

12-29-1972

**Docket Entry 167 - Filed Memorandum of Authorities by  
Washington State Sportsmens Council, Amicus Curiae, in support  
of defendant Washington Department of Game's Motion for  
Summary Judgement**

Follow this and additional works at: <https://digitalcommons.law.uw.edu/us-v-wash-70-9213>

---

**Recommended Citation**

*Docket Entry 167 - Filed Memorandum of Authorities by Washington State Sportsmens Council, Amicus Curiae, in support of defendant Washington Department of Game's Motion for Summary Judgement* (1972), <https://digitalcommons.law.uw.edu/us-v-wash-70-9213/104>

This Memorandum is brought to you for free and open access by the Federal District Court Filings at UW Law Digital Commons. It has been accepted for inclusion in 70-cv-9213, U.S. v. Washington by an authorized administrator of UW Law Digital Commons. For more information, please contact [lawref@uw.edu](mailto:lawref@uw.edu).

FILED

DEC 29 8 49 AM '72

1 William N. Moloney  
2 Davis, Wright, Todd, Riese & Jones  
3 4200 Seattle-First National Bank Building  
4 Seattle, Washington 98154  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

EDGAR SCOFIELD, CLERK  
U.S. DISTRICT COURT  
W.D. OF WASHINGTON  
BY *ew* DEPUTY CLERK

Attorneys for Amicus Curiae, Washington  
State Sportsmens Council

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

NO. 9213

vs.

STATE OF WASHINGTON, et al.,

Defendants.

MEMORANDUM OF AUTHORITIES  
BY WASHINGTON STATE SPORTS-  
MENS COUNCIL, AMICUS CURIAE,  
IN SUPPORT OF DEFENDANT  
WASHINGTON DEPARTMENT OF  
GAME'S MOTION FOR SUMMARY  
JUDGMENT

PERTINENT TREATY LANGUAGE

The various treaties before this Court, and the pertinent  
language which this Court must interpret, of which the Treaty  
of Medicine Creek, 10 Stat. 1132, is typical, narrows down to  
a relatively few words:

"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, . . ."  
[emphasis added]

In another context, the Treaty With the Yakima, 12 Stat.  
951, provided that the Indians had the

"right to go about the public highways  
in common with [emphasis added] citizens  
of the Territory."

In both the Treaty of Medicine Creek involving fishing  
and the Treaty With the Yakima involving going about the public

1 highways, Indians were ceding and giving up certain lands but  
2 had reserved to them the right to continue to go upon such  
3 lands, in the one instance for purposes of fishing, and in  
4 the other, for purposes of movement or transportation, but  
5 in neither instance were such rights exclusive.

6 An example of an exclusive right is found in the Treaty  
7 With the Walla Walla, 12 Stat. 945, which provides:

8 "That the exclusive [emphasis added] right  
9 of taking fish in the streams running  
10 through and bordering said reservation  
11 is hereby secured to said Indians, and  
12 at all other usual and accustomed stations  
13 in common with [emphasis added] citizens  
14 of the United States. . . ."

15 This particular treaty is very significant in that it  
16 clearly shows the contrast in intent. On the reservation  
17 Indians have exclusive fishing rights, whereas off-reservation  
18 their right to fish as equals with U.S. citizens is protected.  
19 The off-reservation language in the Walla Walla Treaty is  
20 nearly identical to that used in the several treaties before  
21 this court. It is quite simply a right in common with others  
22 and it is difficult to imagine a clearer expression of intent,  
23 devoid of any ambiguity.

24 In State v. Moses, 79 Wn.2d 104, 113, 483 P.2d 832 (1971)  
25 the Washington State Supreme Court stated that

26 "Fish, while in a state of freedom, are  
27 the property of the sovereign power in  
28 whose waters they may be. In the United  
29 States, it is the state and not the  
30 United States which is the sovereign  
31 power in whose waters the fish are, and  
32 the state owns the fish in its sovereign  
33 capacity as the representative of and  
34 for the benefit of all people in common."  
35 [emphasis added]

36 Can there be any doubt as to the meaning of this? Is there any  
37 ambiguity to the "in common" phrase?

38 Referring again to the Treaty With the Yakima, supra,  
39 namely the "right to go about the public highways in common"

1 with citizens of the territory," would plaintiffs contend that  
2 members of the Yakima tribe have a greater right than other  
3 citizens to use the public highways of this state? Does the  
4 treaty say this? Obviously not, and it is an absurd proposi-  
5 tion. Yet it logically follows by analogy from plaintiffs'  
6 fundamental position in this case, namely, that certain Indians  
7 have a right that is special, greater or superior than anyone  
8 else to net salmon and steelhead trout in the streams and  
9 rivers of this state. The Indian lawyers and some courts are  
10 quick to point out the reference to "usual and accustomed  
11 places and stations," but at that point, they simply stop.  
12 Ahead lies the "in common with" language. They fail or refuse  
13 to recognize the inevitable coupling of the right, that is,  
14 that such right is to be exercised in common with other citizens.  
15 Courts have tended to duck this issue, and their indecisiveness  
16 has encouraged certain Indians to take the law into their own  
17 hands and the treadmill of conflict and confusion over Indian  
18 fishing rights continues.

#### 19 A FEW DEFINITIONS

20 "In common. Shared in respect to title, use, or enjoy-  
21 ment, without apportionment or division into individual parts;  
22 held by several for the equal advantage, use or enjoyment of  
23 all." Black's Law Dictionary, p. 893, Fourth Edition (1951).

24 "In Common. Commonly; esp., equally with another or with  
25 others; affecting or affected equally." Webster's New Inter-  
26 national Dictionary, p. 540, Second Edition (1948).

27 "In Common. In joint possession or use; shared equally."  
28 The Random House Dictionary of the English Language, p. 297  
29 (1966).

30 There is nothing to suggest that "in common" had any  
31 different meaning at the time the treaties were signed. A  
32

1 treaty is a legal instrument and the phrase "in common" (as in,  
2 "tenants in common") has been a part of Anglo-American law and  
3 the English language for centuries.

#### 4 AN ANOMALY

5 Although an accepted rule in the interpretation of Indian  
6 treaties is that ambiguities are resolved in favor of the Indians,  
7 this rule is qualified by another rule, that Indian treaties are  
8 to be construed according to their tenor and their terms are not  
9 to be varied by judicial construction in order to avoid alleged  
10 injustices. This principle was clearly stated in Confederated  
11 Bands of Ute Indians v. U.S., 330 U.S. 169, 91 L.Ed. 823 (1947),  
12 by Justice Black in the following language:

13 It is said, however, that the Indians  
14 understood in 1880 that they owned the Executive  
15 Order lands which lay north of the White River  
16 Valley; that they understood their "present Ute  
17 Reservation" to include them; that they understood  
18 that Congress undertook by the 1880 Act to sell  
19 the lands for their benefit; and that Congress was  
20 aware of this understanding . . . But even if the  
21 Indians had believed that they had a compensable  
22 interest in the Executive Order lands, this fact  
23 would not necessarily have given it to them . . .  
24 Nor can this alleged understanding be imputed to  
25 Congress in the face of plain language . . . While  
26 it has long been the rule that a treaty with Indians  
27 is to be construed so as to carry out the Govern-  
28 ment's obligations in accordance with the fair  
29 understanding of the Indians, we cannot, under  
30 the guise of interpretation, . . . rewrite con-  
31 gressional acts so as to make them mean something  
32 they obviously were not intended to mean. Choctaw  
Nation v. United States, 318 U.S. 423, 431, 432,  
87 L.Ed. 877, 882, 883, 63 S.Ct. 672. We cannot,  
under any acceptable rule of interpretation, hold  
that the Indians owned the lands merely because  
they thought so. (Pages 829-830)

26 Notwithstanding the fact that the treaties are clear and  
27 unambiguous, and that "in common with" has a well understood  
28 meaning, Indian lawyers have from time to time been able to  
29 convince some courts that Indians have an exalted status,  
30 superior to other people, as far as fishing off-reservation is  
31 concerned. By repeating over and over that Indians have greater  
32

MEMORANDUM OF AUTHORITIES - 4

DAVIS, WRIGHT, TODD, RIESE & JONES  
4200 SEATTLE-FIRST NATIONAL BANK BUILDING  
SEATTLE, WASHINGTON 98154  
MAIN 2-3150

238

1 rights than other citizens, and by weaving imaginative and  
2 deceptively subtle argumentation, they have been able to confuse  
3 and encourage certain courts to accept specious and fallacious  
4 arguments that fly in the face of sound reasoning and common  
5 sense. In endeavoring to show concern for one of the country's  
6 long neglected minority groups, certain courts have either  
7 ignored or perverted the simple language of the treaty. As  
8 stated by Justice Hale of the Washington State Supreme Court,  
9 dissenting in Department of Game v. Puyallup Tribe, 80 Wn.2d  
10 561, P.2d (1972):

11 "There is, I perceive, a curious aura  
12 of romantic whimsy suffusing the law  
13 of Indian treaties. Indian treaty cases  
14 seem never quite fully to depart that  
15 peculiar genre of elemental melodrama  
16 compounded more of fantasy than fact,  
17 more of folk lore than truth --- all  
18 subject to the inevitable distortion  
19 of time and history --- in order to  
20 reach a devoutly wished judicial con-  
21 summation. Although this may make for  
22 good reading, it probably produces bad  
23 law. Inexorably inhering in these  
24 decisions on Indian treaties, I think,  
25 is the judicial conscience which aspires  
26 somehow to right what the courts think  
27 to be historical wrongs --- even if the  
28 treaty is somehow twisted out of shape  
29 to achieve it." (page 577)

#### 21 GUIDELINE FOR THIS COURT

22 The most recent pronouncement on Indian fishing rights by  
23 the U. S. Supreme Court is found in Department of Game v. Puyallup  
24 Tribe, Inc., et al., 391 U.S. 392, 20 L.Ed.2d 689 (1968) in  
25 which Justice Douglas, in a unanimous decision, stated the  
26 following directive:

27 "Whether the prohibition of the use of  
28 set nets in these fresh waters was a  
29 'reasonable and necessary' (70 Wn.2d  
30 at 261, 422 P.2d, at 764) conservation  
31 measure was left for determination by  
32 the trial court when the Supreme Court,  
deeming the injunction in No. 247 too  
broad, remanded the case for further

MEMORANDUM OF AUTHORITIES - 5

1 findings. When the case was argued  
2 here, much was said about the pros and  
3 the cons of that issue. Since the state  
4 court has given us no authoritative answer  
5 to the question, we leave it unanswered  
6 and only add that any ultimate findings  
7 on the conservation issue must also cover  
8 the issue of equal protection implicit  
9 in the phrase "in common with."  
10 [emphasis added] (Pages 695-696)

11 Justice Hale's dissenting opinion in Department of Game  
12 v. Puyallup Tribe, Inc., 80 Wn.2d 561, P.2d (1972), is the  
13 first judicial analysis that we have seen of the relationship  
14 between the "in common with" phrase and equal protection guar-  
15 antees, even though the U. S. Supreme Court, over thirty years  
16 ago, in Tulee v. State of Washington, 315 U.S. 68, 86 L.Ed. 1115  
17 (1942) which upheld the "right" of Indians to fish without a  
18 license, speaking through Justice Black, stated that:

19 ". . . the treaty leaves the state with  
20 power to impose on Indians, equally with  
21 others, [emphasis added] such restrictions  
22 of a purely regulatory nature concerning  
23 the time and manner [emphasis added] of  
24 fishing outside the reservation as are  
25 necessary for the conservation of fish. . ."  
26 (page 1119)

#### 27 EQUAL PROTECTION

28 "No state shall make or enforce any law  
29 which shall abridge the privileges or  
30 immunities of citizens of the United  
31 States; nor shall any state . . . deny  
32 to any person within its jurisdiction  
33 the equal protection of the laws."  
34 14th Amendment to the United States  
35 Constitution.

36 "No law shall be passed granting  
37 to any citizen, class of citizens, or  
38 corporation other than municipal, privi-  
39 leges or immunities which upon the same  
40 terms shall not equally belong to all  
41 citizens, or corporations." Washington  
42 State Constitution, Article I, Section  
43 12.

44 The statutes adopted by the State Legislature of the State  
45 of Washington, and the regulations adopted by its Department of  
46 Game, establish conservation measures for determining the time

47 MEMORANDUM OF AUTHORITIES - 6

48 DAVIS, WRIGHT, TODD, RIESE & JONES  
49 4200 SEATTLE-FIRST NATIONAL BANK BUILDING  
50 SEATTLE, WASHINGTON 98154  
51 MAIN 3-3180

240

1 and manner of the taking of steelhead trout in non-discriminatory  
2 terms and these laws are uniformly enforced by the Department  
3 of Game in a non-discriminatory manner.

4 On the other hand, certain regulations adopted by the  
5 Director of Fisheries and the Washington State Fisheries Depart-  
6 ment during the past couple of years establish special commercial  
7 netting seasons in the rivers and other bodies of water of this  
8 State exclusively for the benefit and privilege of members of  
9 certain Indian tribes. These regulations are in violation of  
10 statutes enacted by the Washington State Legislature prohibiting  
11 the use of set or fixed nets to catch salmon and steelhead trout  
12 and are clearly discriminatory against the other citizens of  
13 this state and violate the equal protection clause of the 14th  
14 Amendment to the U. S. Constitution as well as the Washington  
15 State Constitution.

16 SUMMARY

17 The average citizen has known all along that "in common  
18 with" means that people are to be treated equally and without  
19 discrimination for or against any individual or group of indi-  
20 viduals. In contrast, certain courts have been ethereal in  
21 dealing with the question of Indian fishing rights. This has  
22 resulted in inconsistent positions by agencies within the same  
23 state. Further, individual Indians have set nets whenever and  
24 wherever they please, contending that they have the right to  
25 set their own seasons. This in turn has led to willful breach  
26 of the peace, including the use of firearms and Molotov cocktails  
27 on the Puyallup River last year. In addition, the public is  
28 subjected to a seemingly never ending series of lawsuits from  
29 which no one benefits discernably.

30 As amicus curiae, we urge the Court to use this opportunity  
31  
32

MEMORANDUM OF AUTHORITIES - 7

DAVIS, WRIGHT, TODD, RIESE & JONES  
4200 SEATTLE-FIRST NATIONAL BANK BUILDING  
SEATTLE, WASHINGTON 98154  
MAIN 2-3150

241



1 to inject some long overdue common sense into the area of Indian  
2 fishing rights. This court should act decisively upon the  
3 Department of Game's motion for summary judgment and not only  
4 grant the motion but also declare that the regulations adopted  
5 by the Director of the Washington State Department of Fisheries  
6 granting special netting seasons for certain Indians, exclusive  
7 of all other citizens, are not required by the treaty language,  
8 and not only violate statutes enacted by the Washington State  
9 Legislature, but discriminate against all other citizens, Indians  
10 and non-Indians alike, and thereby abridge the privileges of  
11 other citizens and deny to such citizens the equal protection  
12 of the laws and are therefore invalid and unconstitutional.

13 RESPECTFULLY SUBMITTED,

14 WM N. Moloney

15 WILLIAM N. MOLONEY  
16 of Davis, Wright, Todd, Riese & Jones  
17 Attorneys for Washington State Sports-  
men Council, Amicus Curiae

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32 MEMORANDUM OF AUTHORITIES - 8

DAVIS, WRIGHT, TODD, RIESE & JONES  
4200 SEATTLE-FIRST NATIONAL BANK BUILDING  
SEATTLE, WASHINGTON 98154  
MAIN 3-3180

242