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Docket Entry 83 - Filed Complaint in Intervention of Lummi Indian Tribe

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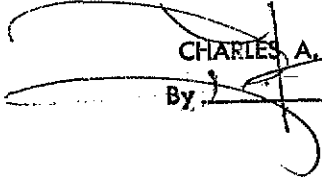
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ORIGINAL

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FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington

SEP 2 - 1971

By  CHARLES A. SCHAAF, Clerk
Deputy

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

9 UNITED STATES OF AMERICA,]

10 Plaintiff,]

11 LUMMI INDIAN TRIBE,]

CIVIL NO. 9213

12 Intervenor,]

13 v.]

COMPLAINT IN
INTERVENTION OF
LUMMI INDIAN TRIBE

14 STATE OF WASHINGTON; THOR C. TOLLEFSON,
individually and as director of the State of Wash-
15 ington Department of Fisheries; CARL N. CROUSE,
individually and as director of the State of Wash-
16 ington Department of Game; and WASHINGTON
STATE GAME COMMISSION,]

17 Defendants.]

18
19 COMPLAINT FOR DECLARATORY JUDGMENT
20 AND INJUNCTION

21 Permission to intervene having been granted, the Lummi Indian Tribe
22 by and through its attorneys, Ziontz, Pirtle & Morisset, complains and
23 alleges as follows:

24 FIRST CLAIM FOR RELIEF

25 1. This court has jurisdiction for the reason that this
26 action is brought by the Lummi Indian Tribe of the Lummi Reserva-
27 tion, a recognized Indian Tribe with a governing body recognized
28 by the Secretary of the Interior and the Bureau of Indian Affairs,
concerning matters arising under a treaty of the United States.

1 28 U.S.C. §1362.

2 2. On January 22, 1855, the Lummi Indian Tribe entered into
3 a treaty with the United States government. 12 Stat. 927.

4 Article V of that treaty provides as follows:

5 "The right of taking fish at usual and accustomed
6 grounds and stations is further secured to said
7 Indians in common with all citizens of the Territory,
8 and of erecting temporary houses for the purpose of
9 curing, together with the privilege of hunting and
gathering roots and berries on open and unclaimed
lands. Provided, however, That they shall not take
shellfish from any beds staked or cultivated by
citizens."

10 This treaty remains in full force and effect between the Lummi
11 Indian Tribe and the United States government.

12 3. The Lummi Indian Tribe has usual and accustomed fishing
13 places and stations within and contiguous to the western portion of
14 the State of Washington including but not limited to the waters of
15 the Straits of Georgia from the Canadian boundary on the north and
16 southward throughout and surrounding the San Juan Island group,
17 and eastward to the mainland shore and including the waters of
18 rivers and streams emptying into Puget Sound from the Samish River
19 on the south and northwards along the shores to the Canadian boun-
20 dary on the north, and including all the bays, passages and inlets
21 along said shore.

22 The tribe has the right secured by the treaty to take fish
23 including all species of salmon at its usual and accustomed fishing
24 places. In particular, the intervenor, Lummi Indian Tribe, has
25 from time immemorial engaged in reef net fishing at certain sites
26 within the area above described, which sites are peculiarly suit-
27 able for reef net fishing.

28 4. Subsequent to the execution of the 1855 treaty and in

1 reliance thereon, the members of the tribe have continued to fish
2 for subsistence and commercial purposes at the usual and accustomed
3 places. Such fishing has provided and still provides an important
4 part of subsistence and livelihood for Lummi Indians. Many members
5 of the Lummi Indian Tribe own and operate and have owned and oper-
6 ated commercial fishing boats including reef net boats, and in
7 addition, other members of the Tribe fish during various times of
8 the fishing season in small kicker boats of the 12 to 16-foot type
9 with outboard engines. Said fishermen have been deterred from
10 exercising treaty fishing rights by reason of the threat of arrest
11 and prosecution by defendant State of Washington in enforcement of
12 its laws and regulations.

13 5. The Lummi Indian Tribe is a dependent sovereign state,
14 subject to the plenary power of the United States Congress and not
15 subject to the jurisdiction of the State of Washington except where
16 Congress or the tribe has given express consent.

17 6. The defendants have failed and refused to recognize and
18 respect the sovereign status and federal treaty rights of the Lummi
19 Indian Tribe. They have sought to impose their regulations con-
20 cerning the taking of fish upon members of the tribe when fishing
21 in their usual and accustomed places without regard for the exist-
22 ence of the treaty right and the sovereign status of the tribe.
23 They have dealt with the Lummi treaty rights as though they were
24 state-conferred privileges which the state was required to regulate
25 to the same extent and in the same manner as it regulates fishing
26 by persons not entitled to exercise treaty rights.

27 Defendants have promulgated and enforced regulations which
28 deny the Lummi tribe the right to take any fish whatsoever of

1 particular runs and species.

2 They have so framed their statutes and regulations as to allow
3 all the harvestable fish from a given run to be taken by those with
4 no treaty rights by restricting fishing times and methods in the
5 Lummi usual and accustomed places, while allowing a longer or less
6 restrictive season on the same run at other places.

7 The defendants have by statute and regulation totally closed
8 many of the usual and accustomed areas of the Lummi tribe to all
9 forms of net fishing while permitting commercial net fishing else-
10 where on the same run of fish, thus denying completely exercise of
11 the tribe's treaty right.

12 The defendants have by statute and regulation declared the
13 waters of Bellingham Bay within the boundaries of the Lummi Reser-
14 vation to be open for sports and commercial fishing, thereby in-
15 vading intervenor's trust area and permitting decimation of fish
16 runs so that intervenor's fishermen are left with meager resources.

17 7. Defendants have by statute and regulation set aside one
18 species of fish, commonly known as steelhead, for the exclusive
19 use and benefit of a single category of persons, namely sportsmen.
20 They have imposed limitations on the taking of these fish, which
21 limitations wrongfully deprive the tribe of its treaty right to
22 fish for this species. The limitations are in derogation of the
23 treaty right of the tribe.

24 8. Defendant, State of Washington, has through other depart-
25 ments of state government issued permits authorizing non-Indians to
26 discharge waste in the waters of the Nooksack River, fouling and
27 polluting it to the extent that the river is incapable of supporting
28 any substantial run of salmon. The State has further permitted

1 non-Indian citizens to divert the waters of the Nooksack River
2 resulting in the lowering of the water level to a degree harmful
3 to the sustenance of marine life in the river. Defendant Department
4 of Fisheries has refused to take any corrective action with respect
5 to these practices and has refused to apply its resources to the
6 planting and stocking of the river and protection of its spawning
7 areas, as distinguished from other rivers in the state, all of
8 which has resulted in the substantial destruction of the Nooksack
9 River salmon run, a run which intervenor is entitled to by reason
10 of said river being adjacent to and part of its reservation and by
11 reason of said river being a usual and accustomed fishing ground
12 and place.

13 9. In devising, adopting, and promulgating the regulations
14 by which they authorize the taking of fish for commercial or sport
15 purposes by persons subject to the State's jurisdiction, and in
16 establishing and carrying out fishery management policies and
17 programs and determining conservation objectives, the defendants
18 have not given recognition to, or made proper allowance for, the
19 rights secured to the Lummi tribe by its treaty with the United
20 States government.

21 10. The State of Washington by statute and regulation purports
22 to license non-Indian fishermen to operate reef nets in the loca-
23 tions where reef-net fishing can be conducted in waters of this
24 state, which locations are at the usual places guaranteed to the
25 intervenor Lummi Indian Tribe by treaty. Non-Indian fishermen,
26 operating under license by the defendant, have stationed themselves
27 and their nets in these sites and have excluded intervenor's
28 members from said sites in violation of intervenor's treaty rights.

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1. *What is the purpose of this study?*
 2. *What are the research questions?*
 3. *What are the hypotheses?*

Aspirations of young

1

- 1 l. WAC 220-48-070: (establishing bottom fishing
2 areas)
- 3 m. WAC 220-48-080: (establishing limitations on gear
4 use for bottom fishing)
- 5 n. WAC 220-48-090: (establishing certain closed
6 waters for bottom fishing)
- 7 o. WAC 220-48-100: (establishing seasons for bottom
8 fishing with gear other than otter trawl)
- 9 p. WAC 220-48-120: (establishing restrictions on use
10 of gear for herring and candlefish fishing)
- 11 q. WAC 220-48-130: (prohibiting herring or candle-
12 fish fishing except with gear authorized by regulation)
- 13 r. WAC 220-48-140: (establishing seasons for herring
14 and candlefish)
- 15 s. WAC 220-48-150: (establishing restrictions on
16 perch fishing)
- 17 t. WAC 220-48-170, 180, 190, 200: (establishing re-
18 strictions on anchovy and pilchard fishing)
- 19 u. WAC 220-48-210, 220, 230, 240: (establishing re-
20 strictions on smelt fishing)
- 21 v. WAC 220-56-020: (establishing restrictions on
22 fishing for personal use)
- 23 w. WAC 220-56-023: (prohibiting salmon fishing for
24 personal use without possession of a required card)
- 25 x. WAC 220-56-030: (establishing possession limits
26 for food fish)
- 27 y. WAC 220-56-050: (establishing general regulations
28 for handling of food fish)
- z. WAC 220-56-066: (restricting fishing in the
Nooksack River and the Samish River)
13. The defendant has maintained a regulatory scheme which
does not protect or recognize intervenor's treaty rights, but which
on the contrary licenses wholesale invasion of these rights by
non-Indian citizens of the state of Washington. The defendants
have intimidated members of the tribe by threatened criminal

1 prosecution and seizure and confiscation of gear.

2 WHEREFORE, intervenor prays that the court order, adjudge and
3 decree that:

4 1. The Lummi Indian Tribe owns, and it may authorize its
5 members to exercise, a right derived from the laws and treaties
6 of the United States to take fish at all usual and accustomed
7 places, which right is distinct from any right or privilege of
8 non-Indians and non-members of the Lummi Indian Tribe; that such
9 right is distinct from any right or privilege of non-members of
10 the Tribe to take fish which may be derived from common law, State
11 authority or any other source.

12 2. The defendant may not interfere with the Lummi Indian
13 Tribe's exercise of its fishing rights derived from treaty unless
14 such interference is necessary to insure the maintenance of the
15 species of fish in the specific waters where such a Lummi fishery
16 is conducted, and where such preservation cannot be achieved by
17 strict regulation or prohibition of fishing by non-Indians and
18 where such preservation will not be achieved by Tribal regulation.

19 3. All of the following provisions of the Washington State
20 Fisheries and Game Code and regulations promulgated thereunder
21 are inapplicable and null and void as to members of the Lummi
22 Indian Tribe when fishing in usual and accustomed fishing places
23 of the Lummi Indian Tribe:

24 RCW 77.12.080: (arrest without warrant for violation of
25 law, rule or regulation pertaining to game)

26 RCW 77.12.090: (search of vehicles for game fish without
warrant.

27 RCW 77.12.100: (seizure and forfeiture of game fish and
28 gear)

RCW 77.12.120: (seizure of contraband game)

1 RCW 77.12.130: (authorizing seizure and abatement of nets
2 for game fish)
3 RCW 77.16.030: (unlawful to have possession of game fish
4 during closed season)
5 RCW 77.16.040: (unlawful to sell game fish)
6 RCW 77.16.060: (unlawful to use nets to take game fish)
7 RCW 77.16.240: (general penalty--misdemeanor--90 days)
8 RCW 75.08.160: (right of entry on any lands or waters--
9 no trespass)
10 RCW 75.08.170: (right to search without warrant)
11 RCW 75.08.180: (search warrants)
12 RCW 75.08.190: (arrest without warrant)
13 RCW 75.08.210: (duty to make required reports)
14 RCW 75.08.260: (gross misdemeanor to violate fisheries
15 code)
16 RCW 75.12.060: (outlawing nets and weirs)
17 RCW 75.12.070: (prohibiting taking of fish by gaff hook)
18 RCW 75.12.160: (fishing with reef nets)
19 RCW 75.12.230: (outlawing transportation of salmon
20 caught in prohibited waters or by prohibited gear)
21 RCW 75.12.280: (outlawing monofilament gill nets)
22 RCW 75.16: (outlawing taking of fish for propagation
23 or scientific purposes)
24 RCW 75.36.010: (authorizing seizure without warrant of
25 fish, gear and boats)
26 RCW 75.36.020: (forfeiture of seized articles)
27 WAC 220-20-010, (1) - (16): (requiring all fish-
28 ing practices to be in conformity to state regulation
and prohibiting certain fishing techniques and prac-
tices)
WAC 220-20-015, (1) - (9): (setting requirements
for fishing for salmon)
WAC 220-20-020, (1) - (6): (prohibiting certain
fishing practices with respect to food fish other than
salmon)

- 1 WAC 220-20-025: (prohibiting certain practices
2 with respect to clams, crabs and shellfish)
- 3 WAC 220-20-030: (purporting to specifically
4 restrict Indian fishing)
- 5 WAC 220-28-010: (establishing emergency closed
6 periods)
- 7 WAC 220-47-020, (4), (12): (establishing a salmon
8 preserve and prohibiting commercial fishing at such
9 preserves in places which are the usual and accustomed
10 fishing grounds of intervenor)
- 11 WAC 220-47-030: (prohibiting use of certain gear
12 for catching of salmon on Puget Sound)
- 13 WAC 220-47-040: (establishing seasons and dates
14 for use of purse seine fishing techniques for salmon
15 in Puget Sound)
- 16 WAC 220-47-050: (establishing closures for reef
17 net fishing in Puget Sound)
- 18 WAC 220-47-060: (establishing closures for
19 gillnet salmon fishing in Puget Sound)
- 20 WAC 220-48-070: (establishing bottom fishing
21 areas)
- 22 WAC 220-48-080: (establishing limitations on gear
23 use for bottom fishing)
- 24 WAC 220-48-090: (establishing certain closed
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8 for handling of food fish)

9 WAC 220-56-066: (restricting fishing in the
10 Nooksack River and the Samish River)

11 Further, that the defendant is restrained and prohibited from issu-
12 ing licenses purporting to authorize non-members of the Lummi
13 Indian Tribe to engage in reef net fishing at places which are
14 usual and accustomed grounds and stations of the intervenor.

15 Further, that the defendant is forever restrained from enforc-
16 ing its criminal penalties against members of the Lummi Indian Tribe,
17 including fines, jail, seizure, confiscation and forfeiture of
18 gear, vessels and fish, when the tribe or its members are fishing
19 at usual and accustomed grounds and stations.

20 4. Defendant is confined to civil remedies in any case where
21 it seeks to interfere with the tribe's fishing rights and in any
22 such case, the burden should be upon the defendants to show that
23 any interference proposed by it is the least restrictive consistent
24 with the necessary escapement for preservation of the species.

25 5. Intervenor tribe has exclusive jurisdiction to permit and
26 regulate fishing by all persons within the boundaries of its
27 reservation.

28 6. Defendants have a duty to regulate fishing which is under
their jurisdiction so as to prevent interference with it by others
who are not members of the Lummi Indian Tribe.

1 7. The right of the Lummi Indian Tribe to promulgate and
2 enforce its own Tribal fishing regulations which should be
3 applicable to its members with respect to exercise of their treaty
4 rights is affirmed.

DATED this 14 day of January, 1971.

ZIONTZ, PIRTLE & MORISSET ~~FOUR~~

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