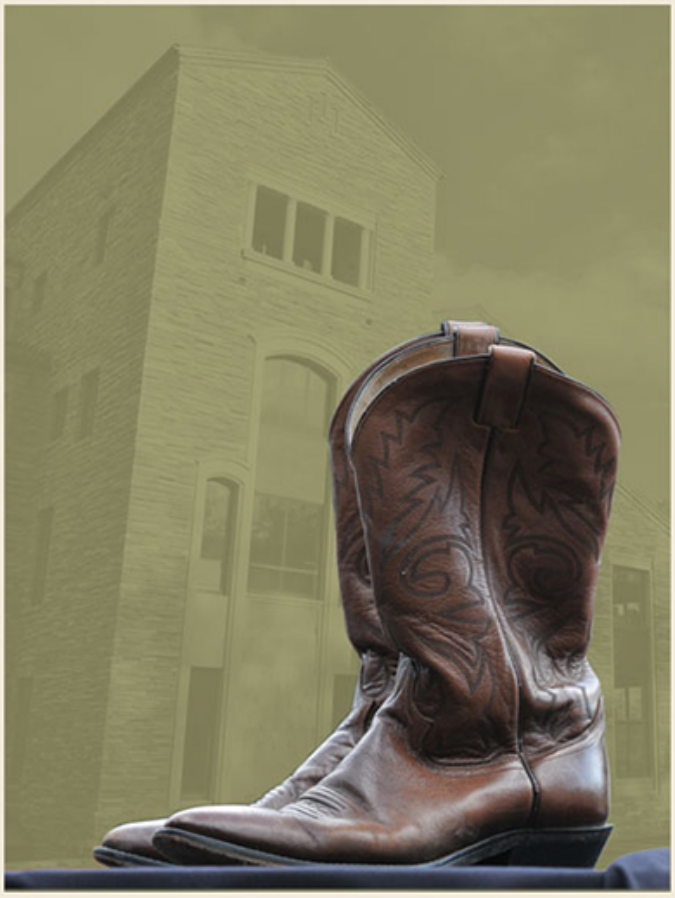

David Getches, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians: A Report Prepared for the American Friends Service Committee* [1970], 23 ME. L. REV. 265 (1971) (book review).

BOOK REVIEWS

UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS. A Report Prepared For the American Friends Service Committee. Seattle: University Of Washington Press, 1970, Pp. 231. $5.95 cloth, $2.50 paperback.

In the mid-nineteenth century the Indians of the Northwest were pressured by government agents into signing treaties ceding most of the land they had historically occupied to the United States.[1] In each treaty, besides reserving small tracts of land for themselves, the Indians specifically reserved the right to fish "at all usual and accustomed grounds and stations." [2] Because the lands which the Indians were permitted to reserve were selected so as "not to interfere with existing [non-Indian] claims, or with the progress of settlements," [3] many traditional fishing places were located outside the reservations. The Indians' grudging acceptance of the treaties was obtained only by insuring their right to continue fishing at such places without interference.[4]

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[1] *E.g.*, Treaty with the Nisqually and other bands of Indians, She-nah-nam Creek, Washington Territory, Dec. 26, 1854, 10 Stat. 1132; Treaty with Dwamish, Suquamish, and other allied and subordinate tribes of Indians in Washington Territory, Point Elliott, Washington Territory, Jan. 22, 1855, 12 Stat. 933; Treaty with the Makah Tribe of Indians, Neah Bay, Washington Territory, Jan. 31, 1855, 12 Stat. 939; Treaty with the Qui-nai-elt and Quil-leh-ute Indians, Qui-nai-elt River, Washington Territory, July 1, 1855 and Jan. 25, 1856, 12 Stat. 971.

[2] *E.g.*, Treaty with the Wisqually and other bands of Indians, She-nah-nam Creek, Washington Territory, Dec. 26, 1854, art. III, 10 Stat. 1132.

[3] Letter from Isaac I. Stevens, Governor of Washington Territory and Superintendent of Indian Affairs, to George W. Manypenny, Commissioner of Indian Affairs, Dec. 30, 1854 (transmitting treaty with the Nisqually) (on file in Office of Solicitor, Department of the Interior, Washington, D.C.).

[4] On-reservation fishing is not subject to any state regulation whatsoever, being within the sovereign power of the tribe. *E.g.*, Moore v. United States, 157 F.2d 760 (9th Cir. 1946); Klamath & Modoc Tribes v. Maison, 139 F. Supp. 634 (D. Ore. 1956). This has been recognized by the state courts of Washington. Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 P. 557 (1930). The fact that portions of the reservation have passed out of Indian ownership does not alter its status as "Indian country" within the meaning of 18 U.S.C. § 1151 (1964), and thus would not give the state jurisdiction. *See, e.g.*, Seymour v. Superintendent, 368 U.S. 351 (1962); Department of Game v. Puyallup Tribe, 70 Wash. 2d 245, 261-66, 422 P.2d 754, 763-64 (1967), *aff'd sub nom.*, Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968). The Supreme Court has recently held that even where an entire reservation was terminated, Indian hunting and fishing rights were not extinguished and continued to exist within the former reservation boundaries. Menominee Tribe v. United States, 391 U.S. 404 (1968). Compare treatment

Isaac Stevens, the Governor of the Washington Territory and Superintendent of Indian Affairs, who was charged with the duty of concluding treaties with the Indians of the territory, appreciated the importance of fishing to the Indians. Although the recognition by Governor Stevens of the rights of the Indians to fish as they historically had done was dictated by necessity, it demonstrated a greater comprehension of the native culture than the present day government of Washington has shown.

Early in September, 1970, an armed encampment of Indians fishing on the Puyallup River was set upon by officers of the State of Washington. Before the ensuing skirmish ended, shots were fired, tear gas was used, Indians were clubbed, and about 60 persons were arrested. The Indians had armed in August to protect their fishermen and families against armed officials of the Washington Departments of Game and Fisheries.[5]

The sixties had been punctuated by demonstrations, "fish-ins," and resulting arrests coincident with runs of fish. Fishing the runs was regularly denied the Indians by State officials who took the position that they had the right to regulate and even prohibit fishing by Indians outside their present reservation boundaries—notwithstanding the fact that the Indians could show that their fishing places were "usual and accustomed" ones at which they presumably have a right to fish under their hundred year old treaties with the United States. Nevertheless, many of the Indians and their supporters were subjected to more arrests as they attempted to assert and exercise what they believed to be treaty fishing rights.[6] State criminal prosecutions have provided poor forums for the assertion of rights protected by treaties, and the law which has developed out of them is generally adverse to the Indians.[7] Unfavorable court decisions increased the Indians' bitterness and heightened their acrimony.

Realizing a need to provoke a definitive court decision in the area of Indian fishing rights in the State of Washington, but probably motivated more by a political climate created by avid fishermen in a state dependent upon sport and commercial fishing for a significant amount of annual

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of Indian hunting and fishing rights upon state as opposed to federal Indian reservations discussed in O'Toole & Tureen. *State Power and the Passamaquoddy Tribe: "A Gross National Hypocrisy?"*, 23 MAINE L. REV. 1, 13-17 (1971).

[5] Washington Post, Sept. 25, 1970, at A3, cols. 5-6.

[6] OUR BROTHERS' KEEPER: THE INDIAN IN WHITE AMERICA 76-82 (E. Cahn ed. 1969).

[7] *E.g.*, State v. McCoy, 63 Wash. 2d 421, 387 P.2d 942 (1963). *But see* State v. Satiacum, 50 Wash. 2d 513, 314 P.2d 400 (1957). Washington courts have accorded little weight to the reasoning of federal court decisions which acknowledge the off-reservation fishing rights of Indians. *E.g.*, United States v. Winans, 198 U.S. 371 (1905); Maison v. Confederated Tribes, 314 F.2d 169 (9th Cir.), *cert. denied*, 375 U.S. 829 (1963).

income,[8] the Departments of Game and Fisheries in 1964 sought injunctions against Indian fishing on the Puyallup and Nisqually Rivers. Injunctions were granted by the trial court in each case but were reversed by the Washington Supreme Court.[9] The United States Supreme Court in *Puyallup Tribe v. Department of Game*[10] upheld the reversal of the trial court decisions in 1968 in an unfortunately vague opinion by Mr. Justice Douglas. *Puyallup* reaffirmed earlier expressions of the Court indicating the propriety of state regulation of off-reservation Indian fishing where such regulation is "necessary for the conservation of fish." [11] The court held that "[t]he overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved." [12] The Court gave no guidance to the State or to lower courts for determining the "necessity" of particular regulations for conservation purposes.[13] Consequently, the State has not changed its position noticeably.

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[8] *See* State v. Satiacum, 50 Wash. 2d 513, 532, 314 P.2d 400, 411 (1957) (concurring opinion).

[9] Department of Game v. Kautz, 70 Wash. 2d 275, 422 P.2d 771 (1967); Department of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 422 P.2d 754 (1967).

[10] Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968).

[11] Tulee v. Washington, 315 U.S. 681, 684 (1942).

[12] 391 U.S. at 399. That the Court did not consider the ability of the tribe to practice conservation is perhaps understandable in light of the facts before it. Attorneys for the Indians had stipulated that if they were permitted to continue their commercial fishery it would "virtually exterminate the salmon and steelhead fish runs in the Nisqually River" and that it was "necessary for the conservation of the salmon and steelhead runs" that state fishing laws be enforced against the Indian defendants. Puyallup Tribe v. Dep't of Game, 391 U.S. at 402 n.15. No reason for this apparently incorrect factual stipulation is evident. *See* note 16 *infra*.

[13] A federal court in Oregon has made an effort to ferret practical guidelines out of *Puyallup*. Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969) held that in regulating Indian fishing:

1. The state must establish that regulations are both reasonable and necessary to conserve the fish resource;
2. "Necessary" means the least restrictive regulations which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes;
3. Factual burdens respecting the regulations are on the state;
4. To prove necessity the state must show there is a need to limit the taking of fish and that the particular regulation is necessary to the accomplishment of the limitation;
5. Indian fishing must be dealt with as a separate subject distinct from regulation of fishing by others;
6. A permissible method of accomplishing conservation is to restrict or prohibit non-Indian fishing at usual and accustomed places without so restricting Indians;
7. Regulation of fishing must be such that Indians have an opportunity to take, at their usual and accustomed fishing places, by reasonable means feasible to them,

The State of Washington assumes that if conservation purposes are to be served, regulation must be done by the Departments of Game and Fisheries. This assumption is based upon an apparent belief that Indians are incapable or unwilling to limit and regulate their own fishing in order to insure the perpetuation of the fish resource. But historically, and to the present day, Indians have practiced conservation in their fishing and have tribal fishing regulations.[14] Undoubtedly, a desire to allocate fish among non-Indian sport and commercial fishermen who figure importantly in Washington's economy is a factor. The conviction that Indians are incompetent to manage the fishery and lack the will to control the fishery for the benefit of non-Indians reveals a callosity not only to the legal rights of the Indians but to their culture—that is, to the fact that they are different. The thesis of *Uncommon Controversy* is that the

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a fair and equitable share of all fish which it permits to be taken from any given run;

8. The right of Indians to fish cannot be subordinated to some other state objective or policy.

Because of the difficulty of judging the propriety of seasonally changing regulations under such standards, the court retained continuing jurisdiction.

[14] Regulation of treaty fishing by tribal members outside the reservation is within the jurisdiction of the tribe. *E.g.*, Settler v. Yakima Tribal Court, 419 F.2d 486, 488 (9th Cir. 1969). The Puyallup, Nisqually, and Muckleshoot Tribes each have tribal regulations or provisions in their constitutions dealing with fishing, although active enforcement is generally not practical due to the failure of state and federal agencies to recognize the authority of the tribes to regulate fishing. AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY 57-58 (1970) [hereinafter cited as UNCOMMON CONTROVERSY]. It has been suggested that some tribes are "more concerned about conservation than the State." Hobbs, *Indian Hunting and Fishing Rights*, 32 GEO. WASH. L. REV. 504, 523 (1964).

A problem with tribal promulgation and enforcement of regulations concerning fishing is the increased complexity of the technology upon which such regulations must be based. Pollution, dams, dredging, increased demands on the rivers and tributaries by "sport" and commercial fishermen, and use of the rivers for logging complicate the task of regulating fishing in the interest of preserving a limited fish resource. *See Hearings on S.J. Res. 170 & 171 Before the Senate Comm. on Interior and Insular Affairs*, 88th Cong., 2d Sess., at 81 (1964). Federal and state assistance in obtaining needed data and technical assistance has been generally unavailable to the tribes. Recently the federal Bureau of Sport Fisheries and Wildlife has provided some limited assistance to tribes in western Washington. Some tribes, including Muckleshoot, are developing programs for their fisheries with the Bureau's help. UNCOMMON CONTROVERSY 142-44. Significantly, the Small Tribes Organization of Western Washington, an Indian-run association of several tribes, has employed a marine biologist, an Indian, and is embarking upon studies of Indian fisheries as a prerequisite to more complete and effective regulation by the tribes. Interview with Roy S. George, President, Charles L. McEvers, Interim Community Action Program Director, and Guy R. McMinds, Fisheries Development Coordinator, Small Tribes Organization of Western Washington, Puyallup, Washington, Sept. 24, 1970.

battle to preserve Indian fishing rights in western Washington is not about conservation; rather, it is about "the attitude of the whole society toward difference." [15]

Uncommon Controversy, the product of several years of assembling facts and data and writing by a dedicated group of people under the auspices of the American Friends Service Committee, documents the fallacies in the conservation argument. Figures based upon Washington's own statistical reports indicate that Indians take only a tiny percentage of the fish which are caught;[16] yet the Washington Department of Game has produced a motion picture, "Indian Fishery Report," for dissemination to the general public which depicts "Indian fishing as universally detrimental to salmon and steelhead, and threatening to sportsmen." [17] This concern, which more properly would be directed against the manifestations of modern "progress," such as pollution of the rivers, construction of dams, use of rivers for logging, and taking gravel from stream beds, is concentrated on the "threat" of unregulated Indian fishing. At the same time the Indians' plea that fishing rights are the foundation of their culture is outside the ken of the non-Indian who insists upon regulating them.

> The Indians' right to fish in different ways and under different rules is felt by many non-Indians to be completely inappropriate, and the connection of fishing rights with identity to be nonsense. Hostility rises from the threat presented by the differences, not from danger to the fish. Efforts to control Indian fishing have been rationalized around conservation, but they have recognized neither the pervasive importance of environmental changes nor the questions of humanness.[18]

Uncommon Controversy makes a convincing case. It sets the stage for the present conflict by tracing its development from the early history of the Northwest. The dependence on fishing by the Indians of the area made the salmon the hub of their society. Religious ceremony, social and political organization, folklore, art, and social organization were all related to salmon fishing. The pre-treaty period is the subject of the first chapter. The second chapter deals with the process of negotiating treaties with the tribes of Washington and the establishment of reservations. The Indians were compelled to cede their lands through treaties concluded in less than a year, which transferred most of what is now Washington to the United States. The discontent of the Indians resulted in the eruption of wars. Ultimately, the greater force and numbers of the "settlers" and their government prevailed.

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[15] UNCOMMON CONTROVERSY 191.

[16] *Id.* at 121-29. The trial court found that the Indian catch for 1964 was between three percent and five percent of the total catch. Department of Game v. Puyallup Tribe, 70 Wash. 2d 245, 268, 422 P.2d 754, 767.

[17] UNCOMMON CONTROVERSY 146.

[18] *Id.* at 191.

The reader is given a capsulized history of United States Indian policy in chapter three, which provides valuable insight into the officially sanctioned efforts to change and "civilize" Indians and, finally, to make them part of the "mainstream." The government's attempts to leach away any remains of Indian culture as a step forward are illustrative of the inability of a dominant culture to respect, or even tolerate, diversity.

The second part of chapter three discusses the changes in the boundaries of the Puyallup, Nisqually, and Muckleshoot Reservations, the past and present political organization of the tribes, and explains where tribal members have traditionally fished. The chapter concludes against this factual backdrop that, while many elements of Indian life have disappeared or diminished, fishing "has assumed even more importance" and

> is the stronghold of the Indian person's sense of identity as an Indian. It is a remaining avenue of close relationship with the natural world. And in this modern world, it is at the heart of his cry for recognition and respect.[19]

A chapter on the "Law of Indian Fishing Rights" is an advocate's brief. It attempts to walk the line between the legal pedantry inherent in a complete exposition and an undocumented argument more likely to hold a reader's interest. When in doubt the author has opted in favor of including technical matter at the risk of losing the lay reader. From the vantage of a lawyer this enhances the utility of the book; the nonlawyer should commend the author's efforts at bolstering the book's credibility. In spite of occasional, and slight, inaccuracies,[20] the chapter

[19] *Id.* at 71.

[20] For instance, the author states that The Act of Aug. 15, 1953, P.L. 83-280, 63 Stat. 588, providing for the assumption of limited civil and criminal jurisdiction by states, requires that certain states amend their constitutions before assuming jurisdiction. He asserts that Washington's response to that federal legislation in WASH. REV. CODE ANN. § 37.12 (Supp. 1970) is vulnerable to challenge because Washington has not amended WASH. CONST. art. 26, disclaiming the State's jurisdiction over Indian land. UNCOMMON CONTROVERSY 77. In fact, the issue has been litigated and the Ninth Circuit has held that the state court decision in State v. Paul, 53 Wash. 2d 789, 337 P.2d 33 (1959), holding that the legislature effectively removed the disclaimer, is binding and the State's version of the federal provision is properly enacted and valid. Quinault Tribe v. Gallagher, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967). The holding in *Paul* has been reaffirmed by the Washington Supreme Court. Makah Tribe v. State, — Wash. 2d —, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970).

Of course, if it can be shown that Washington improperly assumed jurisdiction over individual tribes without tribal consent, by incorrectly assuming that the Indians were not on trust or restricted land within an "established reservation," and thus purporting to invoke immediate jurisdiction over certain matters under WASH. REV. CODE ANN. § 37.12.021 (Supp. 1970), the State's jurisdiction can be challenged. Also, the legality of individual tribal resolutions consenting to jurisdiction might be attacked if they are legally deficient in some way.

on the law is a valuable entry into that subspecialty of Indian law, Indian fishing rights. There are too few secondary sources in this fascinating and unsettled area of the law.[21]

A salient point made in the chapter on the law is that the greatest impediment to the assertion of Indian rights in court is not the remarkable dearth of knowledge of Indian law on the part of the judiciary, but the divergent value systems of judges, legislators, and members of administrative bodies vis-à-vis Indians. History books avoid facing the fact that the United States was seized from the Indians; rather, they emphasize the purchases, grants, and treaties negotiated with other conquering nations. The violence of the pioneers and the cultural genocide which followed is ignored. From these roots of ignorance grows a thicket of misunderstanding. First, decision makers do not comprehend the injustices that have been visited upon Indians and fail to see the value in maintaining a differing culture.

The "Law of Indian Fishing Rights" concludes that the 1968 Supreme Court decision[22] on the subject "failed to resolve the basic issues and questions. Thus further cases must be brought to the Supreme Court if the recognition and preservation of basic Indian rights are to be secured." [23] About a week after authorities raided the Indian fishing encampment on the Puyallup River this year, making arrests, seizing fishing equipment, and plowing under buildings and personal belongings, the United States filed suit against the State of Washington to seek a judicial interpretation of Indian treaty fishing rights.[24] The suit will be no panacea as it is presently framed. It is substantially a duplicate of the complaint filed by the government in *United States v. Oregon*,[25] which

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[21] Other helpful sources include Burnett, *Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy*, 7 IDAHO L. REV. 49 (1970); Hobbs, *Indian Hunting and Fishing Rights*, 32 GEO. WASH. L. REV. 504 (1964); Hobbs, *Indian Hunting and Fishing Rights* II, 37 GEO. WASH. L. REV. 1251 (1969).

[22] Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968).

[23] UNCOMMON CONTROVERSY 106.

[24] United States v. Washington, Civil No. 9213 (W.D. Wash., filed Sept. 18, 1970). The United States Attorney in Seattle and the Department of Justice insist the suit would have been filed even if there had been no hostilities on the Puyallup in September. Washington Post, Sept. 25, 1970, at A3, cols. 5-6. Nevertheless, the threat of violence undoubtedly figured in the decision. Assistant Regional Solicitor for the Interior Department, George D. Dysart, wrote from his Portland office to his superior in Washington urging that the suit be brought more than nine months before: "I'm writing this confidential memorandum because I am afraid the Department is going to have an Indian problem blow up in its face. And neither this Department nor the Department of Justice can avoid responsibility for the explosion." Confidential Memorandum from Acting Regional Solicitor of the Department of the Interior, Portland, Ore., to Deputy Solicitor, Jan. 15, 1970; Washington Post, Sept. 25, 1970, at A3, cols. 5-6.

[25] 302 F. Supp. 899 (D. Ore. 1969).

was consolidated and decided with *Sohappy v. Smith.*[26] Since rendering a favorable decision for the Indian plaintiffs, the court in *Sohappy* has retained continuing jurisdiction and has been plagued with the problems of applying the judgment to the State's regulations, which change with each run of fish.[27] Hopefully, the government and the individual tribes which are likely to intervene in the *Washington* case will learn from the problems of *Sohappy* how to fashion remedies and raise issues. In any event, the entry of the United States into the dispute on behalf of the Indians, though belated, is significant.

A chapter on "The Controversy Today" brings the reader up to date on the fishing rights battles of the Puyallups, Nisquallies, and Muckleshoots. It sets forth their respective positions, which differ between, and even within, tribes. The sentiments of sport and commercial fishermen are also set out. Since the book was written, the approaches of the Departments of Fisheries and Game have become more widely separated. The book states, "They speak with one voice on the matter of Indian fishing." In the Washington case, which was recently filed, the director of each department has sought to intervene separately because of the wide deviations between their two positions.[28] It appears that the Department of Fisheries accepts the holding of the Court in *Sohappy*, which states that the Indian fishery must be treated specially, while the Department of Game refuses to recognize that Indians have any treaty rights at all[29] and thus fails to even accept the narrowest interpretation of the Supreme Court's modest decision in *Puyallup*.

A carefully written chapter on "The Fish and Their Environment" acquaints the reader with the world of anadromous fish. The point emphatically made is that there is a severe threat to the delicate life rites of salmon and steelhead by the infringements caused by "civilization." The obvious conclusion is that if the State were serious about conservation, its efforts and attention would be focused not on Indian fishing but

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[26] *Id.*

[27] *Id.*

[28] Memorandum of the Director of Department of Fisheries in Support of Motion to Intervene, United States v. Washington, Civil No. 9213 (W.D. Wash., filed Sept. 18, 1970):

> The legal positions of these two departments are starkly different and, in matters essential to this lawsuit, profoundly in opposition to one another. In some particulars, the positions of the plaintiff and Fisheries are closer together than the positions of Fisheries and Game.

[29] *See* Proposed Answer of Carl Crouse in Intervention, United States v. Washington, Civil No. 9213 (W.D. Wash., filed Sept. 18, 1970), which specifically denies the existence of any Indian treaty fishing rights and alleges as a counterclaim a conspiracy between federal officials "to accomplish their unlawful and unconstitutional goal of stripping the State of Washington of its ability to protect its invaluable game fish. . . ."

upon the massive destruction of the ecological systems which support the fish caused by building dams and other structures across waterways, taking gravel from spawning grounds, changing the flow of the rivers by dredging, and polluting the water with sewage, industrial discharges and debris from logging operations.

Uncommon Controversy was written over a period of years by a number of people. Thus, its style is varied, although it is generally sympathetic journalism. The journalism ceases in the last chapter, where specific recommendations are urged for making an equitable allocation of fish to Indian fishermen. The suggestion is offered that a commission representing sport, commercial, and Indian fishermen be established to allocate fish among the three groups and to assist in planning conservation programs and coordinating regulatory codes. The approach suffers from two failings: It is unrealistic, and it is too timid.

Uncommon Controversy, if it does anything, convinces the reader that non-Indians in general, and those regulating Indian fishing in particular, are insensitive to the fact that "survival as Indians requires the survival of Indian fishing" [30] and unwilling to accept the full extent of Indian fishing rights under the treaties. Before there will be any hope of cooperation with full regard for Indian rights there will have to be a change of attitude by non-Indians. It may help to approach the State with a cooperative spirit, but in order to give a sound footing to Indian rights and to establish the credibility of Indians in the administrative process, a forceful judicial enunciation of Indian fishing rights is a prerequisite.[31]

Litigants in Indian fishing rights cases in Washington have typically been defendants—either criminal or civil. They have had to respond to issues framed by others in forums not chosen by them. Cases brought by Indians are the exception and have produced the most favorable results.[32] Indians of Washington have far greater fishing rights than they have ever asserted. Their reservation of lands, particularly in light of their additional reservations of certain usual and accustomed fishing places, included an implied intention to provide the Indians with sufficient fish to meet their needs for both subsistence and trade.

It is now well established that Indians have a right to sufficient waters from streams flowing through and adjacent to their reservation to satisfy

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[30] UNCOMMON CONTROVERSY 192.

[31] It is not unusual for Indians to seek refuge in the courts from the animosity felt toward them by surrounding non-Indian communities. *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886), in which the Court noted that "because of local ill feeling, the people of the States where the [Indian tribes] are found are often their deadliest enemies." *Id.* at 384.

[32] *E.g.*, United States v. Winans, 198 U.S. 371 (1905), Marson v. Confederated Tribes, 314 F.2d 169 (9th Cir. 1963), Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969).

the ultimate irrigation needs on all of their irrigable lands.[33] In *United States v. Walker River Irrigation Dist.*,[34] the court, holding in favor of the implied reservation of extensive water rights for Paiute Indians, analogized the situation to the Supreme Court's earlier finding of an implicit guarantee of fishing rights arising out of the purposes for which the reservation was established.[35]

It might be argued that there is no possibility of establishing an Indian fishing right comparable to judicially established water rights. This pessimism is based upon supposed realism about the courts' reluctance to allow Indians to take all the fish they need on their reservations and at their usual and accustomed fishing places outside the reservations before non-Indians are allowed any fish at all from the runs. It should be noted, however, that the Indian water rights cases giving appropriators rights only to water in excess of Indian needs arose in situations where water was desperately needed by all concerned.[36] Can it seriously be argued that fish are more vital than water and, thus, the courts are less likely to acknowledge that Indians have as great a fishing right as a water right?

If the Indians of Washington could get a definitive court decision on the extent of their fishing rights, a commission to allocate fish might have some meaning. Until then a commission with equal representation from Indians, sport fishermen, and commercial fishermen would result in Indians being outvoted two to one most of the time. Given prevailing attitudes, a decision-making or regulatory mechanism which includes one or more Indians does not insure any greater rights for Indians absent an established premise that Indians have such rights. Only when a commission is under a mandate to devise means to insure Indians their fishing rights and to find ways, perhaps together with tribal regulatory officials, to conserve the fishing resource for the future will a commission be equitable for Indians. If the members of a commission would be as sensitive and appreciative of cultural diversity as the American

[33] Arizona v. California, 373 U.S. 546, 600 (1962); Winters v. United States, 207 U.S. 564 (1908); United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *remanded for further hearing*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965); United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939).

[34] 104 F.2d 334, 336 (9th Cir. 1939).

[35] Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

[36] One Washington state court has considered whether the water rights cases apply to Indian fishing rights, holding that they do not because those cases were concerned with the on-reservation use of water. State v. McCoy, 63 Wash. 2d 421, 387 P.2d 942 (1963). This ignores the fact that usual and accustomed fishing places are "reserved" as well as lands. The water rights cases turn upon the intent of setting aside the reservation to assist agricultural development which, in the case of western Washington Indians included a purpose to preserve the Indians' ability to derive sustenance and basic commerce from fishing.

Friends Service Committee study group, the requirement of an unequivocal judicial pronouncement as an antecedent to the commission's establishment would not exist. As the book points out, these qualities are rare.

The hypothesis that "the Indian rivers are a proving ground for our society's substance" [37] implies that the struggle for cultural integrity which is the fishing rights controversy in Washington is really a microcosm of many conflicts, both blatant and muffled, in which our society has been, and is, involved. Most of these conflicts involve external attempts to alter a culture. Cultures are changed, but they are not comfortably changed from without. This is shown by the cultural disruption caused by the failure of the United States to recognize non-material values important to "underdeveloped" countries, such as those in Asia, in giving them foreign aid. The Vietnam War has turned into a fiasco in which we find the United States dedicated to a policy of destruction in order to "protect" the Vietnamese. The colossal failure of the war has been due to the unpredictability of the "enemy" stemming from a lack of understanding for the native culture; our only response to the confusion seems to be to use more force. The well-meaning desire of Western civilization to make a better life for primitive nomadic peoples by luring them into sedentary occupations has done away with delicate, ecologically sound, pastoral processes in which the nomads used areas for grazing land that otherwise would be useless. At the same time the nomad's misunderstood culture has been destroyed.[38] The history of Indian affairs in this country has evidenced a blindness to any positive value in the Indian culture. The national policy has varied between confining Indians to specific land areas and inducing them to be farmers to eliminating reservations and injecting Indians into the mainstream of American society.[39] Whether the policy has been isolation or assimilation or something in between, it has always sought to make Indians something other than what they choose to be.

The intolerance for diversity which is characteristic of our society makes the battle to preserve Indian fishing rights in Washington a most *common* controversy.

David Getches*

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[37] UNCOMMON CONTROVERSY 199.

[38] *Id.* at xv – xxxi.

[39] *See generally* OUR BROTHERS' KEEPER: THE INDIANS IN WHITE AMERICA (1969); O'Toole & Tureen, *State Power and The Passamaquoddy Tribe: "A Gross National Hypocrisy?"*, 23 MAINE L. REV. 1 (1971); Comment, *Indians: Better Dead Than Red?*, 42 S. CAL. L. REV. 101 (1969); Note, *The Indians: The Forgotten American*, 81 HARV. L. REV. 1818 (1968).

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LAW OF FEDERAL COURTS (2D ED). By Charles Alan Wright. St. Paul: West Publishing Co., 1970. Pp. XVIII, 745. $12.50.

Professor Charles A. Wright's[1] second edition of *Law of Federal Courts*, one of the West Hornbooks is not exactly light reading. It probably will not make the best-seller list, at least in competition with some of the current, racy fare that list affords. Indeed, it is not even the kind of law book that one picks up and reads from cover to cover, so to speak. At the same time, *Law of Federal Courts* is a thoroughly realistic, well composed work of legal art which will fill any reviewer's bill. With a broad brush stroke, Professor Wright, who was one of Time-Life's now famous possibilities for a United States Supreme Court appointment, explores both the abstract principles and the concrete foundations of the federal judicial and jurisdictional system and federal court procedure.

The book is not merely a summary of Professor Wright's more laborious revision of the original Barron & Holtzoff treatise on *Federal Practice and Procedure*.[2] Rather, he attempts to provide the historical background and the basic analytical arguments underlying the development of the law in federal courts to its present state, and to predict how it may develop in the future.[3] Thus, the book surely will give the law student insight, but it will also give the practitioner, and indeed the judge who faces a novel point, a quick summary of what the law is and supporting reasons with references to three or four of the leading cases or an occasional law review article. In short, within its own limitations of purpose, *Law of Federal Courts* is more than adequate; it is quite comprehensive and most scholarly.

As in any such work, however, it is obvious that the broad brush strokes sometimes make for missed details. A very junior district judge in the Second Circuit might wonder about the omission of *O'Brien v. AVCO Corp.*[4] in the chapter on devices used to create or defeat diversity jurisdiction. Perhaps this omission was because that case has had such a depressant, if beneficial, effect upon diversity cases in this circuit. But the book does not purport to cite *all* the cases.

There are few substantive arguments which one might have with Professor Wright. He feels, however, that the diversity jurisdiction of federal courts should be limited further. His view is not confined just to academic halls but is supported by federal judges who view congested

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[1] Charles T. McCormick Professor of Law, The University of Texas.

[2] W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (C. Wright, rev. ed. 1961).

[3] C. WRIGHT, LAW OF FEDERAL COURTS vi (2d ed. 1970).

[4] 425 F.2d 1030 (2d Cir. 1969).

dockets with alarm. Some of us, however, believe that crowded federal dockets can be handled more efficiently by administrative means than by further reducing diversity jurisdiction; that the interaction between federal and state courts is both procedurally and substantively desirable in the administration of justice in both systems; and that for the improvement of the law of both, federal courts should be given reasonable latitude to predict what state courts are going to do. An example is *Wasik v. Borg*,[5] which recently affirmed federal District Judge Gibson's "advanced" estimate that Vermont would adopt § 402A of the *Restatement (Second) of Torts*. This appellate decision was argued during the same week the Vermont Supreme Court held that "the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times" in an implied warranty case.[6]

Professor Wright is objective enough to state the arguments for diversity jurisdiction pro and con, so that his underlying point of view shows through only faintly. His scholarly restraint is evident. In summarizing the arguments, the book puts the diversity issue in perspective and makes it comprehensible.

On procedural matters, Professor Wright is at his best. He does not hesitate to call a spade a spade. When, for example, the Second Circuit in *Mamiye Bros. v. Barber Steamship Lines, Inc.*,[7] overlooked *McAllister v. United States*,[8] he said politely, "The Second Circuit persists in a contrary view. . . . Most other lower courts have followed the Supreme Court. . . ." [9]

The federal rules as amended to July 1, 1968, are unfortunately less than useful as an appendage to the book. By virtue of the 1970 amendments, the 1968 rules are partially obsolete; they cannot be relied upon as to any given point without a check of the rules as amended. The 1968 rules in effect are a legal dodo. Since the rules and forms are readily available in a hundred other places, one wonders what law book company decision prompted the addition of 161 extra pages of paper and presumably expense to an otherwise very practical book. Perhaps a reviewer who does not know the cost of a book he is reviewing should not make such a comment. But such a reviewer, especially if his son-in-law is a law student, should be aware of the enormous increase in the past 25 years in the cost of textbooks and hornbooks. It is one thing when the cost of a book can be deducted as a law-office expense, and another when a law student must pay the freight. This reviewer's calculation is

[5] 423 F.2d 44 (2d Cir. 1970).

[6] Rothberg v. Olenik, — Vt. —, —, 262 A.2d 461, 467 (1970).

[7] 360 F.2d 774, 776 (2d Cir. 1966).

[8] 348 U.S. 19 (1954).

[9] C. WRIGHT, LAW OF FEDERAL COURTS 432 n.36 (2d ed. 1970) (citations omitted).

that 21.6 per cent of the bulk of this book had better been omitted. But then he is speaking as a Vermonter and writing in a Maine review.

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