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Appellants' Reply Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-3999

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

and

QUINAULT INDIAN TRIBE,

Plaintiff-Intervenor-Appellee,

vs.

STATE OF WASHINGTON, et al.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON AT SEATTLE,
HONORABLE WALTER E. CRAIG, JUDGE

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I.

CONTRARY TO RESPONDENTS' CLAIMS, THE STATE OF THE LAW WAS UNCLEAR PRIOR TO THIS LITIGATION MAKING CITATION FOR CONTEMPT INAPPROPRIATE

Throughout their several responsive briefs, the United States, the Quinault Tribe, and other interested tribes seek to leave this court with an impression that, in January, 1983, the pertinent rules of law were so crystal-clear that the enforcement action complained of could only have been openly contumacious and contemptuous in nature. The impression sought to be made is a false one.

On this point, generally, we respectfully request that this Court consider the following:

1. The State v. Stritmatter Decision.

In January, 1981, a nearly identical closure order was adopted by the Department of Game closing the same Chehalis River to fishing by these same two Indian tribes. On appeal to the Washington State Supreme Court by a Washington fish dealer and a Chehalis tribal fisherman convicted of trafficking in fish caught in violation of the closure, it was ultimately held that since the closure order was adopted for the purpose of ensuring proper allocation of catch between treaty Indians (i.e., members of the Quinault Tribe) and non-Indian fishermen, it was invalid as to Chehalis tribal fishermen, since their reservation was created by an 1886 Presidential executive order rather than by treaty. State v. Stritmatter, 102 Wn.2d 516, ___ P.2d ___ (1984). What

is significant here, however, is that all of the justices of the Washington State Supreme Court subscribed unequivocally to the proposition that, as to treaty Indians, so-called allocation closures orders were appropriate and consistent with prior orders in this very litigation. The majority opinion reads as follows at 102 Wn.2d 517-519, 522:

> In Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 61 L.Ed.2d 823, 99 S.Ct. 3055, modified on other grounds sub nom. Washington v. United States, 444 U.S. 816 (1979) (Fishing Vessel), the Supreme Court held that treaty Indians have a right to take a "fairly apportioned share" of each run of fish passing through tribal fishing areas, both on and off the reservation. Fishing Vessel, at 682. This fairly apportioned share is approximately 50 percent of the harvestable fish. Fishing Vessel, at 685.
>
> The Washington State Department of Game manages the fishery resources of this state. Pursuant to state statute, and consistent with the federal and state case law, the Department sets limits on the number of steelhead which may be taken by Indian "treaty fishermen" and by "non-treaty fishermen." See Puget Sound Gillnetters Assn'n v. Moos, 92 Wn.2d 939, 603 P.2d 819 (1979). . . .
>
> Each year the Department determines the total number of steelhead which can be caught by all fishermen, Indian and non-Indian, and yet allow a sufficient number of fish to return upstream to spawn. By various means, the Department determines the number of fish caught by Indian and non-Indian fishermen during the open season. Once it is determined that a group has caught its 50 percent share, the river is then closed to further fishing by that group.
>
> In these efforts to manage steelhead runs, the Department of Game issues two types of closure orders. Through "allocation closures", the Department stops the taking of fish by either treaty fishermen or nontreaty fishermen to prohibit one group or the other from taking more than their 50 percent share. A "conservation closure" stops all fishing by both groups to allow the necessary number of fish to return upstream to spawn. The Supreme Court has held that conservation closures operate against Indians, treaty or nontreaty, as well as non-Indians. Antoine v. Washington, 420 U.S. 194, 207, 43 L.Ed.2d 129, 95

S.Ct. 994 (1975).

On January 13, 1981, the Department of Game issued an allocation closure order which provides in relevant part:

> WAC 232-12-130 Closure of Nisqually and Chehalis River systems . . . to the taking of steelhead trout with gill nets and seines by treaty Indians.
>
> Data gathered by the Department of Game . . . indicates that the treaty share of harvestable steelhead has been reached or will have been reached on the effective date of this order. Therefore, a closure of Nisqually and Chehalis river system . . . is necessary to assure non-treaty sports fishermen their right to take their share of those remaining steelhead.
>
> [The following] rule is therefore adopted as an emergency[:]
>
> . . .
>
> It shall be unlawful for all persons to take, fish for, or possess steelhead trout with gill nets and seine gear in the . . . Chehalis River system . . . effective 6:00 p.m., January 14, 1981.
>
> . . .
>
> The closure order in the present case was not necessary for conservation, but instead was an allocation closure, necessary "to assure non-treaty sports fishermen their right to take their share share . . . " Since the nontreaty fishing rights of the Chehalis Tribe are subject only to regulations aimed at conserving the species, the closure order here was an invalid exercise of the State's power as it operated against the Chehalis Tribe's on-reservation fishing.

The point of the foregoing excerpt should be obvious. If the state's lack of authority to promulgate and enforce closure orders for the purpose of insuring proper treaty allocation was and is so clear, then it seems strange, indeed, that the members of the Washington Supreme Court took the contrary view in Stritmatter, supra, that such closures are quite consistent with prior orders in this very litigation.

2. Confusion about the self-regulatory status of the Quinault Tribe.

When the record is examined closely, one is hard-pressed to identify any state actor who deliberately violated any prior order of this court. It seems clear that all of the state actors proceeded in an honest belief that Quinault tribal fishermen enjoyed no special status which insulated them from action to ensure proper treaty allocation of the fishery in question. As the Quinault Tribe itself notes at page 8 of its brief on this appeal, the game official in charge of the enforcement action double-checked to insure that the action would not violate any prior order of the court in this litigation:

> On January 19, 1983, State regional Wildlife Officer John E. Gillespie, received advice from an assistant attorney general, that the state closure was legal and "to arrest Quinaults if they don't comply." QN-M-14; Tr. 160-61; FF 20 [E.R. 63] This advice was apparently based on the conclusion that the decision of the Supreme Court in Passenger Fishing Vessel had terminated self-regulating status. Report and Recommendation at 8 [E.R. 36] Under challenge by both the Quinault Nation and United States the state explicitly abandoned this argument. Id.

Brief of Appellee Quinault Indian Nation, p. 8. Indeed the evidence of record introduced by the Quinault Tribe and the United States corroborates the foregoing statement. In a letter dated July 9, 1979 addressed to then-Governor Dixy Lee Ray, then-Attorney General Slade Gorton advised that the United States Supreme Court had:

> . . . confirmed that the state has the primary management responsiblity for the resource outside of reservation areas and thus Judge Boldt's creation of "self-regulating tribes" which regulate their members

to the exclusion of state regulation has been terminated.

Tribes can control the fishing activities of their members both on-reservation and off-reservation, but when they exercise control over the activities of their members off-reservation, that is an exercise of concurrent jurisdiction with the state, and not of exclusive jurisdiction.

Ex. QN-M-2 at page 2.

3. The citing parties took differing views as to what action constituted a contempt of the court.

Though of lesser significance, it is nevertheless noteworthy here that the Quinault Tribe and the United States openly disagreed in the record of proceedings before the Magistrate on the question of precisely what state action constituted violation of prior orders of the court:

THE COURT: . . .IS IT YOUR POSITION THAT THE STATE VIOLATES OR DOESN'T VIOLATE THE COURT'S INJUNCTIONS BY ADOPTING A REGULATION ABSENT AN ENFORCEMENT OF THE REGULATION?

MR. REICH: WE WOULDN'T HAVE BEEN BEEN HERE, YOUR HONOR, IF THE STATE HAD NOT CHOSEN TO ATTEMPT TO ENFORCE ITS REGULATION WITHOUT PRIOR COURT APPROVAL.

THE COURT: SO, I THINK YOU HAVE TOLD ME IT IS NOT A VIOLATION OF THE COURT'S ORDER, THEN, TO ADOPT THE REGULATION?

MR. REICH: IT'S NOT A VIOLATION. WHAT THE COURT'S ORDER SAYS IS TO REGULATE, ATTEMPT TO REGULATE OR INTERFERE WITH THE FISHING OF TRIBAL MEMBERS. THE BARE ADOPTION OF A CLOSURE AND THE SENDING OF IT TO THE TRIBE BY THE STATE, TELLING -- AND THE STATE TELLING US THAT IT THINKS THAT THE ALLOCATION HAS BEEN MET, WE WOULD NOT BE HERE FOR A CONTEMPT PROCEEDING. I THINK THAT THE COURT'S DECISION AT -- WE JUST VIEW IT AS A COMMUNICATION TO THE TRIBE. AS AN ORDER, IT REALLY HAS NO LEGAL EFFECT, BECAUSE THAT'S WHAT THE COURT ORDERS PROVIDE. THE STATE SENDS US THAT, AND THE COURT'S ORDERS AT PAGE 341 TELLS THE TRIBE THAT IT HAS AN OBLIGATION TO REVIEW IT AND DETERMINE WHETHER OR NOT THERE IS A VALID BASIS FOR A CLOSURE. IF THERE IS, WE'RE UNDER AN OBLIGATION FOR TO ADOPT IT, AND IF WE DECIDE THAT THERE ISN'T, THE STATE IS UNDER AN OBLIGATION TO GO TO THE COURT FOR RELIEF UNDER THAT

PROVISION. . . .

THE COURT: THANK YOU. MR. DYSART?

MR. DYSART: YOUR HONOR, I WOULD MAKE JUST ONE POSSIBLE COMMENT IN RESPECT TO A QUESTION YOUR HONOR ASKED ABOUT WHETHER PASSAGE OF A REGULATION WOULD BE A VIOLATION OF THE ORDER. IN OUR VIEW, IT PROBABLY WOULD BE A VIOLATION OF THE ORDER, BUT MORE OF A TECHNICAL ONE, AND CERTAINLY IF NO ATTEMPT WERE MADE TO ENFORCE IT OR APPLY IT, WE WOULDN'T BE COMING TO THE COURT TO SEEK COURT ACTION. . . . BUT AS FAR AS BEING A VIOLATION, I THINK, YES, IT IS VIOLATION. IT COULD CONCEIVABLY HAVE SOME INHIBITING EFFECT ON INDIVIDUALS, AND IT WAS JUST ONE OF THE THINGS THAT THEY'RE NOT SUPPOSED TO BE DOING, . . .

Tr., April 6, 1983, pp. 73-76.

Again, the point of the foregoing should be obvious. When the citing parties themselves are in disagreement as to what precisely it is that constitutes violation of prior court orders in this case, it becomes inappropriate to hold the party or parties cited for contempt to a higher standard of certainty.

4. Prior adoption of closure orders and acquiescence therein.

As noted in our opening brief at p. 11, note 8, the state had adopted similar allocation closure orders for several years preceding the incident giving rise to the contempt order here. The record of proceedings below also indicates that, in the same manner, tribal nets had been confiscated between 1975 and 1978 pursuant to allocation closure orders adopted by the state. Tr., pp. 158-160. We only repeat here the basic point that even if such closures were in technical violation of prior orders of this Court, the failure of the parties to earlier address the question directly before the court served rather obviously to lull state officials into a sense of false security that their actions were

permissible under the court's orders. At the least, such prior developments suggest that contempt is too draconian a measure in this context.

5. The limited nature of tribal self-regulatory status implies the existence of concurrent state jurisdiction to insure proper treaty allocation.

On this appeal, the United States, the Quinault Tribe, and the other appellee tribes argue strenuously that the sacrosanct nature of tribal self-regulatory status has always been clear and that fishing activity by tribal members is inviolate, except to the extent that the court itself might otherwise determine. This is not, however, the way self-regulatory status was characterized when the original decision of Judge Boldt was before this same court on appeal. Indeed, the United States, in particular, then argued that the capacity for tribal self-regulation was extremely limited:

> F. The court's provision for limited tribal self-regulation was correct.
>
> As we have explained earlier, the Tribes' have jurisdiction to regulate their members' off-reservation fishing, subject to necessary restriction by the State to preserve the resource, and to allocate equal shares. The district court implemented this principle in light of the facts of the case, recognizing "self-regulating" Tribes who meet certain conditions and qualifications and other Tribes which do not. (Decision, pp. 28-38) The State mounts a broad attack on this ruling, much of which has been shown to be refuted by this Court's recent decision in Settler. As we have also shown, the district court did not "preempt" State jurisdiction to regulate treaty Indians fishing off-reservation. (Conclusion, P. 37) The necessary exercise of State power is preserved; in fact, emergency regulations may be immediately imposed without prior approval.

> (Injunction, P. 12) Drawing on the demonstrated responsibility and capacity of the Yakima Nation [footnote omitted] and the Quinault Tribe, [footnote omitted] as well as the State's views of elements of competent regulation, [footnote omitted] the district court provided for limited tribal self-regulation under stringent conditions designed to assure responsible control [citation omitted]; but, even so, the Tribal regulations, under the court's opinion, only establish a rebuttable presumption of validity, subject to testing under the continued jurisdiction of the court. Moreover, co-operation between the Tribes and the State has always been required because of on-reservation fishing. This decision, defining the permissable scope of tribal and State off-reservation regulation, thus provides the vehicle to accomplish a greater coordination in the proper allocation of the entire harvestable portion of the resource.[footnote omitted]

Brief for United States of America, United States of America, et al. v. State of Washington, et al., 9th Circuit Nos. 74-2414, et al., December 12, 1974, pp. 44-45.

Again, then, the suggestion that the inviolate nature of tribal self-regulatory status must have been fully understood by the state in the instant context presumes, in effect, that state actors in this proceeding accorded greater force and effect to tribal self-regulatory status than did the United States at the time of the appeal of the original decision.

II.

THE ISSUANCE OF AN UNSOLICITED BROAD INJUNCTION AFFECTING PARTIES AND ISSUES NOT BEFORE THE COURT WAS ERROR.

On this appeal, the United States, the Quinault Tribe and the appellee tribes take the position that the injunction entered by the District Court merely restates the long-understood law of the case. For example, the United States argues as follows at page 11 of its brief herein:

> The District Court's ruling was neither mischievous or even novel. Rather, it merely reflected the law of this case which has long enjoined the State from interfering with all treaty fisheries, not just those of self-regulating tribes, except for conservation purposes.

As is apparent, however, from the very first sentence of the previously-excerpted portion of the brief of the United States in the original appeal (set out at page 7, supra), the current position of the United States is directly contrary to that which it earlier took. Earlier, the United States had argued that:

> . . . The tribes have jurisdiction to regulate their members off-reservation fishing, subject to necessary restrictions by the state to preserve the resource, and to allocate equal shares.

Brief for the United States, supra, dated December 12, 1974 at p. 44. (Emphasis added).

Indeed, there is really no question about the matter--the injunction in this proceeding profoundly alters the relationship between the State of Washington and all of Washington's treaty tribes. The injunction effectively qualifies all tribes to self-regulate off-reservation fishing exclusively, without requiring them to meet any of the criteria originally outlined by Judge Boldt. Again, it was the United States itself which earlier argued to this Court that those qualifications for self-regulation were properly stringent and difficult to meet:

> To qualify for self-regulation of its off-reservation fishing, the court held, a tribe must demonstrate in a number of specific ways its ability to regulate its members . . . in addition, the tribe must establish written complete fishing regulations, provide identification of fishermen, allow monitoring of catches by the state, and report both on- and off-reservation fish catches to the state . . .

Brief for the United States, supra, dated December 12, 1974 at p. 11. The injunction entered by the District Court, however, effectively obviates the need for a tribe to meet any criteria in order to self-regulate off-reservation fishing by its members.

One related and important point to be emphasized in this reply is that the proceeding here involves only the Quinault Tribe, the United States and officials of the Washington State Department of Game. All of the evidence adduced below pertained to the Quinault Tribe, the Chehalis Tribe and steelhead fishing on the Chehalis River. The injunction first proposed by the magistrate after hearing, effectively grants self-regulatory status to all tribes and by its terms binds all state officials, to include those of the Washington Department of Fisheries. Had the State been fairly apprised of the possibility of such far-reaching injunctive relief in advance of hearing, the evidence adduced would most certainly have addressed the degree of sophistication in governmental affairs (or lack thereof) of many of Washington's treaty tribes and the inability of many of those tribes to meet other criteria originally outlined by Judge Boldt. Furthermore, the evidence would have addressed the peculiar problems of the Washington Department of Fisheries and its management of the salmon resource throughout the case area. As this matter has proceeded, it seems to have run afoul of Federal Rule of Civil Procedure 65, which contemplates opportunity to fairly meet all pertinent issues pertaining to any request for injunctive relief in some sort of hearing or trial.[1]

The District Court has entered a sweeping injunction altering state-tribal relations in the area of treaty-right fishing without benefit of any evidence to show that changed circumstances warrant such relief. This Court should, at the very least, remand the matter for appropriate resolution in light of the original criteria carefully crafted by Judge Boldt.

DATED this 5TH day of February, 1985.

Respectfully submitted,

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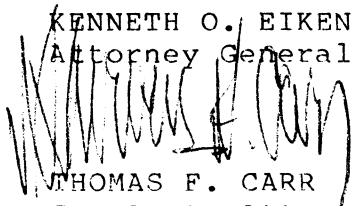

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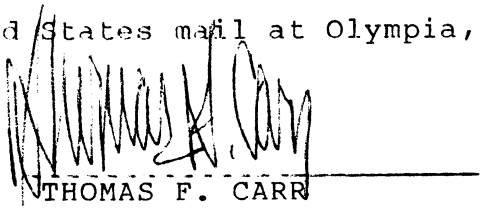
1 Federal Rule of Civil Procedure 65 provides, in pertinent part, that:

> (a) Preliminary Injunction.
> (1) Notice. No preliminary injunction shall be issued without notice to the adverse party.
> (2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which whould be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of February, 1985, served two true and correct copies of the foregoing Appellants' Reply Brief on all counsel of record listed on the attached service list by enclosing said copies in envelopes, properly addressed, and then depositing said envelopes with firstclass postage prepaid in the United States mail at Olympia, Washington.



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