

9-18-1970

## **Docket Entry 1 - Filed complaint. Issued summons**

Follow this and additional works at: <https://digitalcommons.law.uw.edu/us-v-wash-70-9213>

---

### **Recommended Citation**

*Docket Entry 1 - Filed complaint. Issued summons* (1970), <https://digitalcommons.law.uw.edu/us-v-wash-70-9213/6>

This Complaint is brought to you for free and open access by the Federal District Court Filings at UW Law Digital Commons. It has been accepted for inclusion in 70-cv-9213, U.S. v. Washington by an authorized administrator of UW Law Digital Commons. For more information, please contact [lawref@uw.edu](mailto:lawref@uw.edu).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

STAN PITKIN  
United States Attorney  
  
1012 United States Courthouse  
Seattle, Washington 98104  
  
(206) 583-4735  
  
Attorney for Plaintiff,  
United States of America

FILED IN THE  
UNITED STATES DISTRICT COURT  
Western District of Washington

SEP 18 1970

HAROLD W. ANDERSON, CLERK  
By [Signature], Deputy

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
STATE OF WASHINGTON,  
  
Defendant.

CIVIL NO. **9213**  
  
C O M P L A I N T

COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTION

The United States of America, by Stan Pitkin, United States Attorney for the Western District of Washington, acting under authority of The Attorney General and at the request of the Secretary of the Interior, complains and alleges as follows:

FIRST CLAIM FOR RELIEF

1. This Court has jurisdiction by reason of the fact that the United States is plaintiff. 28 U.S.C. § 1345.
2. The United States brings this action on its own behalf and on behalf of the Puyallup Tribe of the Puyallup Reservation, the Nisqually Indian Community of the Nisqually Reservation, the Muckleshoot Indian Tribe of the Muckleshoot Reservation, the Skokomish

*[Handwritten signature]*  
*[Handwritten mark]*

1 Indian Tribe of the Skokomish Reservation, the Makah Indian  
2 Tribe of the Makah Indian Reservation, the Quileute Tribe of  
3 the Quileute Reservation, and the Hoh Tribe or Band of  
4 Indians which are tribes or communities of Indians recog-  
5 nized as such by the Secretary of the Interior.

6 3. The United States has entered into treaties with  
7 the tribes named in paragraph 2 as follows:

8 The Treaty of Medicine Creek on December 26, 1854,  
9 with the Puyallup, Nisqually and other Tribes,  
10 10 Stat. 1132.

11 The Treaty of Point Elliott on January 22, 1855,  
12 with various tribes and bands including the Indians  
13 who now comprise the Muckleshoot Indian Tribe,  
14 12 Stat. 927.

15 The Treaty of Point No Point on January 26, 1855,  
16 with the Skokomish and other Tribes, 12 Stat. 933.

17 The Treaty with the Makahs on January 31, 1855,  
18 12 Stat. 939.

19 The Treaty of Olympia on July 1, 1855 and  
20 January 25, 1856, with the different tribes and bands  
21 of the Qui-naielt and Quil-leh-ute Indians, including  
22 the Hoh Tribe or Band of Indians, 12 Stat. 971.

23 Each of said treaties contains a provision securing to the  
24 Indians certain off-reservation fishing rights. The follow-  
25 ing provision from the Treaty of Medicine Creek is typical  
26 of these treaty provisions:

27 "The right of taking fish, at all usual and  
28 accustomed grounds and stations, is further  
29 secured to said Indians, in common with all  
30 citizens of the Territory, and of erecting  
31 temporary houses for the purpose of curing,  
32 \* \* \* Provided, however, that they shall not  
take shellfish from any beds staked or  
cultivated by citizens, \* \* \* ."

1 Each of the tribes named has usual and accustomed fishing  
2 places within the western portion of the State of Washington,  
3 including, among others, the Nisqually River, the Puyallup  
4 River and Commencement Bay, the White River, the Green  
5 River, the waters of Hood Canal and the rivers flowing into  
6 said Canal, the Straits of Juan de Fuca, the Quileute River  
7 and its tributaries, and the Hoh River. Each of the tribes  
8 named has rights secured by said treaties to take fish,  
9 including the species commonly known as steelhead, at its  
10 usual and accustomed fishing places.

11 4. Subsequent to the execution of the treaties and  
12 in reliance thereon, the members of the tribes have contin-  
13 ued to fish for subsistence and commercial purposes at the  
14 usual and accustomed places. Such fishing provided and still  
15 provides an important part of their subsistence and liveli-  
16 hood.

17 5. The rights of said tribes of taking fish at all  
18 usual and accustomed places guaranteed by said treaties are  
19 subject to regulation by the defendant only to the extent  
20 necessary for conservation. These rights do not derive from  
21 state authority and must be recognized and protected by the  
22 defendant. The defendant's authority to restrict the  
23 exercise of such rights is different from and more limited  
24 than its authority to restrict the state-conferred fishing  
25 privileges of persons who are not the beneficiaries of such  
26 rights. Proper recognition and protection of the rights  
27 require that before restricting their exercise the defendant  
28 must (a) deal with the matter of the Indians' treaty fishing  
29 rights as a subject separate and distinct from that of fish-  
30 ing by others, (b) so regulate the taking of fish that the  
31 tribes and their members will be accorded an opportunity to  
32

1 take, at their usual and accustomed places by reasonable  
2 means feasible to them, a fair and equitable share of all  
3 fish which the defendant permits to be taken from any given  
4 run, and (c) establish that it is necessary (as distinguished  
5 from merely convenient) for conservation to impose the  
6 specifically prescribed restriction on the exercise of the  
7 treaty right.

8 6. The defendant has failed and refused to recognize  
9 and protect the tribes' treaty rights. It has, with limited  
10 exceptions, failed and refused to deal with fishing by the  
11 beneficiaries of such rights as a separate subject when  
12 formulating regulations to govern the taking of fish in the  
13 waters subject to the defendant's jurisdiction. It has,  
14 with limited exceptions, denied that such rights invest the  
15 beneficiaries with any privileges and immunities greater  
16 than those which the defendant chooses to accord citizens  
17 generally. It has dealt with Indian treaty rights as  
18 though they were state-conferred privileges, any exercise of  
19 which the state is not only free to, but is required to,  
20 regulate to the same extent and in the same manner as it  
21 regulates fishing by persons not entitled to exercise said  
22 rights. In conformity with this premise, defendant, with  
23 limited recent exceptions, contends it has no authority to,  
24 and has refused to, recognize or allow any manner of exercise  
25 of the right, or its  
26 / exercise during any time, at any place, or for any purpose  
27 the defendant does not allow other persons to take fish.  
28 It has failed and refused to attempt to so regulate fishing  
29 in waters subject to its jurisdiction as to accord the  
30 beneficiaries of such right an opportunity to catch, at  
31 their usual and accustomed places and by reasonable means  
32 feasible to them, a fair and equitable portion of the fish

1 which are available for catching from a particular run  
2 consistent with adequate escapement for spawning and  
3 reproduction. It has not determined what specific restric-  
4 tions must necessarily be imposed upon the exercise of the  
5 treaty rights in the interest of conservation and informed  
6 the beneficiaries thereof in advance of enforcement what  
7 those restrictions are.

8 It has so framed its statutes and regulations as in  
9 many instances to allow all the harvestable fish from given  
10 runs to be taken by those with no treaty rights before such  
11 runs ever reach the usual and accustomed fishing places to  
12 which the treaties apply.

13 Defendant has by statute and regulation totally closed  
14 many of the usual and accustomed areas of said tribes to all  
15 forms of net fishing while permitting commercial net fishing  
16 elsewhere on the same runs of fish.

17 Defendant has by statute and regulation set aside one  
18 species of fish, the species commonly known as steelhead,  
19 for the exclusive use and benefit of a single category of  
20 persons, namely sportsmen, and has imposed limitations on  
21 the means by which, the purpose for which, and the numbers  
22 of which said species may be taken that are in derogation  
23 of the treaty rights of said tribes.

24 7. Defendant has not undertaken, or caused to be  
25 undertaken, any studies, research, or experimentation--or if  
26 it has, has not introduced the results thereof into any  
27 hearing or public proceeding at which state fishing laws  
28 or regulations were considered or enacted--of the extent to  
29 which it is necessary for the defendant to restrict the  
30 exercise of fishing rights secured to Indian tribes by  
31 treaties of the United States.

1           8. In devising, adopting and promulgating the  
2 regulations by which they authorize the taking of fish for  
3 commercial or sports purposes by persons subject to the  
4 state's jurisdiction, and in establishing and carrying out  
5 fishery management policies and programs and determining  
6 conservation objectives, the defendant and its officers and  
7 agents have not given recognition to, or made proper allow-  
8 ance for, the rights secured to Indian tribes by treaties  
9 of the United States.

10           9. The defendant and various of its officers and  
11 agents claiming to act in their official capacities on  
12 behalf of the defendant, have seized nets and other property  
13 of members of the aforementioned tribes and have harassed,  
14 intimidated, and threatened said members or caused them to  
15 be arrested and prosecuted, for allegedly violating state  
16 laws or regulations pertaining to fishing for, taking of,  
17 or possession of, fish which were taken or sought to be  
18 taken by said members in the lawful exercise of rights  
19 secured by the treaties, and have confiscated or released  
20 fish belonging to said members and taken in the exercise  
21 of said rights, have interfered with, obstructed, and  
22 attempted to prevent the transportation or sale of such  
23 fish so taken by members of said tribes and have otherwise  
24 harassed and interfered with said members in the exercise  
25 of said rights. Defendant, its officers and agents, assert  
26 their intention to continue these actions. In so acting and  
27 threatening to act, the defendant, its officers and agents  
28 are acting wrongfully and in derogation of rights secured by  
29 the treaties.

1           10. As a result of the said wrongful acts of defendant,  
2 the tribes and their members are being unlawfully deprived  
3 of their treaty right, privilege, and immunity to fish at  
4 many of their usual and accustomed places and have suffered,  
5 and will continue to suffer, irreparable damage. The  
6 plaintiff, the tribes and members of the tribes, have no  
7 adequate remedy at law because

8           (a) the damages which have been and will be  
9 sustained are not susceptible of monetary determination;

10           (b) the right of the Indians to fish at their  
11 usual and accustomed places conferred by treaty with  
12 the United States is unique and should be specifically  
13 protected; and

14           (c) in the case of criminal prosecutions  
15 threatened by the defendant or its officers or agents  
16 purporting to act under the authority of the state  
17 statutes, these Indians have no remedy at all except  
18 at the risk of suffering fines, imprisonment and  
19 confiscation of property, involving a multiplicity of  
20 legal proceedings.

21           11. An actual controversy exists between the plaintiff  
22 on the one hand and the defendant on the other as to the  
23 nature and extent of the treaty fishing rights of the tribes  
24 named in this complaint and the attempted regulation thereof  
25 by the defendant.

26  
27                           SECOND CLAIM FOR RELIEF

28           12. Plaintiff restates and re-alleges the allegations  
29 of paragraphs 1 through 11 of this complaint.

30           13. Statutes of the defendant enacted without regard  
31 to Indian treaty rights make it unlawful to use various  
32



1 types of appliances including a set net, a weir, or any  
2 fixed appliance within any waters of the state for the  
3 purpose of catching salmon (RCW 75.12.060) or to lay or use  
4 any net for the purpose of taking fish which the defendant  
5 has classified as game fish, or lay or use any net capable  
6 of taking game fish except as permitted by regulation of  
7 the Department of Fisheries (RCW 77.16.060). Defendant's  
8 statutes also make it unlawful to spear, gaff or snag  
9 salmon except as may be authorized by the Director of  
10 Fisheries (RCW 75.12.070), to use reef nets except in  
11 limited areas specified by statute (RCW 75.12.160). Other  
12 statutes, including RCW 75.08.080, give the defendant's  
13 Director of Fisheries broad authority to regulate the  
14 taking of salmon, and give defendant's Game Commission broad  
15 authority to regulate the taking of steelhead and other  
16 "game fish" (RCW 77.12.040), which authorities have been  
17 exercised without proper regard for Indian treaty rights,  
18 make violation of provisions of defendant's fisheries or  
19 game codes or regulations punishable as a crime (RCW 75.08.  
20 260, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, and  
21 provide for seizure and forfeiture of gear used or held  
22 with intent to use unlawfully (RCW 77.12.100)). Nets and  
23 other items used or "had or maintained for the purpose of"  
24 taking game fish contrary to law or Game Commission rule  
25 or regulation are subject to summary seizure and destruction  
26 by game protectors "without warrant or process."  
27 (RCW 77.12.130). Among other restrictions, regulations of  
28 the defendant issued by said Director of Fisheries make it  
29 unlawful to fish for or possess food fish from any waters  
30 over which the State of Washington has jurisdiction except  
31 as provided for in state statutes or in regulations of the  
32

1 State Department of Fisheries (WAC 220-20-010(1) and (2)).  
2 These regulations also make it unlawful to have an unattended  
3 gill net in the commercial salmon fishery (WAC 220-20-010(5)),  
4 or to place commercial food fish gear in any waters closed  
5 to commercial fishing (WAC 220-20-010(6)), or to attempt to  
6 take food fish by various specified means including gaffing,  
7 snagging, dip netting, spearing, and others, or to possess  
8 food fish so taken (with limited exceptions in connection  
9 with personal use angling) (WAC 220-20-010(11)), or to fish  
10 for or possess food fish taken contrary to provisions of  
11 any special season or emergency closed period prescribed  
12 in Chapter 220-28 of the Washington Administrative Code  
13 (WAC 220-20-010(16)), or to take salmon "for commercial  
14 purposes" i.e., by means other than angling -- within three  
15 miles of any river or stream flowing into Puget Sound  
16 (WAC 220-20-015(2)), or within areas specified in  
17 WAC 220-47-020, or to fish for food fish for personal use  
18 by any means other than angling unless otherwise provided  
19 or possess fish so taken (WAC 220-56-020(2)). Various  
20 officers and agents of the defendant have stated their  
21 intention on behalf of the defendant to apply such laws and  
22 regulations to all Indians fishing at their Tribe's usual  
23 and accustomed places in the exercise of rights secured  
24 by their treaties and have arrested, cited for prosecution,  
25 and seized gear of members of such Tribes for so fishing in  
26 violation of such laws and regulations.

27 14. Defendant's Director of Fisheries has promulgated  
28 regulations which give limited recognition to the treaty  
29 fishing rights of some of the Tribes named in paragraph 2  
30 hereof. (Director of Fisheries Orders No. 866, 875, 885).  
31

1 Said regulations contain limitations and restrictions on  
2 the exercise of treaty rights that are not reasonable and  
3 necessary for conservation and are not the least restrictive  
4 which can be imposed consistent with assuring the necessary  
5 escapement of fish for conservation purposes. Defendant's  
6 Director of Fisheries has failed and refused to promulgate  
7 regulations to provide recognition to, or permit exercise  
8 of, the treaty fishing rights of some Indian Tribes having  
9 treaty fishing rights, including the Muckleshoot Indian  
10 Tribe and the Skokomish Indian Tribe.

11 15. The effect of RCW 75.12.060 and 77.16.060 and the  
12 regulations referred to in paragraph 13 is to close  
13 permanently to the taking of food fish by any means other  
14 than angling, a substantial portion of the area which  
15 contains numerous and important usual and accustomed fishing  
16 places of the Tribes, while permitting commercial fishing  
17 in other areas on migratory fish runs which pass by such  
18 tribal fishing places. The defendant, its officers and  
19 agents, have failed to recognize and to provide sufficiently  
20 for the exercise of the treaty fishing rights of the Tribes,  
21 and their members, at their usual and accustomed places  
22 which failure constitutes a denial of the treaty fishing  
23 rights and an unlawful and unreasonable discrimination in  
24 favor of those fishing commercially or for recreation and  
25 pleasure and against the Tribes and their members. Such  
26 action has not been and cannot be justified as necessary  
27 for the conservation of fish.

28 16. In devising and adopting the rules and regulations  
29 governing the taking of food fish for commercial purposes,  
30 the defendant has failed to give proper recognition or make  
31

1 adequate provision for the exercise of treaty fishing rights  
2 of Indians at their usual and accustomed places and has  
3 adopted regulations which discriminate against the taking  
4 of fish at the usual and accustomed places of the previously  
5 mentioned Indian Tribes in favor of those who take fish at  
6 other locations. In doing so the defendant is unlawfully  
7 discriminating against the exercise of Indian treaty fishing  
8 rights in the recognition and beneficial use of such treaty  
9 rights. Such discrimination results in irreparable damage  
10 to such Tribes and their members.

11 WHEREFORE, plaintiff prays that the Court:

12 1. ORDER, ADJUDGE, and DECREE that

13 (a) Each of the tribes named in this complaint  
14 owns and it may authorize its members to exercise a right  
15 derived from the laws and treaties of the United States to  
16 take fish at its usual and accustomed places, which right  
17 is distinct from any right or privilege of individuals to  
18 take fish derived from common law or state authority, and  
19 the exercise of which is subject to state control only  
20 through such statutes or regulations as have been established  
21 to be necessary for the conservation of the fishery and  
22 which do not discriminate against the exercise of such  
23 right;

24 (b) Before defendant may regulate the taking and  
25 disposition of fish by members of said tribes at usual and  
26 accustomed fishing places pursuant to treaties between said  
27 tribes and the United States:

28 (i) It must establish by hearings preliminary  
29 to regulation that the specific proposed regulation is both  
30 reasonable and necessary for the conservation of the fish  
31

1 resource. In order to be necessary, such regulations must  
2 be the least restrictive which can be imposed consistent  
3 with assuring the necessary escapement of fish for conserva-  
4 tion purposes; the burden of establishing such facts is on  
5 the state.

6 (ii) Its regulatory agencies must deal with  
7 the matter of the Indians' treaty fishing as a subject  
8 separate and distinct from that of fishing by others. As  
9 one method of accomplishing conservation objectives it may  
10 lawfully restrict or prohibit non-Indians fishing at the  
11 Indians' usual and accustomed fishing places without imposing  
12 similar restrictions on treaty Indians.

13 (iii) It must so regulate the taking of fish  
14 that, except for unforeseeable circumstances beyond its  
15 control, the treaty tribes and their members will be  
16 accorded an opportunity to attempt to take, at their usual  
17 and accustomed fishing places, by reasonable means feasible  
18 to them, a fair and equitable share of all fish which it  
19 permits to be taken from any given run.

20  
21 2. Declare RCW 75.12.060, RCW 75.12.070, RCE 77.08.020,  
22 RCW 77.12.130, RCW 77.16.040, 77.16.060, WAC 220.20.010,  
23 WAC 220-20-015(2) and WAC 220-47-020 null and void insofar  
24 as they deny or restrict the right of members of the Tribes  
25 named in this complaint, acting under tribal authorization,  
26 to take fish for subsistence and commercial purposes at  
27 their tribe's usual and accustomed fishing places or to  
28 possess or dispose of fish so taken.

29 3. Declare that the defendant, its officers, agents,  
30 and employees may not apply the provisions of RCW 75.08.260,  
31

1 RCW 77.12.100, 77.16.020, and 77.16.030 in such manner as  
2 to prevent or restrict members of the tribes named in  
3 paragraph 2 hereof from taking fish for subsistence and  
4 commercial purposes at their tribe's usual and accustomed  
5 fishing places or to possess or dispose of fish so taken  
6 without previously having established that the imposition  
7 of such specific restriction is necessary for the conserva-  
8 tion of fish and does not discriminate against the taking  
9 of fish pursuant to such treaty right.

10 4. Enjoin the defendant, its officers, agents and  
11 employees from enforcing the provisions of RCW 75.12.060,  
12 RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040,  
13 RCW 77.16.060, WAC 220.20.010, WAC 220-20-015(2) and  
14 WAC 220-47-020 in such manner as to prevent or restrict  
15 members of the said tribes from taking fish at their usual  
16 and accustomed places in accordance with tribal authoriza-  
17 tion pursuant to the treaties between those tribes and the  
18 United States.

19 5. Enjoin the defendant, its officers, agents and  
20 employees from enforcing the provisions of state laws or  
21 regulations in such manner as to prevent or restrict members  
22 of said tribes from taking fish at their usual and accustomed  
23 places in accordance with tribal authorization pursuant to  
24 the treaties between said tribes and the United States  
25 without previously having established that the imposition  
26 of state regulation is necessary for the conservation of  
27 fish and does not discriminate against the taking of fish  
28 pursuant to such treaty right.

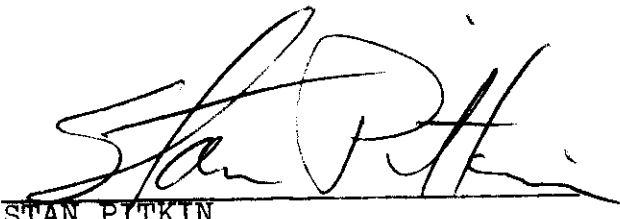
29 6. Grant such further and additional relief as the  
30 plaintiff may be entitled to.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

7. Award plaintiff the costs of this action.

8. Retain jurisdiction of this cause for the purpose of enforcing or supplementing the judgment of this Court.

DATED this 18th day of September, 1970, at Seattle, Washington.



STAN PITKIN  
United States Attorney  
Western District of Washington