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Brief of the United States, Amicus Curiae

No. 38611

In the Supreme Court of the State of Washington

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, AND THE DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON, RESPONDENTS

v.

THE PUYALLUP INDIAN TRIBE, INC., A FEDERAL ORGANIZATION, ET AL., APPELLANTS

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable JOHN D. COCHRAN, *Judge*

BRIEF OF THE UNITED STATES, AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The interest of the United States in this case arises generally out of its special and continuing relationship to the Indians and, in particular, out of the relationship with the Indians

directly involved here as it is affected by the Treaty of Medicine Creek of December 26, 1854, 10 Stat. 1132, made between the United States and, among other signatories, the Puyallup Tribe of the Puyallup Reservation. The judgment and decree permanently enjoining the individual members of the Puyallup Tribe from fishing in the Puyallup River watershed and Commencement Bay in any manner contrary to the laws and regulations of the State of Washington pursuant thereto, and the conclusions of law that there is no presently existing Puyallup Tribe and that state conservation rules and regulations be uniformly applied to all citizens, including these Indians, on an equal basis, raise important questions of federal law and will give rise to serious problems in the administration of Indian affairs by the Department of the Interior.[1] For these reasons, the United States is filing this brief *amicus curiae* urging reversal of the decision below.

[1] A further minor consideration is the fact that the possibility exists, if Indian rights are lost, of assertion of claims against the United States for failure to prevent such loss.

STATEMENT OF THE CASE

The United States adopts the statement of the case as set forth in appellant Puyallup Tribe's brief.

STATEMENT OF THE FACTS

The United States adopts the statement of facts set forth in appellant Puyallup Tribe's brief, with the following clarification with respect to certain points toward which the argument of the United States will be directed.

There is nothing in the findings of the court below to indicate that any attempt has been made by the State of Washington, by legislation or through regulations pertaining to fishing, to recognize the reservation to the Indians by the Treaty of Medicine Creek with the Puyallup Tribe of Indians of "The right of taking fish, at all usual and accustomed grounds and stations * * * in common with all the citizens of the Territory," or to accommodate the general fishing laws and regulations of the State to those treaty-reserved rights.[2] We presume,

[2] There were at one time several laws and regulations specifically recognizing the rights of the Indians, but these have been repealed (see appellant Tribe's brief, pp. 48–53) or at least ignored by the regulatory authorities.

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therefore, that no such attempt to recognize or accommodate has been made, and direct our arguments on this assumption.

In addition, we specifically limit our discussion as *amicus curiae* to the permanent injunction of fishing in the watershed and Commencement Bay and the basis for the injunction as set forth in the following conclusions of law of the court below:

> I
>
> There is no presently existing Puyallup Tribe of Indians which succeeds to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek.
>
> * * * * *
>
> IV
>
> It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

In limiting our argument to these points, we do not intend to suggest tacitly our approval or disapproval of the many other legal and factual arguments made by appellants. Rather, we believe that the interest of the United

States, as described *supra,* is primarily related to these issues.

ARGUMENT

I

Only Congress can terminate the status of an Indian tribe as a tribe and Congress has not done so in this case

The Supreme Court in *United States* v. *Sandoval,* 231 U.S. 28 (1913), clearly placed the responsibility for determining the existence or nonexistence of an Indian Tribe exclusively with Congress and its appropriately delegated authority in the executive branch of the Federal Government. Thus, the Court stated (231 U.S. at 46–47):

> * * * In *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 315, prior decisions were carefully reviewed and it was further said: "Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not for the courts, to determine when

> the true interests of the Indian require his release from such condition of tutelage."
>
> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. *United States* v. *Holliday,* 3 Wall, 407, 419; *United States* v. *Rickert,* 188 U.S. 432, 443, 445; *Matter of Heff,* 197 U.S. 488, 499; *Tiger* v. *Western Investment Co., supra.*

The placement of exclusive responsibility in Congress of determining where and how tribal status is to be terminated has been subsequently reiterated in *United States* v. *Nice,* 241 U.S. 591, 598 (1916); *Brader* v. *James,* 246 U.S. 88, 96 (1918); *United States* v. *McGowan,* 302 U.S. 535, 538 (1938); *Board of Commissioners* v. *Seber,* 318 U.S. 705, 718 (1943); *Haile* v. *Saunooke,* 246 F. 2d 293, 297 (C.A. 4, 1957).

There can be no doubt that Congress in the Treaty of Medicine Creek recognized the Puyallup Tribe, and at all times since has continued to extend recognition whenever the occasion arose. Thus, Congress since the Treaty of Medicine Creek has enacted many special statutes relating to and, hence, recognizing the Puyallup Tribe. See, e.g., 24 Stat. 388 (1887); 26 Stat. 353 (1890); 27 Stat. 468 (1893); 30 Stat. 87 (1897); 33 Stat. 565 (1904); 41 Stat. 27 (1919); 45 Stat. 378 (1928); 46 Stat. 1526 (1931); 56 Stat. 1040 (1942). The last enactment was a correction in the tribal rolls. In addition, the Department of the Interior has actively and continuously recognized the existence of the Puyallup Tribe. See, e.g., the testimony of Mr. Felshaw, Superintendent of the Western Washington Indian Agency (St. 1367–1372, 1401–1406). In short, there has been shown full recognition of the Tribe by Congress and the executive branch, with no indications or suggestions to the contrary. Accordingly, insofar as the lower court attempted to judicially ascertain the nonexistence of the Puyallup Tribe based upon ethnological and cultural assimilation considerations, its action was plainly beyond its jurisdiction.

It is equally plain that, insofar as its conclusion that the Puyallup Tribe does not exist as a tribe purports to be based upon a construction of congressional action and intent, its conclusion is clearly erroneous. Neither the fact that the members of the Tribe are citizens nor that much of the land has been alloted in severalty pursuant to congressional authority has any bearing on the existence of the Tribe. See case cited *supra,* pp. 7–8.

II

State fishing laws and regulations must afford protection for treaty-secured Indian fishing rights

The permanent injunction against the Indians in the instant case, prohibiting them from fishing except in compliance with the laws and regulations of the State of Washington, fails to give *any* recognition to the rights secured to the Indians by Article III of the Treaty of Medicine Creek, which provides (10 Stat. 1132):

> The right of taking fish at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens * * *.

A treaty with an Indian tribe has the same force and effect as a treaty with a foreign nation and consequently is the supreme law of the land binding upon state courts and legislatures. *Cherokee Nation* v. *Georgia,* 5 Pet. 1 (1831); *United States* v. *Winans,* 198 U.S. 371 (1905). Since the State of Washington's Enabling Act, Act of February 22, 1889, 25 Stat. 676, provides that the law existing in the territory at the time of admission remains in effect, this Treaty remained in full force and effect.[3] In the Treaty a nonexclusive right to take fish at the accustomed places was reserved by and secured to the Indians, unlike their white counterparts who have only a privilege to take fish at the same places, and that only because the Indians agreed to share in common. As the Supreme Court stated in *United States* v. *Winans,* 198 U.S. 371, 381 (1905): "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." That the fishing rights of the Indians under a treaty are differ-

[3] Of course, there was no repeal by implication. See *State* v. *Satiacum,* 50 Wash. 2d 515, 314 P. 2d 400, 405 (1957).

ent and greater than the privilege enjoyed by others in the same area has been subsequently recognized and refined by the Supreme Court in *Seufert Bros. Co.* v. *United States,* 249 U.S. 194 (1919), and *Tulee* v. *Washington,* 315 U.S. 681 (1942); by this Court in *State* v. *Satiacum,* 50 Wash. 2d 515, 314 P. 2d 400 (1957), and *State* v. *McCoy,* 63 Wash. 2d 421, 387 P. 2d 942 (1963); and by the Ninth Circuit in *Makah Indian Tribe* v. *Schoettler,* 192 F. 2d 224 (1951), and *Maison* v. *Confederated Tribes of Umatilla Indian Res.,* 314 F. 2d 169 (1963). There is nothing in *Tulee* to indicate a retreat from the position that the treaty-secured rights of the Indians must be given effect in any state laws or regulations relating to fishing. All cases must perforce be decided within the framework of the facts and assertions presented. In *Tulee* the Indians claimed an absolute unrestricted right to take fish in whatever amount and by whatever means they wished, without regard to any principles of conservation. The State, on the other hand, urged that its regulations were valid because they did not discriminate against Indians as such. It was in this context that the court stated (315 U.S. at 684):

> We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power 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, it forecloses the state from charging the Indians a fee of the kind in question here.

Thus, *Tulee* held that Indians had greater fishing rights than others and that their rights were not subject to the license requirements of the State. As evidenced by the divided opinion of this Court in *State* v. *Satiacum* and *State* v. *McCoy, supra,* and by the decision of the Ninth Circuit in *Maison* v. *Confederated Tribes of Umatilla Indian Res.,* 314 F. 2d 169 (1963), the extent to which a state may regulate the exercise of these rights in the interest of conservation under the philosophy of *Tulee* dictum is not free from dispute.

In any event, it is clear that, where appropriate tribal or federal authority does undertake to regulate exercise of the treaty-reserved rights, state authority may not ignore the existence of such regulations. The problem is thus

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reduced to defining the reserved treaty right and ascertaining the effect of the regulation in question upon that right. We deal under Point III with regulations of the Secretary of the Interior. It is enough at this point to note that the permanent injunction against fishing in the instant case, except in accordance with the regulations applicable to all, absolutely ignores the treaty-reserved rights of these Indians. Conclusion of Law IV, *supra,* is plainly contrary to *Tulee.* For this reason alone, the judgment and decree must be reversed.

III

The scope of the treaty-reserved rights may best be determined by a federal authority

We must start with the established principle that interpretation of a treaty with an Indian tribe, like a treaty with a foreign nation, presents a federal question. *Worcester* v. *Georgia,* 6 Pet. 515 (1832). Had the Treaty itself, or Congress in contemporary or subsequent legislation, more specifically defined the right reserved or regulated how it was to be exercised (which would be another way of defining its scope), there would be no problem today. For,

clearly, the federal statute would prevail, and no state law or regulation could impinge upon the Indians' exercise of the right as defined or regulated. See *Missouri* v. *Holland,* 252 U.S. 416 (1920), where the Supreme Court rejected the argument that implementing legislation pursuant to a treaty interfered with exercise of state regulatory provisions as to wildlife.

Congress has not passed implementing legislation on the provision of the Treaty here involved. However, Congress has delegated to the Secretary of the Interior and the Commissioner of Indian Affairs the functions, duties and obligations to execute its policies in broad terms in the Act of June 17, 1957, 71 Stat. 157, successor to R.S. 441, 5 Stat. 485, and R.S. 463, 25 U.S.C. sec. 2. Exercise of all appropriate powers to execute what has been called the federal guardianship of the Indians has been many times sustained without any additional specific statute authorizing the particular action. In *Armstrong* v. *United States,* 306 F. 2d 520 (C.A. 10, 1962), in sustaining the conviction of persons interfering with Interior employees in the performance of their duties on an Indian reservation, the court said (p. 522):

The United States, by virtue of its status as guardian, is responsible for the protection of the Indians on a reservation so long as they are wards of the government. United States v. Sandoval, 231 U.S. 28, 46, 34 S. Ct. 1, 58 L. Ed. 107; Choctaw Nation v. United States, 119 U.S. 1, 27, 7 S. Ct. 75, 30 L. Ed. 306; United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228. Congress has provided:

"The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." Rev. Stat. § 463 (1875), 25 U.S.C.A. § 2.

This statute furnishes broad authority for the supervision and management of Indian affairs and property commensurate with the obligation of the United States. United States v. Birdsall, 233 U.S. 223, 34 S. Ct. 512, 58 L. Ed. 930; United States v. Ahtanum Irrigation Dist., 9 Cir., 236 F. 2d 321, cert. denied 352 U.S. 988, 77 S. Ct. 386, 1 L. Ed. 2d 367; United States v. Anglin & Stevenson, 10 Cir., 145 F. 2d 622, 628, cert. denied 324 U.S. 844, 65 S. Ct. 678, 89 L.

> Ed. 1405; Rainbow v. Young, 8 Cir., 161 F. 835. See United States ex rel. West v. Hitchcock, 205 U.S. 80, 84, 27 S. Ct. 423, 51 L. Ed. 718. The management of water and water projects on a reservation is clearly within the scope of the general statutory authority granted to the Commissioner of Indian Affairs, and, in addition, specific legislation has been enacted pertaining to the management of water on reservations. United States v. Ahtanum Irrigation District, supra; 25 U.S.C.A. § 381 et seq.

Justice Van Devanter, then Circuit Judge, in *Rainbow* v. *Young,* 161 Fed. 835 (C.A. 8, 1908), when sustaining the authority of the Secretary of the Interior to exclude collectors from a reservation on the day payments were to be made to the Indians, referred to R.S. 441 and 463, *supra*; to R.S. 2058, defining the general duties of Indian agents; and to R.S. 2149 as to removal of persons from Indian reservations, and said (p. 838):

> No other statute imposes any limitation applicable here upon the exercise of the authority so given to the Commissioner, and upon this record it cannot reasonably be doubted that the Commissioner, in giving to the superintendent

> the direction before named, acted with the approval of the Secretary of the Interior. * * * [Citations omitted.]
>
> In our opinion the very general language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary of the Interior, to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage.

Illustrative of the same approach is *United States* v. *Birdsall,* 233 U.S. 223 (1914), holding that, despite the absence of written rule or regulation authorizing the Commissioner to make recommendations concerning sentences for convictions of violation of the laws covering liquor traffic with the Indians, bribery to influence action in the making of such recommendations was a violation of the statute punishing bribery to influence official action. And in *Parker* v.

Richard, 250 U.S. 235 (1919), as to supervision of lease income of restricted Indian lands, Justice Van Devanter briefly remarked (p. 240): "In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. Rev. Stat. §441, 463." See also *West* v. *Hitchcock,* 205 U.S. 80, 85 (1907); cf. *Bishop of Nesqually* v. *Gibbon,* 158 U.S. 155, 166 (1895); *United States* v. *Barnsdall Oil Co.,* 127 F. 2d 1019, 1021 (C.A. 10, 1942).

In *Rainbow, supra,* Justice Van Devanter had quoted from *United States* v. *Macdaniel,* 7 Pet. 1 (1833), that (pp. 14–15):

> "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of govern-

> ment would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government."

In *Federal Indian Law* (G.P.O. 1958), these basic principles are summarized as follows: (p. 49) "Federal administrative power over Indian affairs, vested in the Secretary of the Interior, is virtually all-inclusive." (pp. 51–52) "* * * Discretionary power to act in situations not specifically provided for, often is lodged in the Secretary."

It must be remembered that the treaty-reserved right of the Indians is a "reservation" in a very real sense. For it reserves to them a right to make a specified use of definite areas of land above and below water, i.e., the accustomed fishing places. Thus, even if one of the usual and accustomed places to fish has been, in fact, patented to a third party, the Indian retains his superior right to use it in accordance with the terms of the treaty. *United States* v.

Winans, 198 U.S. 371 (1905). The source of the Secretary's authority to implement the treaty reservation by regulations stems basically from the existence of the treaty reserving the fishing rights off the geographically defined reservation, as well as on the reservation itself. It would be strange indeed if the Secretary could implement one part of the treaty and not another. No question is here presented with respect to whether or not the United States, through the Secretary of the Interior, has or purports to exercise exclusive territorial jurisdiction in the sense of Article I, section 8, clause 17, of the Constitution. Of course neither does in this situation.

The Secretary has under consideration regulations with respect to exercise of the treaty-reserved fishing rights outside the physical boundaries of the reservation and has published notice of the proposed rule-making at 30 Fed. Reg. 8969. (For the convenience of the Court the proposed rule-making is printed as an Appendix to this brief.) The regulations under consideration are intended to accommodate the need for conservation and the fishing industry, with recognition and protection of the treaty-reserved fishing rights. If such regulations

are issued, it will be the position of the United States that, so long as an Indian with such a right conducts his fishing within the framework of the federal regulation, that activity will be immune from state regulation.

Until such time as regulations are promulgated, we submit that, at the very least, the burden is on the state enforcing authority to show specifically that the Indian right has been recognized and is afforded the special protection to which it is entitled by reason of its treaty reservations. *Maison* v. *Confederated Tribes of Umatilla Indian Res.,* 314 F. 2d 169 (C.A. 9, 1963). In the instant case, no such recognition is contained in the fishing regulations, nor has a showing otherwise been made that such recognition exists and, more to the point, no such qualification is even suggested in the broad permanent injunction issued.

CONCLUSION

For the foregoing reasons the judgment and decree should be reversed.

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APRIL 1966.

APPENDIX

PROPOSED RULE MAKING

[30 Fed. Reg. 8969]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[25 CFR Part 255]

OFF-RESERVATION TREATY FISHING

Notice of Proposed Rule Making

Notice is hereby given, pursuant to section 4(a) of the Administrative Procedure Act of June 11, 1946 (60 Stat. 237), that the Secretary of the Interior proposes to amend Title 25, Code of Federal Regulations, by adding a new Part 255—Off-Reservation Treaty Fishing. The proposed regulations are set forth in tentative form below.

The proposed regulations are to be adopted under the authority contained in section 22, Title 5, United States Code, and sections 2 and 9, Title 25, United States Code, and are intended to provide a framework within which the exercise of off-reservation fishing rights

reserved to certain Indian tribes under treaties with the United States may be subjected to Federal restrictions and controls wherever required for conservation of the fishery resources.

Prior to the final adoption of the proposed regulations, consideration will be given to any data, views, or suggestions pertaining thereto which are submitted in writing to the Commissioner of Indian Affairs, Department of the Interior, Washington, D.C., 20242, within the period of 30 days from the date of publication of this notice in the Federal Register.

The new Part 255 reads as follows:

Sec.

AUTHORITY: The provisions of this Part 255 issued under 25 U.S.C. 2 and 9; 5 U.S.C. 22.

§ 255.1 Purpose.

(a) The purposes of these regulations are:

(1) To assist in promoting the development, management, conservation, and protection of the Nation's fisheries resources;

(2) To assist in protecting the off-reservation fishing rights which were reserved to certain Indian tribes under their treaties with the United States;

(3) To assist in the orderly administration of Indian affairs;

(4) To remove uncertainties resulting from recent Federal and State court decisions over the precise fishing restrictions with which Indians with treaty rights must comply;

(5) To assist the States in enforcing their laws and regulations for the conservation of fish and wildlife to the extent permitted under any Federal law or treaty applicable to off-reservation fishing activities of Indians; and

(6) To facilitate consultation and cooperation between the States and the Indian tribes in the management and improvement of fisheries resources affected by such Federal laws or treaties.

(b) The following conservation regulations are found to be necessary to assure that the nonexclusive rights reserved to certain Indians by treaty to fish at usual and accustomed places outside the boundaries of an Indian reservation shall be protected and preserved for the benefit of present and future members of such tribes and in a manner consistent with the nonexclusive character of such rights. Any exercise of an Indian off-reservation treaty fishing right shall be in accordance with these regulations,

except as may be otherwise authorized by tribal regulation approved by the Secretary of the Interior or his designee or permitted by less restrictive requirements of State law.

§ 255.2 Definitions.

As used in these regulations:

(a) "Enforcement officer" means (1) any special officer of the Bureau of Indian Affairs, U.S. Game Management Agent, U.S. Fishery Management Agent or any other officer or employee of the Department of the Interior or any Indian tribe authorized by the Secretary of the Interior to enforce these regulations, and (2) any officer of any State or political subdivision thereof authorized to enforce State fish or game laws if there is in effect an agreement between the Secretary of the Interior and the fish or game management agency or agencies of such State for the recognition and enforcement of these regulations;

(b) "Off-reservation treaty fishing permit," "permit," or "permit card" mean a permit or card issued pursuant to § 255.3;

(c) "Off-reservation treaty fishing rights" or "treaty right" mean any right reserved or granted to one or more Indian tribes, bands, or groups by treaty with the United States to take, cure, or possess fish at usual and accustomed places outside the boundaries of an Indian Reservation in common with others;

(d) "These regulations" means the regulations comprising this Part 255 of Title 25 of the Code of Federal Regulations together with any regulations adopted pursuant to § 255.7, and any additions thereto or amendments thereof.

§ 255.3 Off-reservation treaty fishing permits.

(a) Subject to the provisions of these regulations, the Commissioner of Indian Affairs or his designee shall, upon application therefor, issue an Indian off-reservation treaty fishing permit to any Indian whom he finds to be a member of a recognized Indian tribe having off-reservation treaty fishing rights. Such permits shall be issued for periods of not to exceed 5 years and shall be renewed upon application so long as the holder remains entitled to off-reservation fishing rights.

(b) Effective January 1, 1968, no such permit shall be issued to any person who is not on an official membership roll of the tribe which has been approved by the Secretary of the Interior. Prior to that date, the Commissioner of Indian Affairs or his designee may issue such a permit to any person who submits evidence of his entitlement thereto satisfactory to the issuing officer. Any person claiming to have been wrongfully denied a permit may appeal the decision of the issuing officer to the Commissioner of Indian Affairs.

(c) Each permit card shall be evidence that the lawful holder is entitled to the off-reservation treaty fishing rights identified in said permit, to be exercised as provided in these regulations.

(d) No charge or fee of any kind shall be imposed for the issuance of an off-reservation treaty fishing permit, provided that this shall not prevent any Indian tribe from imposing any fee or tax upon the exercise of any tribal fishing right.

(e) No person shall be issued a permit or permits on the basis of membership in more than one tribe at any one time.

(f) All permit cards issued pursuant to these regulations shall be and remain the property of the United States and may be retaken by any enforcement officer from any unauthorized holder (including the permittee during any period for which the permit may have been suspended or revoked pursuant to these regulations). Any card so retaken shall be immediately forwarded to the officer who issued it.

(g) Each permit card issued under these regulations shall specify the period for which it is effective and shall state the name, address, tribal affiliation and enrollment number (if any) of the holder, identify the treaty under which the holder is entitled to fishing rights, contain such additional personal identification data as may be required on fishing licenses

issued under the law of the State or States within which it is valid, and be signed by the issuing officer and countersigned by holder.

(h) Upon the revocation or suspension of the off-reservation treaty fishing privileges of the holder of a permit by any court of Indian Offenses or tribal court for violation of any tribal fishing ordinance incorporating or adopting the regulations in this Part 255 and approved by the Secretary of the Interior, any such permit issued hereunder may be revoked or suspended for a like period. No permit shall be issued to any person whose [8970] off-reservation treaty fishing privileges may have been suspended or revoked by such court, during the period of such suspension or revocation.

§ 255.4 Unauthorized use of permit cards—only permittees to fish.

(a) No permit holder shall allow any use of his permit card by any other person. Any use of another's permit card by any Indian subject to these regulations shall constitute a violation of these regulations.

(b) Whenever exercising off-reservation treaty fishing rights no Indian shall allow anyone other than a holder of a currently valid permit under these regulations to fish for him, to use gear marked pursuant to these regulations, or to assist him in fishing.

§ 255.5 Possession of permit card.

Any Indian fishing under an off-reservation treaty fishing right shall have a currently valid off-reservation treaty fishing permit card in his immediate personal possession while so fishing, or while having in his possession outside an Indian reservation any fish so caught. He shall upon demand display the permit card to any enforcement officer.

§ 255.6 Identification of fishing equipment.

All fishing gear or other equipment used in the exercise of any off-reservation treaty fishing right and not in the immediate personal possession of such Indian shall be marked in such manner as shall be prescribed in regulations issued pursuant to § 255.7 to disclose the identity of its owner or user.

§ 255.7 Area regulations.

(a) The Commissioner of Indian Affairs and the Commissioner of Fish and Wildlife shall from time to time jointly recommend to the Secretary of the Interior specific conservation regulations to govern Indian off-reservation treaty fishing for areas found by them to be in need of Federal restrictions on Indian fishing as a means of assuring the conservation and wise utilization of the fishery resources for the benefit of the Indians and other persons entitled to the enjoyment thereof. Such regula-

tions shall be designed to prevent, in conjunction with appropriate State conservation regulations governing fishing by persons not fishing under treaty rights, the depletion or impairment of the fishery resources.

(b) In formulating their recommendations for regulations to be promulgated by the Secretary of the Interior, the two Commissioners shall seek the views of the affected Indian tribes, of the fishery conservation agency of any affected State, or of other interested persons as may desire to participate in the proposed rule making. A general notice of proposed rule making shall be published in the FEDERAL REGISTER to afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally as may be determined by the Secretary of the Interior. Following the expiration of the time allowed for the submission of written data, views, or arguments, the final recommendations of the Commissioners shall be submitted to the Secretary of the Interior for appropriate action. Such of the recommended regulations or modifications thereof as the Secretary shall adopt shall become effective on such date as the Secretary of the Interior shall prescribe.

(c) Any regulations issued pursuant to this section shall contain provisions for invoking

temporary emergency closures or restrictions or the relaxation thereof at the field level when necessary or appropriate to meet conditions not foreseeable at the time the regulations were issued.

(d) Regulations issued pursuant to this § 255.7 may include such requirements for recording and reporting catch statistics as the Secretary of the Interior deems necessary for effective fishery management.

§ 255.8 Enforcement.

(a) Any fishing or related activity which is contrary to the provisions of the regulations in this Part 255 and the laws of the State in which it occurs shall be deemed to be outside the scope of any off-reservation treaty fishing rights, and the offender shall be subject to arrest and prosecution under State law: *Provided,* That this paragraph (a) shall not apply to Indians fishing within any Indian reservation or within reservation boundary waters in which an Indian tribe has exclusive fishing rights.

(b) Any unattended fishing gear which is not marked or labeled for identification as required by the regulations in this Part 255 shall be presumed not to be used in the exercise of an off-reservation treaty fishing right and shall be subject to control or seizure under State law.

§ 255.9 Savings provisions.

Nothing in these regulations (25 CFR Part 255) shall be deemed to:

(a) Prohibit or restrict any persons from engaging in any fishing activity in any manner which is permitted under State law;

(b) Deprive any Indian or any Indian tribe, band or group of any right which may be secured to him or to it by any treaty or other law of the United States;

(c) Permit any Indian to exercise any tribal fishing right in any manner prohibited by any ordinance or regulation of his tribe;

(d) Enlarge the right, privilege, or immunity of any person to engage in any fishing activity granted or reserved by treaty with the United States;

(e) Exempt any person or any fishing gear, equipment, boat, vehicle, fish, or fish products, or other property from the requirements of any law or regulation pertaining to safety, obstruction of navigable waters, national defense, security of public property, pollution, health and sanitation, or registration of boats or vehicles; or

(f) Abrogate or modify the effect of any agreement affecting fishing practices entered into between any Indian tribe and the United States, or any State, or agency of either.

JOHN A. CARVER, JR.,
Under Secretary of the Interior.

JULY 5, 1965.

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