large number of non-Indian commercial and charter fishing licenses outstanding.⁸³ The Act establishes a pro-

77. *Id.* at § 113, 94 Stat. at 3279.

78. *Id.* at § 124, 94 Stat. at 3283.

79. *Id.*

80. *Id.*

81. *Id.*

82. H.R. REP. No. 1243, pt. 1, *supra* note 4, at 44. Other than artificial propagation, several remedial enhancement measures could be taken. Removal of obstructions in streams and rivers, laddering of falls and dams, and construction of artificial spawning channels would facilitate the upstream passage of spawning adults. Screening of turbines, dams, and irrigation ditches would help prevent the destruction of downstream migrating juveniles. *Id.* at 43.

83. The number of nontreaty commercial fishing licenses rapidly increased during the preceding decade. In 1965, for example, there were 1,822 trollers licensed by Washington state. By 1977 the number had increased to 3,232. The Puget Sound gillnet fleet increased from 906 to more than 1,500 during the same period. On the Columbia River, the gillnet fleet increased from 237 to more than 700. H.R. REP. No. 1243, pt. 1, *supra* note 4, at 34.

gram by which the state of Washington can reduce the number of fishing vessels in the state's salmon fishery by purchasing those vessels and their licenses. Funds will be available under the buy-back program only if the state establishes a program that meets standards specified in the Act.⁸⁴

The final version of the Salmon and Steelhead Conservation and Enhancement Act leaves the question of commercial fishing for steelhead unresolved. Because of the omission of a provision addressing the status of steelhead, the Act does little to ease the tension between Indians and non-Indian sports fishermen. The steelhead issue is an emotional one for the tribes as well as for the sports fishermen.⁸⁵ The tribes, economically and socially dependent upon the steelhead resource, are threatened by attempts to limit their treaty fishing rights. The sportsmen believe that the Indians should not be exempt from state laws prohibiting commercial fishing for steelhead because of antiquated treaty rights. Therefore, despite the special rights to steelhead reserved for the tribes by the treaties, sportsmen have sought to decommercialize the species. Several unsuccessful attempts have been made to congressionally end Indian treaty rights to steelhead.⁸⁶ By failing to address the steelhead question, the Act does nothing to prevent future abrogation of Indian treaty rights. Nor does it satisfy the many thousands of non-Indian fishermen who want commercial fishing for steelhead to end. As long as Congress fails to enact legislation addressed to the steelhead issue, the controversy over the fishery resource will continue.

Author's Note: On April 2, 1981, steelhead decommercialization bills were once again introduced in both houses of Congress. Senator Slade Gorton of Washington introduced S. 874, entitled the "Steelhead Trout Protection Act."⁸⁷ Senator Gorton's bill was referred to the Senate Select Committee on Indian Affairs.⁸⁸ Representative Don Bonker of Washington introduced an identi-

84. Pub. L. No. 96-561, § 132, 94 Stat. at 3285. Among the standards specified in the Act is the requirement that the state continue its moratorium on the licensing of new salmon fishing vessels. The state also is required to deposit any money received from the resale of vessels and gear (without licenses) into a revolving fund for the operation of the fleet reduction program. *Id.*

85. See note 6 *supra*.

86. *E.g.*, S.J. Res. 170, 171, 88th Cong., 2d Sess. (1964); H.R. 9736, 95th Cong., 1st Sess. (1977); H.R. 6144 96th Cong., 2d Sess. (1980).

87. S. 874, 97th Cong., 1st Sess., 127 CONG. REC. S3386 (1981).

88. *Id.*

cal bill in the House.⁸⁹ Representative Bonker's proposal was referred jointly to the House Interior and Insular Affairs and Merchant Marine and Fisheries Committees.⁹⁰

In view of earlier unsuccessful attempts to enact similar legislation,⁹¹ it is this writer's opinion that the "Steelhead Trout Protection Act" will not pass during the Ninety-seventh Congress. The Senate Select Committee on Indian Affairs completed hearings on S. 874 on Sept. 21, 1981. Senator Gorton temporarily withdrew the bill, however, before the Committee could take further action.⁹² Senator Gorton has not as yet reintroduced the bill.⁹³ Neither House Committee has taken action on H.R. 2978.⁹⁴

89. H.R. 2978, 97th Cong., 1st Sess., 127 CONG. REC. H1295 (1981).

90. *Id.*

91. See note 86, *supra*.

92. Interview with John Chaves, Staff Attorney, Senate Select Comm. on Indian Affairs (July 20, 1982).

93. *Id.*

94. Interview with William K. Bakamis, Chief Legislative Assistant to Representative Dicks, Member of Congress (July 21, 1982).