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Docket Entry 20 - Lodged Proposed Complaint in Intervention of Confederated Tribes

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7 ~~FILED~~-IN THE
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON

10 JAN 14 1971

11 CHARLES A. SCHAAF, CLERK

12 By _____ Deputy

13 IN THE UNITED STATES DISTRICT COURT
14 WESTERN DISTRICT OF WASHINGTON

15 UNITED STATES OF AMERICA,)
16 Plaintiff,) NO. 9213
17 vs.) PROPOSED COMPLAINT IN INTERVENTION
18 STATE OF WASHINGTON,)
19 Defendant.)

20 The Confederated Tribes and Bands of the Yakima Indian
21 Nation complain and allege as follows:

22 FIRST CLAIM FOR RELIEF

23 1. This Court has jurisdiction by reason of the fact
24 that the United States is plaintiff. 28 U.S.C. 1345.

25 2. This Court has jurisdiction by reason of the existence
26 of a federal question. This case involves the interpretation of
27 plaintiff's rights under a treaty with plaintiff and the United
28 States (Treaty with the Yakimas 12 Stat 951) 28 U.S.C. 1331.

29 3. The United States has entered into a treaty with
30 the Confederated Tribes & Bands of the Yakima Indian Nation, herein-
31 after called "Yakima Tribe" as follows:

32 Treaty with the Yakimas of June 9, 1855,

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12 Stat. 951.

Paragraph III of said treaty contains a provision reserving to the Indians certain off-reservation fishing rights, as follows:

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

The Yakima Tribe has usual and accustomed fishing places off its reservation in the State of Washington.

4. Subsequent to the execution of the treaty and a reliance thereon, the members of the Yakima Tribe have continued to fish for subsistence and commercial purposes at the usual and accustomed places. Such fishing provided and still provides an important part of their subsistence and livelihood. The Yakima Tribe has for conservation and other purposes enacted regulations governing the exercise by its members of the fishing rights secured by its treaty, including restrictions as to times, places and manner of fishing.

5. The rights of said Tribe of taking fish at all usual and accustomed places guaranteed by said treaty do not derive from state authority and must be recognized and protected by the defendant. The defendant's authority to restrict the exercise of such rights is different from and more limited than its authority to restrict the state-conferred fishing privileges of persons who are not the beneficiaries of such rights. Proper recognition and protection of the rights require that before restricting their exercise the defendant must (a) deal with the matter of the Indians' treaty fishing rights as a subject separate and distinct from that of fishing by others, (b) so regulate the taking of fish that the Tribes and their members will be accorded an opportunity to take,

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

7 6. The defendant has failed and refused to recognize
8 and protect the Yakima Tribe's treaty rights. It has, with limited
9 exception, failed and refused to deal with fishing by the benefici-
10 aries of such rights as a separate subject when formulating regu-
11 lations to govern the taking of fish in the State of Washington.
12 It has, with limited exception, denied that such rights invest the
13 beneficiaries with any privileges and immunities other than those
14 which the defendant chooses to accord citizens generally. It has,
15 with limited exception, dealt with Indian treaty rights as though
16 they were state-conferred privileges, any exercise of which the
17 state is not only free to, but is required to, regulate to the same
18 extent and in the same manner as it regulates fishing by persons not
19 entitled to exercise said rights. In conformity with this premise,
20 defendant, with limited exception, contends it has no authority to,
21 and has refused to, recognize or allow any manner of exercise of
22 the right, or its exercise during any time, at any place, or for any
23 purpose the defendant does not also allow other persons to take fish.
24 It has failed and refused to attempt to so regulate fishing in
25 the State of Washington as to accord the beneficiaries of such
26 right an opportunity to catch, at their usual and accustomed
27 places and by reasonable means feasible to them, a fair and
28 equitable portion of the fish which are available for catching
29 from a particular run consistent with adequate escapement for
30 spawning and reproduction. It has not determined what specific
31 restrictions must necessarily be imposed upon the exercise of the
32 treaty rights in the interest of conservation and informed the

1 beneficiaries thereof in advance of enforcement what those
2 restrictions are.

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

7 Defendant has by statute and regulation totally closed
8 many of the usual and accustomed areas of said tribes to all
9 forms of net fishing while permitting commercial net fishing
10 elsewhere on the same runs of fish.

11 Defendant has by statute and regulation set aside one
12 species of fish, the species commonly known as steelhead, for the
13 exclusive use and benefit of a single category of persons, namely
14 sportsmen, and has imposed limitations on the means by which, the
15 purpose for which, and the numbers of which said species may be
16 taken that are in derogation of the treaty rights of said tribes.

17 7. Defendant has not undertaken, or caused to be under-
18 taken, any studies, research, or experimentation - or if it has,
19 has not introduced the results thereof into any hearing or public
20 proceedings at which state fishing laws or regulations were con-
21 sidered or enacted - of the extent to which it is necessary for the
22 defendant to restrict the exercise of fishing rights secured to
23 Indian tribes by treaties of the United States.

24 8. In devising, adopting and promulgating the regulations
25 by which they authorize the taking of fish for commercial or sports
26 purposes by persons subject to the State's jurisdiction, and in
27 establishing and carrying out fishery management policies and
28 programs and determining conservation objectives, the defendant and
29 its officers and agents have not given recognition to, or made
30 proper allowance for, the rights secured to Indian tribes by treaties
31 of the United States.

32 9. The defendant and various of its officers and agents

1 claiming to act in their official capacities on behalf of the defend-
2 ant, have seized nets and other property of members of the Yakima
3 Tribe and have harassed, intimidated, and threatened said members
4 or caused them to be arrested and prosecuted, for allegedly violating
5 state laws or regulations pertaining to fishing for, taking of, or
6 possession of, fish which were taken or sought to be taken by said
7 members in the lawful exercise of rights secured by the treaties,
8 and have confiscated or released fish belonging to said members and
9 taken in the exercise of said rights, have interfered with, obstructed,
10 and attempted to prevent the transportation or sale of such fish so
11 taken by members of said Tribe and have otherwise harassed and inter-
12 fered with said members in the exercise of said rights. Defendant,
13 its officers and agents, assert their intention to continue these
14 actions. In so acting and threatening to act, the defendant, its
15 officers and agents are acting wrongfully and in derogation of
16 rights secured by the treaties.

17 10. As a result of said wrongful acts of defendant,
18 the Yakima Tribe and its members are being unlawfully deprived of
19 their treaty right, privilege, and immunity to fish at many of their
20 usual and accustomed places and have suffered, and will continue to
21 suffer, irreparable damage. The plaintiff has no adequate remedy at
22 law because

- 23 (a) the damages which have been and will be sustained
24 are not susceptible of monetary determination;
25 (b) the right of the Indians to fish at their usual and
26 accustomed places conferred by treaty with the United
27 States is unique and should be specifically protected; and
28 (c) in the case of criminal prosecutions threatened by
29 the defendant or its officers or agents purporting to act
30 under the authority of the State statutes, these Indians
31 have no remedy at all except at the risk of suffering fines,
32 imprisonment and confiscation of property, involving a

1 multiplicity of legal proceedings.

2 11. An actual controversy exists between plaintiff
3 Yakima Tribe on one hand the defendant on the other hand as to the
4 nature and extent of the treaty fishing rights of the treaty
5 tribes in the State of Washington and the attempted regulation
6 thereof by the defendant.

7 SECOND CLAIM FOR RELIEF

8 12. Plaintiff restates and re-alleges the allegations
9 of Paragraphs 1 through 12 of this complaint.

10 13. Statutes of the defendant enacted without regard
11 to Indian treaty rights make it unlawful to use various types
12 of appliances including a set net, a weir, or any fixed appliance
13 within any waters of the state for the purpose of catching
14 salmon (RCW 75.12.060) or to lay or use any net for the purpose
15 of taking fish which the defendant has classified as game fish,
16 or lay or use any net capable of taking game fish except as
17 permitted by regulation of the Department of Fisheries
18 (RCW 75.12.070), to use reef nets except in limited areas specified
19 by statute (RCW 75.12.160). Other statutes, including RCW 75.08.080,
20 give the defendant's Director of Fisheries broad authority to
21 regulate the taking of salmon, and give defendant's Game Commission
22 broad authority to regulate the taking of steelhead and other
23 "game fish" (RCW 77.12.040), which authorities have been exercised
24 without proper regard for Indian treaty rights, make violation of
25 provisions of defendant's fisheries or game codes or regulations
26 punishable as a crime (RCW 75.08.260, RCW 77.16.020, RCW 77.16.030,
27 RCW 77.16.040, and provide for seizure and forfeiture of gear used
28 or held with intent to use unlawfully (RCW 77.12.100). Nets and
29 other items used or "Had or maintained for the purpose of" taking
30 game fish contrary to law or Game Commission rule or regulation are
31 subject to summary seizure and destruction by game protectors
32 "without warrant or process." (RCW 77.12.130). Among other

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

28 14. In devising and adopting the rules and regulations
29 governing the taking of fish the defendant has failed to give
30 proper recognition or make adequate provision for the exercise of
31 treaty fishing rights of members of the Yakima Tribe at the usual
32 and accustomed places of said tribe in favor of those who take

1 fish by other means and at other locations. In doing so the
2 defendant is unlawfully discriminating against the exercise of
3 Indian Treaty fishing rights. Such discrimination results in
4 irreparable damage to the Yakima Tribe and its members.

5 WHEREFORE, Plaintiff prays that the court:

6 1. ORDER, ADJUDGE, AND DECREE that

7 (a) The Yakima Tribe owns and it may authorize its
8 members to exercise a right derived from the laws and treaties of
9 the United States to take fish at its usual and accustomed places,
10 which right is distinct from any right or privilege of individuals
11 to take fish derived from common law or state authority, and the
12 exercise of which is subject to state control only through such
13 statutes or regulations as have been established to be necessary
14 for the conservation of the fishery and which do not discriminate
15 against the exercise of such right;

16 (b) Before defendant may regulate the taking and
17 disposition of fish by members of the Yakima Tribe at usual and accus-
18 tomed fishing places pursuant to treaties between said tribes and
19 the United States:

20 (i) It must establish by hearings preliminary
21 to regulation that the specific proposed regulation is both reason-
22 able and necessary for the conservation of the fish resource.
23 In order to be necessary, such regulations must be the least
24 restrictive which can be imposed consistent with assuring the
25 necessary escapement of fish for conservation purposes; the burden
26 of establishing such facts is on the state.

27 (ii) Its regulatory agencies must deal with the
28 matter of the Indians' treaty fishing as a subject separate and
29 distinct from that of fishing by others. As one method of
30 accomplishing conservation objectives it may lawfully restrict or
31 prohibit non-Indians fishing at the Indians' usual and accustomed
32 fishing places without imposing similar restrictions on treaty

1 Indians.

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

8 2. Declare RCW 75.12.060, RCW 75.12.070, RCW 77.08.020,
9 RCW 77.12.130, RCW 77.16.040, 77.16.060, WAC 220.20.010, WAC
10 220-20-015(2) and WAC 220-47-020 null and void insofar as they deny
11 or restrict the right of members of the Yakima Tribe, acting under
12 tribal authorization, to take fish for subsistence and commercial
13 purposes at their tribe's usual and accustomed fishing places or
14 to possess or dispose of fish so taken.

15 3. Declare that the defendant, its officers, agents,
16 and employees may not apply the provisions of RCW 75.08.260, RCW
17 77.12.100, 77.16.020, and 77.16.030 in such manner as to prevent
18 or restrict members of the tribes named in paragraph 2 hereof
19 from taking fish for subsistence and commercial purposes at their
20 tribe's usual and accustomed fishing places or to possess or dispose
21 of fish so taken without previously having established that the
22 imposition of such specific restriction is necessary for the
23 conservation of fish and does not discriminate against the taking
24 of fish pursuant to such treaty rights.

25 4. Enjoin the defendant, its officers, agents and
26 employees from enforcing the provisions of RCW 75.12.060, RCW
27 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, RCW 77.16.060,
28 WAC 220.20.010, WAC 220-20-015(2) and WAC 220-47-020 in such manner
29 as to prevent or restrict members of the said tribes from taking
30 fish at their usual and accustomed places in accordance with tribal
31 authorization pursuant to the treaties between those tribes and the
32 United States.

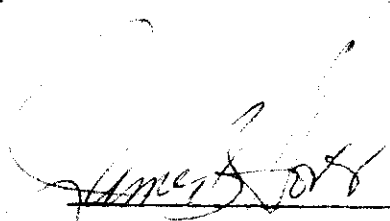
1 5. Enjoin the defendant, its officers, agents and
2 employees from enforcing the provisions of state laws or regulations
3 in such manner as to prevent or restrict members of the Yakima
4 Tribe from taking fish at their usual and accustomed places in
5 accordance with tribal authorization pursuant to the treaties
6 between the Yakima Tribe and the United States without previously
7 having established that the imposition of state regulation is
8 necessary for the conservation of fish and does not discriminate
9 against the taking of fish pursuant to such treaty right.

10 6. Grant such further and additional relief as the
11 plaintiff may be entitled to.

12 7. Award plaintiff the costs of this action.

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

15 DATED this 1ST day of December, 1970
16 at Yakima, Washington.



JAMES B. HOVIS
Yakima Tribal Attorney

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