<u>Robert C. Belloni</u>, Or Hist #1208, tape 12, side 2; tape 13, side 1

(transcript pp. 191 – 201).

S: Well, I'm glad that we talked about it. It's such an important recent development in the courts. During this period you are already quite involved in the Indian cases, and I think that at one point you were quoted as saying that you had been involved in it since 1967. Is that where we start? I just wonder if maybe we could start farther back with your interest in the situation of the native peoples, and is there a background to it?

B: No, there's not. I started at ground zero. I'd never been well aware of the Indian culture. I became interested because the cases were assigned to me, and I got prepared for them and then began to understand the situation. I've handled many, many Indian cases. And while Indian fishing cases are the most important cases I've ever handled from the point of view of altering the lifestyle and the industry, the fishing industry., in the historical sketch, it really should be talked about a bit. The first case that I had assigned to me was a case brought by a man named Sohappy against the Fish and Game Department of the United States. He, [Sohappy] alleged that the state was treating Indian fishermen the same as all other citizens and they were entitled to special rights because of their 1856 treaties. A short time later, the United States filed a separate action and they were always tried together. They were handled on a consolidated basis and the United States representing the tribes, Warm Springs, the Yakimas, the Umatillas, Nez Perce. But the theory and the request was the same. It was generally that the states had very little authority to make rules governing Indian fishing because the treaty of 1856 make a big exchange in which the Indians gave up vast tracts of land and moved onto

reservations. The thing that really put the treaty together and made it halfway acceptable to the Indians was their special rights to fish in their usual and accustomed fishing places. One must remember that most of the Indians of Oregon lived...their principal food was fish, mostly salmon, so that it became not only their living but their culture as well. The salmon had great religious significance. The states took the view that indeed the Indians had no more rights than any other citizens. When I talk about the states, I'm talking about Oregon, Washington and Idaho. As a matter of fact, the attorneys general of those three states had issued a joint opinion, in effect, which gave the treaty very little credence and did conclude that the Indians had the same rights and no further rights than other citizens. The way that came about is the treaty itself says that the Indians shall not be barred from their usual and customary fishing places and have all the rights of any other citizens of the territory, as it was put. But there's a lot more to it than simply the words. The history of the treaties clearly indicated to me that their rights were much greater than that. The fish were going down and down in numbers. There was a big contest between all the fishing groups, Indians, the sports fishermen, the commercial trollers out in the ocean, the gillnetters at the mouth of the river. And they were really in a battle over who was going to catch the last fish in the Columbia River system. My ruling was that the state does have authority to regulate fishing, including Indian fishing, but only for the purposes of conservation of the fish. And while they could make rules regarding non-Indian fishermen in other areas than just conservation, as far as Indian fishing was concerned, they could only regulate Indian fishing to the extent that it conserved the resource. The burden of proof was on the states to prove that that was true, that the method that the rules were designed for the purpose of fostering conservation. One of the big unknowns

at the time, because we didn't get a very good press, the press was hostile, was that nobody ever read my opinion before they started criticizing it. [chuckles] So my ruling was, in effect, that the Indians were entitled to a fair and equitable share of those fish which were destined to pass their usual and accustomed fishing places, using the words of the treaty. But that before that happened, before anybody got any fish, any of the user groups or the Indians, there had to be an escapement of 90,000 adult salmon to protect the species from disappearing. This was the part that wasn't clearly understood and often ignored. At that time, that was the number of adult fish that needed to escape all fishermen in order to maximize the return. Any less than that would have diminished the return. Any more than that would have been a waste because the rivers will only accommodate so many fish.

As a matter of fact, it has really been gratifying to know that since that decision, the fish have actually increased.

Tape 12, Side 2

B: [I have here a current newspaper article. Its caption reads:] "THE SQUABBLING ABATES AS FISH RUNS POST INCREASE". Well, if that's correct, they're no longer out there fighting for the last fish in the system. But everybody wanted his fair share, to which they were entitled.

S: Did that 90,000 hold up. Was it a pretty well established figure, scientifically.

B: Yes, at that time fish biologists didn't have much dispute about that. That's the number of fish needed to stock the system. The fish experts from both sides pretty well agreed to that. Now whether that's changed since then, I don't know. In my ruling then, I

also required the parties to get together and come up with a plan to which they could all agree. They've been working on that plan now for all these years. Several times we thought that we had complete agreement, but it fell apart for some reason or another. However, it really has worked well in Oregon. The reason I say in Oregon is that after my case, some years after my case,Judge George Boldt was handed a lawsuit by a group of Indians in the Puget Sound area. The area of my dispute was the Columbia River and its tributaries no matter in which state they were located, Oregon, Washington or Idaho. His case area was the Puget Sound area and the issues were the same in his case as they were in mine. His opinion came out five years after mine. In his opinion he followed mine exactly. In fact, he quoted verbatim I think about five pages of my opinion in his. He made one change which I thought was a good one. Where I had ruled that the Indians were entitled to a fair and equitable share of fish destined for their usual and accustomed fishing places which were all above Bonneville Dam, incidently. My opinion had ruled that the Indians were entitled to a fair and equitable share of all the fish destined to be in their usual and accustomed fishing places. Judge Boldt clarified that and he said that fair and equitable share will be 50% of the fish. Well this, of course, meant 50% of those fish that passed the upstream areas above Bonneville. It didn't award any part of those fish that were going to branch off into the Willamette and other tributaries, just those that were going to pass that particular point above the Bonneville Dam. In a way, his decision probably didn't differ from mine but I was pleased that he did clarify that. A fair and equitable catch invariably had to be decided by the judge each year, what is fair and equitable. It made it a little bit easier when Judge Boldt came up with the ruling that this means 50%. In a way, there's no difference between his and mine. Whatever a fair and

equitable share is is a matter for the judge to decide and 50% is a matter for the judge to decide, too, because there's fish out in the ocean, fish coming up the tributaries, and you have to make a calculation, listen to the best scientific evidence, to figure out what 50% or a fair and equitable share would be at that particular point.

S: Where do you get that information?

B: From fish biologists testifying in court.

S: So that's a sort of supervisory role that you go through all the time?

B: Yes, after I decided the case I realized that it wouldn't operate by itself. Someone in authority had to see that it was enforced, implemented, changed, if need be so I took continuing jurisdiction of the case. The case didn't end with my ruling. Whenever disputes arose under the system, they'd come to me after filing the proper papers and have it decided. I operated in that capacity for twelve years, I was more or less fishmaster of the Columbia River for that length of time. Finally, I stepped down from that case entirely and I gave the reason at that time, which is true, that it was a little bit hard for me to continue to be neutral. The Indians had won almost 100% victory in their original case and somehow or another as each year passed, they weren't getting the number of fish to which they were entitled on some theory or another. I really began to feel that they were being prejudiced in their rights because the other user groups didn't like the opinion in the first place. So you can't very well continue judging cases when you feel biased toward one side, as I became over those years, so I did step down, and it was taken over by Judge Walter Craig of Arizona. But the case occupied a very important part of my life and of my judicial career. There were other problems. This has nothing to do with my stepping down from those cases, but the United States, of course,

was on the side of the Indians. They took the same theory exactly as the Indians, as is the government's duty to do in these cases, but there were areas of federal government that were uncooperative. They're still losing a lot of fish to turbines in the dams and the Corps of Engineers was unwilling to do anything about it. I remember one time the head of the Engineers was in my court testifying when the complaint arose that he was really defeating the treaty and the public interest by not being more careful about the fish runs and he said something to this effect. "It's our mission to create power with these dams and the Corps of Engineers has no intention of babysitting a bunch of fish." Well, I looked at him and said, "Colonel, that's where you're mistaken. From now on the Corps of Engineers is going to babysit a bunch of fish." And of course, they have, and they've accepted that and the plan has worked well. I am particularly proud of the State of Oregon because the state fought very hard, in the Sohappy case in the beginning, to sell me, the judge, their point of view that the Indians had the same rights as anybody else, but once my ruling was made, the State of Oregon accepted it and worked very hard to implement it. I can't say the same for the state of Washington. The state of Washington was pretty reluctant to give it the credence that it should be. When Dan Evans was governor, he made a statement after my ruling that the state of Washington had every intention of carrying out both the letter and the spirit of the Sohappy decision and, indeed, while he was governor they did. But then they changed governors, and his successors didn't feel the same way about it, particularly Dixie Lee Ray, who fired one of the best game people in the United States. That's one reason why Judge Boldt later had much more problem seeing that his decrees were obeyed in Washington than I did in Oregon about it. There wasn't all that much controversy in Oregon because the State

itself was so cooperative. Washington was not.

S: What kind of support were you getting, say in the appeals rulings, the decisions in the circuit court, and also [from] Judge Boldt?

B: I worked very closely with Judge Boldt on those cases. We compared notes often and in the process we became very close friends. It's kind of amusing that I decided my case in 1969. He decided his in 1974 in which he followed my decision exactly, right down the line, except to make the one change, not a change, but an improvement, that I mentioned. And somehow or another it's become known as the Boldt decision. [chuckles] In a light vein, I tell you that I was very happy that they were calling it the Boldt decision at that time because it was very unpopular. [chuckles] But now that it's been a success and the newspapers have changed their point of view completely, I see it called the Boldt decision all the time. [laughs]

S: Now it should be called the Belloni decision.

B: Yes [laughs]. Not really, but just in a light vein, that's the way things worked out.

S: And it also, I guess, besides being reviewed in the circuit court, it eventually, Rehnquist of the Supreme Court, plays a role in it?

B: Yeah, I'm not prepared to give you the whole history of the court system's rulings on the cases. But this is very interesting, my case, the Sohappy case, was one that turned around the entire system of allocating fish, not only to the Indians, but as a result to the other groups as well; and the states fought it as hard as they could, the states of Oregon and Washington, and lost. And neither one of them even bothered to appeal my decision. I think that they knew perfectly well that I was right under the law and they

were not. But they were bound, and it was their duty to fight to uphold the position of the states, and they did. But, when Judge Boldt made his ruling, it was appealed to the 9th Circuit, and the 9th Circuit affirmed his opinion. At the same time, they in effect affirmed mine, even though mine was never appealed.

S: In the case of Washington, you said, you indicated that they still managed to cut down on the Indian catch in certain ways in spite of the court's work. How did this happen?

B: Well, I'm hesitant to make accusatory statements against any officials of the State of Washington. They were doing what they thought was right for their people. I don't like to be the one that just gives you one side of a story. But once these rulings were made, it became the duty of the state police of the two states, Oregon and Washington, to enforce it on the Columbia River. Oregon did. Washington didn't. Finally, I threatened to call the Coast Guard out to enforce the law of the United States on the Washington side of the Columbia River and once I did that, immediately they started enforcing the law in Washington, as well.

The Court of Appeals opinion, either Judge Boldt's or another, I'm not sure, called this, in effect, the most heated controversy ever reaching the federal courts with the exception of the school desegregation cases in the South.

S: Is that right?

B: Yeah.

S: Well, what was it like living through, experiencing this kind of controversy and the pressure from the groups, the interests?

B: Well, a judge is used to not pleasing everybody with his judicial decisions.

It does, though, get to you after awhile, when you feel sure that you are right and are continually criticized by huge numbers of letters coming into my office and by the newspaper. And a judge is not in a position to go out and start making speeches and defending his opinions. So you just sat and waited for it to blow over. And in this case, it has. I remember one man who was very involved in one of the fishing groups used to send me vicious letters and call me up and tell me how wrong I was. And not too long ago I got a telephone call from that fella, and my secretary said, “Mr. so and so is calling,” and I said, “I don't want to talk to him.” So she said, "the judge doesn't want to talk to you", and he said, "well, I was just going to tell him, maybe you can tell him, that I've been wrong about this from the beginning and that you were right and I commend your courage in sticking to your guns".

S: Is that right?

B: Yes.

S: That's a remarkable testimony isn't it?

B: Right.

S: Who was this person?

B: Well, I don't remember his name, and if I did I wouldn't tell you. [laughs] He was involved in organized fishing groups and he, too, was taking the point of view that he felt very strongly about.

S: Well, of course, the sports editors, like Don Holmes, for instance, were writing about that issue. Were you getting any support from any of the, say the people, the media who were handling sports, or the public?

B: No. No. They just were not supportive at all. Strangely, now, they are.

Now they think this was the best move ever taken for the conservation of fish and the fair allocation of fish. They act like they invented it in the first place. [laughs] It's a total 100% turnabout from the attitude they took before.

S: Well, it just seems like such a frustration to be in a position as a judge, to be interested in justice, and not to be able to actually reach the public more directly than by the weight of your opinions.

B: Yes, it's a frustrating experience, but I've had the inspiration of Judge Frank Johnson in the South. His problem was much more delicate than mine, in some of the school desegregation cases. His friends and neighbors were no longer friends. He was subject to vilification. His family was threatened. So I've seen courageous actions taken by other federal judges in the United States and I felt that this was one of the things I had to go through. I went through it all right.

S: Did you ever meet him.

B: Yes. Yes, I have.

S: Share experiences?

B: Yes. This particular case I was talking about, the Indian fishing cases, but Indian law in general is very much affected in other ways than this. I've tried many cases involving Indians and mostly in Oregon and Arizona. Ten years after my Sohappy decision there was a case in which the federal government was being sued to enjoin them from building a dam on Catherine Creek in Eastern Oregon. It was a large dam. Had the dam been built, it would have flooded land which were claimed by a group of Indians in that area. They brought suit asking that the government be enjoined from building this dam, claiming that they had rights to the fishing there and certain gathering rights, of

berries and roots. So the government, as it must, represented it's own interests. But the government was in kind of a spot because they had always been committed to the idea that the Indian treaties meant what they meant, and that was to give Indians some rights and so their theory was that the people hadn't proved that this was a usual and accustomed fishing place of their particular tribe. See, in my case, I didn't rule that all Indians could go up there and catch fish, only those particular tribes involved. And the government denied that this was an ancient rite, an ancient place of fishing. So I held a hearing, held a trial. A lot of very old Indians appeared, and archaeologists and anthropologists, who convinced me that indeed these people were descendants of Indians who had fished there for 1,000 years. So I made that ruling. The dam, it was a huge project too, the dam was never built. The government never appealed. [chuckles]

S: So you were asked, also to do cases down in Arizona. Is that so? Was that a fallout of your work with Indians, did you become sort of known as a judge for this kind of a case?

B: I didn't really want to do that, because I made an effort not to specialize in any field of law. But I was working in Arizona on temporary duty there, and the case came up and it was assigned to me. I expect that is the reason, all right. But now that was a diverse case, too, and the water cases. The Papago Indian tribe in Southern Arizona was a nomadic tribe. They were all over the place. The government in an effort to make it possible for white settlers, made a deal with the Papago Indians, and said, "Look, we're going to give you this large reservation in Southern Arizona, Papago reservation, and you're to quit wondering around. You're supposed to go there and be farmers." So they taught them to be farmers. The Catholic fathers took a big part in

that, taught them to be farmers, so they became farmers and ranchers on the Papago Indian reservation. And then, Arizona, being in the Sun Belt, became a very popular place and so it started building up. Lots of housing developments and golf courses were being built, so the water table started going down. All of the water in Southern Arizona is underground water. The only place it comes from is by digging wells. The rivers, as you probably know, don't run in Arizona. I don't know why they call them rivers. They're just a bunch of sand. But it's all underground water and the water level started dropping so bad on the Papago reservation that the Indians' farms dried up. And they said, "Now look, the deal you made with us 100 years ago was that we come in here and we get this place to farm; in order to farm, you have to have water and you've now given away all of our water. We want you to stop that. We want you to quit selling water to all these people. It ultimately was never litigated, but they had a very strong argument, very strong argument. Now, much of the judge's work, unheralded, is through getting people together and it has much more effect and it's a much better way than to come out with court rulings which perhaps neither side is happy with. But it would have been a tremendous blow to Arizona to have lost that case. The towns of Tucson and Phoenix would have just have dried up and reverted to the desert. So I encouraged settlement between the government and the Indians, and they were able to get together. I think that the government was pretty aware of the strength of their arguments and as a result in settlement for their claims, the government built a pipeline which carried the central Arizona project, which already irrigated around the Phoenix area, now there's another 120 miles down.

Tape 13, Side 1

B: There are all kinds of Indian cases and I've handled most of them, most kinds. But the Indians don't always win in my court either. There was a case I was assigned in Arizona in which the Yaqui Indians were making a claim that they weren't bound by Pima County's laws on sanitation. The Yaquis were not American Indians in the sense of the United States of America. They were North American Indians, but they had were south of the border into Mexico. They were treated very, very badly. So they became political refugees, the whole tribe became political refugees and moved up into Southern Arizona, and the United States in a very benevolent mood gave them land "This is your land, you're welcome, here, in Arizona." But Congress also made a point of saying that this is not a reservation, we're not creating another tribe of Indians, and so I held that they were not a sovereign nation, like some of the Indian tribes are. But they were political refugees and as such they had to abide by the laws of Arizona. But you could see from that the wide diversity of cases there are in this country, and I think this dispute about what really are the rights of Indian tribes will be with us for another 100 years. They have certain sovereign rights, the tribes do. What they are has never been completely defined and it's going to be a slow, evolutionary process to work that out ultimately.

S: It's still not clear what that extends to, sovereign rights?

B: Not at all, not at all clear. No, and you see, the United States Government could, if they wanted to, simply abrogate all of the treaties. The treaties are the highest law of the land, but the United States, just ex parte, by itself, can pass a law that says the

treaty of 1856 involving the Indian fishing is null and void, and they would have no more rights. But it doesn't do that, and it shouldn't do that either. But instead, not the government so much, but the states, have just simply interpreted the laws out of existence. The federal courts' rulings have done much to remedy the problem. They will be called upon to do more. And, as is the way with human nature, not all the Indian claims have merit. As I said before, it will take a century to build a sensible and fair set of rules which will clearly define the bounds of Indian law in all the disputed areas.