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Docket Entry 14 - Filed Memorandum of Points and Authority in support of above Motion to Intervene

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FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DEC 31 1970

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By *[Signature]* Deputy

11 Attorneys for Plaintiff-Intervenors

12 UNITED STATES DISTRICT COURT
13 WESTERN DISTRICT OF WASHINGTON

14 UNITED STATES OF AMERICA,)
15)
16 Plaintiff,)
17)
18 MUCKLESHOOT INDIAN TRIBE, SQUAXIN)
19 ISLAND TRIBE OF INDIANS; SAUK-)
20 SUIATTLE INDIAN TRIBE; SKOKOMISH)
21 INDIAN TRIBE; BILLY FRANK, JR.,)
22 Individually and on behalf of all)
23 others similarly situated; and)
24 RAMONA BENNET, Individually and)
25 on behalf of all others similarly)
26 situated;)
27)
28 Plaintiff-)
29 Intervenors,)

CIVIL NO. 9213

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION TO
INTERVENE

30 vs.

31 STATE OF WASHINGTON; THOR C.)
32 TOLLEFSON, Individually, and as)
33 Director of the State of Washington)
34 Department of Fisheries; CARL CROUSE,)
35 individually, and as Director of)
36 the State of Washington Department)
37 of Game; JAMES AGEN, CLAUDE BEKINS,)
38 ARTHUR S. COFFIN, EDSON DOW, ELMER)
39 G. GERKEN, and HAROLD PEBBLES,)
40 individually, and as members of the)
41 State of Washington Game Commission.)
42 Defendants.)

43 I
44 Applicants For Intervention Have A Right
45 To Intervene In this Action

46 Applicants for Intervention are four tribes of Indians in
47 Western Washington, which are parties to, or are made up of
48 Indians from tribes or bands which were parties to, treaties with
49 the United States, and two individual members of tribes which were

1 parties to such treaties. Each applicant for intervention meets
2 the criteria of Rule 24 (a)(2) of the Federal Rules of Civil
3 Procedure for Intervention of Right. Rule 24 (a)(2) states:

4 Intervention of Right. Upon timely applica-
5 tion anyone shall be permitted to intervene in an
6 action...when the applicant claims an interest
7 relating to the property or transaction which is
8 the subject of the action and is so situated that
9 the disposition of the action may as a practical
10 matter impair or impede his ability to protect
11 that interest, unless the applicant's interest
12 is adequately represented by existing parties.

13 Each of the applicants for intervention has a substantial
14 interest in the subject matter of this action. The suit as framed
15 by the United States against the State of Washington, puts in
16 issue before the court the rights of treaty Indians to fish and
17 seeks to enjoin interference with those rights by the State
18 through its regulatory scheme and the acts of its officials. Two
19 of the applicant tribes, Muckleshoot and Skokomish, are named by
20 the United States as tribes on behalf of which the action is
21 brought. Certainly it could not be argued seriously that they do
22 not claim "an interest relating to the property or transaction
23 which is the subject of the action."

24 The two other applicant tribes, Squaxin Island and Sauk-
25 Suiattle, while not specifically named in the complaint of the
26 United States, were parties to two of the treaties which the
27 government seeks to construe. The failure of the United States
28 to name these tribes as tribes on behalf of which the suit is
29 brought does not alter the fact that once this court determines
30 the fishing rights of any one tribe under one of the treaties, the
31 rights of all other tribes party to the same treaty will have been
32 determined, as a practical matter. The two individual applicants

1 for intervention, Billy Frank, Jr. and Ramona Bennet, are members
2 of tribes, Nisqually and Puyallup, respectively, on whose behalf
3 the United States brings the suit. The individual applicants ask
4 to sue as representatives of a class.

5 The fishing right is one communally owned by the tribe.
6 Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942);
7 Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), cert.
8 denied 369. U.S. 818 (1962). Fishing rights, as valuable assets,
9 are rights, the taking of which by the government is compensable
10 E.g., Whitefoot v. United States, supra. To deny the tribes an
11 opportunity to protect their fishing rights would be tantamount to
12 denying them a right to protect any other property right.

13 There is no doubt that an adjudication of this case will
14 decide the nature and the extent of important rights of the
15 plaintiff tribes. The disposition of the action may do much more
16 than "impair or impede" their ability to protect their interests;
17 it may result in loss or serious qualification of those interests.

18 Although the fishing right has been described as one
19 communally owned by the tribe, the right to exercise it lies
20 with individual tribal members. For this reason, individual
21 tribal members have been found to have standing to bring actions
22 asserting treaty fishing rights. E.g., Sohappy v. Smith, 302 F.
23 Supp. 899 (D. Ore. 1969); United States v. Alaska Packers'
24 Association, 79 Fed. 152 (D. Wash. 1897), appeal dismissed by
25 stipulation 174 U.S. 799 (1898); Mason v. Sams, 5 F.2d (W.D.
26 Wash. 1925).

27 In Sohappy several individual Yakima Indians brought suit
28 against officials of the States of Oregon and Washington (the
29 Washington officials were later dismissed). The case was
30 decided together with an action subsequently filed by the United
31 States against the State of Oregon raising issues similar to
32 those raised by the individual plaintiffs in the first action

1 (and nearly identical to those involved in this action).
2 Several tribes intervened in the action brought by the United
3 States. The court had no trouble deciding "The individual
4 plaintiffs...have an interest in the controversy and have stand-
5 ing to maintain to that action to assert that interest." 302 F.
6 Supp at 904.

7 Under Rule 24(a)(2) applicants should be allowed to
8 intervene as a matter of right unless their interests are ade-
9 quately represented by existing parties. The United States has
10 purported to represent some of the plaintiffs and has urged this
11 court to adjudicate their fishing rights. In spite of
12 "representation" of these tribes by the United States in the case,
13 they have nothing to say about the conduct of the litigation.
14 While each is pleased that the United States has taken some action
15 to assert Indian treaty fishing rights, each feels that indepen-
16 dent and direct participation in the case is the only way its
17 interests will be fully and adequately protected.

18 To say that the United States Attorney will not adequately
19 represent applicant's interests is not to say that he is incom-
20 petent to perform the task. It is a fact, however, that the
21 Department of Justice is subject to many conflicting pressures and
22 too often Indian interests are compromised for the sake of more
23 weighty political interests. That such is the case is not mere
24 speculation or unjustified distrust.

25 The unfortunate history of the Yakima Tribe's attempts
26 for over thirty years to get its trustee, the United States, to
27 protect its water rights is documented in United States v.
28 Ahtanum Irrigation District, 236 F.2d 321, 330 n.12 (9th Cir.
29 1956), cert. denied 352 U.S. 988 (1957).

30 That the problem of adequate representation of Indians
31 by the United States is a common one, was recognized by President
32 Nixon in his Message on Indian Affairs, July 8, 1970. In the

1 Message he proposed an independent Indian Trust Counsel Authority
2 to represent Indian interests, explaining the need as follows:

3 "The United States Government acts as a
4 legal trustee for the land and water rights
5 of American Indians. These rights are often
6 of critical economic importance to the Indian
7 people; frequently they are also the subject
8 of extensive legal dispute. In many of these
9 legal confrontations, the Federal government
10 is faced with an inherent conflict of interest.
11 The Secretary of the Interior and the Attorney
12 General must at the same time advance both the
13 national interest in the use of land and water
14 rights and the private interests of Indians in
15 land which the government holds as trustee.

16 Every trustee has a legal obligation to
17 advance the interests of the beneficiaries of
18 the trust without reservation and with the
19 highest degree of diligence and skill. Under
20 present conditions, it is often difficult for
21 the Department of the Interior and the Depart-
22 ment of Justice to fulfill this obligation.
23 No self-respecting law firm would ever allow
24 itself to represent two opposing clients in
25 one dispute; yet the Federal government has
26 frequently found itself in precisely that
27 position. There is considerable evidence
28 that the Indians are the losers when such
29 situations arise. U.S. Code Cong. Admin.
30 News, No. 8, pp 2965, 2972 (1970).

31 In testimony before the Senate Committee on Interior and
32 Insular Affairs during hearings on a bill to establish the Indian

1 Trust Counsel Authority proposed by the President, Senator Edward
2 M. Kennedy revealed that, indeed, this litigation -- United States
3 v. Washington -- had been filed only after many months of haggling,
4 delay, and unresponsiveness on the part of the Justice and
5 Interior Departments in Washington, D. C. (Hearings not yet
6 published; see newspaper account in Washington Post, Sept. 25,
7 1970.) Kennedy apparently made public confidential memoranda from
8 Interior Department Assistant Regional Solicitor, George D. Dysart,
9 to his Washington D. C. superiors in which he urged that the
10 United States must take action against the violations of Indian
11 treaty rights by the State of Washington, but acknowledged the
12 reluctance of the United States to get into conflicts with state
13 agencies.

14 The Indians on whose behalf United States v. Washington
15 was brought and who will be affected by its outcome do not want
16 to risk their valuable rights by entrusting them to the vicissitudes
17 of the federal establishment and the political pressures to which
18 it is, and may become, subject. That the suit has been filed
19 does not mean that it will proceed to a conclusion, or if it is
20 concluded, that it will proceed in the best interests of the
21 Indians. The extent of the pressures which can be exerted upon
22 the Justice Department in the course of litigation initiated by
23 it is exemplified in the case of Fallbrook Public Util. Dist. v.
24 United States, 202 F.2d 942 (9th Cir. 1953). In this complicated
25 and lengthy water rights litigation local sentiment was so strong
26 against the lawsuit that Congress put a provision in the Justice
27 Department appropriation act to prevent use of any of the funds
28 for preparation or prosecution of the case.

29 One need only read the newspaper to know the contro-
30 versial character of Indian fishing rights in Washington. It is
31 not unreasonable to suggest that the conduct of this lawsuit by
32 the Department of Justice could be influenced by political

1 pressures. The fact that a stormy internal conflict over whether
2 or not to file the action was resolved within Justice and Interior
3 in favor of proceeding does not assure the most zealous, continuing
4 advocacy on behalf of the Indians whose interests are at stake.
5 Applicants feel that already their interests are not receiving
6 the most favorable presentation to this court. The complaint in
7 the main action does not present the court with the full extent
8 of applicant's rights. For instance, it makes unwarranted con-
9 cessions of the State's power to regulate.

10 Only a full, fair, and unswerving advocacy of Indian
11 treaty fishing rights will do. So far the United States, while
12 commendably taking long delayed action, has not adequately ful-
13 filled the advocate's role. History has shown that even when the
14 Department of Justice takes decisive action, its commitment may be
15 as ephemeral as the political winds.

16 II

17 Even If Applicants For Intervention Had No 18 Right To Intervene, They Would Meet The 19 Requirements For Permissive Intervention

20 Although it is rather clear that applicants may intervene
21 as of right, they also easily meet the requirements for permissive
22 intervention of Rule 24(b)(2) of the Federal Rules of Civil
23 Procedure. Under the rule the court has discretion to permit
24 intervention "when the applicant's claim or defense and the main
25 action have a question of law or fact in common." While stated in
26 somewhat different terms, the questions of law and fact both in
27 applicant's proposed complaint and the main action are substantially
28 similar. Factual development can come about most easily through
29 cooperation between applicants and the United States. It is anti-
30 cipated by applicants and the United States based upon preliminary
31 discussions between them that this will be done to a large extent
32 jointly. Particular legal questions vary somewhat between the

1 complaint of the United States and the proposed complaint of
2 applicants, but the central issue--interference by the State of
3 Washington with Indian treaty fishing rights--is the same.

4 Under the circumstances it would be difficult to argue
5 that intervention by applicants would "unduly delay or prejudice
6 the adjudication of the rights of the original parties." Indeed,
7 applicants are some of the original parties "represented" by the
8 United States. Their presence may actually enhance the presenta-
9 tion of the case. The matters before the court are likely to be
10 more completely presented, and, with more participants on the
11 side of plaintiffs, facts may be more easily and fully developed.

12 CONCLUSION


13 All applicants for Intervention have rights and
14 interests which are before the court in the main action. They
15 would like, and are entitled to, a voice in the management and
16 conduct of the litigation concerning these rights and interests.
17 Without such a voice applicants will not be adequately represented.

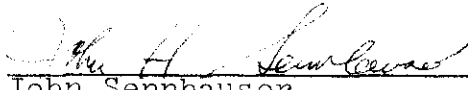
18 Dated: December 28, 1970

19 Respectfully Submitted

20 DAVID H. GETCHES
21 NATIVE AMERICAN RIGHTS FUND

22 DAVID ALLEN
23 JOHN SENNHAUSER
24 MICHAEL TAYLOR
25 SEATTLE LEGAL SERVICES CENTER

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12 UNITED STATES DISTRICT COURT

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14 UNITED STATES OF AMERICA,)
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18 MUCKLESHOOT INDIAN TRIBE, SQUAXIN)
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22 Individually and on behalf of all)
23 others similarly situated; and)
24 RAMONA BENNET, Individually and)
25 on behalf of all others similarly)
26 situated;)

27 Plaintiff-)
28 Intervenors,)

29 vs.)

30 STATE OF WASHINGTON; THOR C.)
31 TOLLEFSON, Individually, and as)
32 Director of the State of Washington)
Department of Fisheries; CARL CROUSE,)
individually, and as Director of)
the State of Washington Department)
of Game; JAMES AGEN, CLAUDE BEKINS,)
ARTHUR S. COFFIN, EDSON DOW, ELMER)
G. GERKEN, and HAROLD PEBBLES,)
individually, and as members of the)
State of Washington Game Commission.)

33 Defendants.)

34 Plaintiff-Intervenors allege:

35 JURISDICTION

36 1. This court has jurisdiction of this action under 28
37 USC §§1331, 1337, 1343(3), 1343(4), and 1362. This is a civil
38 action for declaratory relief, pursuant to 28 USC §§2201 and 2202,

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DEC 31 1970

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U. S. DISTRICT COURT
SEATTLE, WASHINGTON**

1 and injunctive relief with respect to the enforcement of certain
2 statutes, regulations, orders, practices, and policies of the
3 State of Washington and its officers and agents, including Thor
4 C. Tollefson, Director of the Department of Fisheries, and Carl
5 Crouse, Director of the Department of Game, and the members of the
6 State of Washington Game Commission, restricting, prohibiting, and
7 otherwise qualifying the rights of Plaintiffs and the members of
8 Plaintiff tribes to take fish within Indian country and at their
9 usual and accustomed places off their reservations. It is brought
10 under the Constitution, laws, and treaties of the United States
11 including the Commerce Clause, Article I, Section 8, Clause 3, of
12 the Constitution; the Supremacy Clause, Article VI, Clause 2, of
13 the Constitution; Amendments I and IV to the Constitution; and
14 the Due Process and Equal Protection Clauses of Amendment XIV to
15 the Constitution; 18 USC §1151 through 1153; 42 USC §1983; Public
16 Law 280 (Act of Aug. 15, 1953, 67 Stat. 588 et. seq., as amended);
17 the Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; The
18 Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; and
19 The Treaty of Point No Point, January 26, 1855, 12 Stat. 933. This
20 action seeks to redress the deprivation under color of the laws,
21 statutes, ordinances, regulations, customs and usages of the State
22 of Washington relating to fishing including, but not limited to,
23 Revised Code of Washington (RCW), Chapters 75 and 77 and Washington
24 Administrative Code (WAC), Chapter 220 and the orders, regulations,
25 and policies promulgated pursuant to them, of rights, privileges,
26 and immunities secured to Plaintiffs by the United States Consti-
27 tution. A three judge federal district court is required by 28
28 USC §2281 to hear this case in that an injunction against the
29 enforcement, operation, and execution of state statutes and regu-
30 lations is sought on the ground of the unconstitutionality of
31 such statutes as applied to Plaintiffs. The amount in controversy
32 far exceeds the sum or value of \$10,000.00 exclusive of interest

1 or costs.

2 PARTIES

3 2. Plaintiffs Muckleshoot Indian Tribe of the Muckleshoot
4 Reservation, Squaxin Island Tribe of Indians of Squaxin Island,
5 and Skokomish Indian Tribe of the Skokomish Reservation are
6 tribes of Indians with governing bodies duly recognized by the
7 Secretary of the Interior. Sauk-Suiattle Indian Tribe is one of
8 the parties to the Treaty of Point Elliott. The Muckleshoot Tribe
9 is comprised of Indians included among the tribes or bands which
10 were parties to the Treaty of Point Elliott with the United States.
11 The Squaxin Island Tribe is one of the parties to the Treaty of
12 Medicine Creek. The Skokomish Tribe is one of the parties to the
13 Treaty of Point No Point. Typically, the members of the tribes
14 are poor and many are dependent upon fishing for their subsistence
15 and livelihood. Plaintiffs all depend upon the exercise of treaty
16 fishing rights to maintain their culture and traditional way of
17 life.

18 3. Plaintiff Billy Frank, Jr., is an individual member
19 of the Nisqually Indian Tribe, and is a citizen of the United
20 States. Plaintiff Ramona Bennet is an individual member of the
21 Puyallup Tribe, one of the parties to the Treaty of Medicine Creek,
22 and is a citizen of the United States. Each brings this action on
23 behalf of all other persons similarly situated as a class action
24 pursuant to Rule 23 of the Federal Rules of Civil Procedure. The
25 class consists of all Washington Indians having fishing rights
26 based upon treaties with the United States of America. The class
27 is so numerous that joinder of all members of the class is
28 impracticable. There are questions of law and fact common to the
29 class and the claims of the representative parties are typical of
30 the claims of the class. The representative parties will fairly
31 and adequately protect the interests of the class.

32 4. Defendants are the State of Washington, Thor C.

1 Tollefson, Director of the Department of Fisheries, Carl Crouse,
2 Director of the Department of Game and the individual members of
3 the Game Commission. Tollefson and Crouse are the officials of
4 the State of Washington who regulate the taking of fish through
5 regulations and orders promulgated by them and by the Game Com-
6 mission in their official capacities, and through enforcement of
7 the statutes, regulations, orders, and policies of the State of
8 Washington relating to fishing, which are challenged in this pro-
9 ceeding. Each of the individual defendants have acted illegally
10 and unconstitutionally.

11 GENERAL ALLEGATIONS

12 5. By each of the treaties mentioned in this complaint
13 the several Indian tribes ceded to the United States vast tracts
14 and parcels of land, which they had used and occupied since time
15 immemorial, in what was then the Territory of Washington. Such
16 treaties were not sought by the Indian parties but by the United
17 States in order to expand its lands in the Territory and to open
18 the Territory to "settlement" by non-Indians. In addition to
19 reserving certain tracts of land (hereinafter called "reservations"),
20 representing only a small fraction of their former holdings, the
21 Indian parties to the treaties reserved other rights, including
22 fishing rights at usual and accustomed grounds and stations out-
23 side the reservations and agreed to allow non-Indians to fish at
24 such places with them.

25 Each of the treaties used language substantially the same
26 as the following language found in the Treaty of Point Elliott.

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 6. The members of the tribes of the area now known as

1 the State of Washington, prior to execution of the treaties with
2 the United States and thereafter, depended upon fishing for
3 anadromous fish, including steelhead and several species of
4 salmon for a substantial part of their subsistence and livelihood
5 and otherwise to maintain their culture. Plaintiffs fished in
6 waters within and adjacent to reservations which were established
7 upon and after execution of the treaties and at certain other
8 usual and accustomed places outside the reservation. They reserved
9 such lands and fishing places as an important part of the consid-
10 eration for entering into the treaties because it was and is their
11 heritage, custom, and habit to derive their needs from the lands
12 and the waters passing through, adjacent, and near them. Not only
13 was fishing of great economic importance to Plaintiffs but it was
14 at the heart of the religion and culture. In order to retain
15 their way of life the Indians reserved to themselves, and the
16 United States promised to protect, their right to fish.

17 7. Plaintiffs' relationship to the lands and waters
18 utilized by them, and the resources upon and in such lands and
19 waters, has always dictated that only so much of the resources as
20 can be taken without threatening the continued existence of the
21 resources is harvested. Toward this end, the tribes have prac-
22 ticed conservation, have regulated the fishing of their members,
23 continue to do so now, and are competent, and intend, to continue
24 such regulation and conservation in the future. Concern for
25 preservation of the anadromous fish upon which Plaintiffs were
26 and are dependent is implicit in their heritage. By virtue of
27 countless generations of Indian fishermen, techniques and expertise
28 in managing and conserving various species of anadromous fish have
29 been developed and practiced.

30 8. In executing the treaties as set out above, Plaintiffs
31 intended to reserve, and the United States intended that there be
32 reserved for Plaintiffs, sufficient fish in the waters within and

1 adjoining their reservations and passing by their usual and
2 accustomed stations in order for the tribes and their members to
3 derive their subsistence and to sustain and protect their liveli-
4 hood and culture then and in the future. The reservation of these
5 rights and the agreement of the United States to protect the
6 rights was an important element of consideration in the treaties
7 in return for which the Indians ceded a large amount of lands and
8 consented to a limitation of many rights.

9 9. Plaintiffs' fishing has been and is frustrated and
10 interfered with by Defendants' enforcement and attempted enforce-
11 ment of certain statutes, regulations, orders, practices, and
12 policies, and by acts of, or sanctioned by, defendants and their
13 agents in violation of Plaintiffs' constitutional and treaty rights
14 as more fully set out in this complaint.

15 10. As a result of the frustration and interference with
16 plaintiffs' fishing as complained of in this complaint, Plaintiffs
17 and the members of Plaintiff tribes are unable to obtain sufficient
18 fish to meet their present subsistence needs, to maintain a live-
19 lihood, to regulate their own fishing practices, and to continue
20 their traditional culture and way of life. These inabilities will
21 continue in the future so long as the statutes, regulations, orders,
22 practices, policies, and acts of the State of Washington and its
23 agents regulating and purporting to regulate fishing are enforced
24 and sanctioned.

25 11. The treaties entered into between Plaintiffs and the
26 United States are the supreme law of the land and must be recog-
27 nized and respected by Defendant State of Washington and its
28 officers and agents. To the extent that any laws or regulations
29 of the State of Washington are inconsistent with them, such laws
30 and regulations are void and of no force or effect as to Plaintiffs.

31 12. Plaintiff tribes and their members and the individual
32 Plaintiffs and the class represented by them have suffered irrepa-

1 rable damage and will continue to be so harmed unless Defendants
2 are enjoined by this court as prayed; Plaintiffs have no adequate
3 remedy at law.

4 13. An actual controversy exists between the Plaintiffs
5 on the one hand and the Defendants on the other as to the nature
6 and extent of the treaty fishing rights of the Plaintiffs and the
7 attempted qualification of them by Defendants.

8 FIRST CLAIM

9 Extent of Fishing Rights

10 In Indian Country

11 14. Defendants have recognized the right of Plaintiffs
12 to fish free from the prohibitions, restrictions, and regulations
13 of the State of Washington upon Plaintiffs' reservations. Defen-
14 dants have not recognized that such reservations include all lands
15 reserved by the treaties executed by the tribes and the United
16 States, and added to such reservations by subsequent Act of
17 Congress or Executive Order. Even though such lands subsequently
18 may have been patented or rights of way granted across them, and
19 whether or not Indian title to such lands has been extinguished,
20 they remain within the reservations and, as such, are Indian
21 country in which the tribes have full and exclusive power and
22 jurisdiction to regulate, authorize, and prohibit fishing, free
23 from all prohibitions, restrictions, and regulations of the State
24 of Washington.

25 15. Defendants have not recognized that allotments or
26 other lands outside the boundaries of the reservations, the
27 Indian title to which has not been extinguished, and which were
28 issued in exchange for allotments within the reservations taken
29 by condemnation or otherwise lost, are Indian country. As Indian
30 country, allotments and lands are outside the jurisdiction of the
31 State to regulate or authorize fishing by Indians.

32 16. The failure of Defendants to recognize the full

1 extent of Plaintiffs' exclusive jurisdiction over fishing within
2 their reservations and the State of Washington's lack of authority
3 or right to apply or attempt to enforce its laws, regulations, and
4 orders purporting to regulate fishing any place within Indian
5 country is contrary to the treaties between Plaintiffs and the
6 United States, contrary to the purposes and intent of the treaties
7 in that the tribes and their members are unable to harvest suffi-
8 cient fish for subsistence and the maintenance of a livelihood,
9 and inconsistent with federal law including 18 USC §§1151 - 1153
10 and Public Law 280.

11 SECOND CLAIM

12 Non-Indian Fishing In Indian Country

13 17. Defendants have purported to allow non-Indians to
14 fish and to regulate fishing by them, within the boundaries of
15 Plaintiffs' reservations and upon other lands which constitute
16 Indian country.

17 18. Fishing by non-Indians at the sufferance and with
18 permission of the Defendants upon such lands interferes with fish-
19 ing by Indians and depletes the runs of fish available to Plain-
20 tiffs.

21 19. The tribes have exclusive jurisdiction to permit
22 and regulate fishing by all persons within the boundaries of their
23 reservations and Defendants have no jurisdiction whatsoever within
24 the boundaries of the reservations and other Indian country.
25 Defendants' purported regulation of such matters is contrary to
26 the purposes and intent of the treaties in that the tribes and
27 their members are unable to harvest sufficient fish for subsistence
28 or the maintenance of a livelihood, violates Plaintiffs' treaty
29 rights, and is contrary to federal law, including 18 USC §§1151-
30 1153 and 1165, and Public Law 280. Defendants' attempts to allow
31 and regulate non-Indian fishing in Indian country thus violate
32 the Supremacy Clause of the Constitution.

1 FIFTH CLAIM

2 Fishing Rights At Usual And Accustomed

3 Places Outside The Reservation

4 20. Defendants have failed to recognize that the exer-
5 cise of the right to fish at usual and accustomed grounds and
6 stations reserved by the tribes in their treaties with the United
7 States is subject to no qualification by the State and that
8 Defendants may not regulate persons in the exercise of treaty
9 fishing rights as a matter of course within the State's normal
10 exercise of its police power. The right of Plaintiffs to fish
11 at their usual and accustomed grounds and stations may be regu-
12 lated only by the tribes, and, according to federal court
13 decisions, by Defendant state to the extent regulation is shown
14 by the State to the satisfaction of a court to be necessary for
15 the conservation of fish. Regulation of Indian fishing is
16 necessary only if conservation of fish cannot be achieved by
17 restriction, regulation, or prohibition of fishing by non-Indians
18 and will not be achieved by tribal regulation.

19 21. Defendants' failure to recognize the rights of
20 Plaintiffs at usual and accustomed grounds and stations utilized
21 by them to take fish for subsistence and commercial purposes with-
22 out regulation by any but tribal authorities, except in extreme
23 circumstances when conservation of the fish can be achieved in no
24 other manner, is contrary to the purpose and intent of the treat-
25 ies in that tribes and their members are unable to harvest suf-
26 ficient fish for subsistence or the maintenance of a livelihood,
27 or to maintain their culture and traditional way of life, and
28 violates plaintiffs' treaty rights. All statutes, regulations,
29 and orders of the State which attempt to impose restrictions,
30 qualifications, or prohibitions upon plaintiffs' fishing at usual
31 and accustomed places are invalid as applied to Plaintiffs under
32 the Supremacy Clause of the United States Constitution.

1 FOURTH CLAIM

2 Washington's Discriminatory Scheme of
3 Regulating Fishing

4 22. Defendants have failed to recognize and protect the
5 priority of fishing by Indians as required by the treaties and to
6 limit fishing by others in order to insure an opportunity to
7 Plaintiff tribes and their members to harvest sufficient fish for
8 subsistence and the maintenance of a livelihood. Instead, they
9 have attempted to impose and enforce statutes, regulations, orders,
10 and policies including RCW chapters 75 and 77 and WAC chapter 220
11 and the regulations and orders promulgated pursuant to them.
12 This scheme of regulation discriminates against Indians and favors
13 other classes of fishermen.

14 23. Defendants' statutes, regulations, and orders were
15 enacted and promulgated for the benefit of, and to meet the par-
16 ticular needs of, commercial and "sport" fishermen. The regulatory
17 scheme recognizes and affords rights to commercial fishermen
18 (whose fishing is solely for personal or corporate profit) and
19 "sport" fishermen (whose fishing is solely for the entertainment
20 and enjoyment derived from catching, killing, and taking the fish)
21 and have as their purpose and design meeting the particular
22 needs of these two groups of fishermen.

23
24 24. Special departments within the State of Washington
25 have been established for the regulation of commercial and "sport"
26 fishermen and to carry out the State's purpose of recognizing and
27 meeting their needs. The Department of Fisheries is under the
28 direction and supervision of Defendant Tollefson who takes into
29 account the needs of commercial fishermen and makes regulations
30 concerning commercial fishing. The Department of Game is under the
31 direction of Defendant Crouse. Crouse is appointed by and is
32 responsible to the Game Commission whose members are appointed by

1 the Governor and are representative of "sport" fishermen. The
2 Game Commission takes into account the needs and desires of
3 "sport" fishermen and makes regulations concerning "sport" fish-
4 ing. Neither the Department of Fisheries, the Department of Game,
5 nor the Game Commission has authority or jurisdiction to regulate
6 Indian fishing, as a part of its normal regulatory powers, but
7 each of these departments, refusing to respect and abide by
8 plaintiffs' federally secured treaty fishing rights or to recog-
9 nize and take into account the particular needs or cultural heri-
10 tage of Indian fishermen, attempts to do so.

11 25. Many of Defendants' statutes, regulations, orders,
12 and policies appear on their face to be objective and non-
13 discriminatory, but nevertheless effect a harsh discrimination
14 against Plaintiffs. Plaintiffs traditionally fish at certain
15 places within their reservations and at usual and accustomed
16 places outside their reservations. In order to protect Plaintiffs'
17 fishing rights under the treaties and to avoid discriminating
18 against Plaintiffs it is necessary to protect their right to take
19 at those places, in a manner feasible to them, sufficient fish to
20 maintain a subsistence and livelihood and to carry on their
21 traditional way of life, culture, and religion. Because of the
22 poverty of many of the members of Plaintiffs' tribes, they are
23 unable to move about freely from place to place, but are confined
24 to their particular, traditional places. The statutes, regulations,
25 orders, and policies of the State of Washington, including RCW
26 chapters 75 and 77 and WAC chapter 220, are framed and enforced
27 by defendants in a manner which invidiously discriminates against
28 plaintiffs based upon their race, culture, religion, and poverty
29 in the operation of the regulatory scheme. A few examples of the
30 discriminatory effect of the regulatory scheme are:

31 a. Persons with no treaty rights are allowed to take
32 all or substantially all of the harvestable fish from certain runs

1 of fish before such runs reach the reservations of Plaintiffs or
2 the usual and accustomed fishing places of Plaintiffs outside
3 their reservations.

4 b. Portions of Plaintiffs reservations and many of their
5 usual and accustomed fishing places have been closed to net fish-
6 ing while allowing net fishing on the same runs of fish by com-
7 mercial fishermen at other locations.

8 c. The species of fish known as steelhead, has been
9 reserved for the exclusive use and benefit of a class of persons
10 totally without treaty fishing rights known as "sport" fishermen,
11 and the taking of such fish by Plaintiffs in order to maintain
12 their livelihood and way of life is made illegal.

13 26. The entire scheme to regulate fishing in the State
14 of Washington consisting of the statutes, regulations, orders, and
15 policies of Defendant State relating to fishing, including RCW
16 chapters 75 and 77 and WAC chapter 220 and the regulations and
17 orders promulgated pursuant to them, and the acts of defendants
18 Tollefson and Crouse and the members of the Game Commission, and
19 their officers, agents, and employees, in attempting to enforce
20 the statutes, regulations, orders, and policies and carry out
21 the regulatory scheme is invalid and unconstitutional under
22 Amendment I, the Equal Protection Clause of Amendment XIV, and
23 the Supremacy Clause of the United States Constitution in that
24 they discriminate against Plaintiffs upon the basis of race,
25 culture, religion, and poverty and inhibit the maintainence of
26 that culture and religion by plaintiffs, and in that they prevent
27 and fail to provide for the exercise of Plaintiffs' treaty fishing
28 rights, thereby frustrating the purpose of the treaties.

29 FIFTH CLAIM

30 State's Duty To Protect Treaty

31 Rights By Regulating Non-Indians

32 27. Fishing by non-Indians, which is under the juris-

1 diction of Defendants, has an adverse effect upon Plaintiffs'
2 fishing in that it often reduces the number of fish available to
3 Plaintiffs.

4 28. Defendants have a duty to exercise their police
5 power to regulate and limit fishing by non-Indians, which is
6 under their jurisdiction, and to institute programs of conserva-
7 tion and propagation, in a manner which prevents infringement of
8 Plaintiffs' treaty rights, toward the end that there is available
9 to Plaintiffs sufficient fish for subsistence and the maintenance of
10 a livelihood. It is not enough that defendants merely refrain
11 from active infringement of Plaintiffs' fishing rights such as it
12 is alleged they have done in the other Claims of this Complaint;
13 they must take affirmative action to prevent such infringement
14 and to ensure Plaintiffs' ability to exercise rights under the
15 treaties.

16 29. Defendants have not taken action necessary to
17 limit the extent of non-Indian fishing and regulate it in a
18 manner which allows for the full exercise of Indian treaty fishing
19 rights and which carries out the purpose of the treaties to secure
20 a subsistence and livelihood to Plaintiffs and the members of
21 Plaintiffs' tribes and to protect them in their exercise and main-
22 tainance of their traditional religion and culture.

23 30. In developing, drafting, enacting, and promulgating
24 the statutes, regulations, and orders regulating the fishing on
25 non-Indians, who are under Defendants' jurisdiction, neither the
26 tribes nor their members were included upon decision making bodies
27 or boards, or otherwise involved in the process, although many
28 such statutes, regulations, and orders permit and regulate fish-
29 ing by non-Indians which affects the rights of Plaintiffs.

30 31. The failure of defendants to limit and regulate non-
31 Indian fishing and to take affirmative action to prevent infringe-
32 ment of Plaintiffs' rights and the failure to include plaintiffs'

1 members of their tribes upon decision making bodies and boards
2 or otherwise involve them in the process of regulating non-
3 Indian fishing which affects plaintiffs' rights, violate Plaintiffs'
4 rights to due process and equal protection of the laws and
5 Plaintiffs' treaty rights.

6 SIXTH CLAIM

7 Physical Interference With

8 Exercise of Treaty Rights

9 32. Defendants Tollefson and Crouse and their officers,
10 agents, and employees, acting under color of state law, and pur-
11 portedly in their official capacities as agents of the State of
12 Washington, have trespassed on the lands of Plaintiffs, have
13 seized nets and other fishing equipment and personal property
14 belonging to members of the Plaintiff tribes and have harassed,
15 intimidated, threatened, assaulted, beaten, clubbed, and battered
16 plaintiffs and members of Plaintiffs' tribes, caused them to be
17 arrested, prosecuted, and incarcerated for allegedly violating
18 state laws, regulations, or orders pertaining to fishing for,
19 taking of, or possessing fish which were taken or sought to be
20 taken by said members in the lawful exercise of rights secured
21 by the treaties. The same defendants likewise have confiscated
22 or released fish belonging to said members and taken in the
23 exercise of said rights, and otherwise harassed and interfered
24 with them in the exercise of their rights. Defendants Tollefson
25 and Crouse and their officers, agents, and employees intend to
26 continue these actions and will do so unless enjoined by this
27 court.

28 33. Defendants' continued trespasses, seizures, harass-
29 ment, intimidation, threats, and other interferences with the
30 lawful exercise by Plaintiffs of their rights under their treaties
31 with the United States are discriminatory toward Plaintiffs in
32 that no other group of fishermen or racial or ethnic group is

1 similarly treated. Defendants' acts violate Plaintiffs' treaty
2 rights and civil rights, including their rights to be secure in
3 their persons, to be free of unreasonable seizures, to be free
4 from deprivations of life, liberty, or property without due pro-
5 cess of law, and to equal protection of the laws as guaranteed
6 to Plaintiffs by Amendments IV and XIV of the United States
7 Constitution.

8 WHEREFORE, Plaintiffs pray that this court:

9 1. Assume jurisdiction of this case, determine that this
10 matter may be heard as a class action, convene a three judge
11 district court to hear and determine this controversy pursuant to
12 28 USC §2881, and set this case down for hearing.

13 2. Declare that:

14 a. Plaintiff tribes are entitled to sufficient fish
15 from the waters within and adjoining their reservations and pass-
16 ing by their usual and accustomed fishing stations in order for
17 such tribes and their members to derive their subsistence, sustain
18 their livelihood and continue their way of life, culture, and
19 religion now and in the future;

20 b. Plaintiffs have a right to fish free from the
21 prohibitions, restrictions, and regulations of the State of
22 Washington upon Plaintiffs' reservations which reservations in-
23 clude all lands reserved by such tribes in treaties executed by
24 them and the United States even though such lands subsequently may
25 have been patented or rights of way granted across them, whether
26 or not Indian title to such lands has been extinguished, and in-
27 cluding Indian allotments held in trust outside the boundaries of
28 reservations which were obtained in exchange for reservations
29 land and to which the Indian title has not yet been estinguished;

30 c. Plaintiffs have a right to fish at usual and
31 accustomed grounds and stations outside their reservations as
32 reserved in their treaties with the United States, subject to no
qualification or limitation by the State of Washington except in

1 the extreme circumstances when the regulation is shown by the
2 state to the satisfaction of a court of competent jurisdiction to
3 be necessary for conservation of fish which conservation cannot
4 be achieved by restriction, regulation, or prohibition of fishing
5 by non-Indians and will not be achieved by tribal regulation;

6 d. Plaintiff tribes have exclusive jurisdiction to
7 permit and regulate fishing by all persons within the boundaries
8 of their reservations and Defendants' purported permission to
9 non-Indians and purported regulation of their fishing violates
10 the sovereignty of the tribes, is contrary to Plaintiffs' treaty
11 rights, and is contrary to federal law;

12 e. The scheme of the State of Washington to regulate
13 fishing, including RCW chapters 75 and 77 and WAC chapter 220, and
14 the acts of Defendants in enforcing the scheme, are invalid and
15 unconstitutional insofar as they discriminate against Indian
16 fishermen on the basis of their race, culture, religion, or
17 poverty by inhibiting or preventing the full exercise of Indian
18 treaty fishing rights and impairing the ability of Plaintiffs to
19 maintain a subsistence and livelihood and to exercise their
20 traditional culture and religion, which is dependent upon their
21 treaty fishing rights;

22 f. Defendants have a duty to exercise the police
23 power of the State of Washington, to regulate fishing by non-
24 Indians, which is under their jurisdiction, and to institute pro-
25 grams of conservation and propagation, so as to insure that Plain-
26 tiffs' treaty rights are protected and that there is available
27 to Plaintiffs sufficient fish for subsistence, the maintenance
28 of a livelihood, and the exercise of their traditional culture and
29 religion;

30 g. Defendants' continued trespasses, seizures,
31 harassment, intimidation, threats, and other interferences with
32 the lawful exercise by Plaintiffs of their rights under their

1 treaties with the United States violates Plaintiffs' civil
2 rights.

3 5. Enjoin Defendants, their officers and agents, and
4 all persons in concert or participation with them, from:

5 a. Enforcing or attempting to enforce any state
6 statute, regulation, or order purporting to prohibit, regulate
7 restrict, authorize, or license fishing by any person in waters
8 adjacent to or passing through lands within the boundaries of
9 Plaintiffs' reservations as reserved in the treaties entered into
10 by Plaintiffs' tribes with the United States even though such
11 lands subsequently may have been patented or rights of way
12 granted across them, whether or not Indian titles to such lands
13 has been extinguished, or allotments or lands outside such
14 reservations which were exchanged for allotments within the
15 reservation condemned or otherwise taken, the Indian title to
16 which allotments or lands has not been extinguished, except when
17 such enforcement is pursuant to a request by or agreement with a
18 tribe having jurisdiction over the land in question or individual
19 Indians holding allotments or other lands outside the reservation;

20 b. Attempting to apply or enforce any statute,
21 regulation or order which is declared by this court to be contrary
22 to the treaties between the tribes and the United States or their
23 purposes, or violative of any provision of the United States
24 Constitution;

25 c. Considering, developing, drafting, enacting,
26 or promulgating statutes, regulations, or orders intended to
27 regulate fishing by non-Indians under Defendants' jurisdiction
28 without including members of Plaintiffs' Tribes upon decision
29 making bodies and boards.

30 6. Retain jurisdiction of this case to enforce com-
31 plaince with the orders of this court;

32 7. Award Plaintiffs their costs in this action;

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8. Grant such other relief as may be proper.

Dated this 28th day of December, 1970, at Berkeley, California.

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