12-1-1977

Brief of Appellants

NO. 77-3654
NO. 77-3655

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,

Appellees,

vs.

STATE OF WASHINGTON, et al.,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT TACOMA

BRIEF OF APPELLANTS

SLADE GORTON
Attorney General

JAMES M. JOHNSON
Sr. Asst. Attorney General

Attorneys for
State of Washington

600 No. Capitol Way
Olympia, WA 98504

Telephone: AC 206, 753-2498

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BRIEF OF APPELLANTS

I. ISSUES PRESENTED FOR REVIEW

The federal district court for the Western District of Washington has retained continuing jurisdiction to implement its interpretation of certain Indian treaties which provide a "right to fish in common with all citizens . . ." The issues presented in these appeals from certain of of that court's orders are:

(1) Whether that court may take over management and regulation of the extremely valuable fisheries of Washington State from the State of Washington and its management agencies

including:

(a) allocating by order a specific number of each run of fish for treaty Indians to catch (as he defines the term treaty Indian),

(b) prohibiting the state from regulating fishing by treaty Indians even under certain conditions where that regulation is necessary for conservation of the runs,

(c) prohibiting the state from authorizing fishing by its non-Indian commercial fishermen except under strict conditions (normally requiring agreement of the Indians or approval by the court or his appointed "expert"), and

(d) enjoining nonparty non-Indian fishermen from fishing except as permitted by orders of the court subject to contempt penalties.

(2) Whether the allocations of fish decreed by the district court or indeed any allocation of a guaranteed number of fish to Indians are an abuse of discretion and deny equal protection to non-Indian citizens of the State of Washington.

(3) Whether that court may enjoin courts of the State of Washington especially where the state court proceedings involve questions of

state law or whether a federal court is bound by state court determinations of state law.

(4) Whether the area of the State of Washington covered by the decision and subsequent decrees may be expanded to include an area outside that defined in the original pleadings, pretrial order, and decision and beyond the area ceded by any of the plaintiff (or plaintiff intervenor) tribes in treaties.

(5) Questions 1-3 may also be asked as to the area covered in 4 above.

II. STATEMENT OF THE CASE.

A. Nature of the Case.

These are two consolidated appeals from numerous orders entered by George H. Boldt, Senior United States District Judge for the Western District of Washington, in which he: (1) sets aside a particular number of each run of salmon in the northwestern portion of the State of Washington for treaty Indians (as he defines that term), (2) orders the State of Washington and its agencies to refrain from regulating fishing by treaty Indians or authorizing fishing by nontreaty citizens except under

strict conditions, (3) enjoins nontreaty commercial fishermen from fishing except as permitted by the court subject to contempt of court - penalties including jail, (4) enjoins the courts of the state from proceedings which would interfere with the state complying with the federal court's orders, and (5) though not expanding the case area in United States v. Washington, enjoins the state to treat an area outside the case area (and outside the area ceded by any of the treaties previously considered in United States v. Washington) "as if" it were in the case area and applies the system for running the fishery described above to that area.

These orders as they relate to the area outside the case area have been separately appealed. The two appeals are consolidated. Citations to the record(s) will be by page and appeal numbers, i.e., No. 3654, p. 8.

A motion is presently pending to consolidate this appeal with No. 77-2497, appealing a decision by the same district court judge denying a motion for disqualification from further participation in the action below because of his impartiality is reasonably questioned pursuant to 28 USC 455.

B. Course of Proceedings.

A decision was rendered by the district court on February 12, 1974, in which he interpreted the language of certain treaties made with Northwest Indians, providing for them a "right to take fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the territory."

After the decision, some 12 additional tribes, bands, or groups claiming treaty entitlement intervened as the court exercised continuing jurisdiction over the controversy. Some of these groups are not recognized as Indian tribes by the United States Government. They have all been granted certain rights to fish not available to non-Indian citizens of the State of Washington.

Decisions of the Supreme Court of the State of Washington (and of superior courts of that state) interpreted that the statutory authority the state agencies with jurisdiction over fish did not extent to allocating a majority of Washington fish to the small percentage of fishermen claiming descent from Indians with whom treaties had been signed. (That court also interpreted the "in common with" treaty language as not

requiring such an allocation.)

Following these decisions of the Washington State Supreme Court (in Puget Sound Gillnetters Assn. v. Moos, 88 Wn.2d 677, ___P.2d ___ (1977) and Purse Seine Vessel Owners Assn. v. Moos, 88 Wn.2d 799, ___P.2d___ (1977)), Washington's Fisheries Department issued regulations which would allow a harvest of all available fish by all citizens.

On August 8, 1977, the state Fisheries and Game Departments had filed a Motion for Modification of Judgment (p. 51) to change the situation in several particulars: (1) to respect the State Supreme Court decisions and to relieve those agencies of any affirmative burden to stop non-Indian fishing in order to provide additional fish to treaty Indians, (2) to count all fish caught by treaty Indians in any allocation (whether caught on or off the reservation), (3) to exclude hatchery fish, and (4) to exclude fish caught in the ocean outside the state from being counted as part of the non-Indian share. This motion has not yet been acted upon. Granting that motion would probably solve many of the problems this litigation now presents.

The recent federal court litigation giving rise to this appeal began in July of 1977. Plaintiff tribes and the United States requested the federal court to take control of a portion of the fishery to be granted treaty Indians and remove it from state jurisdiction (No. 3654, p. 6).

The response of the court was characterized by the district court itself in one of the orders appealed from:

> [the] court thereupon issued a preliminary order on August 10, 1977, by which it assumed the responsibility for allocating the salmon runs between treaty and non-treaty fishermen, enjoined the state from authorizing or permitting harvest of the treaty fishermen's share and directed the state to manage the remaining portion in a manner that would meet conservation needs, permit harvest of the remainder by nontreaty fishermen under state law.

(No. 3654, p. 186).

Rather than providing the treaty Indians an opportunity to harvest fish:

> the August 10, 1977, order referred to above allocated a specific number of Puget Sound chinook to treaty Indians for the 1977-78 season.

(No. 3654, p. 186).

The 10 August order, then, set out differing numbers of chinook treaty Indians could take, dependent upon the area of Puget Sound where

the fishing occurred.

There were some areas in which no nontreaty commercial harvest would be allowed (No. 3654, p. 61, ¶ 4). In these areas, of course, the treaty Indian share of the commercial harvest would be 100 percent.

Percentage-wise, the shares of Puget Sound net-caught chinook to be taken by treaty Indians where a limited non-Indian fishery was allowed varied from 75 percent Indian (Hood Canal, No. 3654, p. 61, ¶ 3), to 60 percent (Bellingham Bay, No. 3654, p. 61, ¶1).

On August 12, the court entered a Minute Order (No. 3654, p. 66) to clarify the intent of the August 10 order; only the commercial fisheries which occurred inside Washington waters were to be effected by the Preliminary Injunction; all sports and the ocean commercial troll were not to share the burden. (No. 3654, p. 66). Washington adopted regulations in compliance with this system.

As the record on appeal and attached docket sheets indicate, the litigation in United States v. Washington continued at a brisk pace after

the August 10 order, accelerating through the course of the matters which are on appeal in the instant action. The designation of record (pp. 1-4) in No. 77-3654 includes 45 separate items spanning docket entries numbering over 500 (and note some multiple entries under one number).

Numerous additional motions were brought on by the United States and tribes and acted upon. The state's Motion for Modification of Judgment remains for determination.

On August 17, 1977, a request for determination and motion for preliminary injunction was filed on behalf of the Quinault Tribe asking that Grays Harbor and its watershed "as of the date of the requested decree shall be encompassed by and added to the case area of United States v. Washington as defined in Final Decision #I." (No. 3655, p. 309). The request was supported by the United States Government (No.3655, p. 337).

The Quinault's motion came on for hearing on preliminary injunction on August 25, 1977. That same day a state court considered the regulations Fisheries had adopted to comply with the district court's recent orders. (Those regulations assumed

the Indian allocation to have been magically removed by the federal court's orders and provided for catch of only the remaining harvestable numbers). The state court ruled those regulations invalid and ordered the state to provide for the catch of all fish not necessary for conservation, all harvestable fish.

On August 26 the federal district court enjoined the state court and ordered the state agencies to disregard the state court order.

On August 31 the district court entered 53 pages of 8 separate orders structuring the "system" to run Washington State's fisheries which is appealed from here.

Allocations by run (species and area) which had not been included in the earlier orders were set out.

The state courts were enjoined from proceedings in any action which might interfere with implementation of the district court's orders. Those orders also included one ordering that Grays Harbor be treated "as being" within the case area. (No. 3655, p. 361, ¶2). Thus, Grays Harbor, an area outside the case area, is subject to the same system.

Allocations for Grays Harbor runs were

made later. (No. 3655, p. 444).

Finally, on September 27, 1977, Findings of Fact and Conclusions of Law Re: Enforcement of 1977 Fisheries Orders and a Preliminary Injunction Re: Enforcement of 1977 Fisheries were entered putting into final form the system for control of the fisheries which exists to the present.

On October 10, 1977, appellants filed two timely notices of appeal to this Court. (They appealed the order requiring them to treat the area outside the case area as being within the case area, the allocation set forth by the court for that area, and those orders setting forth the regulatory and enforcement take over for that area separately from the appeal of the case area "system" and allocation.)

The litigation has continued. A motion to make this system permanent is still pending before the district court (as are the motions of the state, set forth at page 6).

C. Disposition of Court Below.

Through numerous orders, the federal district court has taken over regulation of Washington State fisheries including enforcement. The court

sets out a number of fish from each run which must be caught by those who are treaty Indians and a number which may be caught by non-Indian commercial fishermen. The state agencies are ordered not to regulate the treaty fishery until it has harvested the number determined appropriate by the court. Regulation even for purposes of conservation is not allowed where nontreaty fisheries have exceeded their share. (No. 3654, p. 229).

Even those conservation regulations which are justifiable to the court must be delayed in effect as to treaty Indian fishermen rather than being immediately effective. Nontreaty commercial fishermen are ordered not to fish unless they have been advised that fishing is allowed by orders of the court. (No. 3654, p. 251). This information is communicated to them by a telephone "hotline" (a recorded phone message). Those who fish except as advised are subject to contempt of court including jail penalties. (Numerous individuals have been cited for contempt; two so far have been sentenced, each to sixty days in jail.) Opening a fishery for nontreaty commercial fishermen is allowed

only where approved by the Indians, a court technical advisor, or the court itself. (No. 3654, p. 300).

Finally, the superior court of the State of Washington was enjoined from issuing or enforcing any order in any cause which would prevent the state and its agencies from complying with the orders of the federal district court. The state and its agencies and officers are ordered to disregard the orders of the superior court. (No. 3654, p. 293).

All of this "system" has also been extended beyond the case area to include other Washington waters and other valuable fisheries.

D. Statement of the Facts.

The waters of Northwest Washington annually produce millions of salmon and steelhead trout. These fish are produced either in freshwater streams in which they naturally spawn or in numerous hatcheries.

There are five species of salmon, one of which occurs only every other year. This appeal primarily concerns itself with three of the salmon species, chinook, coho and chum salmon.

The salmon share many characteristics as

anadromous fish. They spawn in either the freshwater systems or hatcheries of the State of Washington. At a particular time of their life cycle, they migrate out into the Pacific Ocean where they feed for one or more years, then return to the areas from which they originate to spawn. After spawning, salmon die but steelhead trout may survive several cycles.

Production of each species varies each year. The total production is in the millions of fish with a value of tens of millions of dollars. By law of the State of Washington, steelhead trout are a game fish to be taken only by anglers and not to be sold. RCW 77.16.060, 77.16.040.

The timing of these runs varies by species and area. They often overlap. Generally, however, the chinook are the earliest to return, followed by coho and then chum salmon.

While in the ocean, coho and chinook may be taken by both sport and commercial gear. Chum salmon and steelhead trout, however, apparently do not eat in the ocean the kinds of food imitated by the baits and lures of commercial and sports fishermen and are so not harvested in any

significant numbers in the ocean fishery.

Studies of ocean interception rate which have continued over the years cumulatively provide a data base from which the ocean interception of each run by species and the area of origin can be predicted. As the fish return towards their streams of origin, they are subject to sport and commercial harvest in the inside marine waters by both Indians and non-Indians alike. The commercial harvest in these waters is usually by use of nets. Gill net and purse seine gear are used by Indians and non-Indians and this gear accounts for most of the commercial catch.

By statute, it is unlawful for set nets to be used for salmon or steelhead in the State of Washington. RCW 75.12.060 and RCW 77.16.060. Indians fishing under treaty right now do so, however.

The numbers of commercial fishermen in Western Washington alone was found by the district court to be 794 Indians and 6,600 non-Indians. (U.S. v. Washington, 384 F. Supp. 312 at 387 (1974).

In Grays Harbor, testimony below (by a tribal biologist) indicated there were fewer than 40 treaty Indian fishermen and 190 non-Indians. (No. 3655, Vol. 5, p. 27).

A gill net is hung in the water, supported by floats at the top surface and held vertical by a weighted line at the bottom known as the lead line. Fish attempting to swim through the net are usually caught by their gill covers though some are otherwise entangled.

A purse seine commonly has smaller mesh than a gill net. It captures fish by enclosing them. That is, the net is pulled into a circle and a long rope threaded through rings on the bottom line is pulled tight. The net is then pulled into the boat, steadily diminishing the circle in which the fish are confined until the fish may be lifted onto the boat. Non-Indians are required to release any steelhead trout.

Some idea of the huge numbers and high value of fish available in the case area may be gained from the orders of the district court dividing those fish between Indian and non-Indian fishermen.

AREA	SPECIES		
	Coho	Chum	Chinook
Strait of Juan de Fuca Tributaries			
a. Total Harvestable	38,000		
b. Treaty Indian Share			
(1) Number	22,500		1,150
*(2) Percentage	60%		100%
c. Nontreaty Share			
(1) Number	15,500		none
(2) Percentage	40%		
d. Sports & Ocean Harvest	12,000		not in record
Bellingham Bay-Samish Bay (Nooksack Samish Rivers)			
a. Total Harvestable	98,000	11,300	78,700
b. Treaty Indian Share			
(1) Number	49,000	5,650	47,200
(2) Percentage	50%	50%	60%
c. Nontreaty Share			
(1) Number	49,000	5,650	31,500
(2) Percentage	50%	50%	40%
d. Sports & Ocean Harvest	24,000		10,600
Skagit River			
a. Total Harvestable	19,600		9,400
b. Treaty Indian Share			
(1) Number	12,000		6,600
(2) Percentage	60%		70%
c. Nontreaty Share			
(1) Number	7,600		2,800
(2) Percentage	40%		30%
d. Sports & Ocean Harvest	13,000		1,800
Snohomish-Stillaguamish Rivers			
a. Total Harvestable	95,500		
b. Treaty Indian Share			
(1) Number	57,000		5,300
(2) Percentage	60%		100%

* Each percentage is the percent of commercial catch in Washington waters

	Coho	Chum	Chinook
Snohomish Stillaguamish Rivers (Continued)			
c. Nontreaty Share			
(1) Number	38,500		
(2) Percentage	40%		
d. Sports & Ocean Harvest	39,000		not in record
South Sound			
a. Total Harvestable	385,000	148,800	27,100
b. Treaty Indian Share			
(1) Number	231,000	74,400	27,100
(2) Percentage	60%	50%	100%
c. Nontreaty Share			
(1) Number	154,000	74,400	
(2) Percentage	40%	50%	
d. Sports & Ocean Harvest	100,000		not in record
Hood Canal			
a. Total Harvestable	60,600	65,500	16,600
b. Treaty Indian Share			
(1) Number	36,400	32,750	12,500
(2) Percentage	60%	50%	75%
c. Nontreaty Share			
(1) Number	24,200	32,750	4,100
(2) Percentage	40%	50%	25%
d. Sports & Ocean Harvest	19,000		4,700
TOTAL CASE AREA TREATY SHARE	407,900	112,800	66,300
TOTAL CASE AREA NON-TREATY SHARE (COMMERCIAL WASHINGTON WATERS)	288,800	112,800	38,400
Grays Harbor			
a. Total Harvestable	37,400	16,000	9,000
b. Treaty Indian Share			
(1) Number	30,200	8,000	6,300
(2) Percentage	81%	50%	70%

	Coho	Chum	Chinook
Grays Harbor (Contd)			
c. Nontreaty Share			
(1) Number	7,200	8,000	2,700
(2) Percentage	19%	50%	30%
d. Sports & Ocean Harvest			
TOTAL ALL TREATY SHARE	438,100	120,800	72,600
TOTAL ALL NON-TREATY SHARE (COMMERCIAL WASHINGTON WATERS)	296,000	120,800	41,100

These were the figures available to the district court. In-season changes or run size predictions vary the actual catch.

Note this is not the total commercial fishery in the case area. Between 1.1 and 1.5 million fish were taken by Washington fishermen, treaty Indian and non-Indian, from runs returning to the Fraser River in Canada. Those runs are regulated by the International Pacific Salmon Fisheries Commission. Orders of the federal court allocating those runs are the subject of separate appeals in this Court. (See United States v. Washington, No. 75-2835 and No. 76-1042.)

The weight and price per pound varies by species and area caught. In Grays Harbor, according to a tribal biologist (No. 77-3655,

Vol. 4, pp. 44-45) coho average 10 pounds, chinook average 18 pounds and chum average 15 pounds while in Puget Sound this year coho averaged 7 pounds, chinook averaged 16 pounds, and chum averaged 10 pounds. Prices in Grays Harbor were $2 per pound (averaging high and low) for coho, chum only $.60, and chinook $2.00 (No. 77-3655, Vol. 3, p. 45). In Puget Sound comparable average prices were $1.75 per pound for chinook, $1.25 for coho and $.85 for chum. These figures vary widely by size and condition of fish and condition of the market and can be used only in a very rough way to calculate market values to the fishermen for any given year.

III. ARGUMENT

The district court's take over of the fisheries of Washington is in derogation of management rights of that state guaranteed by the Constitution and recognized by decisions of the United States Supreme Court and acts of Congress. In regulating, the court is performing a legislative function it does not have constitutional or statutory authority to perform.

By allocating a certain number of fish to Indians and severely limiting the fishing of

non-Indian commercial fishermen (but not sports) the court has abused its discretion and denied those fishermen equal protection of the law.

The district court should be bound by state court interpretations of state law but rather unlawfully enjoined the state courts.

Finally, the extension of the allocation and regulation system to areas outside the "case area" was beyond the court's jurisdiction and improper as neither the Quinaults nor any other tribe has treaty rights in areas outside of those covered by treaty.

All of these actions of the district court are founded in an interpretation of treaty language providing a "right to fish in common with all citizens" which does not provide a lawful basis for such actions.

(A) The Allocations of Salmon Are an Abuse of Discretion and Deny Equal Protection of Law.

In the initial appeal, this Court stated that the lower court sits as a court of equity and its decisions must be reviewed under the standards of equity. In the initial appeal, this Court broadly stated a determination that treaty Indians shall have the opportunity to share up to fifty percent of harvestable numbers of fish did not constitute an abuse of the district court's discretion.

As set forth above, the district court is now granting a specific number of fish to Indians, creating a property right in these fish.

That this is improper is recognized in the decision of this court affirming the original decision wherein the "property right" was rejected:

> The district court's order does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession. [Geer v. Connecticut], 161 U.S. at 529, 16 S.Ct. 600. Rather, the court decreed an allocation of the opportunity to retain possession of a portion of the run.

United States v. Washington, 520 F.2d 676, 687.

The idea of a property right in fish has also been recently considered by the United States Supreme Court:

> it is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter have title to these creatures until they are reduced to possession.

Douglas v. Sea Coast Products, 52 L.Ed.2d 304, 97 S.Ct. 1740 (1977).

This "fantasy" now forms the basis for the district court's orders. The result is a severe impact on the non-Indian commercial net fishermen in the State of Washignton as can be seen from the table at pp. 17-19.

In embracing this fantasy and giving it the monstrous form it has, the district court has abused his discretion:

> Discretion, in this sense, is abused when when the judicial action is arbitrary, fanciful or unreasonable."

Detno v. Market St. Ry. Co., 124 F.2d 965, 967 9th Cir. 1939)

This result, that a treaty providing a "right to fish in common with all citizens" means (or was intended by the treating parties to mean) that all (commercial fishing) citizens would be

totally banned from some areas and strictly limited in their fishing in other areas in order to guarantee a specific number of fish to Indian fishermen is an arbitrary and unreasonable result, an abuse of discretion.

This result also works a denial of equal protection to these affected non-Indian net commercial fishermen.

The district court does not believe equal protection applies, probably because of his finding "off reservation fishing by other citizens and residents is not a right but merely a privilege which may be granted, limited, or withdrawn by the state as . . . the exercise of treaty rights may require." United States v. Washington, supra, at 332.

This analysis of these treaties has been rejected by the United States Supreme Court, however:

> As to the treaty fishermen, this sentence effecta a reaservation of a previously exclusive right. But that language also recognizes that the right is to be shared in common with the non-Indian "citizens of the Territory."

Puyallup Tribe v. Department of Game of Washington, __U.S.__, 53 L.Ed.2d 667, 671, ft. 16, 97 S.Ct. 2616 (1977), emphasis supplied.

This is in accord with earlier decisions of

that court that fishing is a right to be afforded protection under the Constitution.

Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 63 S.Ct. 1138, 92 L.Ed. 1475 (1945), involved an attempt to exclude certain persons from California fisheries, which is what the district court has done here, at least in certain areas. The analysis of the California court (30 Cal.2d 719, 185 P.2d 805, 1947) was that such regulation was justified by California's proprietary interest in the fish. The United States Supreme Court held that California could not discriminate under the 14th Amendment by reason of any claimed ownership interest. What the state cannot do, the federal district court cannot do nor can it compel the state to do (by forcing a closure of seasons).

Even Congress does not have such authority:

> Congress may not authorize the states to violate the Equal Protection Clause . . . Congress is without the power to enlist state cooperation in a joint federal-state program by legislation which authorizes the state to violate the Equal Protection Clause."

Shapiro v. Thompson, 394 U.S. 615, 89 S.Ct. 1322 (1969). See also Katzenbach v. Morgan, 384 U.S. 641, 651, and also discussion of a court's

authority to regulate, p. 49.

Under the Equal Protection Clause of the 14th Amendment, there are two modes of analysis, dependent upon the interest which the legislation affects. One test is the "rational basis test," the other the "strict scrutiny test."

The "strict scrutiny test" is generally activated when the classification upon which the legislation is based is, in the words of the Supreme Court, "suspect." An example of a suspect classification is that based upon race. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 90 L.Ed. 873 (1954), national origin, Oyama v. California, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948), and alienage, Graham v. Richardson, 43 U.S. 365, 91 S.Ct. 848, 29 L.Ed.2d 534 (1972).

The distinction between Indians and non-Indians as to who may commercial fish and how many fish they may take is probably subject to this "strict scrutiny" test. This is because this distinction is based on racial or ethnic background. As to tribes recognized by the United States Government, membership standards

include the blood quantum of the applicant.

As to those intervening groups which are not recognized, the district court has required proof of the blood quantum of those desiring to fish. (See Order Re Samish, Snohomish, Steilacoom, Duwamish and Snoqualmie Tribes' Treaty Status dated March 19, 1976, attached in the appendix.)

The question of whether a preference to Indians over non-Indians is one based upon race or is political in character has been considered by the United States Supreme Court. Morton v. Mancari, 94 S.Ct. 2474, fn. 24 (1974). In noting that a preference given to Indians in employment in the Bureau of Indian Affairs did not constitute "racial discrimination" the court stated in Mancari, supra, that the preference was not a racial preference because it was not directed toward a "racial group" consisting of "Indians;" instead, the court stated it applied only to members of "federally recognized" tribes. In this sense, then, the court believed the preference was political rather than racial in nature.

Note here, however, that this special treatment extends beyond recognized tribes.

Further, in Morton, supra, the court considered the narrow subject of employment preference for Indians in jobs dealing with their own affairs and land as administered by the Bureau of Indian Affairs. In this connection, the court stated:

> In the sense that there is no other group of people favored in this manner, the legal status at the BIA is truly sui generis. Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other governmental agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations.

94 S.Ct. 2474 at 2484.

Here we have the more difficult question of exemption from state law and granting of a portion of common resources on the basis of the ethnic background of the party.

An additional problem is posed by the court imposing the whole of the burden of providing the fish to Indians upon the commercial net fishermen, exempting troll and all sports fishermen from the restrictions the court has imposed. This classification of non-Indian citizens is also subject to

scrutiny under the 14 Amendment probably according to the "rational basis" test, whereby a classification is unconstitutional if it "rests on grounds wholly irrelevant to the achievement of the state's objectives." McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

The basis for the court's exemption of the sports fishery does not appear of record. It will be interesting to see whether the appellee United States and tribes who sought these orders can provide a rational basis for this exemption.

(B) A Federal District Court is Bound by a State Court Determination Concerning Questions of State Law.

The questions involved in Puget Sound Gillnetters v. Moos, 88 Wn.2d 677, ___P.2d___ (1977), and Purse Seine Vessel Owners Assn. v. Moos, 88 Wn.2d 799, ___P.2d___ (1977), was "to determine authoritatively the powers delegated to state officials and to determine whether state officials are using these powers lawfully." 88 Wn.2d at 804.

A judicial determination of the extent of a state official's authority to act under a statute is solely and exclusively within the jurisdiction of the state courts:

> A state court's construction of a state statute is binding on federal courts as if the meaning of the statute so fixed had been expressed in the statute in specific words.

20 Am.Jur.2d, Courts § 214, p. 549 (1965). Accord: Puget Sound Gillnetters v. Moos, supra, at 689; Shuttlesworth v. Birmingham, 382 U.S. 87, 91 (1965) ("It is our duty, of course, to accept this state judicial construction of the ordinance.").

It is also black letter law that state agencies are creatures of statute, with authority to act only within the terms and by the conditions specified in their enabling statutes:

> Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication. State ex rel. PUD 1 v. Department of Public Serv. supra; Northwern Pac. Ry. v. Denney, 155 Wash. 544, 285 P. 452 (1930); Wishkah Boom Co. v. Greenwood Timber Co., 88 Wash. 568, 153 P. 367 (1915).

State v. Pierce, 11 Wn. App. 577, 523 P.2d 1201 (1974). Accord: Soriano v. United States, 494 F.2d 681 (9th Cir. 1962).

Not only are lower federal courts bound by determinations of the highest state court as to questions of state law, but lack authority to affirmatively compel state officials to take steps, such as the promulgation and enforcement of regulations ordered by the district court in this case, which would be beyond the authority granted them by the legislature. The cases are summarized in Purse Seine Vessel Owners Assn. v. Moos, supra, at 808-809.

> We are told that in order to implement its decision relating to Indian treaty fishing rights in United States v. Washington 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied,

423 U.S. 1086, 47 L.Ed. 97, 96 S.Ct. 877 (1976), the Federal District Court can compel the director to promulgate regulations which are beyond his authority under state law. This proposition is untenable. The Department of Fisheries is solely a creature of the legislature. Its director cannot be compelled to do an act which is beyond the authority granted to him by the legislature which created his office and designated his powers and duties.

. . .

. . .

The question whether the federal government can compel state officials to promulgate and enforce regulations was considered by the Ninth Circuit Court of Appeals in Brown v. Environmental Protection Agency, 521 F.2d 827, 841 (9th Cir. 1975). It was there held that the Administrator of the Federal Environmental Protection Agency could not compel California state officials to promulgate regulations pursuant to the Federal Clean Air Act. The court quoted and approved these words from a law review article of Professor Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L.Rev. 515-16 (1954):

> "'And we think it clear,' said Chief Justice Taney in the latter case [Kentucky v. Dennison, 65 U.S. (24 How.) 66, 16 L.Ed. 717 (1860)], "that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.' Taney's statement can stand today . . ."

In Brown, the court continued:

> Lower federal courts may prohibit state officers, in their individual capacity, from taking action under color of office in violation of law. But an action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment.

Brown v. Environmental Protection Agency, supra, at 841.

We said in Puget Sound Gillnetters Ass'n v. Moos, supra, at 687: "The courts have

been consistent in recognizing that a state official cannot be compelled to exceed his authority."

The United States Government has consistently advised the district court that certain provisos to the Anti-Injunction Statute, 28 USC § 2283 (1965), which generally prohibits a court of the United States from granting an injunction staying proceedings in a state court, supports the authority of the lower court to issue the stays in question. The exceptions apply (a) where expressly authorized by an act of Congress, and (b) where necessary in aid of its jurisdiction or to protect or effectuate its judgment. The latter exception is crucial here.

Ignoring decisions prohibiting federal courts from ordering ultra vires acts of state officials, the federal government has cited cases, primarily relating to school desegregation, which federal courts have ordered state agencies to take affirmative steps to implement federal rights. Illustrative are Milliken v. Bradley, ___U.S.___, 97 S.Ct. 2749 (1977), and Dayton Board of Education v. Brinkman, ___U.S.___, 97 S.Ct. 2766 (1977), both of which order such steps as student assignment

and transportation, provision of remedial education programs, special training of teachers, testing and counseling and guidance.

However, unlike the situation at bar, the school districts have authority to conduct such programs and actually were so conducting them. This is contrasted to the subject of allocation of fish runs, an authority the Washington State Department of Fisheries specifically lacks under state law.

The United States has also argued under the principles enunciated in Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957), that a stay of state proceedings by the district court is proper. Leiter was ably considered and distinguished by the Washington State Supreme Court in Purse Seine Vessel Owners Assn. v. Moos, supra, at 805-806, as follows:

> While the United States Supreme Court held that a state court action could be stayed even though neither of the exceptions mentioned in 28 U.S.C. § 2283 (1965) was present, it nevertheless looked to see whether the injunction was properly issued in the case. . . .
> Before attempting to answer [questions concerning the interpretation of the statute] and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by

> the only court that can interpret the statute with finality, the Louisiana Supreme Court.

Leiter Minerals, Inc. v. United States, supra, at 229.

An additional basis for the conclusion the state court should be allowed to decide questions of state law is the doctrine of abstention:

> The Leiter result is in harmony with, if not indeed demanded by, the rule that the federal district courts are bound to abstain from deciding an issue regarding an unsettled question of state law (here, the extent of the director's statutory authority), until the state courts are given an opportunity to decide the question. In Reetz v. Bozanich, 397 U.S. 82, 25 L.Ed.2d 68, 90 S.Ct. 788 (1970), the Supreme Court reaffirmed this statement from its opinion in Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 640, 3 L.Ed.2d 562, 79 S.Ct. 455 (1959).
>
> Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions . . . That is especially desirable where the questions of state law are enmeshed with federal questions.

Purse Seine Vessel Owners Assn. v. Moos, supra, 806-807.

Under the principles of law enunciated, the district court could not properly stay the state court proceeding.

(C) The Court Improperly Extended This System to Grays Harbor.

Grays Harbor was eliminated from the case area in the course of pretrial proceedings. Indeed, as the affidavit dated August 16 of Mike Taylor, counsel for that tribe, sets forth, in 1973 he signed an order allowing the Quinault Nation to withdraw from participation in United State v. Washington. Upon becoming counsel for that tribe and discussing it with the general council of the Quinaults, he decided to continue to participate. However,

> at the time the Quinault general council had made the decision to proceed as a full party in the trial, the pretrial order had been filed and it was the conclusion of the majority of plaintiff attorneys that the pretrial order should not be amended to change the case area boundaries such a short time prior to trial.

Taylor affidavit, No. 77-3655, p. 325.

Thus, the case area as defined in the decision in United States v. Washington did not include Grays Harbor but rather "the watersheds of Puget Sound and the Olympic Peninsula north of Grays Harbor." United States v. Washington, supra, at 400, emphasis supplied.

As noted above, the court in the orders appealed from still recognized that Grays Harbor is not in the case area but orders that it be treated "as being included." (No. 77-3655, p. 361)

The definition of the "case" area amounted to a limitation on the subject matter jurisdiction of the court. It does not have jurisdiction to render relief beyond the subjects brought under its jurisdiction by the pleadings, pretrial order and decision.

The State of Washington and its agencies did not have the opportunity at the time of trial to raise arguments in opposition to the finding of treaty rights to fish in Grays Harbor. Additionally, these non-Indian fishermen who fish Grays Harbor had no opportunity to participate. This is notable in that the court's injunction is specifically directed at those fishermen both individually and through their organization, the Grays Harbor Gillnetters.

As to those fishermen, they were neither joined as parties nor given proper notice of the proceedings. The general rule is that a

judgment is void unless a reasonable method is employed to give notification and a reasonable opportunity to be heard afforded to persons affected by the judgment. Restatement of the Law, Judgments, Chapter 2, § 6 (1942).

The United States Supreme Court in Mullane v. Central Hanover Trust Co., 339 U.S. 306, 316, 70 S.Ct. 652, 94 L.Ed. 865 (1950), sets forth the fundamental requirement of due process as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Judge Boldt, in Final Decision #I, took great care in limiting the application of the decision rendered in United States v. Washington by specifically defining the "case area," seeking to join all interested parties claiming direct or indirect justifiable interest in treaty fishing rights and by concluding at p. 328:

> Thus every interested agency and organization not joined as a party has had an opportunity to present its views on any of the issues in the case.

This Court has concluded, as did the lower

court, that the treaties act to reserve to the Indians rights not extinguished by those treaties:

> [T]he treaty was not a grant of rights to the Indians but a grant of right from them---a reservation of those not granted. . . .
>
> . . .
>
> It only fixes in the land such easements as enables the right to be exercised.

United States v. Winans, 198 U.S. 371, 381, 384, 25 S.Ct. 662 (1905).

The Indians could not "reserve" rights in areas in which the United States did not recognize they had rights. Grays Harbor is not within the area ceded by any tribe party to United States v. Washington nor indeed is it within the area ceded by any tribe by treaty. The Quinault treaty, 12 Stat. 971, ceded only lands to the north of Grays Harbor watershed (Article 1). They have no rights in Grays Harbor. Additional support for the conclusion is found in the decisions of the federal district court, this Court and the United States Supreme Court in United States v. McGowan, 2 F.Supp. 426 (D.C. Wa. 1931), aff'd 62 F.2d 955 (9th Cir. 1933), aff'd 54 S.Ct. 95, 290 U.S. 592.

The court there concluded the defendant did not have treaty rights to fish the lower Columbia: (1) as a chinook Indian since that group did not sign

treaties with the United States, (2) as a Quinault since that tribe did not have usual and accustomed grounds and stations there. United States v. McGowan, 62 F.2d at 957-58.

Of significance is the district court's reasoning in concluding the Quinault Tribe did not have such rights. Fishing was so good at treaty times in all areas that the Quinaults would not "usually" nor "customarily" resort to remote fishing areas.

This analysis is appropriately applied to Grays Harbor and indeed may account in part for the Quinailts' not demanding Grays Harbor's inclusion in the case area.

The court's orders on allocation as to Grays Harbor are clearly so inequitable as to be held an abuse of discretion. The few (under 50) Indian fishermen who choose to fish Grays Harbor get a disproportionate share of the fish. (See pp. 18-19)

Though figures for 1977 were not available at hearing, the tribal biologist testified that in 1976, 37 Indian fishermen shared $330,000.

This means in a four-week season (No. 77-3655, Vol. 3, p. 61), an average income to the Indian fishermen of nearly $9,000 for four weeks.

These fishermen also have an additional

on-reservation fishery which was expected to provide an additional 30,000 sockeye, 3,600 chum, 5,400 chinook and 14,800 coho. (No. 77-3655, Vol. 3, p. 406). There is no nontreaty commercial harvest allowed on reservation. Some chinook and coho would be intercepted in the ocean, but no (or very few) sockeye and chum.

Compare the guaranteed Indian income with the several hundred non-Indian fishermen whose average income would be less than $2,000.

The only justification is the catch in the ocean, regulated by the United States Government pursuant to the Fisheries Conservation and Management Act, 16 USC 1801.

The regulations adopted by the United States Department of Commerce pursuant to the Fisheries Conservation and Management Act of 1976, at the request of several coastal tribes in United States v. Washington, included provision for special treaty Indian fisheries. 50 CFR 661.1 - 661.9 A biologist for the Quinault Tribe testified to his knowledge the Quinault Tribe had not asked for nor received such special fisheries and did not choose to fish in ocean waters. No. 77-3655, Vol. 3, p. 49.

Thus, the non-Indian fishermen in Grays Harbor are penalized for catch allowed by the United States Government, some of which is taken by treaty Indians.

It is important too that these are not the same fishermen who participate in ocean harvest. The non-Indian fishermen involved are net fishermen, and net fishing for salmon in Pacific Ocean waters is unlawful. (RCW 75.12.210 implementing an agreement with Canada and other coastal states.)

Further, the plaintiffs and the court followed improper procedure in extending the system to Grays Harbor. The proper procedure to modify a decree, including a continuing injunction, as to its scope or breadth, is not a temporary restraining order or request for declaratory relief, but by a motion to modify under Federal Rule 60(b). United States v. Partin, 524 F.2d 992, 999 (5th Cir. 1975), cert. den. 425 U.S. 904.

Though it did not specify, the lower court could have treated the Quinault's motion for temporary relief as being in the nature of an

"independent action" to modify judgment, which is permissible under Rule 60(b). 7 Moore's Federal Practice, § 60.28(1), p. 387 (1975) The extension of the case area could only occur if some proper grounds for modification under Rule 60(b) was shown to the court.

The only grounds alleged by the tribe for modification of the case area is "legal advice" given the tribe prior to the original trial in United States v. Washington (No. 77-3655, p. 312, ll. 16-19) which resulted in the case area not being extended in the way later contemplated by the tribe (No. 77-3655, p. 325-26).

Mistakes based upon advice of counsel, as demonstrated below, do not support a modification under the terms of Federal Rule 60(b). As well, mistake or excusable neglect must be cured by motion under the rule "not more than one year after the judgment, order, or proceeding was entered or taken." Certainly, the Quinault's motion was not timely under the rule if the stated grounds for modification are to be believed.

Free, calculated, deliberate choices are not to be relieved from under Rule 60(b). For example, in Ackermann v. United States, 340 U.S.

193 (1950), the petitioner relying upon advice of counsel and a governmental official, and considering the cost of appeal, did not appeal a decision of the Naturalization Board. When petitioner later sought to set aside a judgment of denaturalization, the Supreme Court affirmed a denial of the petition to modify, stating further at page 198 of its opinion:

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him his decision not to appeal was probably wrong, considering the outcome of the Keilbor case. There must be an end to litigation someday, and free, calculated choices are not to be relieved from.

The record indicates the Quinault Tribe, as the petitioner in the Ackermann case, freely and deliberately, upon advice of counsel, agreed with all other parties, to accept the definition of "case area" which would exclude Grays Harbor. Such a choice does not fall within the purview of inherent power of a court to relieve a party from a final judgment.

(D) The State Has Authority to Regulate Its Fisheries. Neither the Federal Government Nor a Federal Court has Such Authority.

Soon after the establishment of our federal system, the first ten amendments to the United States Constitution were passed to make clear the relationships of the states, the people and the newly established federal government (including the federal judiciary). Amendment 10 provides that "the powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states respectively, or to the people." It has long been held that among the powers reserved to the states are the ownership and/or management of the fisheries and wildlife resources of the respective states, e.g., in which and the waters in which they are found. Geer v. Connecticut, 161 U.S. 519, 40 L.Ed. 793, 16 S.Ct. 416 (1920).

Many years later by act of Congress, this ownership of or right to manage the resource was affirmed in the Submerged Lands Act, codified at 43 USC 1301-1343. The relevant section provides:

> Title to and ownership of the land beneath navigable waters within the boundaries

> of the respective states, and the natural resources within such lands and waters, and (2) the right to manage, administer, lease and develop said lands and natural resources, all in accordance with applicable law be and they are subject to the provisions hereof recognized, confirmed, established and vested and assigned to the respective states."

43 USC 1311(a).

One exemption was made for Indian lands. Excepted from the operation of that section were "such lands beneath the navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians." 33 USC 1313.

The district court's orders have now stripped the state of its authority to regulate its fisheries. The state may not authorize nontreaty commercial fisheries except with approval of the tribes (through the "advisory board") or the approval of the court's expert or the court. No. 77-3654, p. 300. Those fishermen may not fish without court approval communicated by a telephone hotline. The state is ordered to operate as directed by the court. No. 77-3654, p. 251. Even conservation regulations may not be applied to Indians if the nontreaty fishery has exceeded its share.

No. 77-3654, p. 229. Even justifiable conservation closures may not be immediately effective. No. 77-3654, p. 206.

This conflicts with all of the United States Supreme Court cases considering these treaties which have affirmed the state's authority to regulate, e.g., Puyallup v. Department of Game, 391 U.S. 392 (1968); Puyallup v. Department of Game, 414 U.S. 44 (1973); and Puyallup v. Department of Game, 53 L.Ed.2d 667 (1977).

If the United States Government wishes to undertake fisheries management, it must do so by statute. Whether an attempt to statutorily pre-empt state management of fisheries in state waters would be unconstitutional need not be extensively considered here since no such legislation exists. However, National League of Cities v. Usery, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976), suggest it would be improper:

> This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers . . . an express declaration of this limitation is found in the Tenth Amendment:
>
> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' United States

> v. Darby, 312 U.S. 100, 125 [85 L.Ed. 609, 61 S.Ct. 451, 132 ALR 1430] (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the State's integrity or their ability to function effectively in a federal system." 421 U.S. at 547 n 7, 44 L.Ed.2d 363, 95 S.Ct. 1792.

As noted, the Submerged Lands Act, supra, evidences a contrary intent by Congress.

The recently enacted Fisheries Conservation and Management Act, 16 USC 1801, et. seq., similarly evidences Congress' intent to allow the states to fully manage their fisheries. At § 1856, that act provides for the states to retain exclusive management of fishery resources in waters of the state.

The method of establishing United States Government management over offshore fisheries should also be contrasted with what has been done here. This raises another fundamental and constitutional problem. The approach to regulating offshore fisheries was Congressional legislation delegating the authority to regulate, setting out appropriate standards for the exercise of the delegated legislative powers.

Here, we have a court establishing such a regulatory scheme. This is beyond the judicial

power.

The Constitution sets forth a system of separated powers: "All legislative powers [are] vested in a congress of the United States." Constitution, Article I, 6 1.

The judicial power vested in the United States Supreme Court and inferior courts established by Congress is restricted to cases and controversies. Article III, § 2.

The court here in the guise of resolving a controversy has crossed the line and begun legislating. The court takes treaty language that speaks of a "right to fish in common with all citizens" and construes it as authority to take over the regulation of Washington's fisheries.

The court may define the protection afforded by the treaties, e.g., the interpretation that treaty fishing may not be regulated except as necessary for conservation has been upheld on numerous occasions by the United States Supreme Court. The court may not turn this "shield" into a "sword" to be used against the other citizens who also have rights to fish in common with the Indians.

IV. CONCLUSION

The treaty language reserved a "right to fish at all usual and accustomed grounds and stations in common with all ctiizens"

The orders of the district court and the system they establish are contrary to Constitutional principles. They are beyond the authority and jurisdiction of the court. Most importantly, the treaty language does not provide a lawful basis for the order appealed.

The system must be dismantled by this Court reversing. This Court should define with precision the authority of the district court in implementing that language. The United States Supreme Court has held it provides a "shield" to treaty fishermen, and the state may regulate them only as necessary for conservation. The language also provides all citizens shall share this valuable fishing right. Their rights must also be protected.

DATED this 13th day of December, 1977.

Respectfully submitted:

SLADE GORTON
Attorney General

JAMES M. JOHNSON
Sr. Asst. Attorney General

DENNIS D. REYNOLDS
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA et al, Plaintiffs, vs STATE OF WASHINGTON, et al, Defendants	CIVIL NO. 9213 ORDER RE SAMISH, SNOHOMISH, STEILACOOM, DUWAMISH AND SNOQUALMIE TRIBES' TREATY STATUS

The Court has fully reviewed the hearing transcripts, exhibits, affidavits and memoranda of counsel and concludes therefrom that upon the showing thus far made, it would be difficult, if not impossible, to render a sound and well reasoned decision as to any of the five petitioning tribes. The decision as to each tribe will be limited solely to treaty status for the exercise of fishing rights but in the opinion of the Court this requires further submission of the factual data stated below.

No one has contested the applicability of the standards for treaty entitlement stated in the Ninth Circuit Court of Appeals, as follows:

> "Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure, is a factual question which a district court is competent to determine." (Emphasis added) 520 F.2d at 693.

Apparently counsel for the tribes have submitted all information available to them pertaining to "organized tribal structure." However, if any party desires to present further evidence on that subject, such party may apply therefor, in writing, promptly after receipt of this Order.

Under the Circuit Court mandate, every group of persons

Appendix

of Indian blood must establish their descent from a treaty signatory. While counsel for each of the five tribes has submitted current or dated tribal membership lists, only the Samish list contains information concerning blood quantum as to individual persons on the Samish tribal roll. A showing of individual tribal descendency from a treaty signatory is necessary. Although the Court is reluctant to require the submission of individual Indian blood quantum information, there have been serious disputes among the parties concerning the validity of certain persons being named as enrolled tribal members. Also, counsel have argued that waiver or abrogation of treaty rights by individual Indians is an issue in these proceedings and the Court believes that blood quantum information, among other factors, may have some relevancy.

Accordingly, counsel for each of the five tribes shall serve and file on or before Tuesday, June 1, 1976, the following information: A current list of the complete names and addresses of all persons listed as tribal members; the cities, states or other geographical locations where each person listed has established residence during his or her lifetime; and identification of the specific tribal blood quanta by fraction, of each person enrolled by each tribe. For example, a Steilacoom enrolled member may have one-quarter Steilacoom, one-eighth Puyallup and one-eighth Nisqually blood.

On or before Tuesday, June 1, 1976, counsel for each tribe shall submit the above specified data, in writing, serving and filing copies thereof upon the counsel of record in these proceedings. Counsel for any party may serve and file a memorandum, responsive to the above specified information reported by any tribe on or before Monday, June 14, 1976

and reply memoranda shall be served and filed on or before Monday, June 28, 1976.

IT IS SO ORDERED this 19th day of March, 1976.

GEORGE H. BOLDT
SR. UNITED STATES DISTRICT JUDGE

ORDER RE SAMISH, SNOHOMISH, STEILACOOM, DUWAMISH & SNOQUALMIE TREATY STATUS - #3.

FPI—Sandstone
3-5-75—175M—008