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Docket Entry 77 - Filed Complaint of Intervenor Hoh Tribe of Indians

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JUL 23 1971

CHARLES A. SCHAAF, CLERK

Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

HOH TRIBE OF INDIANS,

Plaintiff-Intervenors,

vs.

STATE OF WASHINGTON,

Defendant.

CIVIL NO. 9213

COMPLAINT OF INTERVENOR

HOH TRIBE OF INDIANS

COMES NOW the Hoh Tribe of Indians as Plaintiff-Intervenors
and alleges as follows:

JURISDICTION

1. This Court has jurisdiction of this action by virtue of 28 U.S.C., Sections 1331, 1337, 1343(3), 1343(4) and 1362. This action is for declaratory relief in a civil action pursuant to 28 U.S.C., Sections 2201 and 2202, and for injunctive relief with respect to the enforcement of certain statutes, regulations, orders, practices, and policies of the State of Washington and its officers and agents, including Thor C. Tollefson, Director of the Department of Fisheries, and Carl Crouse, Director of the Department of Game, and the members of the State of Washington Game Commission, restricting prohibiting and otherwise qualifying the rights of plaintiff Hoh Indian Tribe to take fish within Indian country and at their usual

and accustomed places off their reservation. This action is brought under the Constitution, laws and treaties of the United States, including the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution; the Supremacy Clause, Article VI, Clause 2, of the Constitution; Amendments I and IV to the Constitution, and the Due Process and Equal Protection Clauses of Amendment XIV to the Constitution; 18 U.S.C. Sections 1151 through 1153; 42 U.S.C. Section 1983; Public Law 280 (Act of August 15, 1953, 67 Stat., 588 et seq., as amended); The Treaty of Olympia, July 1, 1855, and January 25, 1856.

This action seeks to redress the deprivation under color of the laws, statutes, ordinances, regulations, customs and usages of the State of Washington relating to fishing including, but not limited to, Revised Code of Washington (RCW), Chapters 75 and 77 and Washington Administrative Code (WAC), Chapter 220 and the orders, regulations, and policies promulgated pursuant to them of rights, privileges, and immunities secured to plaintiff, Hoh Indian Tribe, by the United States Constitution.

PARTIES

2. Plaintiff Hoh Tribe of Indians is an Indian Tribe located on the Hoh Reservation at the mouth of the Hoh River, in Jefferson County, State of Washington, with a governing body duly recognized by the Secretary of the Interior and the Department of Interior and by the United States Government as one of the signatories to the Treaty of Olympia concluded by Isaac Stevens on July 1, 1855 and January 25, 1856, with certain Western Washington Indian Tribes. The members of this tribe are generally poor and many of its members are dependent or partially dependent upon fishing for their subsistence and livelihood. Plaintiff's members depend upon the exercise of treaty fishing rights to maintain their culture and traditional way of life.

3. Defendant is the State of Washington which by and through its Director of Fisheries, Thor Tollefson, and its Director of Game, Carl Crouse, and the members of the State Game Commission regulate the taking of fish through orders and regulations promulgated by them in their official capacities, and through enforcement of statutes, regulations, orders, and policies of the State of Washington relating to fishing, all of which are challenged in this proceeding. All of said representatives of the defendant, State of Washington, have acted illegally and unconstitutionally.

GENERAL ALLEGATIONS

4. The Treaty of Olympia (together with other similar Treaties) contained the following general language:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory..."

5. The members of the Hoh Tribe, prior to execution of the Treaty of Olympia, and thereafter, depended upon fishing for anadromous fish, including steelhead and several species of salmon, for a substantial part of their subsistence and livelihood and otherwise to maintain their culture. Plaintiff's members fished in waters within their reservation and in those waters adjacent to their reservation to the Olympic Range of mountains to the East, to the Straits of Juan de Fuca to the North, and to Grays Harbor to the South, such area comprising the usual and accustomed fishing places of various members of the Hoh Tribe.

They reserved such lands and fishing places as an important part of the consideration for entering into the Treaty of Olympia because it was and is their heritage, custom, and habit to derive their needs from the lands and the waters passing through, adjacent, and near them. Not only was fishing of great economic importance to the Hohs but it was at the heart of their religion and culture. In order to retain their way of life the Indians reserved to

themselves, and the United States promised to protect, their right to fish.

6. The Hoh Tribe has always harvested only so much of their fish resource as can be taken without threatening the continued existence of the resource. Toward this end, the Tribe has always practiced conservation, has regulated fishing grounds of its members and are competent to continue such regulation and conservation in the future. Concern for preservation of the anadromous fish upon which the Hoh Tribe is dependent is implicit in their heritage. By virtue of countless generations of Indian fishermen, techniques and expertise in managing and conserving various species of anadromous fish have been developed and practiced. The yearly take and the yearly run has remained relatively constant at all times, despite the influx of white sports fishermen.

7. Fishing by the Hoh Tribe has been and is being frustrated and interfered with by the actions of Defendant in enforcing and attempting to enforce certain statutes, regulations, orders, practices, and policies, and by acts of, or acts sanctioned by defendant and its agents in violation of the treaty and constitutional right of members of the Hoh Tribe as set out in this complaint.

8. As a result of the frustration and interference with Hoh Indian fishing rights the members of the Hoh Tribe are and have been subjected to harassment, intimidation, arrest, incarceration, deprivation of fishing gear and subjected to excessive defense costs, as well as inability to obtain sufficient fish to meet their present subsistence needs and to maintain their livelihood. These practices and inability to catch fish will continue in the future so long as the statutes, regulations, orders, practices, policies, and acts of the State of Washington and its agents regulating and purporting to regulate fishing are enforced and sanctioned.

9. The Treaty entered into between the Hoh Tribe and the United States is the supreme law of the land and must be recognized

and respected by defendant State of Washington and its officers and agents. To the extent that any laws or regulations of the State of Washington are inconsistent with them, such laws and regulations are void and of no force or effect as to the Hoh Tribe.

10. The Hoh Tribe and its members have suffered irreparable damage and will continue to be so harmed unless Defendant and its agents are enjoined by this Court as prayed; Plaintiff Hoh Tribe has no adequate remedy at law. An actual controversy exists between the Hoh Tribe and Defendant as to the nature and extent of the Treaty fishing rights of the Hoh Tribe.

CLAIM FOR RELIEF

11. Statutes of the defendant enacted without regard to Indian treaty rights make it unlawful to use various types of appliances including a set net, a weir, or any fixed appliance within any waters of the state for the purpose of catching salmon (RCW 75.12.060) or to lay or use any net for the purpose of taking fish which the defendant has classified as game fish, or lay or use any net capable of taking game fish except as permitted by regulation of the Department of Fisheries (RCW 77.16.060). Defendant's statutes also make it unlawful to spear, gaff or snag salmon except as may be authorized by the Director of Fisheries (RCW 75.12.070), to use reef nets except in limited areas specified by statute (RCW 75.12.160). Other statutes, including RCW 75.08.080, give the defendant's Director of Fisheries broad authority to regulate the taking of salmon, and give defendant's Game Commission broad authority to regulate the taking of steelhead and other "game fish" (RCW 77.12.0) which authorities have been exercised without proper regard for Indian treaty rights, make violation of provisions of defendant's fisheries or game codes or regulations punishable as a crime (RCW 75.08.260, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, and provide for seizure and forfeiture of gear used or held with intent

to use unlawfully (RCW 77.12.100)). Nets and other items used or "had or maintained for the purpose of" taking game fish contrary to law or Game Commission rule or regulation are subject to summary seizure and destruction by game protectors "without warrant or process." (RCW 77.12.130). Among other restrictions, regulations of the defendant issued by said Director of Fisheries make it unlawful to fish for or possess food fish from any waters over which the State of Washington has jurisdiction except as provided for in state statutes or/in regulations of the State Department of Fisheries (WAC 220-20-010(1) and (2)). These regulations also make it unlawful to have an unattended gill net in the commercial salmon fishery (WAC 220-20-010(5)), or to place commercial food fish gear in any waters closed to commercial fishing (WAC 220-20-010(6)), or to attempt to take food fish by various specified means including gaffing, snagging, dip netting, spearing, and others, or to possess food fish so taken (with limited exceptions in connection with personal use angling) (WAC 220-20-010(11)), or to fish for or possess food fish taken contrary to provisions of any special season or emergency closed period prescribed in Chapter 220-28 of the Washington Administrative Code (WAC 220-20-010(16)), or to take salmon "for commercial purposes" i.e., by means other than angling -- within three miles of any river or stream flowing into Puget Sound (WAC 220-20-015(2)), or within areas specified in WAC 220-47-020, or to fish for food fish for personal use by any means other than angling unless otherwise provided or possess fish so taken (WAC 220-56-020(2)). Various officers and agents of the defendant have stated their intention on behalf of the defendant to apply such laws and regulations to all Indians fishing at their Tribe's usual and accustomed places in the exercise of rights secured by their treaties and have arrested, cited for prosecution, and seized gear of members of such Tribes for so fishing in violation of such laws and

12. Apparently, pursuant to Federal Court decisions the Director of Fisheries of defendant has promulgated certain regulations (Director of Fisheries Orders No. 866, 875, 885) in a vain and restrictive attempt to apply the sanctions of the Federal Courts; that the Director of Game of defendant has openly defied the Federal Court decisions and by its attempted intervention herein and its proposed Answer in Intervention has shown its complete disregard for the Treaty rights of the Hoh Tribe and the other Indian Tribes that are a party to this proceeding and by said acts and actions has shown that it could not and would not pursue any reasonable practice and policy as dictated by the Federal Courts, necessitating that this Court maintain continuous jurisdiction of this matter for the reasonable application of the ultimate orders of this Court.

SECOND CLAIM FOR RELIEF

13. Defendant has purported to establish and regulate non-Indian fishing upon lands which constitute Indian Country and which constitute the usual and accustomed fishing grounds of the Hoh Tribe. Such fishing interferes with the fishing by Indians and depletes the runs of fish available to members of the Hoh Tribe. Such regulations as to steelhead by the Washington Game Department have virtually ended any steelhead fishing by members of the Hoh Tribe outside the one mile square area of the Hoh Reservation, whereas the Hoh Tribe has from time immemorial fished an area constituting hundreds of square miles surrounding the Hoh Reservation. The Department of Fisheries has allowed a very limited fishery outside the boundaries of the Hoh Reservation.

14. Defendant has no jurisdiction whatsoever to interfere with fishing by the Hoh Tribe within the boundaries of the Indian Country where the usual and accustomed fishing grounds of the Hoh Tribe exist. Regulation and proposed regulation by defendant violates the Treaty rights of the Hoh Tribe and is contrary to Federal

law, including 18 U.S.C. Sections 1151-1153 and 1165, and Public Law 280, thus violating the Supremacy Clause of the Constitution.

THIRD CLAIM FOR RELIEF

15. Regulation of Indian fishing would be necessary only if conservation cannot be achieved by restriction, regulation or prohibition of fishing by non-Indians and will not be achieved by Tribal regulation. The State of Washington asserts its claimed right to regulate as a basis for allocation of the Indian fish resources among Indians and non-Indians on an equal per capita basis and without any regard to preferential treatment to be accorded by the Treaty of Olympia.

16. The failure of defendant to accord to the Hoh Tribe their Treaty rights have deprived them of their livelihood. All such restrictions and prohibitions should be voided by this Court as invalid under the Supremacy Clause of the United States Constitution.

FOURTH CLAIM FOR RELIEF

17. The fishing regulation scheme of the State of Washington discriminates against Indians and favors other classes of fishermen.

Defendant's statutes are promulgated for the benefit of and to meet the needs of the sport and commercial fishermen of the state, with complete and utter disregard for and failure to mention any Indian Treaty rights. Such is especially true of the steelhead which has been virtually withdrawn from any harvest except by the sports fishermen, whereas the steelhead was the prime food fish of the Hoh Tribe at the time of the Treaty of Olympia.

18. The entire scheme to regulate fishing in the State of Washington is invalid and unconstitutional under Amendment I, the Equal Protection Clause of Amendment XIV, and the Supremacy Clause of the United States Constitution in that they discriminate against the Hoh Tribe upon the basis of race, culture, religion, and poverty

and inhibit the maintenance of that culture and religion by the Hoh Tribe, in that they prevent and fail to provide for the exercise of the Treaty rights of the Hoh Tribe, thereby frustrating the purpose of the Treaty.

WHEREFORE, Plaintiff prays that this Court:

1. ORDER, ADJUDGE and DECREE that

(a) The Hoh Tribe owns and it may authorize its members to exercise a right derived from the laws of the United States and the Treaty of Olympia to take fish at its usual and accustomed places, which right is distinct from any right or privilege of individuals to take fish derived from common law or state authority.

(b) The matter of Indian treaty fishing must be dealt with as a subject separate and distinct from fishing by others. As one method of accomplishing conservation objectives, it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

2. Declare RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, 77.16.060, WAC 220-20-010, WAC 220-20-015(2) and WAC 220-47-020 null and void insofar as they deny or restrict the right of members of the Hoh Tribe, acting under tribal authorization, to take fish for subsistence or commercial purposes at the tribe's usual and accustomed fishing places, or to possess or dispose of fish so taken.

3. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, RCW 77.16.060, WAC 220.20.010, WAC 220-20-015(2) and WAC 220-47-020 in such manner as to prevent or restrict members of the Hoh Tribe from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the Treaty of Olympia.

4. Grant such further and additional relief as the Hoh Tribe

may be entitled to.

5. Award the Hoh Tribe its costs and disbursements herein.
6. Retain jurisdiction of this cause for the purpose of establishing any necessary rules or regulations and for enforcing or supplementing the judgment of this Court.

DATED this 20th day of January, 1971, at Hoquiam, Washington.

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By *Lester Stritmatter*
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Hoh Tribe of Indians