

2-2-1972

## Docket Entry 124D - Filed Affidavit of Loyd A. Royal

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FILED IN THE  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

FEB 2 - 1972

CHARLES A. SCHAAF, CLERK

11 UNITED STATES DISTRICT COURT  
12 WESTERN DISTRICT OF WASHINGTON  
13 AT TACOMA

14 UNITED STATES OF AMERICA, et al.,

15 Plaintiffs,

16 v.

17 STATE OF WASHINGTON, et al.,

18 Defendants.

NO. 9213

AFFIDAVIT OF  
LOYD A. ROYAL

20 STATE OF WASHINGTON }  
21 COUNTY OF THURSTON } ss.

22 I, LOYD A. ROYAL, being first duly sworn upon  
23 oath, depose and say:

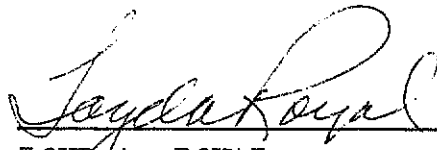
24 That I graduated from the College of Fisheries of  
25 the University of Washington in 1930 with a B.S. degree and  
26 became an employee of the Washington State Department of  
27 Fisheries. In 1935 I was appointed Chief Biologist and  
28 Assistant Director, which positions I held until 1943. At  
29 that time I was granted a leave of absence for military service  
30 in the Second World War. I returned in October, 1945, at  
31 which time I held the position of Chief of the Stream Improvement  
32 Division of the Washington State Department of Fisheries,  
33 becoming Chief Biologist for the second time in 1948.

AFFIDAVIT - 1

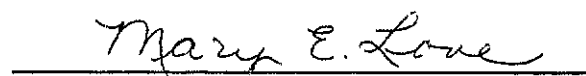
12718  
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1           On January 1, 1949, I left the employment of the  
2 Washington State Department of Fisheries and became the Chief  
3 Biologist for the International Pacific Salmon Fisheries  
4 Commission. (This Commission was established pursuant to a  
5 convention between the United States and Canada for the protection  
6 and preservation of Fraser River sockeye salmon.) On August  
7 8 of the same year, I was appointed Acting Director of the  
8 Commission and became full Director in 1950. I remained  
9 Director until March 1, 1971. As a result of my accomplishments  
10 in directing the fulfillment of the objectives of the Commission,  
11 I was awarded an honorary Doctor's degree in law by the  
12 University of British Columbia.

13           On March 1, 1971, I retired as Director of the  
14 Commission and became a special adviser and, in addition,  
15 at the same time, I accepted the position with the Department  
16 of Game having as its term of reference an analysis of the  
17 anadromous trout management program of the State of Washington  
18 which includes steelhead and cutthroat. In assembling available  
19 data relating to the design of both a short and long term  
20 program for the protection and extension of the steelhead  
21 fishery in the State of Washington, it was obvious that the  
22 Indian fisheries constitutes a major involvement with this  
23 program. Therefore, the attached document, marked Exhibit  
24 #3, was prepared in partial fulfillment of these terms of  
25 reference.

26  
27  
28   
LOYD A. ROYAL

29  
30 SUBSCRIBED AND SWORN to before me this 2nd day of February, 1972.

31  
32   
33 NOTARY PUBLIC in and for the  
State of Washington, residing  
at Olympia

Game Comm. / Claude Atkins, Seattle, Chairman  
Edson Dow, Wenatchee  
Harold A. Pablos, Olympia  
Arthur S. Coffin, Yakima  
James R. Agen, LaConner  
Elmer G. Gerken, Quincy  
Director [redacted] Carl N. Crouse

State of Washington



## DEPARTMENT OF GAME

600 North Capitol Way / Olympia, Washington 98501

May 3, 1971

## M E M O R A N D U M

TO: Carl N. Crouse, Director

FROM: Loyd A. Royal, Fisheries Research Coordinator

SUBJECT: The Relation of the Indian Fishery to Fisheries Management

In assembling available data relating to the design of both a short and long-term program for the protection and extension of the steelhead fisheries in the State of Washington the Indian fishery constitutes a major involvement with these terms of reference. The Indian fishery operates under two provisions generally applicable to all treaties between the United States and the Indian nations within the boundaries of the State of Washington. The first of these provisions stipulates, "an exclusive right of taking fish in all streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians." Due to the articulate phrasing encompassed in the above referenced provision the right of the Indian as specified should not and cannot be questioned even though any or all anadromous salmonids involved represent

a transient, renewable resource during its singular passage from the high seas of the North Pacific Ocean to reproductive areas and the return of the off-spring to the feeding grounds of their parents. Actually the resource as a whole is composed of many individual populations, mostly unrelated, which genetically are adapted to specific reproductive environments.

Thus we have a resource which, under the law of the sea, becomes available to exploitation by all nations during the rather lengthy period it is present in the North Pacific Ocean. Upon returning into territorial waters it falls under the jurisdiction of the sovereign state except when passing through Indian territory established by treaty, or otherwise, between the Indian bands concerned, and the United States government.

It seems important to note that other than the United States, nations created under somewhat similar circumstances did not render the same judgement in the allocation of fishery resource rights. Canada, for instance, did not grant any exclusive rights in respect to the fishery resource to the native Indian. This nation maintained jurisdiction in many important areas although the close relationship of the native Indian to the salmonid resource was usually recognized by the granting of yearly permits for the native Indians to take fish for their subsistence

(food) in some of their usual and accustomed fishing locations.

Although Indian reservations are sufficiently numerous in the State of Washington to involve a part of many spawning rivers, the small size and/or the physical geography and location of the individual reservations have limited the impact of exclusive Indian fishing rights on the renewable nature of the resource. The sovereign state, being primarily responsible for the maintenance of the transitory resource, has designed its management policies to permit compensation for the exclusive Indian fishery as required by limiting the harvest of the resource by non-Indians.

It is obvious from the catch statistics of fish taken by both Indian and non-Indians that the resource has not maintained its original capability for renewal. Until recently, when the State developed and started operating effective artificial aids to resource renewal, increased restrictions were placed on the utilization of the resource by non-Indians. In the case of steelhead all commercial harvest has been eliminated except in the lower Columbia River which is under interstate jurisdiction and in the Indian reservations which are outside the jurisdiction of the State. All harvesting of steelhead by non-Indians is now restricted to hook and line fishing for personal use.

The general decline in the renewal capability of the salmonid resource has been caused to a large extent by federal development of the State's water resources. This development has severely impaired the reproductive and survival capacity of the individual stocks involved. State, County, Municipal and privately sponsored water use projects, including watershed logging both on and off reservation lands, has had an adverse influence as well. In a vigorous attempt to stem the decline, artificial aids have been developed to stimulate production of salmon and steelhead in most of the affected waters. These aids are now producing substantial returns for each dollar expended. Certain races of salmon and steelhead have been cultured in such a way as to make them more tolerant to the environmental changes created by civilization in the reproducing areas. Hopefully, the benefits from new fish cultural procedures will be sufficient not only to reverse the decline in abundance but to forestall any need for negotiating with the Indian tribes for a possible reduction in their harvest on the reservation. This is important for the economic, cultural and religious relationship between the Indian tribes and the fisheries resource is centered primarily within the reservation. It is this relationship that the people of the United States obviously wish to maintain. It is axiomatic, however, that individual federal agencies concerned with the development of water resources have given little con-

sideration to this policy and other like agencies are at fault, also, except to a lesser degree. Most of the time the Indians only supporters have been the fisheries agencies, particularly those of the State, who have endeavored to sustain the resource for all concerned.

The indifferent attitude in the past of federal agencies towards the maintenance of the Indian fishery is exemplified by the construction of Grand Coulee Dam by the U.S. Bureau of Reclamation. This dam not only destroyed the historic fishery of the Colville and Spokane Indian tribes but the Indians residing in that vast watershed of the Columbia lying in Canada as well. Little, if any consideration was given to the fishing rights of the Colville and the Spokane Indians and apparently no compensation was ever given for their loss of salmon and steelhead. Unless new methods can be developed for restoring the anadromous fish runs above this dam, the economic, cultural and religious relationship of several thousand Indians to the fisheries resource has been destroyed forever. It is this relationship which is such a point of issue with our present populace. Yet it has been destroyed for over one-fourth of the State's Indian population by a single act of the federal government.

In managing the salmonid population, so vital to the Indian tribes on their reservations, the State must assess the



reproductive potential of each species separately and determine the surplus of each that is available for harvest. Obviously the several species, acting together, form a major part of the ecology of each spawning stream but the total ecological complex involves a survival relationship which varies between species and between rivers. It should be noted again that the survival capacity of any one or more species can be upset in specific cases even to the point of extermination by over-harvest or by adverse environmental factors created by utilization of the water resource associated with the migratory or reproductive areas. Naturally the tolerance to these artificial factors varies between species.

It is difficult to define the numerical importance of steelhead in the total salmonid complex reproducing in each river system. Exact statistics of the individual populations by species usually are not obtainable by practical means. Catch statistics and trends in the annual catches do serve, however, as an adequate management tool. Steelhead have always represented a minor component of the salmonid populations of all streams in the State of Washington. The size of this component varies, of course, between streams, representing about 10% of the total original salmonid population of the Columbia River watershed on the basis of relative catches, and probably as low as 2½% for some of the other

streams in the State. The cause for dominance of salmon in all streams, or the dominance of one species of salmon over another, or over the steelhead trout, is not fully understood. It is suffice for the purpose of this memorandum to state that species dominance does exist and must be recognized in good management practices. Usually the productivity of each species determines the annual surplus to be harvested of the component parts of this renewable resource.

The consistent minority position of the steelhead in the salmonid complex combined with a great interest in public utilization, has necessitated the gradual elimination of privileged harvesting except for net fishing on reservations which is sacrosanct. The International North Pacific Fisheries Treaty, by its terms of reference and the moral influence of this treaty on other nations, has prevented the development and growth of a highly effective long-line fishery on steelhead and salmon in the treaty area. Further action, stimulated by the International Pacific Salmon Fisheries Commission and the Pacific Marine Fisheries Commission, resulted in eliminating net fishing in the same area by the Nationals of Canada and the United States. Since the commercial high seas troller, the only salmon gear operating on the high seas, catches few, if any steelhead, this species enjoys full protection during this period of its life. Washington State also has eliminated commercial fishing and the sale of steelhead within territorial limits except on Indian

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reservations and the lower Columbia River. In essence, the steelhead is fully protected from privileged exploitation and the entire resource now becomes available each year at the mouth of the parent stream. It is here they become available for the first time to utilization by Indians fishing on their reservations and by the public at large. The steelhead, in contrast to many salmon populations, maintain an attractive appearance and a satisfactory food quality for some time after entering their natal stream. The taking of steelhead, by necessity, is limited to personal use fishing with hook and line with a bag limit of two fish per day and a limit of 30 fish per season. Thus the harvest of Washington's steelhead by non-Indians has progressed from one involving privileged exploitation to strictly a personal use fishery throughout its transitory existence. A similar history of utilization has been recorded for live resources represented among others by the resident trout, waterfowl, deer, buffalo and the passenger pigeon, except that the latter passed quickly through the personal use and endangered species stages and was exterminated.

Coincident with a greatly increased standard of living and the growth of other available food resources the taking of salmon, steelhead, and other fish for personal use, has become recognized more for its recreational value than as a source of food. Because of this, those fishing for steelhead are mistakenly

referred to by lawyers and jurists as a select or special privileged group called sportsmen. In fact, those exercising this right represent the public at large and an unprivileged fishery which is open to all citizens whether they be non-Indians or Indians. This is the last stage in the utilization of any animal resource before that resource is locked up to be revered by posterity.

The majority of the Indian reservations in the State of Washington, other than those adjacent to the Columbia River and its tributaries, are located at the mouth of important steelhead and salmon streams. In this case, the reservation Indian has the first and exclusive right to harvest a varying percentage of a previously unfished population of steelhead. This is true regardless of the fact that most steelhead populations are now enhanced by State operated facilities. The harvest of steelhead by reservation Indians is substantial since they have benefitted from the continued improvement of gill net and set net web which currently is many times more efficient in catching fish than was their aboriginal net. The development of synthetic nets, about 1955, doubled the efficiency of commercially operated gill nets over linen nets in use prior to that date. The effect on the salmon resource of the synthetic gill net is evident in the non-Indian fishery in Northern Puget Sound and Juan de Fuca Strait. Few gill nets operated in this

major salmon migration area prior to 1955 since linen nets caught insufficient fish to justify the operation. With the advent of the synthetic net, the gill-netter not only found it profitable to fish in this area but he is now catching such a large share of the allowable commercial catch that purse seine fishing is becoming non-competitive economically except for the more efficient operators.

In spite of the effectiveness of modern fishing gear, unrestricted fishing on the reservation has not as yet seriously disturbed the conservation of the non-dominant steelhead populations except in isolated cases such as that population supported by the Yakima River. In this case, the reservation is located above an extensive commercial fishery by both Indians and non-Indians and the migratory environment of the fish involved has been seriously impaired, mainly by federal power and reclamation projects.

As previously noted, the character and location of the reservations is a limiting factor on the Indian harvest of steelhead even though that harvest is relatively substantial. It is suffice to state that this exclusive fishing privilege and its commercial connotation as enjoyed by reservation Indians has not seriously disturbed the proper conservation of this resource. Whether this situation continues to exist or not depends on the ability of the fisheries agencies to compensate for the adverse effects of continued water resource development

by improved fish protective facilities including more advanced and expanded artificial aids to reproduction.

The reservation Indians and non-Indians alike have already benefitted from artificially stimulated increases in the steelhead population though the expense of doing this has been borne solely by non-Indians. There is a need for the State to expand these facilities to provide a greater harvest to meet increased demands in the future. Since the status of the reservation Indian is the responsibility of the federal government and since federal agencies have committed the major depredation of the steelhead's reproductive environment it seems reasonable that additional federal funds be made available and specifically allotted to the appropriate State agency for steelhead production in compensation thereof. It seems pertinent, also, to suggest if such monies are made available, that Indian employees be trained in the related operation to possibly serve as a catalyst for a better understanding and acceptance by Indians of the problems involved in managing the steelhead resource.

The second provision relating to fishing by Indians as incorporated in the Treaties made by Governor Stevens stipulates, "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." While the State interpreted this phraseology to mean the avoidance of discrimination against the

Indian if he wished to leave the reservation and fish under State regulation as applied to non-Indians, the courts have not seen fit to fully justify this interpretation. Numerous court decisions, while avoiding a coherent interpretation of this provision of the Indian treaties, have tended to recognize in rather vague verbiage the right of the Indian to fish in his usual and accustomed grounds as being superior to some undefined degree to any fishing right granted by the State to non-Indians. At the same time the right of the State to exercise police power for conservation purposes has been universally upheld provided the State can justify the need to the court. A more recent federal court decision raised the quantum philosophy to govern off-reservation fishing as related to special privileged commercial fishing by non-Indians but the judge left his decision in a vacuum of interpretation by not further defining the philosophy.

The above has resulted in such a confused interpretation of the referenced provision that the long-range management of the resource by the State for both the benefit of Indian and non-Indian, alike, becomes difficult. First, there is no practical definition of the Indian's off-reservation fishing right; second, there is no agreement as to the location of usual and accustomed fishing grounds which are known to the numerous and widely dispersed; third, it is impractical for the court or the federal

government to adequately judge the need for conservation inherent in each of the many required fishing regulations promulgated by the State in respect to all fishing; fourth, there is no definition as to what this off-reservation fishing right primarily relates to - be it economic, cultural, or religious, or all three and finally there has been no decisive recognition of the effect of modern fishing gear used by the Indians in relation to the physical characteristics of their off-reservation fishing areas wherever they might be claimed.

It appears that the modern interest of most Indians in off-reservation fishing is solely economic since his cultural and religious ties can be maintained on the reservation except where the federal government has destroyed that possibility by its own actions. An examination of court arguments fails to reveal that the proponents for granting special or prior rights to off-reservation fishing by Indians had considered or realized the consequences of their action. The desire of the individual Indian for monetary affluence is no different than for that of any other race. Such a desire is insatiable and can only be controlled by law leading to social justice for Indians and non-Indians alike. The granting of special privileges to the Indian for commercially exploiting the fishery resource with modern fishing gear on all accustomed fishing ground can only result in pitting one Indian against another, one Indian tribe



against another, and finally the continual agitation for a greater quantum in relation to that harvested by the non-Indian can reach a point where the question arises if any of the resource belongs to the people of the Sovereign State, the United States or other nations operating under international law.

Lack of a definite decision on off-reservation Indian fishing rights, which may not be available in the foreseeable future, can lead only to difficult relations between the Indian and the Sovereign State in carrying out its responsibility of conserving the fishery resource. Yet failure on the part of the state to control off-reservation Indian fishing would result in the resource being in the same dangerous condition that would result from an illogical or ill-founded court decision rendered in the interest of justice to the Indian.

In every case where the non-Indian has a special privilege to harvest salmonids for commercial purposes it appears logical on a superficial examination that the Indian tribes should have an equal opportunity to carry out commercial fishing in all their usual and accustomed grounds as well as on the reservation. This logic was applied in a recent court decision wherein the judge developed the quantum philosophy adding that the Indian share should be taken by means feasible to them. Obviously the judge

did not extend his analysis of the facts beyond the specific case involved, namely, the lower Columbia River. However, an application of this decision to all of the off-reservation fishing areas throughout the Columbia River watershed would create an unmanageable situation from the standpoint of maintaining the resource. That the same chaotic situation would occur on all watersheds elsewhere in the State cannot be denied since the Indians in these areas historically installed fishing obstructions made out of available material in small spawning streams whenever and wherever convenient.

In considering all of the requirements for the successful protection of the whole salmonid resource for use by Indians and non-Indians alike, it is difficult to conceive of a usable legal interpretation of the Indian treaties different than the one followed by the State in past years.

The interjection of benevolence as a policy toward the harvest of salmonids by the Indian off the reservation is worthy of consideration, particularly in view of judicial attitudes and the current attitude of local, state and federal government. How this policy can be exercised without the obstructing qualification of legal definition is the real point at issue, since it can hardly work under the restriction of such a definition. The abundance of individual populations of salmonids by species vary from year to year and are often affected unequally by artificial

and natural changes in reproduction. The Yakima River chinook and steelhead populations are in danger of extinction unless a plan can be worked out with the Yakima Indians and the federal government to develop a program of restoration involving action by both Indians and the State. The State's pink salmon runs have been so reduced in abundance the last three cycle years because of a reduced survival capability that closures to all fishing, including that by hook and line for personal use, were promulgated to obtain a maximum possible escapement. Only the reservation fishing remained uncontrolled.

In contrast, relatively large numbers of coho and chinook salmon have returned to some of the hatchery streams in recent years, creating a surplus escapement over hatchery requirements. A policy of benevolence has been followed in certain cases by the State in establishing special permission by Indians to harvest the surplus. Thus we have three existing situations; (1) the occurrence of surplus escapements; (2) a population of a size insufficient for escapement, and (3) other populations reaching a point of extermination. While steelhead populations generally are responding to the rearing and planting of emigrating smolts, the lack of dominance of this species continues to exist, nullifying the possibility of a commercial exploitation or an off-reservation harvest using gear more effective than hook and line excepting, of course, the lower Columbia River under present cir-

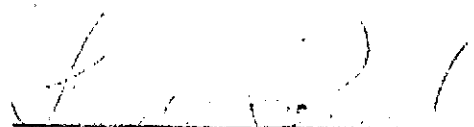
circumstances. Unless the artificial factors which continue to reduce the survival capabilities of the salmonids reproduced above McNary Dam on the Columbia River are controlled, and soon, commercial harvesting of these fish by any one may eventually have to be eliminated.

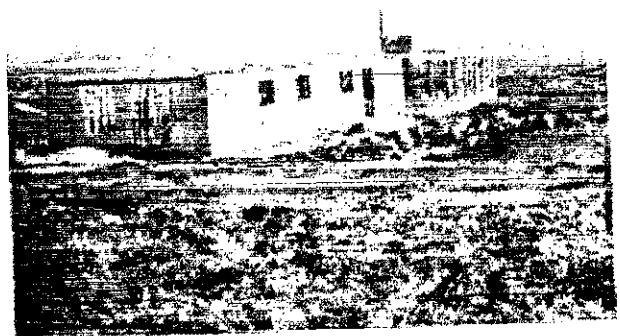
In summarizing the above, it would appear that with justifiable federal aid, the State can manage the salmonid resource to benefit the reservation Indian and the non-Indian alike. If exceptions appear through no fault of the State, such as the present complex situation on the Yakima River, the State and federal government and the Indian tribes concerned should agree to a mutually satisfactory program for solving the problem, in which case reduced Indian fishing would be required as an interim measure. In the development of an increased production and subsequent harvest by reservation Indians, it is suggested that a closer liaison regarding fish management practices be maintained with the reservation Indians to the point of hiring Indian employees, where practical, to further the understanding of the Indian of the methods being used by the State in protecting and extending his resource and the benefits being derived therefrom.

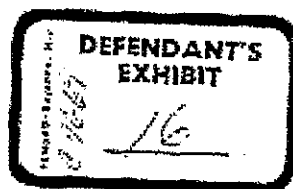
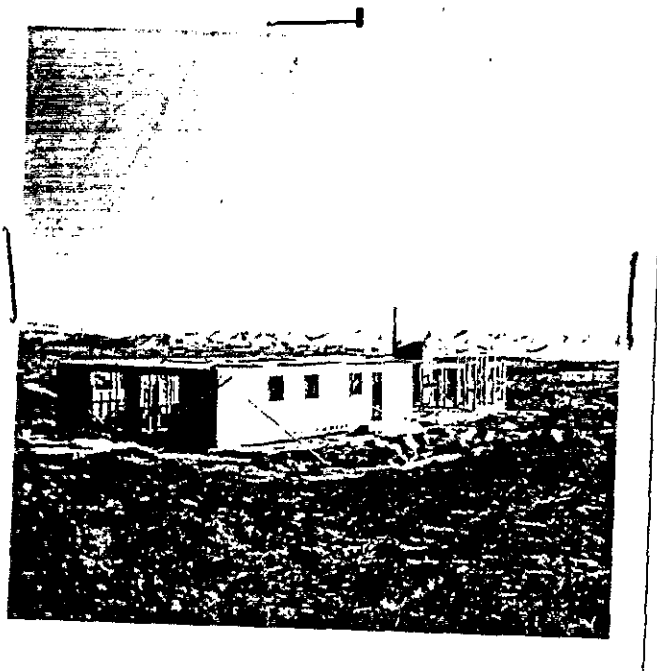
It is inconceivable that the State, or any category of government can successfully manage the entire salmonid

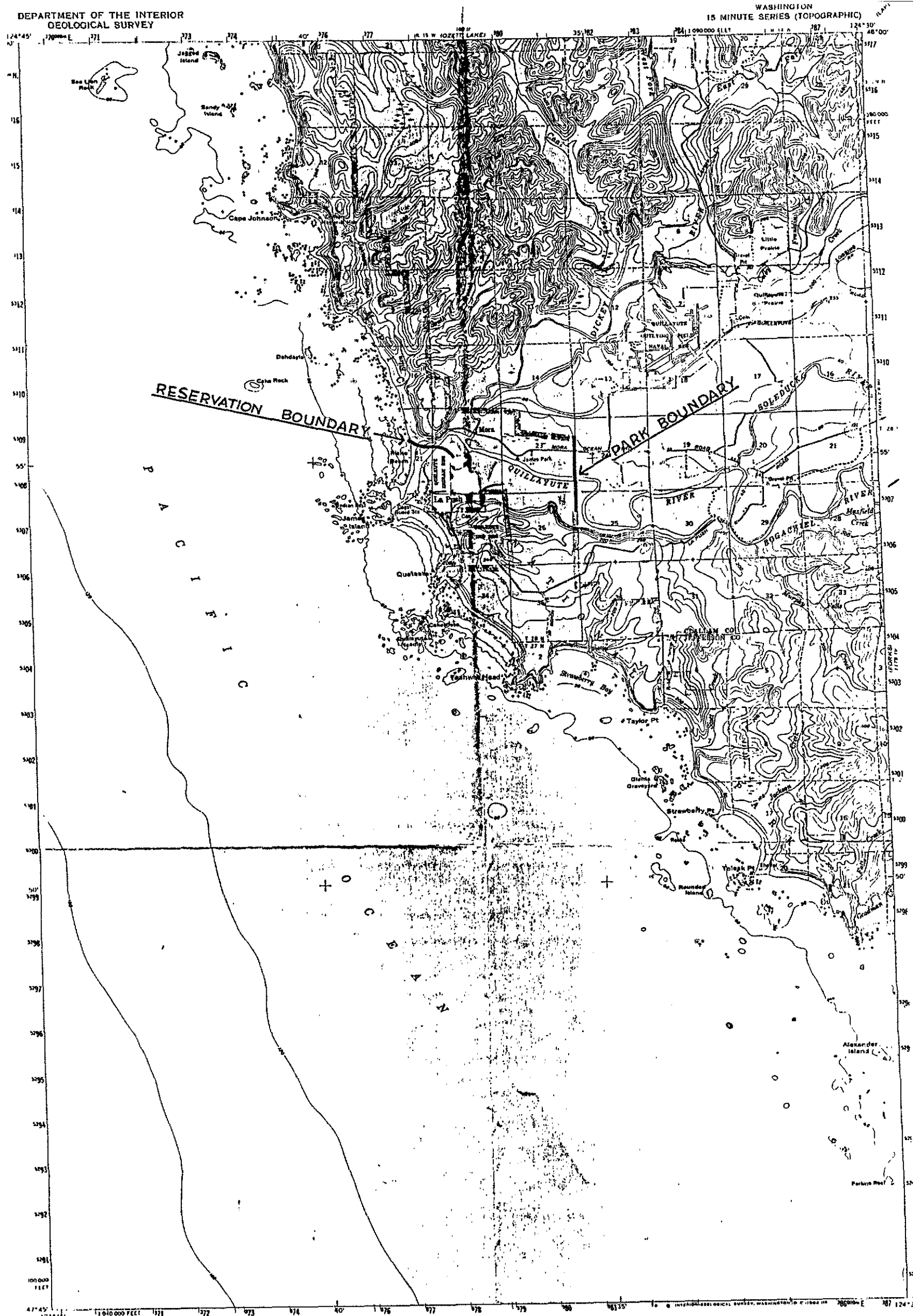
resource involving several species and thousands of genetically separated populations if off-reservation fishing rights are defined as separate in any way from those applicable to the citizens as a whole, other than the right of access. Concern for the maintenance of the reservation fishery is a necessary part of this determination.

There appears to be a place for benevolence in the exercising of police power by the State to the extent of granting special harvest privileges for off-reservation fishing by Indians whenever and wherever possible. However, the granting of such privileges by the State can hardly be legally defined for such a definition would, by its very nature, be too restrictive in a legal sense for practical application. Such a policy might well be declared with its application subject to the discretionary powers of the appropriate State agencies.

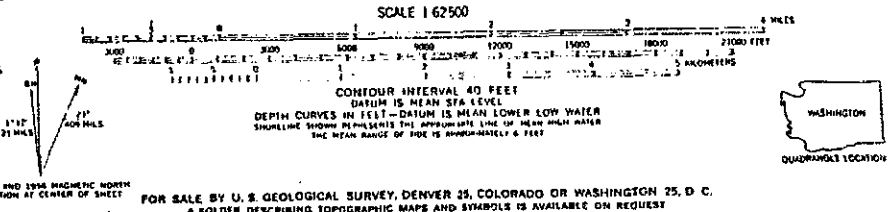
  
Loyd A. Royal  
Fisheries Research Coordinator







Maped, edited, and published by the Geological Survey  
Control by USGS, USC&GS, and USCE  
Topography from aerial photographs by photogrammetric methods  
Aerial photographs taken 1952 and 1955. Advance field check 1956  
Hydrography compiled from USL&GS chart 6102 (1952)  
and hydrographic surveys 1930-1931 and 1955  
Polyconic projection. 1927 North American datum  
10,000 foot grid based on Washington coordinate system,  
north zone  
1000 meter Universal Transverse Mercator grid ticks,  
zone 10, shown in blue  
Dashed land lines indicate approximate locations



ROAD CLASSIFICATION  
Light duty  
Unimproved dirt  
LA PUSH, WASH.  
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1956  
AMS 10791-5-SERIES 7791

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