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Beyond the Belloni Decision: Sohappy v.Smith and the Modern Era of Tribal Treaty Rights

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BEYOND THE BELLONI DECISION: *SOHAPPY V. SMITH* AND THE MODERN ERA OF TRIBAL TREATY RIGHTS

BY

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Indian tribes and their members are leading a revived political, legal, and social movement to protect the nation's natural resources. In doing so, tribes and their allies employ many effective strategies but core to the movement are the historic promises made to tribes by the United States through treaties. Tribes are asserting treaty-protected rights, which the United States Constitution upholds as the supreme law of the land, to defend the resources on which they and their ancestors have relied for generations. Those claims have resulted in significant legal victories, igniting a broader movement in favor of tribal sovereignty and securing a prominent and perpetual tribal presence in the movement and on the ground.

Given the strength of this modern movement and the centrality of treaty rights to its success, it is hard to believe that, just two generations ago, those rights faced seemingly existential threats. Notwithstanding bedrock Supreme Court precedent from the first half of the 1900s recognizing the supremacy of Indian treaties, tribal members exercising the rights those treaties guaranteed were under attack in the Pacific Northwest and the Great Lakes, with armies of state wildlife rangers and law enforcement arresting tribal members for not following state laws and regulations. Then, in 1968, the Supreme Court cut against its earlier solicitude for tribal treaty rights by opening the door for broad state power to establish laws, rules, and regulations that could govern tribal members engaged in treaty-reserved activities. Facing escalating harassment from state authorities, the Court's endorsement of state priorities seemed to leave little room for the meaningful exercise of treaty rights as the tribes and tribal members themselves saw fit.

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But, with his 1969 decision in Sohappy v. Smith*, Judge Robert Belloni began to reverse the course of that time and, in doing so, opened the modern era of tribal sovereignty over natural resources. Judge Belloni's approach to reaching that momentous decision recognized the permanence and supremacy of tribal treaties while also accounting for the ongoing exercise of state sovereignty. Rather than approach the balance of those two interests as a zero-sum proposition, however, Judge Belloni sought and provided practical guidance pursuant to which states and tribes could work together to ensure their continued coexistence. While that coexistence would demand higher burdens and more limitations on the state's exercise of authority, Judge Belloni also had the foresight to provide a judicial forum for resolving conflicts over those burdens and limitations and urged the parties to reach cooperative agreements beyond the courtroom doors. Judge Belloni's approach and the* Sohappy *decision laid the foundation for state and federal courts struggling to balance state authority and tribal treaty rights. This Article traces the legacy of the* Sohappy *decision across litigation in the Great Lakes region, where members of the Chippewa Tribes fought to continue their time-honored and treaty-reserved practices, various states sought to regulate those activities, and judges relied on Judge Belloni's wisdom and insight to reach sustainable solutions.*

I. INTRODUCTION

Entering the second millennium's third decade, American Indian tribes and their members continue the lifeways, cultures, and traditions that they and their ancestors have practiced since time immemorial.[1]

[1] This Article uses the general descriptor "Indian" as the legal term of art widely incorporated into federal law, see for example Title 25 of the United States Code, entitled "Indians," but the author recognizes that other descriptors, such as Native American or Indigenous, are far more accurate and appropriate. 25 U.S.C. §§ 1–4301 (2012). For a rich discussion of the interwoven nature of the activities carried out by tribal members and spirituality, see *David Treuer: Language Carries More Than Words*, ON BEING WITH KRISTA TIPPET (June 19, 2008), https://perma.cc/3BG9-UZUL.

These practices, including activities like hunting, fishing, and gathering, are interwoven with the cultures, ceremonies, and spirituality of many tribal societies, making their ongoing practice an essential aspect of protecting and enhancing tribal existence.[2] Unlike prior decades, however, tribes and their expanding exercise of sovereignty, are now two generations into a meteoric rise from the depths of the termination era of the mid-Twentieth Century[3] and leading the way to represent those values and ensure their survival.[4] In doing so, tribes, their allies, and their members build upon the legal standing of treaties their ancestors made with the United States and the protection those treaties offer for the continued exercise of rights reserved therein.[5] A recent string of important victories demonstrate the permanence and power of these arguments, as tribes push the boundaries of historic treaty agreements to better serve their modern needs.[6]

While those victories have immediate impact,[7] the future potential of the current moment is even more striking, particularly in light of the seemingly dim future that treaty-reserved rights faced just fifty years ago. While the U.S. Supreme Court has long recognized and upheld the supremacy of treaties,[8] and even insulated tribal members from some state efforts to interfere with their exercise of treaty-reserved rights,[9] those legal victories provided little actual protection for tribal members seeking to fish or hunt in exercise of treaty-reserved rights until the late 1960s and early 1970s. In the Pacific Northwest, for example, the state of Washington essentially waged war upon tribal fishermen, enacting regulations to prohibit them from fishing, arresting them for violating those regulations, and confiscating their boats and fishing gear.[10] The

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[2] *See, e.g.*, *Native American Spirituality*, INDIANS.ORG, https://perma.cc/M53E-548N (last visited Apr. 18, 2020).

[3] *See generally* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 57–86 (2005).

[4] *See, e.g.*, Anna Brady, *Through Bears Ears, Tribes Lead the Way for True Collaboration over Utah's Public Lands*, UNIV. OF UTAH S.J. QUINNEY COLL. OF LAW ENVTL. DISPUTE RESOL. BLOG (Nov. 9, 2015), https://perma.cc/TH82-HHPK; *see* Anna V. Smith, *The Klamath River Now Has the Legal Rights of a Person*, HIGH COUNTRY NEWS (Sept. 24, 2019) https://perma.cc/9BES-NK3U.

[5] *See, e.g.*, United States v. Washington, 827 F.3d 836, 865 (9th Cir. 2016) (affirming a federal court injunction requiring the state to replace culverts that blocked or impeded salmon migration and thereby interfered with the treaty reserved right of tribes to take fish).

[6] *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1691–92 (2019) (upholding treaty rights of the Crow Tribe to hunt in Wyoming's Bighorn National Forest).

[7] Within months of the *Herrera* decision and its repudiation of *Ward v. Race Horse*, 163 U.S. 504 (1896), in which the Supreme Court invalidated the off-reservation treaty rights of the Eastern Shoshone and Shoshone-Bannock Tribes, those Tribes began considering how best to resume the exercise of those rights. *Herrera*, 139 S. Ct. at 1697; Savannah Maher, *E. Shoshone and Shoshone-Bannock Tribes Meet to Discuss Off-Reservation Hunting*, WYO. PUB. RADIO (July 31, 2019), https://perma.cc/4D6S-BBZC.

[8] *See* U.S. CONST. art. VI, cl. 2.

[9] *See, e.g.*, United States v. Winans, 198 U.S. 371, 382–84 (1905).

[10] *See, e.g.*, CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 33, 34, 38–40 (2000); United States v. State of

situation in the Great Lakes region was similar.[11] Those state-supported assaults mixed with the economic interests and racism of non-Indian communities created dangerous conditions for tribal members and their traditional practices.[12]

Even the United States Supreme Court seemed to change course from its earlier reverence for treaties, rendering a milquetoast 1968 decision in *Puyallup Tribe v. Department of Game*[13] (*Puyallup I*), broadly endorsing Washington's ability to regulate tribal fishermen. Although treaties remained the supreme law of the land,[14] *Puyallup I* treated their constitutional status only abstractly and the Court appeared uninterested in protecting actual, non-theoretical exercise of the rights reserved in those agreements.[15] Instead, the first *Puyallup* decision suggested that the nation's highest Court would blithely defer to state interests.[16] When matched with the ferocity of state and local opposition to the exercise of treaty rights on the ground, the Court's recognition of a legal basis from which state governments could act marked a potentially existential threat: if the practice of treaty-protected activities would be subject to state power—even if only in the name of conservation—with few clear limits, the permanence of those practices and the tribal role in protecting them would be seriously jeopardized.[17]

But, despite the setback of *Puyallup I* and the dangers from state police and local non-Indians, tribes and tribal members across the country refused to accept the possibility that their time-honored rights might be diminished.[18] Tribal hunters, fishers, and gatherers continued to exercise their rights, and tribes, along with the United States as trustee on their behalf, began to consider new legal avenues for defending those rights. Richard Sohappy and thirteen of his fellow members of the Yakama Nation, insisted on a different future for tribes

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Wash., 573 F.2d 1123, 1126 (9th Cir. 1978) (noting that the State of Washington's efforts to avoid federal court orders requiring management of the salmon fishery to respect tribal treaty rights rivaled efforts of southern states to resist desegregation), *vacated*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 (1979).

11 *See, e.g.*, Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing of the Wisconsin Chippewa*, 1991 WISC. L. REV. 375, 375–76 (1991).

12 *Id.*; Gabriel Chrisman, *The Fish-in Protests at Franks Landing*, THE SEATTLE CIVIL RTS. & LAB. HIST. PROJECT, https://perma.cc/68JM-D5CT (last visited Apr. 18, 2020).

13 391 U.S. 392, 399 (1968) ("The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved.").

14 U.S. CONST. art. VI, cl. 2.

15 *Puyallup I*, 391 U.S. at 400 (suggesting tribal rights are subject to the same regulations as all other fishing by non-tribal members).

16 *Id.* at 398.

17 *Id.* at 398–99 ("[T]he manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets the appropriate standards and does not discriminate against the Indians.").

18 *See* WILKINSON, *supra* note 3, at 166–72.

and treaty rights and were integral in lighting the fuse of that movement.[19]

In 1968, Sohappy and his fellow plaintiffs, who eventually joined the United States and the tribes of the lower Columbia,[20] filed a demand for a federal court decree to define their treaty-reserved fishing rights in Oregon.[21] By doing so, the *Sohappy v. Smith* plaintiffs opened the door to the modern era of tribal treaty rights, an era ushered in and defined by Judge Belloni's 1969 decision in *Sohappy*. Rather than adopting the Supreme Court's unworkable and zero sum *Puyallup I* concepts, Judge Belloni approached Sohappy's demand from a practical perspective, acknowledging the well-established legal basis for treaty rights while sketching a path forward demanding recognition of and equality for their continuing—and perpetual—exercise.[22] In rendering the *Sohappy* decision, Judge Belloni recognized the importance of a broader view of the interests at stake and demanded that the state decision-making also expand beyond its own, narrower concerns.[23] Finally and perhaps most critically, Judge Belloni understood that neither the tribes nor the states would disappear and, by retaining continuing jurisdiction and calling on the defendant states to work cooperatively with the tribes, his *Sohappy* decision created a new framework to support the ongoing development of practical solutions.[24] That framework eliminated the existential threats posed by *Puyallup I* and, instead, shifted the focus to specific details of how treaty rights would be exercised: how many fish would be caught, by what means, at which locations, and subject to oversight by whom. After *Sohappy*, the tribes could begin answering those questions on an equal footing with states and do so with eyes toward their own needs, values, and perspectives. Judge Belloni's *Sohappy* decision thereby announced the modern era of tribal treaty rights and natural resources management by ensuring tribes could continue to meaningfully exercise their rights according to their own sovereign priorities. Thanks to that decision and the five decades of subsequent decisions and hard work that built upon it, that modern era

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19 *See* Sohappy v. Smith, 302 F. Supp. 899, 903–04 (D. Or. 1969).

20 *Id.* at 904 (stating the United States filed a separate suit against the State of Oregon "on its own behalf and on behalf of the Confederated Tribes and Bands of the Yak[a]ma Reservation, the Confederated Tribes and Bands of the Umatilla Reservation . . . , the Nez Perce Indian Tribe, and 'all other tribes similarly situated,'" in which the Warm Springs Tribe, the Yakama Nation, and the Nez Perce Tribe intervened and which was ultimately consolidated with the *Sohappy* case).

21 *Id.* at 903–04.

22 *Id.* at 911 ("In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users.").

23 *Id.* at 910 ("In considering the problem of salmon and steelhead conservation in the Columbia River and its tributaries, it is necessary to consider the entire Columbia River system.").

24 *Id.* at 911–12.

is now defined by the efforts and successes of Indian tribes and their members to expand and protect their historic, treaty-reserved rights.

Sohappy came at a critical turning point in the development of treaty rights jurisprudence and by virtue of his approach and analysis in that decision, Judge Belloni connected the historical legal status of treaties to the realities of their everyday exercise in the current day. This Article marks the 50th anniversary of Judge Belloni's decision in *Sohappy* by detailing the importance of those connections and tracing Judge Belloni's influence across treaty rights litigation in the Great Lakes. The scope of that influence and the ongoing usefulness and importance of *Sohappy*'s framework demonstrates that, just as the Supreme Court's blanket endorsement of tribal sovereignty in the 1959 decision of *Williams v. Lee*[25] marked the beginning of the modern era of federal Indian law,[26] *Sohappy* changed the course of history by providing a firm platform from which tribes could exercise that sovereignty to sustain their treaty reserved rights.

To support that argument, the Article begins with a brief review of that historical legal status and the challenges presented by state efforts to interfere with treaty rights, particularly in the mid-1900s. From there, the Article details the novel approach utilized in *Sohappy* and traces how that framework played out for the tribes of the Great Lakes. While a series of judicial decisions in that region resulted in slightly different approaches to the balance of state regulatory power and tribal treaty rights, the concepts and perspectives announced by Judge Belloni in *Sohappy* were instrumental in setting the stage for those approaches. Despite the consistency across these decisions, however, the Article concludes with a cautionary note stemming from recent Supreme Court opinions that appear to pose a potential return to the unexamined approach utilized by the *Puyallup I* court. Despite that potential, the wisdom and power of *Sohappy* remain critically important for tribes and their allies seeking to protect and expand their traditional treaty-reserved rights and are likely to remain important in treaty right challenges to come.

II. TREATIES: CONSTITUTIONAL PROMISES MEANT TO ENDURE (BUT STILL SUBJECT TO INTERPRETATION)

Treaties made by and between the United States and Indian tribes have defined the terms of that relationship from the founding of the federal government. Beyond that relationship, however, tribal treaties have also helped inform basic principles inherent in the nature of our constitutional republic. The Supreme Court's resolution of the important questions posed by tribal treaties and the rights reserved therein helped set the stage for the modern era of tribal treaty rights ushered in by *Sohappy*.

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25 358 U.S. 217 (1959).

26 *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 1 (1987).

Upon its founding, the United States acceded to a long tradition of "linking arms together" with Indian nations by continuing to engage with those nations through treaties.[27] By the time the Constitution was ratified, tribes were negotiating and entering treaties with European colonial powers for over 175 years.[28] The practice of reaching terms on a government-to-government basis to serve the mutual interests of both sovereigns was already well-accepted and represented an important and ongoing bond rooted in ceremony, especially from the tribal perspective.[29]

Given that long history, the critical national interests served by treaty arrangements with native people, and the penchant for colonists and their local interests to interfere with those commitments, it is not surprising that the ratified Constitution included a provision ensuring that the treaties made or yet to be made by the United States would be the supreme law of the land.[30] But, although the Supremacy Clause establishes the primacy of treaties as a legal matter,[31] it was not until Chief Justice John Marshall began interpreting and applying that clause in the context of treaties between the United States and the Cherokee Nation that the true weight of Indian treaties became clear.[32] The language of those solemn agreements helped define and invigorate the constitutional federalism of the republic and establish the balance of power—tipped entirely in favor of the federal government—with regard to engaging in relations with Indian tribes.[33] In reviewing the terms of these agreements, Marshall made clear their import, not just to the Cherokee Nation, who was seeking the protection of the United States from the existential threats posed by Georgia, but also their role in the early legislative identity and action of the United States.[34] Those important national purposes helped support Marshall's conclusion that the federal government and, importantly, his own Supreme Court, could review and negate Georgia's laws as "repugnant to the constitution, laws, and treaties of the United States."[35] From its earliest days,

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[27] *See, e.g.*, ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800 at 121–23, 128–29 (1997).

[28] *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 97 (7th ed. 2017) ("The first-ever formal treaty ceremony recorded between English colonists and an Indian confederacy in North American occurred in 1608 at Powhatan's seat of government . . . .").

[29] *See* WILLIAMS, *supra* note 27, at 103.

[30] U.S. CONST. art. VI, cl. 2.

[31] *Id.*

[32] *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 536, 549–57 (1832) (reviewing treaty provisions to conclude that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.").

[33] *See id.* at 557.

[34] *Id.* at 556–57 ("From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.").

[35] *Id.* at 562.

therefore, the United States depended on treaties with Indian nations not only to serve its own national interests but also to engage and define the terms of its own internal relations under the Constitution.

Notwithstanding the central role that Indian treaties played in elucidating the details of the federal balance of power between the federal government and the several states, conflicts between those sovereigns over the scope and bounds of tribal relations continued. Less than sixty years after Chief Justice Marshall's resounding endorsement of tribal treaties as instruments of federal protection insulated from state interference, the Court famously noted the ongoing tension between states and tribal nations, saying in *United States v. Kagama*[36] that "[b]ecause of the local ill feeling, the people of the States where [tribes] are found are often their deadliest enemies." As a result, despite expressions of federal interest and the supremacy of treaties under federal law,[37] conflict with states and local citizens persisted. The Supreme Court was continually called upon to resolve these conflicts, especially with regard to the exercise by tribal members of reserved treaty rights.

The first of these significant decisions arose within twenty years of the Court's *Kagama* decision and began the Court's long tradition of resolving conflicts over the rights of tribes in the Pacific Northwest to exercise their treaty reserved rights to take fish in their usual and accustomed locations.[38] Over the first half of the twentieth century, these decisions laid an important legal foundation for the continuing exercise of those rights by confirming their nature, scope, and existence. In *United States v. Winans*, for example, the Court rejected the argument that rights reserved by the Yakama Nation in an 1855 treaty with the United States were abrogated by the admission of the State of Washington to the Union.[39] Central to the Court's interpretation and protection of the reserved right was its recognition that the treaty "seemed to promise . . . and give the word of the Nation for more" than just allowing Indians to exercise the same rights as other citizens of the state.[40] The Court recognized that the right to take fish at traditional fishing locations was "part of larger rights possessed by the Indians," and that the "form of the [treaty] and its language was adapted" to preserve the exercise of those rights, albeit "in common with the citizens of the territory."[41] The *Winans* Court understood the importance of those rights to the Yakama, calling them "not much less necessary to the

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[36] 118 U.S. 375, 384 (1886).

[37] *Id.*; U.S. CONST. art VI, para 2.

[38] United States v. Winans, 198 U.S. 371, 371 (1905) (decided approximately twenty years after *Kagama* was decided in 1886).

[39] *Id.* at 382–84.

[40] *Id.* at 380; *see also* Michael C. Blumm & James Brunberg, *"Not Much Less Necessary than the Atmosphere They Breathed:" Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of* United States v. Winans *and its Enduring Significance*, 46 NAT. RES. J. 489, 491 (2006).

[41] *Winans*, 198 U.S. at 381.

existence of the Indians than the atmosphere they breathed,"[42] and laid a critical foundation for their continuing vitality even in the depths of the dismal allotment and assimilation era.[43]

But, while upholding the continuing existence of rights guaranteed through the treaty with the United States, *Winans* did not wrestle with the nuances of Washington's ability to control the exercise of those rights and, if so, to what extent. Instead, the *Winans* Court dismissed the state's concern over the rights as a limitation on state sovereignty by suggesting that the Treaty does not "restrain the State unreasonably, if at all, in the regulation of the right."[44] The Court again picked up that thread in deciding *Tulee v. State of Washington*[45] in 1942, in which another member of the Yakama Nation challenged Washington's attempts to force him to acquire a state fishing license in order to exercise his treaty-reserved fishing rights. Washington asserted that its "broad powers to conserve game and fish within its borders" authorized state licensing authority over Mr. Tulee and similarly situated tribal fishermen.[46] While the Court rejected that specific requirement, saying that it could not be "reconciled with a fair construction of the treaty," the Court, relying in part on its earlier statement in *Winans*, did recognize a right of the state to "impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish."[47]

With the encouragement of these words from the Supreme Court, Washington continued its efforts to regulate tribal fishing in the interests of conservation and, through state regulations, began prohibiting precisely the manner of fishing in which members of the Puyallup and Nisqually Tribes engaged: the setting of nets at the mouths of rivers where salmon would migrate.[48] By the time the Supreme Court considered tribal challenges to these regulations in its 1968 *Puyallup I* decision, then, it was clear that Washington's efforts to regulate in the interests of conservation could completely frustrate, if not prohibit, the exercise of treaty-reserved rights in contravention of the Court's long history of protecting the sanctity of those treaties from state interference and the very foundations of federal Indian law.[49] As the Court's negative treatment of other uniquely tribal rights has

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[42] *Id.*

[43] The Court subsequently relied on *Winans* to recognize that the treaty reserved to the Yakama rights to fish on both sides of the Columbia River in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198 (1919).

[44] *Winans*, 198 U.S. at 384; *see also* Blumm & Brunberg, *supra* note 40, at 535–36.

[45] 315 U.S. 681, 682 (1942).

[46] *Id.* at 683.

[47] *Id.* at 684–85 (citations omitted).

[48] *Puyallup I*, 391 U.S. 392, 395–96 (1968).

[49] *See, e.g.*, *Worcester*, 31 U.S. 515, 552–57 (1832).

demonstrated,[50] facially neutral laws or regulations that serve other state interests such as conservation tend to have narrow, direct, and disparate impact on Indian tribes and their members. But, with *Winans*' one-sentence recognition of the possibility of state regulatory authority over the exercise of treaty rights, bolstered by *Tulee*'s expansion of that concept, the Court strode boldly forward, determining that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[51] The Court did determine that the state's regulation measures must be "reasonable and necessary" in the interests of conservation but, given the lack of clarity around those standards, refused to decide whether the prohibition on tribal net fishing met those requirements.[52]

By the summer of 1968, therefore, the status and continuing viability of treaty-reserved rights to fish, particularly in the Pacific Northwest, remained unsettled. Despite the Supreme Court's tradition of solicitude for the import of the promises made by the United States,[53] the increasing pressure of conflicting state interests and attempts to control tribal member fishing on the same basis as all other citizens of the state convinced the Court to open the door to unprecedented state power to limit or even prevent the exercise of the rights reserved in those promises.[54] A century and a half after Chief Justice Marshall relied on tribal treaties to establish the unique and exclusive federal-tribal relationship and invalidate state attempts to interfere therein, *Puyallup I* provided a broad and nebulous basis for precisely such state interference.[55] Meanwhile, tribal members continued to fish in reliance on the supremacy of their treaty-reserved rights.[56] Two such members of the Yakama Nation, Richard and David Sohappy, were arrested for doing so in the summer of 1968 and, along with a dozen of their fellow tribal members, asked the U.S. District Court for the District of Oregon to resolve the interplay of these seemingly conflicted legal interpretations.[57]

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[50] *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 881 (1990) (upholding the constitutionality of "neutrally, generally applicable laws" even where such laws interfered with the individual religious beliefs of practitioners of the Native American Church).

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

[52] *Id.* at 401–02.

[53] *See, e.g.*, *Worcester*, 31 U.S. at 549–57; *Winans*, 198 U.S. 371, 382, 384 (1905).

[54] *See, e.g.*, *Tulee*, 315 U.S. 681, 683–84 (1942); *Puyallup I*, 391 U.S. at 398.

[55] *Puyallup I*, 391 U.S. at 398–400.

[56] *See supra* notes 38–43 and accompanying text.

[57] Michael C. Blumm & Cari Baermann, *The Belloni Decision and its Legacy:* United States v. Oregon *and its Far-Reaching Effects After a Half-Century*, 50 ENVTL. L. 347, 360–63 (2020) (discussing *Puyallup I).*

III. TURNING THE TIDE: THE *SOHAPPY* DECISION

Like its neighbor to the north, Oregon engaged in numerous efforts to regulate and control the exercise of tribal treaty rights. In a statute dating back to 1901, for example, Oregon had closed a portion of the Columbia River to fishing by any means other than angling, thereby putting tribal members who used traditional fishing methods such as nets at risk of arrest by state officers.[58] Similarly, the state's game and fish commissions exercised "broad authority to regulate the times, places and manner of taking fish" as well as the rules regarding possession of fish, oftentimes upon the presumption that all fishermen, whether tribal or not, must be treated equally.[59] While the *Sohappy* plaintiffs, which included tribal members, various tribes, and the United States,[60] did not dispute that the state, pursuant to *Puyallup I*, had some authority to regulate "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation,"[61] they contended that such power was much more limited than the manner in which Oregon had been exercising it.[62] Thus, the *Sohappy* plaintiffs sought a decree that would define the nature of their treaty reserved rights, cabin state authority to interfere with those rights, and result in a workable outcome that might avoid the arrests and harassment that continued through the late 1960s and early 1970s.[63]

Oregon urged Judge Belloni to reject that attempt and, instead, insisted that the relevant treaty language guaranteed to the tribes only those rights equally available to all other state citizens.[64] Based on that interpretation, the state viewed its regulation of tribal fishermen on the same basis as its statewide efforts to promote conservation of dwindling salmon and steelhead populations as well as the state's own sport and commercial fishing industries.[65] In other words, Oregon argued that its regulatory power was applied equally across all those accessing and utilizing the fishery resource and that the treaties required nothing more, particularly in light of the treaty language suggesting that tribal rights would be exercised "in common with the citizens" of the

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58 *Sohappy*, 302 F. Supp. 899, 908 (D. Or. 1969).

59 *Id.* at 906–08.

60 *Id.* at 903–04.

61 *Puyallup I*, 391 U.S. 392, 398 (1968).

62 *Sohappy*, 302 F. Supp. at 906–07.

63 *Id.* at 903–04, 907 (urging Judge Belloni to require that the 1) state preliminarily establish a reasonable and necessary conservation purpose before seeking to regulate treaty fishing; 2) state's regulatory agencies treat tribal fishing differently from non-Indian fishing; and 3) state regulations allow treaty fishermen to take "a fair and equitable share" of the fish).

64 *Id.* at 904–05.

65 *See id.* at 910–11 ("Oregon recognizes sports fishermen and commercial fishermen and seems to attempt to make an equitable division between the two.").

territory.[66] In the state's view, its regulatory authority was supreme and available to serve state interests, regardless of tribal rights.[67]

Judge Belloni quickly and with memorable flourish dismissed the state's position, suggesting that it would be tenable only "if all history, anthropology, biology, prior case law and the intention of the parties to the treaty were to be ignored."[68] But Judge Belloni's decision in *Sohappy* went well beyond his colorful rejection of Oregon's equal access/equal application arguments. Through his thoughtful and prescient approach acknowledging both the supremacy of the tribes' treaty rights and the challenges posed by the murky avenues for state regulation authorized in *Winans*, *Tulee*, and *Puyallup I*, Judge Belloni developed three key concepts that continue to define judicial approaches to the balance of state authority and the exercise of tribal treaty rights. First, the *Sohappy* decision rejected a zero-sum approach and accepted the permanence of both state sovereignty and treaty rights; a perspective that forced the development of practical and perpetual accommodations for balancing these competing principles and avoided an all-or-nothing result. Second, Judge Belloni developed such a workable approach through his deeper understanding of the nature of state regulations and his avoidance of the broad and largely conceptual directions from earlier Supreme Court decisions. Finally, in conjunction with each of those foregoing perspectives, Judge Belloni recognized the need for continuing and dynamic solutions that would adapt to the changing needs of the states, tribes, and resources without demanding an overly formalistic or rigid answer.

A. The Permanence of States and Tribes

While looking back from the current era of prominent tribal sovereignty may provide a different perspective, just fifty years ago, tribes, treaties, and tribal governments within the United States still faced an uncertain future. Though most tribes had survived the federal government's termination era, over one-hundred tribes were in fact terminated, with devastating and long-lasting impacts on their status and members.[69] And, although tribal leaders had begun to sway federal policies closer to tribal priorities in both the Kennedy and Johnson administrations, it was not until 1970 that President Nixon's statement to Congress formally rejected the termination policy and endorsed a new

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[66] *See, e.g.*, Treaty with the Yakama Tribe, Yakama Tribe-U.S., art. III, June 9, 1855, 12 Stat. 951; Treaty with the Indians in Middle Oregon, Indians in Middle Oregon-U.S., art. I, June 25, 1855, 12 Stat. 963; Treaty with the Walla-Walla, Walla-Walla Tribe-Umatilla Tribe-U.S., art. I, June 9, 1855, 12 Stat. 945; Treaty with the Nez Perces, Nez Perce Indians-U.S., art. III, June 11, 1855, 12 Stat. 957.

[67] *Sohappy*, 302 F. Supp at 907.

[68] *Id.* at 905.

[69] Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151–54 (1977).

era of tribal self-determination.[70] Thus, while momentum was swinging toward the continued and expanding exercise of tribal sovereignty, the staying power of that swing was by no means assured when *Sohappy* was decided.

That uncertain future reflected a long history of federal policies premised on the demise or disappearance of tribes and any associated treaty rights. Since the earliest days of the republic, the nation's founding fathers indicated a preference for removing tribes from conflict with non-Indian settlers under the presumption that, over time, tribal lands, people, and identities would be absorbed and subsumed within the broader American experience.[71] Those beliefs were incorporated into early federal policies and, in many ways, motivated the federal government's treaty negotiation strategy and overall relationship with tribes.[72]

During the assimilation and allotment era of the late 1800s and early 1900s, federal policy was expressly premised on eliminating tribes and tribal cultures, with the entire might of the burgeoning American empire aimed directly at dispossessing Indian lands, destroying cultural connections, and severing tribal traditions and family ties.[73] While considering the *Winans* case in 1905 at the height of that assault, the Supreme Court may have had a much different view on the future vitality of the rights that they were upholding.[74] Perhaps that Court's passing acknowledgment of state regulatory authority was in recognition of widespread view of the time that tribal members would ultimately be treated on the same basis as all other state citizens. Aside from that possibility, the long history of federal policies premised on the disappearance of tribes and their treaties would certainly provide a basis for upholding broader state authority over tribal members.

But Judge Belloni rejected that history and, instead, emphasized both the constitutional supremacy and true nature of the treaties at issue in *Sohappy*.[75] The decision describes that the agreements are "not

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[70] *See, e.g.*, Lyndon B. Johnson, *The Forgotten American*, 4 WEEKLY COMP. PRES. DOC. 438, 440 (Mar. 6, 1968) ("I propose, in short, a policy of maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, self-determination."); RICHARD NIXON, RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363, at 3 (1970); 116 CONG. REC. SEN. 23,258 (1970) ("Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination.").

[71] *See, e.g.*, Letter from George Washington, Commander-in-Chief, to James Duane, Head of the Committee of Indian Affairs of the Continental Congress, (Sept. 7, 1783), *re-printed in* GETCHES ET AL., *supra* note 28, at 99–100.

[72] *See* GETCHES ET AL., *supra* note 28, at 101.

[73] *Id.* at 194–99.

[74] Even artistic renditions of Native people during this era, such as James Earle Frazer's (in)famous "end of the trail" sculpture, suggested their impending demise. *See, e.g.*, Rennard Strickland, *Indian Law and the Miner's Canary: The Signs of Poison Gas*, 39 CLEV. ST. L. REV. 483, 486 (1991).

[75] *See Sohappy*, 302 F. Supp. 899, 905 (1969).

treaties of conquest but [instead] were negotiated at arm's length," and notes that, by 1969, all of the parties to the treaties agreed as to their meaning.[76] Judge Belloni went on to restate the essential canon of treaty interpretation, that treaty language is to be read as the tribes would have understood it and that the rights reserved in the treaties were essential to the tribes—their consent to the terms of the negotiation would not have been secured without the promises regarding fishing.[77] Though the Supreme Court had approached its *Puyallup I* decision in a similar "spirit,"[78] the majority quickly turned to dissecting the treaty language without regard for any tribal understanding of it or mention of the importance of those rights to the tribes.[79]

By beginning his analysis from a faithful application of the foundations of federal Indian and tribal treaty jurisprudence, Judge Belloni dispelled any notion that the state could ultimately eliminate or even substantially diminish the constitutionally supreme and inherently integral treaty rights that he was being urged to protect. Instead, with those principles as his starting point, successfully resolving *Sohappy* would demand a new solution that could accommodate both the status of those rights and the potential regulatory authority of the state recognized through passing statements in *Winans* and *Tulee* and wholeheartedly endorsed by *Puyallup I*.[80]

B. Practical Solutions

Importantly, rather than just rely on the broad and conceptual statements of those Supreme Court decisions, Judge Belloni sought to provide more practical and workable guidance to the *Sohappy* parties. To begin that process, Judge Belloni distilled the rather ambiguous language of *Puyallup I* into three more concrete guidelines: "First, the regulation must be 'necessary for the conservation of the fish.' Second, the state restrictions on Indian treaty fishing must 'not discriminate against the Indians.' And third, they must meet 'appropriate standards.'"[81] Analyzing Oregon's existing statutory and regulatory measures against this rubric, Judge Belloni determined that the state's

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[76] *Id.*

[77] *Id.* at 905–06.

[78] *Puyallup I*, 391 U.S. 392, 398 (1968).

[79] *See id.* ("But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the 'usual and accustomed places' *in the 'usual and accustomed' manner*. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State.").

[80] *Winans*, 198 U.S. 371, 384 (1905); *Tulee*, 315 U.S. 681, 684 (1942); *Puyallup I*, 391 U.S. at 398.

[81] *Sohappy*, 302 F. Supp. at 907.

efforts met none of those guidelines, holding instead that state standards were too broad to be necessary for conservation purposes,[82] discriminated against the Indians by virtue of a complete lack of consideration of their treaty rights,[83] and failed to meet appropriate standards for protecting those rights.[84] Instead of leaving the decision there, however, Judge Belloni presented additional guidance to help the parties progress toward a more appropriate balancing of state interests and tribal rights.

With regard to the availability of state regulations in the interests of conservation, for example, Judge Belloni instructed that, although the state retains broad authority over non-Indians to serve its regulatory objectives, "it does not have the same latitude" over tribal rights.[85] Rather, "[t]he state may not qualify th[at] federal right by subordinating it to some other state objective or policy."[86] The state must instead demonstrate both the need to limit the take of fish *and* the necessity of the particular regulation upon the exercise of the treaty right before pursuing such regulations.[87] Beyond its own regulatory objectives, therefore, the "treaty right to take fish . . . must [also] be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users."[88]

In addition, Judge Belloni directed that the state consider the entire Columbia River system in the context of determining its regulatory approach and "must manage the over-all fish run in a way that does not discriminate against the treaty Indians as it has heretofore been doing."[89] That determination would ensure that the tribal members, with "an absolute right to th[e] fishery" get the "fair share of fish produced by the Columbia River system" to which their treaties entitle them.[90]

Finally, with regard to the development of new state rules and regulations, Judge Belloni insisted that the tribes be duly informed of and represented in the state's decision making process.[91] Although *Sohappy* did not result in a requirement that the state secure tribal consent for its management of the fishery resource, Judge Belloni

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[82] *Id.* at 908.
[83] *Id.* at 910.
[84] *Id.* at 911.
[85] *Id.* at 908.
[86] *Id.*
[87] *Id.* at 908–09.
[88] *Id.* at 911.
[89] *Id.* at 910.
[90] *Id.* at 911.
[91] *Id.* at 912 ("The state must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the tribal entities are interested parties to any regulation affecting the treaty fishing right. They, as well as their members to whom the regulations will be directly applicable, are entitled to be heard on the subject and, consistent with the need for dealing with emergency or changing situations on short notice, to be given appropriate notice and opportunity to participate meaningfully in the rule-making process.").

foresaw and demanded recognition by the state of the unique tribal perspective on those issues.[92]

With these determinations, Judge Belloni set the stage for a more effective and responsive state regulatory structure that better aligned with the foundational role of treaties and treaty rights in the American legal system. Instead of simply dealing with these complex issues on that conceptual basis, however, Judge Belloni gave clear and practical instructions to the parties that would help guide them toward a more appropriate and functional future relationship.[93] In further recognition of the challenges presented by effectuating those instructions, Judge Belloni also set forth avenues for resolving further disagreements.

C. Resources for Future Disputes

By taking a more holistic and practical approach than his predecessors who faced these conflicts, Judge Belloni understood the need for a dynamic and adaptable solution that could continue to evolve with the changing environment and needs of the parties. The *Sohappy* decision recognized that the reality of attempting to regulate a largely anadromous fishery necessarily meant that conditions on the ground would change as greater or fewer fish traversed the Columbia River system.[94] He also realized that requiring an equitable share for tribal fishermen and mandating state consideration of tribal treaty rights as a co-equal regulatory objective would place new and previously unconsidered demands on the state, which would likely result in additional but unpredictable challenges and conflicts.[95] Therefore, in a prescient stroke that would continue to pay dividends for the parties to the case, Judge Belloni retained continuing jurisdiction over the case, a status that continues to the present day.[96] That status has proven to fulfill Judge Belloni's prediction that ongoing judicial oversight would "be the only way of assuring the parties an opportunity for timely and effective judicial review of [regulatory] restrictions should such review become necessary."[97]

In an effort to potentially avoid the need for such additional review, Judge Belloni suggested that the parties work together to accommodate their interests on a cooperative basis.[98] Although he noted that tribal consent to state regulations was not required, he stressed that "agreements with the tribes or deference to tribal preference or regulation on specific aspects pertaining to the exercise of treaty fishing

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92 *See id.*

93 *See supra* notes 85–88 and accompanying text.

94 *Sohappy*, 302 F. Supp. at 911.

95 *See id.*

96 *Id.* Although the court's jurisdiction continues, recent decisions have administratively closed the matter for reasons unknown to the parties. *See* Blumm & Baermann, *supra* note 57, at 370–71, 381.

97 *Sohappy*, 302 F. Supp. at 911; *see also* Blumm & Baermann, *supra* note 57, at 380.

98 *Sohappy*, 302 F. Supp. at 912.

rights are means which the state may adopt in the exercise of its jurisdiction," and he encouraged the state and the tribes to do so.[99]

Perhaps more than any other of *Sohappy*'s important holdings, this encouragement reflected the potential and desire for a new and more progressive era of state–tribal relations regarding the exercise of treaty rights. Far from the "deadliest enemies" conception of the late 1800s,[100] and more effective than relying on the Supreme Court to sketch only conceptual boundaries for that relationship, Judge Belloni's call for a (state)government–to–(tribal)government–to–(federal)government cooperative approach brought together his due regard for tribal treaties and sovereignty, his guidance to the parties to reach practical solutions, and his hope that the future would bring progress toward those ends. As subsequent litigation over treaty rights in the Great Lakes region demonstrates, other courts would soon follow Judge Belloni's lead to resolving these challenges.[101]

IV. *SOHAPPY* FEELING 'SUMMER IN THE SPRING'[102]

On September 28th, 1971, A.B. LeBlanc, a member of the Bay Mills Indian Community, took his boat about 300 yards out into Lake Superior and set his nets to catch some fish.[103] LeBlanc was soon confronted by state natural resources officials who informed him that he was illegally fishing in waters closed to commercial fishing according to Michigan's 1929 Commercial Fishing Act and offered to provide LeBlanc with a copy of that state law.[104] LeBlanc responded that he had a copy of the 1836 treaty between the United States and the Chippewa and Ottawa Indians that he would also be happy to provide to the state officials.[105]

Although LeBlanc's arrest and citation for illegally fishing under Michigan law was not the first such legal challenge regarding Chippewa treaty rights in the Great Lakes,[106] it marked the first time that courts of the Great Lakes region began to wrestle with the complexity of the supremacy of Indian treaties and state attempts to regulate the exercise of those rights.[107] The *Sohappy* framework announced by Judge Belloni

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99 *Id.*

100 *Kagama*, 118 U.S. 375, 384 (1886).

101 *See* United States v. Oregon, 769 F.2d 1410, 1412 (9th Cir. 1985).

102 *See* Wilkinson, *supra* note 11, at 375.

103 *Michigan Indians in Fishing Dispute*, N.Y. TIMES (Oct. 3, 1971), https://perma.cc/W7VZ-DDD9.

104 *Id.*

105 *Id.* For consistency with historic treaties and to avoid confusion, this Article uses the term Chippewa in lieu of Ojibwe or Anishinaabe.

106 *See, e.g.*, People v. Chosa, 233 N.W. 205 (Mich. 1930) (upholding state convictions of tribal treaty hunters), *overruled by* People v. Jondreau, 185 N.W.2d 375 (Mich. 1971).

107 In *Jondreau*, the Michigan Supreme Court relied on the supremacy of treaties and *State v. Arthur*, 261 P.2d 135 (Idaho 1953), in denying any state regulatory power over the exercise of tribal treaty rights, and suggested that if conservation issues became a concern, the terms of the 1854 treaty at issue, which allowed for the President of the United States

would play a critical role in how those courts ultimately addressed those challenges.

Like the tribes of the Pacific Northwest, the various bands of the Chippewa entered into a series of treaties with the United States, pursuant to which the bands ceded wide swaths of territory across the entire Great Lakes region.[108] Though negotiating in an earlier era and a different context, the Chippewa, like the tribes of the Pacific Northwest, insisted on treaty language that would leave in place their time-honored lifeways across the waters and lands of their territory.[109] While subsequent decades would subject them to immense pressure, loss of land, assimilation, and the onslaught of state authority,[110] the bands of the Chippewa and their members across the upper Midwest would maintain and eventually assert those treaty-reserved rights as a means to protect their own traditions and enhance their individual and collective sovereignty.

In considering the state's attempt to prosecute Mr. LeBlanc, the Michigan Supreme Court began by applying the time-honored canons of treaty construction to interpret the treaty language at issue there. Based on those principles, the court determined that the 1836 Treaty reserved the right for the Chippewa to fish in the Great Lakes even though fishing was not expressly mentioned by the treaty's language.[111] Even with that interpretation, however, Michigan still insisted that its laws applied to Mr. LeBlanc; a proposition that the court noted, "has been the subject of a good deal of controversy."[112] Like Judge Belloni in *Sohappy*, the Michigan Supreme Court considered the U.S. Supreme Court's consideration of state authority in *Tulee* and *Puyallup I* but, ultimately, looked for additional guidance from subsequent decisions, like the Supreme Court's 1975 decision in *Antoine v. Washington*,[113] to "help[ ] clarify" that precedent.[114] Ultimately, however, the Michigan

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to "issue an order limiting or extinguishing the hunting and fishing rights of the Indians," could provide a remedy. *Jondreau*, 185 N.W.2d at 380–81.

108 *See, e.g.*, Treaty with the Chippewa, Chippewa of Michigan-U.S., art. I, May 9, 1836, 7 Stat. 503; Treaty with the Chippewa at St. Peter's, Chippewa Nation of Indians-U.S., art. I, July 29, 1837, 7 Stat. 536; Treaty with the Chippewa at La Pointe Of Lake Superior, Chippewa of Lake Superior and Mississippi-U.S., art I, Oct. 4, 1842, 7 Stat. 591; Treaty with the Chippewa, Chippewa of Lake Superior and Mississippi-U.S., art I, Sept. 30, 1854, 10 Stat. 1109; *see also* Wilkinson, *supra* note 11, at 383–85 (describing the treaty negotiations and the sophistication with which the Chippewa approached them).

109 *See* Wilkinson, *supra* note 11, at 387–88; *see, e.g.*, Treaty with the Chippewa at St. Peter's, *supra* note 108, at art. V ("The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States.").

110 Wilkinson, *supra* note 11, at 389–93.

111 People v. LeBlanc, 248 N.W.2d 199, 204–05 (Mich. 1976).

112 *Id.* at 212.

113 Antoine v. Washington, 420 U.S. 194, 207 (1975) (*Puyallup I*'s "'appropriate standards' requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure . . . and that its application to the Indians is necessary in the interest of conservation.'") (citations omitted).

114 *LeBlanc*, 248 N.W.2d at 214.

Supreme Court relied on the United States Court of Appeals for the Ninth Circuit's 1975 decision in *United States v. Washington*,[115] which it called "significant in . . . help[ing] define when a state regulation is necessary and when such regulation is discriminatory," and cited *Sohappy* as "another case taking the approach used in *United States v. Washington*."[116] From that guidance, then, the court determined that Michigan's prohibition on gill nets could be applicable to Mr. LeBlanc and his fellow tribal members if and only if: 1) that prohibition "is necessary for the preservation of the fish protected by the regulation; 2) [its] application . . . to the Chippewas is necessary for the preservation of the fish protected; 3) and the regulation does not discriminate against the Chippewas."[117]

By adopting that basic framework, the Michigan Supreme Court provided a foundation for future decisions to flesh out the complicated relationship between Chippewa treaty rights and state regulatory efforts. Just five years after *People v. LeBlanc*, for example, the United States Court of Appeals for the Sixth Circuit adopted the Michigan Supreme Court's reasoning wholesale, saying that *LeBlanc* "accurately states the rule of reason and the principles of federal law applicable" to the balance of state authority and tribal treaty rights.[118] The Sixth Circuit went on to say that, when applying *LeBlanc*'s three factors and considering whether state regulation is necessary, the burden is on the state "to show by clear and convincing evidence that it is highly probable that irreparable harm will occur and that the need for regulation exists."[119]

Like Mr. LeBlanc and the legal challenges brought by tribes and the United States in Michigan, the Chippewa of Wisconsin also began asserting their treaty rights more forcefully in the early 1970s.[120] In a 1972 decision regarding Wisconsin's attempt to prosecute tribal members for exercising treaty-reserved fishing rights, for example, the Wisconsin Supreme Court, like the Michigan Supreme Court, upheld the continuing vitality of those rights but remanded for further consideration of whether state regulations might be "reasonable and necessary to prevent a substantial depletion of the fish supply" and whether such regulations might also be "necessary in the exercise of other valid police powers."[121] Thereafter, the Lac Courte Oreilles Band

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115 520 F.2d 676 (9th Cir. 1975).

116 *LeBlanc*, 248 N.W.2d at 215. The court apparently did not recognize that *Sohappy* preceded the Ninth Circuit's decision by six years, making it the foundational decision of its preferred approach.

117 *Id.* at 215.

118 United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981).

119 *Id.*

120 As Wilkinson notes, while improved access to lawyers through legal services programs was key to this broader movement, it began with tribal leaders across the country reaching "a consensus that the terrible descent since the treaties and allotment must be halted and reversed." Wilkinson, *supra* note 11, at 396–97.

121 State v. Gurnoe, 192 N.W.2d 892, 902 (Wis. 1972).

of Lake Superior Chippewa Indians (LCO) brought a declaratory judgement action against various Wisconsin officials to confirm the existence and status of their treaty rights across the state, a case that was consolidated with actions by the United States to protect various property interests of the Chippewa established pursuant to their treaties.[122] Like the *Sohappy* litigation, this action began a decades-long journey through the federal courts of Wisconsin, and, to resolve the balance of state authority and tribal treaty rights across the state, those courts would come to rely on Judge Belloni's approach.

The early decisions in the LCO treaty rights saga focused on treaty interpretation and whether subsequent treaties or other federal actions invalidated or otherwise affected the rights guaranteed by the 1837 and 1842 agreements. In the first of these decisions, for example, the U.S. Court of Appeals for the Seventh Circuit considered the canons of treaty interpretation,[123] analyzed the terms of the treaties,[124] acknowledged the similar approaches of the Michigan Supreme Court in *LeBlanc* and the Sixth Circuit,[125] and concluded that the LCO's treaty reserved rights remained effective, at least upon portions of their ceded lands that were not privately owned.[126] The case was then remanded "for further consideration as to the permissible scope of state regulation over the LCO's exercise of their usufructuary rights."[127] Though the matter's next trip to the appellate court focused on other issues, the court still took the opportunity to make clear that the extent of state authority would need careful analysis going forward.[128]

Following that direction, the district court issued a preliminary decision adopting the conservation basis for state regulation but called for more detailed briefing and a second phase of the litigation specifically focused on the question of state authority.[129] After receiving briefing on the proper legal standards for considering state regulatory authority, the district court issued a sweeping and detailed opinion outlining the standards it would apply.[130] Though differing in a key

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122 *See* United States v. Bouchard, 464 F. Supp. 1316, 1321–22 (W.D. Wis. 1978), *rev'd* LCO v. Voigt (*LCO I*), 700 F.2d 341, 365 (7th Cir. 1983).

123 *LCO I*, 700 F.2d at 350–51.

124 *Id.* at 354–57.

125 *Id.* at 357.

126 *Id.* at 365.

127 *Id.*

128 LCO v. Wisconsin (*LCO II*), 760 F.2d 177, 183 (7th Cir. 1985) ("[W]e make it clear on remand that to which we adverted only by implication because it was not the focus of this Court's attention on the first appeal, namely that the usufructuary rights might be subject to some conservation regulations. While the LCO's in the exercise of their rights are relieved of licensing requirements and no doubt from other restrictions, nevertheless we think that public policy which would benefit the Indians as well as all others might well enter into the picture. We doubt that extinction of species or even wholesale slaughter or a substantial detriment to the public safety is a reasonable adjunct to the rights reserved by the Indians. These matters again can best be determined by appropriate exploration by the district court.") (citations omitted).

129 LCO v. Wisconsin (*LCO III*), 653 F. Supp. 1420, 1435 (W.D. Wis. 1987).

130 LCO v. Wisconsin (*LCO IV*), 668 F. Supp. 1233, 1235 (W.D. Wis. 1987).

respect, the district court's conclusions largely adopted *Sohappy* and Judge Belloni's treatment of similar questions in that litigation.[131] Relying on *Sohappy*, for example, the court made clear that Wisconsin's authority to regulate in the interest of conservation must be based on specific facts showing such regulation is essential to protect the species of concern.[132] Similarly, drawing on a subsequent decision regarding the plans called for by Judge Belloni,[133] the court required that state regulations be "the least restrictive alternative available," which "would accord with the tribes' understanding at the time of the treaties."[134]

But the court refused to limit state regulation to solely conservation purposes, saying that the treaty rights at issue in the Great Lakes region are different from those in the Northwest and, "extend to dozens or even hundreds of resources."[135] Therefore, the court allowed that the state could regulate tribal treaty rights "only in certain narrowly defined circumstances" such as where such regulations might be "necessary to prevent or ameliorate a substantial risk to the public health or safety."[136] Even then, however, just as Judge Belloni said in *Sohappy*, treaty rights "may not be subordinated to every state objective or policy."[137]

Finally, the court allowed that tribal regulations may preclude state regulations, provided the tribal efforts at self-regulation "address legitimate state concerns in the areas of conservation of resources and public health and safety," along with acceptable procedures regarding enforcement and cooperation with the state.[138] Like Judge Belloni's view of a more cooperative future, the court indicated it could help ensure that the state and tribe work together, including through the potential ordering of "a joint tribal-state natural resources commission."[139]

Thus, with the exception of the possibility of state regulation in the interests of public safety, the district court's comprehensive analysis and consideration of these issues largely tracked the *Sohappy* framework.[140] Like that decision, *LCO IV* envisioned the permanence of state interests and tribal treaty rights but developed practical and considered guidance for their long-term coexistence; guidance that substantially limited the state's regulatory power. Also, just as Judge Belloni encouraged intergovernmental cooperation among Oregon and the tribes of the Columbia River, the district court used the *LCO IV* decision to prompt deeper consideration of joint state-tribal collaboration through a more formally ordered natural resources

131 *See id.* at 1235–36.
132 *Id.*
133 *See* United States v. Oregon, 769 F.2d 1410, 1412–13 (9th Cir. 1985).
134 *LCO IV*, 668 F. Supp. at 1236.
135 *Id.* at 1238.
136 *Id.* at 1238–39.
137 *Id.* at 1238 (citing *Sohappy*, 302 F. Supp. 899, 908 (1969)).
138 *Id.* at 1242.
139 *Id.*
140 *See id.*

commission. Finally, just as Judge Belloni retained jurisdiction to continue to review and address issues arising after *Sohappy*, the Western District of Wisconsin continued to hear challenges related to the LCO litigation.

Just like developments in the district of Oregon after *Sohappy*, the Wisconsin federal court's approach led to significant and timely progress by the state and tribes. Just two years after *LCO IV*, the court took up the specific issue of fishing regulations applicable to the take of walleye and muskellunge and described the results of that progress, specifically highlighting the benefit of state–tribal agreements.[141] The court then went on to largely uphold tribal efforts to regulate their own members in the take of those fish species, provided the tribal regulations were sufficiently detailed to accommodate for biological conditions that would ensure conservation.[142]

Like the conflicts in Michigan and Wisconsin, the Chippewa in present-day Minnesota also sought to assert and protect their treaty

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[141] Chief Judge Barbara Crabb was quite complimentary of both parties:

> [w]hat the parties in this case have done to give practical effect to plaintiffs' judicially recognized treaty rights is a remarkable story.
>
> . . . .
>
> It is to this state's credit that its officials did not adopt the recalcitrant attitude of the State of Washington, but chose instead to work to adjust the state's resource management programs to accommodate the newly-recognized rights of the tribes. The effort has not been an easy one. The court orders provided no real guidance for translating a treaty right into a harvest opportunity. . . .
>
> The department has negotiated a number of interim agreements with the tribes covering the harvesting not only of walleye and muskellunge, but other species of fish, deer, small game, migratory birds, bear, and wild rice. . . .
>
> It is to the tribes' credit that they have adopted an equally cooperative attitude toward the implementation of their rights. It has not been an easy time for them, either. The tribes and their members have been subjected to physical and verbal abuse over the recognition of their treaty rights, most publicly when they have attempted to exercise their treaty rights to spearfish, but not only then. Harassment has become a fact of life for them.
>
> Tribal members have negotiated and entered into a series of interim agreements with the state that have circumscribed their rights to accommodate state concerns, despite their understandable impatience to reap the benefits of treaty rights they have been forced to forgo for so many years.
>
> . . . .
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> Both the tribes and the officials of the State of Wisconsin responsible for implementing the tribes' treaty rights can take pride in their accomplishments over the last six years. They deserve widespread recognition and appreciation for their efforts.

LCO v. Wisconsin (*LCO VI*), 707 F. Supp. 1034, 1052–54 (W.D. Wis. 1989).
Though specific to the parties' work in Wisconsin, the cooperative development of management plans in the Pacific Northwest is entitled to similar praise. *See* Blumm & Baermann, *supra* note 57, at 376–79.

[142] *Id.* at 1060.

rights there. The Mille Lacs Band of Chippewa and various tribal members filed suit in 1990 to secure those rights and were eventually joined in that effort by the United States and additional tribes with treaty rights applicable in that state.[143] With the benefit of relying on precedent generated by the prior approaches of their fellow tribal members in Michigan and Wisconsin,[144] the Mille Lacs' case provided a forum for the plaintiff tribes and the defendant state agencies to work together on agreeable standards and protocols for the oversight and regulation of tribal member hunting and fishing.[145] Like in Wisconsin, the parties' "commendabl[e]"[146] efforts to cooperatively resolve those challenges came up short in some respects, leaving federal court to prescribe the boundaries of state authority.[147] Once again, the *Sohappy* framework proved appropriate and, despite Minnesota's attempt to reinterpret that case to support an argument for unilateral state authority over harvest levels,[148] that court ultimately determined that state had not met its burden to demonstrate that any regulation of tribal treaty rights was necessary for conservation purposes, particularly in light of the sufficiency of the code, management plan, and supporting materials developed by the Bands and applicable to the exercise of those rights by their members.[149]

While conflicts over the details and boundaries of the exercise of tribal treaty rights would continue, including increasing conflicts over the allocation of scarce resources, the framework built upon *Sohappy* and laid down in these cases provided a solid basis from which the court could resolve those questions.[150] Like Judge Belloni, and guided by his thoughtful perspective, the state and federal judges considering these complicated questions in the Great Lakes region contemplated the ongoing relationship between tribal and state interests and, rather than accepting the historical misconception that the tribal presence would be temporary, developed workable guidance for accommodating both. While the legitimacy of state regulation of treaty rights is arguably inconsistent with the clear import of the Constitution's supremacy

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143 Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F. Supp. 1362, 1365–66 (D. Minn. 1997).

144 *See id.* at 1374–75.

145 *See id.* at 1366–67.

146 *Id.* at 1372.

147 *See id.* at 1368–69 (describing "unresolved" issues including the state's assertion of unilateral authority to determine harvestable surplus levels and that those determinations are not judicially reviewable and whether state prohibitions on night hunting and gillnetting in certain lakes were necessary for conservation).

148 *Id.* at 1373.

149 *Id.* at 1374–75 (harvestable surplus issue); *id.* at 1382 (hunting); *id.* at 1384 (gillnetting); *id.* at 1385 (all regulatory issues).

150 *See, e.g.*, LCO v. Wisconsin (*LCO VII*), 740 F. Supp. 1400, 1421–22 (W.D. Wis. 1990) ("Therefore, I conclude as I have throughout this phase of the litigation that the state may regulate for the purposes of conservation or for public safety, *but only if it meets its burden of demonstrating the need for the particular proposed regulatory measure*.") (emphasis added); LCO v. Wisconsin, 769 F.3d 543, 545–46 (7th Cir. 2014).

clause and Chief Justice Marshall's emphasis on treaties as the basis for an exclusive federal–tribal relationship,[151] *Sohappy*'s model ensured that such state authority would be limited and appropriate only where the state could meet a high burden to demonstrate its necessity. Those limitations would leave substantial room for tribes to assume the primary responsibility for exercising their sovereign prerogatives over their members' treaty-reserved activities. With that model's recognition of tribal permanence, workable guidance, and additional resources for further collaboration or dispute resolution, tribes have rapidly built some of the leading natural resource and wildlife management systems in the nation and continue to build upon their sovereign capacities and capabilities.[152]

Despite the success of those efforts and the power of the current tribal sovereignty movement they are engendering, recent decisions of the U.S. Supreme Court, though upholding the sanctity of treaty reserved rights, may portend a reassessment of Judge Belloni's approach.

V. CONCLUSION: THE NEXT 50 YEARS OF *SOHAPPY*

The U.S. Supreme Court has yet to take a detailed dive into the balance of state regulatory authority and tribal treaty rights. Though the Court heard two sequels to *Puyallup I*, neither of those opinions went much beyond their predecessor's adoption of the basic conservation necessity framework.[153] In *Puyallup II*, for example, though the Court called on states to demonstrate some scientific basis for their regulatory interests, the majority provided scant guidance on what would constitute state discrimination against tribal treaty fishers and three concurring justices saw need for further limits on treaty rights.[154] And that general approach was endorsed again when the Court considered

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[151] *Cf. LCO VII*, 740 F. Supp. at 1421 ("I appreciate the strength of the argument … that any state regulation of such rights violates the supremacy clause of the United States Constitution. I appreciate also that the basis for state regulation has never been explained satisfactorily. However, the legitimacy of state regulation in this area is not open to reconsideration.") (citations omitted).

[152] *See, e.g.*, *Great Lakes Indian Fish & Wildlife Commission* (GLIFWC), https://perma.cc/VB84-8CFV (last visited Apr. 18, 2020); *Columbia River Inter-Tribal Fish Commission*, https://perma.cc/C6PV-7V6K (last visited Apr. 18, 2020).

[153] *See, e.g.*, Dep't of Game v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 48–49 (1973) (holding that Washington's prohibition of net fishing constituted discrimination against tribal members but that the tribal treaty rights do not "persist down to the very last steelhead in the river."); Puyallup Tribe, Inc. v. Dep't of Game (*Puyallup III*), 433 U.S. 165, 175 (1977) ("Our construction of the Treaty of Medicine Creek in *Puyallup I* makes it perfectly clear that although the State may not deny the Indians their right to fish 'at all usual and accustomed' places, the treaty right is to be exercised 'in common with all citizens of the Territory.' We squarely held that 'the right to fish at those respective places is not an exclusive one.' Rather, the exercise of that right was subject to reasonable regulation by the State pursuant to its power to conserve an important natural resource.") (citations omitted).

[154] *Puyallup II*, 414 U.S. at 48–50 (White, J., concurring).

the status of Chippewa treaty rights in Minnesota, an appeal that arose from the *Minnesota v. Mille Lacs Band of Chippewa Indians*[155] case described above. There, the Court relied upon its prior adoption of the "conservation necessity standard" to underscore the reconcilability of state sovereignty and treaty rights and defeat Minnesota's claims that the Chippewa's treaty rights were extinguished upon statehood.[156] But, while the Court has relied on the standard as a general proposition, two recent treaty rights decisions indicate that the specifics of state authority and the exercise of treaty reserved rights may still trouble the justices.

In 2019's *Washington State Department of Licensing v. Cougar Den, Inc.*,[157] for example, the Court again considered the Yakama's 1855 treaty, this time with regard to its reservation of a right to travel for tribal members. Washington sought to assess a tax upon the transport of fuel by a tribal member owned company which, in its defense, asserted that the state tax would directly burden those reserved rights.[158] While a plurality of the Court agreed with the tribal member company and interpreted the treaty to prohibit the state tax, both opinions reaching that conclusion expressly acknowledged the potential for state regulatory authority over various aspects of the treaty-reserved rights.[159] And yet, short of ensuring that state regulations were "nondiscriminatory" and did not interfere with the substance of the treaty right itself, the plurality appeared to indicate acceptance of the potential for state regulations in the interest of public safety but mostly glossed over the specific limits on such state regulations; a treatment for which the Chief Justice, in dissent, took both opinions to task.[160] The

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155 526 U.S. 172, 205 (1999) ("We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation. This 'conservation necessity' standard accommodates both the State's interest in management of its natural resources and the Chippewa's federally guaranteed treaty rights.") (citations omitted).

156 *Id.*

157 139 S. Ct. 1000, 1004 (2019).

158 *Id.* at 1004.

159 *See id.* at 1015 ("Although we hold that the treaty protects the right to travel on the public highway with goods, we do not say or imply that the treaty grants protection to carry any and all goods. Nor do we hold that the treaty deprives the State of the power to regulate, say, when necessary for conservation. . . . Nor do we hold that the treaty deprives the State of the power to regulate to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights. The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety."); *id.* at 1020–21 (Gorsuch, J., concurring) (suggesting that Washington may regulate the transportation of hazardous goods, like "bad apples . . . just as the State may require tribal members to abide nondiscriminatory regulations governing the safe transportation of flammable cargo as they drive their gas trucks from Oregon to the reservation along public highways.").

160 *Id.* at 1024–26 (Roberts, C.J., dissenting) ("Application of state safety regulations, for example, could prevent Indians from hunting and fishing in their traditional or preferred manner, or in particular 'usual and accustomed places.' I fear that, by creating the need for this untested exception, the unwarranted expansion of the Yakamas' right to travel may undermine rights that the Yakamas and other tribes really did reserve.").

Chief Justice's concerns suggest a willingness to carefully examine potential state interference with the exercise of reserved rights, even in the context of conservation necessity.[161] If genuine, that willingness may signal another ally for tribes seeking to insulate their treaty-reserved rights from state regulations; however, the Chief Justice would also consider arguments in favor of broader state authority.[162]

In the Court's other significant treaty rights decision of 2019, *Herrera v. Wyoming*,[163] the Court upheld the treaty reserved rights of the Crow Tribe but the majority "note[d] two ways in which [that] decision is limited," including that "[o]n remand, the State may press its arguments as to why the application of state conservation regulations to Crow Tribe members exercising the 1868 Treaty right is necessary for conservation."[164] The Court did not consider those arguments in reaching its decision.[165] Despite leaving those arguments for another day, the Court did address Wyoming's concerns that recognizing the Crow's treaty rights would, in Wyoming's view, undermine the state's previously "unquestioned" regulatory authority over wildlife.[166] Wyoming argued that, since the Court's 1896 decision in *Ward v. Race Horse*,[167] the state believed that treaty rights did not apply within its boundaries and that modern recognition of Crow treaty rights would disrupt "the settled expectations of private property owners."[168] Though the *Herrera* majority dismissed those concerns as unfounded,[169] the passing reference to the Court's increasing reliance on *City of Sherrill v. Oneida Indian Nation of New York*[170] and the possibility that a future Court might be convinced by similar state concerns poses another potential complexity for tribes addressing state arguments regarding their regulatory authority over the exercise of treaty rights.

Ultimately, while both *Cougar Den* and *Herrera* reaffirmed the commitment of a slim majority of Supreme Court justices to the

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161 *See id.* at 1025 ("…the conservation exception would presumably protect regulations *that preserve the subject of the Yakamas' right* by maintaining safe and orderly travel on the highways.") (Emphasis added).

162 *Id.* ("Perhaps there are good reasons to revisit our long-held understanding of reserved treaty rights … and adopt a broad health and safety exception to deal with the inevitable fallout.")

163 139 S. Ct. 1686 (2019).

164 *Id.* at 1703.

165 *Id.*

166 *Id.* at 1698 n.3.

167 163 U.S. 504, 516 (1896).

168 *Herrera*, 139 S. Ct. at 1698 n.3.

169 *Id.* ("The State suggests that public support for its conservation efforts may be jeopardized if it no longer has 'unquestioned' authority over wildlife management in the Bighorn Mountains. Wyoming does not explain why its authority to regulate Indians exercising their treaty rights when necessary for conservation is not sufficient to preserve that public support. The State's passing reference to upsetting the settled expectations of private property owners is unconvincing because the 1868 Treaty right applies only to 'unoccupied lands of the United States.'") (citations omitted).

170 544 U.S. 197 (2005).

foundational tenets of treaty rights precedent,[171] and confirmed the power and role of treaty rights in the modern era,[172] the Court's loose treatment of the possibility of state regulatory authority suggests the potential for future Supreme Court battles over the specifics of those issues. Unlike the tenuous nature of tribal treaty rights after *Puyallup I*, however, the last 50 years of progress since *Sohappy* have charted a different and more stable path forward. The uncertain and conclusory nature of a decision rendered in a particular case by justices far removed from any on-the-ground implications stands in stark contrast to the collaborative, practical, and ongoing approach engendered by Judge Belloni.[173] Following that approach, tribes and states in the Pacific Northwest and Great Lakes have worked together for decades to build better solutions and—perhaps more importantly—stronger interagency and intergovernmental relationships.[174] As a result, the principles recognized by Judge Belloni in *Sohappy*—the permanence of tribal treaties and state sovereignty and commitments to providing clear, workable guidance and long-term solutions—have helped ensure that the balance of tribal treaties and state authority remains mostly functional across the country, subject to some ongoing skirmishes over particularly difficult specifics.[175]

Beyond those continuing benefits of Judge Belloni's framework, tribes took advantage of the opportunities it presented to develop their sovereign and technical capabilities, efforts that have sparked the current era of tribal leadership in a variety of environmental and natural resource arenas. The future will almost certainlty present additional litigation over the scope of state authority and tribal treaty rights. But, regardless of how those specific conflicts are resolved, the *Sohappy* decision has provided a broader foundation from which tribes

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171 The concluding paragraph of Justice Gorsuch's concurrence will likely—and rightly—be prominently featured in every future treaty rights case. *See Cougar Den*, 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring) ("Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.").

172 Remarkably, the Supreme Court decision in *Cougar Den* affirmed the decision of the Washington Supreme Court, which had also upheld the Yakama's treaty rights and rejected the state's attempts to tax Cougar Den. *See* Cougar Den v. State Dep't of Licensing, 392 P.3d 1014 (Wash. 2017). Perhaps even more surprising than the United States Supreme Court, the state supreme court decision demonstrates the tectonic shift in tribal rights over the last century, particularly when compared to the views of the Washington Supreme Court in *State v. Towessnute*, 154 P. 805, 807 (Wash. 1916). *See* Blumm & Baermann, *supra* note 57, at 385 n. 266.

173 *See supra* notes 69–101 and accompanying text.

174 *See, e.g.*, *supra* note 141; Blumm & Baermann, *supra* note 57, at 386 n. 272.

175 *See, e.g.*, United States v. Washington, 827 F.3d 836, 865 (9th Cir. 2016) (affirming a federal court injunction requiring the state to replace culverts that blocked or impeded salmon migration and thereby interfered with the treaty reserved right of tribes to take fish), *aff'd by an equally divided Court per curiam*, 138 S. Ct. 1832 (2018) (mem.).

and their members can more effectively work with their state and federal partners and continue to lead the way forward.