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**Fisheries: Fishers, Natives, Sportsmen, States and Provinces
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Fisheries: Fishers, Natives, Sportsmen, States and Provinces**

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FISHERIES: FISHERS, NATIVES, SPORTSMEN, STATES, AND PROVINCES

David A. Colson[†]
U.S. Speaker

Good morning. Thank you, Jim. Thank you, Dr. King, for inviting me to this conference once again. And it is always a pleasure to be on the same platform with Don McRae.

It is true that fish do not respect boundaries, but some fish wear flags on their back, and they stray into other people's territory from time to time, creating problems. As noted, we have a very exotic title for this session, and I am going to try to simplify it. However, we cannot speak to all of the implied issues. Thus, I am going to focus my talk in terms of fisheries and Federalism.

I believe that there are several things that can be learned, as one considers other binational issues, about the experiences that the United States and Canada have had in managing fishery problems, for better or for worse. There are many definitions of Federalism. What I will address are the legal and institutional structures that exist in the United States that play a role in any agreement that the United States has with Canada on a fisheries matter.

When we, as government lawyers, think about reaching an international agreement, the first thing we should think about is the following: if I make a

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deal with Don McRae about how the United States is going to act, how do I enforce that deal and ensure that those constituent interests in the United States that are affected behave themselves and comply with the international agreement that the United States and Canada enters into.

I am going to be general, and I am going to tell stories. I have been out of this game for 7 ½ years. I do not practice law in this area, so I am not current on the most recent fish issue between the United States and Canada, but I believe that the institutional issues that surround decision-making have not changed, and that I can speak to those.

I also want to say that it is my understanding that in the time since I left the government, the fishery issues have been put on a very positive track, and they seem to be better today than they have been in many years. Hopefully, this is not a dip in a long story. I would like to think that it is a positive, upward trend that we are going to see continue.

When addressing fisheries, I always like to recall that in the Treaty of Peace of 1783 that separated the United States as an independent nation from British North America, the fishery issues were the toughest issues to negotiate.¹ It was not American independence. The fishery issues continued after we separated from British North America and into a new United States.

It is worth recalling that during the 19th Century, there were at least three major international conventions that were negotiated between the United States and Great Britain at that time on fishery issues. Each time the treaties were submitted to the Senate, and they were rejected by the Senate of the United States.

In the early part of the 20th Century, when Canada achieved full foreign affairs authority from Great Britain, the first treaty that it entered into with the United States was a fisheries treaty. It was the Halibut Convention.² It remains vibrant international convention between the two countries that works reasonably well.

Having said that, in the last century, throughout the period up until the 1970s, fisheries did not play a very important role in the bilateral relationship and the legal relationship between the two countries. However, the new Federalism issues of today had not-yet surfaced. The Senate of the United States had a role in approving agreements, but because of the way these issues were structured, there were not-a lot of other legal institutions in the United States playing a role in that decision-making process concerning international fisheries matters.

That changed in the 1970s with two events. One event was the decision in *U.S. v. Washington*³, a lawsuit in the Pacific Northwest that we call the

¹ 8 Stat 80 (Sept. 3, 1783).

² 47 Stat 1872 (1931).

³ *United States of America et al. v. State of Washington et al.* (DC. Wash, 1978) 384

Judge Bolt decision. This was a holding that Indians, having entered into treaties with the United States in the Pacific Northwest, were entitled to 50 percent of the salmon on their usual and accustomed fishing grounds.⁴ The other event that occurred in the 1970s was the establishment of 200 nautical miles zones off our Pacific and Atlantic coasts by both the United States and Canada in 1977. The United States passed its 200-mile law in April of 1976.⁵ That law had a specific purpose. Its specific purpose was to kick foreigners off the fishing grounds off the coast of the United States, and get them as far away from the coast of the United States as the United States could possibly get them. Now, the United States certainly did not frame the intent of the legislation as such, but that was certainly the objective.

This law established a set of quasi-government institutions to manage the 200-mile zone that the United States was creating. These institutions were called Regional Fishery Management Councils.⁶ Under law, these Councils had the legal responsibility and authority to determine the status of the fishery resources in the United States zone in their area of responsibility.⁷ They had the responsibility and authority to determine what amount of that fish United States fishermen could catch.⁸ If they were to determine that there was a surplus then it could be made available to foreigners.⁹

If the foreigners wanted that surplus, then the government of the nation of the foreign fishermen had to come to the United States and negotiate with the United States a very complex international fishing agreement.¹⁰ Then the fishing boat of the foreign fishermen had to get a permit.¹¹

We can note two simple points about that law. First, the law was crafted with the Soviet Union, Eastern European countries, Japan, and other countries that have large industrial fishing fleets in mind. You will not find very much in the legislative history of that statute that even refers to Canada. Second, the powers that were given to the Council created a new legal institution that had the power to make decisions on matters of concern to Canada; again, without much thought going into it. These powers are powers that are independent of the States of the Union, they are powers that are independent of members of the executive branch, and they can only be overridden by a new act of Congress.

F.Supp. 312.

⁴ *Id.*

⁵ 16 U.S.C.A. 1801-1882 (1976).

⁶ *Id.* at Sec. 302.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at SEC. 210. 16 USC 1821(a)(3)

I do not remember exactly the date, but it was in 1976, when I participated in a meeting in Vancouver with Canadian officials to sit down and talk about the implications of this new U.S. fisheries law. We were also going to talk about boundary issues, but I must put those issues aside and just discuss fish. We still have many of those boundary issues outstanding, but in terms of the fish issues, the Canadians came to that meeting prepared to establish their 200-mile zone. The Minister of Fisheries and Oceans was empowered to make deals with the U.S. Therefore, there would not be a big problem determining where the authority rested in Canada to broker a deal and enforce a fisheries deal with the United States. That Minister would have the power to enforce the deal that he made with the United States. On the U.S. side, we started talking about the new, very complex structure enacted into U.S. legislation. The Canadians were appalled when we told them, "No, there is no flexibility. You guys are just like the Soviet Union. If you want to fish in the United States zone, you are going to have to do all of the things that this law requires."

Now, some of you know Len Legault. He was the Canadian negotiator at that meeting, and he was incredulous. The fact was that this law was tight and there was no flexibility. If foreigners, including Canadians, were going to fish in the United States zone and not get arrested by the Coast Guard, they were going to have to comply with this very onerous statutory scheme.

Now, it is not fair to say that those formulating foreign policy for the U.S. government, did not look for flexibility. They tried to find some flexibility. Indeed, they concocted a legal scheme and said, "We have some flexibility." For a few months throughout 1977, we got away with a deal that sort of allowed the status quo to continue while we continued to negotiate a more permanent arrangement that would be submitted to the Senate. Of course, that got very complicated. When the interest groups of concern got impatient, the lawsuit came. The U.S. Federal Government lost, and the Federal Judge said, "You've got to get rid of those Canadians." Thereafter, three centuries of fishing, mutual fishing, and reciprocal fishing off the United States coast by British North America or Canada, and Americans off the Canadian coasts, ended in early 1978.¹²

If you want to make a deal with the United States that says that the United States will behave itself in some particular way concerning fish off the coast of the United States, you are going to have to get these Regional Councils involved in the process, and they are going to have to make the determinations that are going to have an impact on Canadian interests.

¹² *Progress Seen in U.S. Fish War*, FACTS ON FILE - WORLD NEWS DIGEST, Jan. 19, 1979, at A1.

This whole process brought a lot of new people to the negotiating table on the U.S. side. I remember very well on the Canadian side that at the start there were only a handful of Federal bureaucrats. Over a period of months, however, that group kept expanding and expanding and expanding.

Additionally, it is imperative to examine tribal issues. In the early 1970s, in the United States, the Native American people in the Pacific Northwest accounted for about five percent of the catch of salmon.¹³ That was in spite of 19th Century treaties with these tribes, which stated that the Native Americans could fish in common with the non-natives.

In 1974, in this Federal Court opinion, Judge Bolt determined that the phrase "in common" meant 50 percent.¹⁴ Now, that decision was challenged repeatedly, but it was upheld repeatedly by the Appellate Courts and by the U.S. Supreme Court.¹⁵ This resulted in a social revolution in the Pacific Northwest amongst that community of interests that were familiar with salmon, that fish for salmon, whether you were a recreational fisherman or a commercial fisherman, whether you were a government bureaucrat, whether you were somebody that bought salmon, it was a revolution.

As a result, there were arrests, there were protests, there were lawsuits, and there was civil disobedience.

As somebody that grew up in that region, I am always surprised that within a fairly short time, five or six years, the region came to accept that the native tribes went from being a non-player in the world of salmon to being a major player at the table.

Now, one big problem in all of this was that there had been a long-standing treaty with Canada that was focused on Canada's Fraser River salmon stocks.¹⁶ That had been a very successful treaty. As I said, salmon is the fish that has a flag on its back. Canada, has always taken care of the Fraser River, did not put dams on the Fraser River, and thus did not block the Fraser River to salmon. These are serious economic choices. Naturally, Canada wants the salmon back.

¹³ David Schaefer, *Century-Old Dispute Over Shellfish Finally Goes to Court*, SEATTLE TIMES, April 17, 1994, at A1.

¹⁴ *United States of America, et al. v. State of Washington* 384 F. Supp. 312, 343; 1974 U.S. Dist. LEXIS 12291, 56 (W.D. Wash. 1974).

¹⁵ *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 445+, 31 Env'tl. L. Rep. 20,306, 20306+, 00 Cal. Daily Op. Serv. 9896, 9896+, 2000 Daily Journal D.A.R. 13,197, 13197+ (9th Cir, Dec 13, 2000), *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 99 S.Ct. 3055, 3062; 443 U.S. 658, 662; 61 L.Ed.2d 823, 823; 9 Env'tl. L. Rep. 20,517, 20517; (July 02, 1979).

¹⁶ Convention between the United States of America and Canada and protocol of exchange of ratifications concerning the sockeye salmon fisheries, 50 Stat 1355, T.S. No. 918 (Aug. 4, 1937).

The United States built dams, did all kinds of other things on our rivers, and we pay the price in limited salmon production from those rivers. Canadians do not really want us catching their salmon and as a general proposition we understand that, because the U.S. today is making enormous investments in our rivers, including under the Endangered Species Act to protect salmon, and when we make that economic investment, we too like to get our salmon back. The fact is the salmon do not come right from the oceans right into our rivers; however, they are all mixed up in our respective offshore waters.

The problem with this particular treaty was the way the treaty had developed and been managed over the years. The United States came to Canada in that setting and said, "Look, we have got to adjust some stuff here, because we have a new Federal requirement in the United States that we are going to have to manage our salmon fisheries in such a way that the tribes are going to get a shot of 50 percent of the salmon coming through U.S. waters." Canada replied, "Nuts, we don't want to have anything to do with this. You have a treaty with us."

A treaty, according to the way we understand the U.S. Constitution, is the law of the land. The question soon became, "Why does some Judge's interpretation of an old Indian treaty trump this international agreement that the United States and Canada have, a treaty that the Senate had approved?" The answer that we got was, "that is not the way U.S. law works." The U.S. law works in such a way that the requirements imposed by the Judge's decision bound the way Federal authorities would go about implementing the old Fraser River Convention.

When Canada would not consent and try to develop some flexibility, we found out that we were going to have to pull the pin on that treaty. We withdrew from the treaty, exercised our right under the treaty to withdraw from it, and said we will just have to do this our own way.

Canada would not cooperate in that context. It did not want to hear about Native American issues at that time, frankly. I think some Canadians were concerned about managing the Fraser for U.S. tribes. Further, Canada had not developed a response to a similar scenario on their side of the border.

Now, once that decision was made to pull out of the old treaty, then the two governments set down and said, "Okay, if the old treaty is history, we'll have to have a new salmon treaty." However, there was a four or five year gap between the time we terminated the old treaty and the time before we got the new treaty in force.

Now, personally, I had been involved in some of the salmon matters in the 1970s, but I had left them to work on the Gulf of Maine boundary issue; when that was over in the mid-1980s, I got back into the salmon world at about the time that the new salmon treaty negotiations were completed.

One of the problems on the U.S. side was that nobody had contemplated how were we, the United States, going to live up to our promises that we

were making to Canada in this new international salmon treaty. I was given the responsibility of trying to figure that out. I meet with our various institutions that had the legal power, which concerned U.S. salmon management and enforcement. They would have to be brought into the tent in order for the United States to make a promise to Canada.

We had three states, Washington, Oregon and Alaska, and we had 24 Indian tribes, all of them with rights in this area, all of them with legal power in this area, all of them that had to be part of the United States if the United States was going to make an agreement with Canada.

Somebody might say, "What's the big problem? Congress can write a law." Under our system, Congress could write a law. They could write a law that said the Secretary of Commerce has the full power to do whatever he wants to do in the salmon context, and preempts state and tribal rules and regulations in order to accommodate Canada. That law could be written, but it is politically unrealistic. It is never going to happen that way. The only way you are going to do this is to bring everybody in.

Now, that became very frustrating, because the only way we could bring everybody in was to agree not to make any deals with Canada within the framework of this treaty unless there was unanimous consent. That was the only way we could get the treaty ratified with Canada.

One of the primary problems we had to overcome, as well, was to ensure that once we agreed with Canada, that such an agreement could be enforced. That required statutory authority to preempt state and tribal law in cases where one of them put the United States in jeopardy of breaking the deal with Canada. The U.S. federal government could not allow a situation where a local government might say, "Oh, we're not going to catch ten fish like we agreed, we're going to catch twenty fish." The federal government in that context must have the authority written into the agreement to preempt such local decisions, including the power to arrest people that violate agreements with Canada that they in the first instance had agreed with.

In my time that power was used on two occasions. One occasion, the threat was good enough to get the institution concerned to back down. The second time, the fishery was a protest fishery, where the Federal will was being tested. In that case, we did use Federal Marshals to arrest the people that were concerned in trying to overcome an agreement that had been reached and in which they had concurred in the first instance.

MR. CRANE: Could I just ask a quick question? Who appoints the members of the Regional Councils on the East Coast?

MR. COLSON: Under the statute, the authority is in the Secretary of Commerce, but he normally acts on recommendations of Governors of the states.

MR. McRAE: We are not going to get into the fisheries and trade in this section, maybe another panel on that.

