

2-7-1972

## **Docket Entry 136 - Filed and Entered Order denying Plaintiff's motion for preliminary Injunction**

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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 UNITED STATES OF AMERICA, )

12 Plaintiff, )

13 MUCKLESHOOT INDIAN TRIBE; SQUAXIN )  
14 ISLAND TRIBE OF INDIANS; SAUK- )  
15 SUIATLE INDIAN TRIBE; SKOKOMISH )  
16 INDIAN TRIBE; STILLAGUAMISH TRIBE; )  
17 QUINAULT TRIBE OF INDIANS on its )  
18 own behalf and on behalf of the )  
19 QUEETS BAND OF INDIANS; MAKAH )  
20 INDIAN TRIBE; LUMMI INDIAN TRIBE; )  
21 QUILEUTE INDIAN TRIBE; UPPER SKAGIT )  
22 RIVER TRIBE; HOH TRIBE OF INDIANS; )  
23 and CONFEDERATED TRIBES AND BANDS )  
24 OF THE YAKIMA INDIAN NATION; )

25 Plaintiff-Intervenors, )

26 vs. )

27 STATE OF WASHINGTON, )

28 Defendant, )

29 THOR C. TOLLEFSON, Director, )  
30 Washington State Department of )  
31 Fisheries; CARL CROUSE, Director, )  
32 Washington Department of Game; and )  
WASHINGTON STATE GAME COMMISSION, )

Defendant-Intervenors. )

FILED IN THE  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

FEB 7 - 1972

CHARLES A. SCHAAF, CLERK  
By eh Deputy

CIVIL NO. 9213

O R D E R

33 The United States and the intervenors seek a temporary  
34 restraining order restraining the enforcement by State Game  
35 Department employees of state laws prohibiting the use of set  
36 nets in the rivers of the state, and in particular, as it  
37 relates to the Quileute (spelled three different ways) River.

38 The Quileute has its source in the Olympic Mountains

1 and flows into the Pacific Ocean at LaPush, Washington. The  
2 Quileute Indian Tribe has a reservation adjacent to and  
3 bounded by the river at its mouth. The United States has  
4 appropriated certain lands for park purposes and the boundary  
5 of the park is some distance inland from the shores of the  
6 Pacific. Certain maps attached to affidavits of State Game  
7 Department employees, and made a part of this record by the  
8 defendant State of Washington, show the Quileute River, the  
9 Bogachiel River, and the Sol Duc River, the national park and  
10 the Indian reservation at the mouth of the Quileute. The  
11 plaintiff, as trustee for certain Indian tribes including  
12 the Quileute, contends that enforcement by the State of the  
13 laws prohibiting set net fishing on land east of the boundary  
14 of the national park violates the 1854 Treaty entered into  
15 between the United States and the Indians. This treaty is  
16 set forth in part in Puyallup Tribe v. Department of Game of  
17 Washington, et al, 391 U.S. 392, decided by the United States  
18 Supreme Court on the 27th day of May, 1968.

19 The evidence considered by the Court includes all the  
20 affidavits on file, and the Court, in denying the application  
21 of the plaintiff United States considered the evidence in  
22 light of the opinion of Justice Douglas in Puyallup Tribe v.  
23 Washington, supra, and the opinion of Justice Hale in State  
24 of Washington v. Moses, 79 Wn.2d 104 (1971).

25 The facts showed that the Indians were fishing on the  
26 Quileute on land over which the State of Washington has police  
27 power jurisdiction. The facts further show that on the  
28 Bogachiel River the State has steelhead smolt rearing ponds.  
29 The facts further show that three million smolt were freed in  
30 the Bogachiel River in 1970 which, with the Sol Duc River,  
31 forms the Quileute River. Further, a check of the catch of  
32 steelhead by fishermen, excepting the Indians, shows that

1 76% of the fish caught had been "pen-raised." In other words,  
2 these fish were reared and released by the State of Washington  
3 and had returned after their migration into the salt water to  
4 spawn in the area and on the river where they had been first  
5 released from the rearing pens.

6 The maps showed that the Indians used set nets to fish  
7 on the Quileute adjacent to the reservation and off the  
8 reservation but within the confines of the national park, and  
9 the maps show that this area allows set net fishing by the  
10 Indians along the Quileute for a considerable distance.

11 Puyallup Tribe v. Washington, supra, holds that the  
12 State of Washington has the right to limit Indian fishing at  
13 the usual and accustomed places and where the Indians must  
14 fish in common with the other citizens. The state may regulate  
15 the time, the manner, the amount of the take, etc. See  
16 Puyallup Tribe v. Washington, supra, at page 398:

17 "But the manner of fishing, the size of the take,  
18 the restriction of commercial fishing, and the  
19 like may be regulated by the State in the interest  
20 of conservation, provided the regulation meets  
appropriate standards and does not discriminate  
against the Indians."

21 The last paragraph of the opinion related to the  
22 failure of the Supreme Court to consider the question of the  
23 necessity for rules prohibiting net fishing because of con-  
24 servation of the resource. That was a salmon case. This is  
25 a steelhead case.

26 In this case, the affidavits show that about 6% to 8%  
27 of all the anadromous fish are steelhead. Further, that  
28 forty-five years ago the Washington State Legislature enacted  
29 legislation declaring the steelhead to be a game fish. In  
30 State of Washington v. Moses, supra, the Supreme Court of the  
31 State of Washington approved lower court findings that held  
32 that prohibition of set net fishing by Indians at usual and

1 accustomed places pursuant to treaty provisions are valid  
2 because it was necessary to conserve the resource. This  
3 holding is not limited to any river but is applicable to all  
4 rivers. In this Court's mind, this holding answered the  
5 question posed by the Supreme Court in the last paragraph of  
6 Puyallup Tribe v. State of Washington, supra.

7 In granting a temporary restraining order, this Court  
8 must be satisfied that the plaintiff intervenor is suffering  
9 irreparable harm and that the ultimate result of a trial on  
10 the merits will result in judgment for the plaintiff. This  
11 Court is convinced that no irreparable harm is being done to  
12 plaintiff-intervenors by virtue of the fact that plaintiff-  
13 intervenors have ample area to fish with set nets on the  
14 Quilleute River without fishing on state land, and the affi-  
15 davits show that Quilleute fishermen catch thousands of pounds  
16 of steelhead both on the reservation and on park lands  
17 adjacent to the reservation where set net fishing is not  
18 restricted.

19 The reading of the affidavits and the facts contained  
20 therein and the reading of the Supreme Court opinion and the  
21 holding of that Court, the reading of the opinion of the  
22 Supreme Court of the State of Washington in State v. Moses,  
23 supra, leads this Court to conclude that plaintiffs have  
24 failed to establish that plaintiffs will succeed in the  
25 ultimate resolution of the problem.

26 The plaintiffs' application for a temporary restraining  
27 order is DENIED.

28 IT IS SO ORDERED.

29 DONE BY THE COURT this 7th day of February, 1972.

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32 UNITED STATES DISTRICT JUDGE