

2-12-1974

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 QUINAULT TRIBE OF INDIANS on its own
7 and on behalf of the QUEETS BAND OF
8 INDIANS; MAKAH INDIAN TRIBE; LUMMI
9 INDIAN TRIBE; HOH TRIBE OF INDIANS;
10 MUCKLESHOOT INDIAN TRIBE; SQUAXIN
11 ISLAND TRIBE OF INDIANS; SAUK-
12 SUIATLE INDIAN TRIBE; SKOKOMISH
13 INDIAN TRIBE; CONFEDERATED TRIBES
14 AND BANDS OF THE YAKIMA INDIAN
15 NATION; UPPER SKAGIT RIVER TRIBE;
16 STILLAGUAMISH TRIBE OF INDIANS; and
17 QUILEUTE INDIAN TRIBE:

18 Intervenor-Plaintiffs,

19 v.

20 STATE OF WASHINGTON,

21 Defendant,

22 THOR C. TOLLEFSON, Director, Washington
23 State Department of Fisheries; CARL
24 CROUSE, Director, Washington Department
25 of Game; and WASHINGTON STATE GAME
COMMISSION; and WASHINGTON REEF NET
OWNERS ASSOCIATION,

Intervenor-Defendants.

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FEB 12 1974

EDGAR SCOFIELD, CLERK

By *[Signature]* Deputy

CIVIL NO 9213

TRANSCRIPT OF PROCEEDINGS

August 27, 1973
Tacoma, Washington

THE HONORABLE GEORGE H. BOLDT
UNITED STATES DISTRICT JUDGE, Presiding

416a
Vol. 1

A P P E A R A N C E S

1 On behalf of the Plaintiff UNITED STATES OF AMERICA and
2 Plaintiff Intervenor PUYALLUP TRIBE and
Nisqually Tribe:

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10 On behalf of Plaintiff-Intervenor QUILEUTE TRIBE, MAKAH TRIBE and
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14 On behalf of Plaintiff-Intervenor UPPER SKAGIT RIVER TRIBE:

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16 Sedro Wooley, Washington 98284

17 On behalf of Plaintiff-Intervenor QUINAULT TRIBE:

18 Mr. Michael Taylor
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19 Taholah, Washington 98587

20 On behalf of Plaintiff-Intervenor HOH TRIBE:

21 Mr. Lester Stritmatter,
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22 407 - 8th Street,
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23 On behalf of Plaintiff-Intervenor YAKIMA TRIBE:

24 Mr. James B. Hovis,
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On behalf of the Plaintiff-Intervenors MUCKLESHOOT TRIBE, SQUAXIN ISLAND TRIBE, SKOHOMISH TRIBE, STILLAGUAMISH TRIBE, and SAUK-SUIATLE TRIBE:

Mr. John Sennhauser,
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On behalf of the Defendant WASHINGTON DEPARTMENT OF GAME:

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Department of Game,
600 North Capitol Way,
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On behalf of the Defendant WASHINGTON DEPARTMENT OF FISHERIES:

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Assistant Attorney General,
Department of Fisheries,
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On behalf of the Defendant WASHINGTON REEF NET OWNERS ASSOCIATION:

Mr. David E. Rhea,
Amundson, Rhea & Atwood,
220 Bellingham National Bank Bldg.
Bellingham, Washington 98225

1 THE COURT: Good morning, gentlemen. Cause
2 Number 9213, United States v. Washington and others.
3 Ready for the Plaintiff?

4 MR. PIERSON: Ready, your Honor.

5 THE COURT: Ready for the defendant?

6 MR. CONIFF: The defendant is ready, your
7 Honor.

8 THE COURT: The first order of business,
9 of course, are the opening statements of counsel. An
10 equal amount of time has been allotted for the
11 plaintiffs and the defendants for the purpose. The
12 speakers will be those who the counsel themselves have
13 selected for that purpose. Are you ready, Mr. Pierson?

14 MR. PIERSON: Yes, your Honor, we are.

15 THE COURT: Proceed, please.

16 MR. PIERSON: I would like before giving my
17 opening statement to introduce counsel on the plaintiff's
18 side. We have divided up our time not exactly equally,
19 but closely.

20 Next to me is Mr. George Dysart, who is of
21 counsel for the United States Department of the
22 Interior, Regional Solicitor's Office; Mr. James Hovis,
23 who represents the Yakima Indian Nation; Mr. Dave
24 Getches and Mr. John Sennhauser, who represent five
25 of the plaintiff's tribes, Mr. Alvin Ziontz, who

1 represents three of the plaintiffs' tribes, Mr. Michael
2 Taylor, who represents the Quinault Tribe, Mr. Lester
3 Stritmatter, who represents the Hoh Tribe, and Mr.
4 William A. Stiles, who represents the Upper Skagit River
5 Tribe, who is not in the courtroom at this time.

6 May it please the Court, the United States filed
7 this suit for two basic purposes; first, to reaffirm the
8 principles which protect the exercise of the Indians'
9 treaty rights to fish against improper state regulations.

10 | The second purpose was to examine and establish
11 specific standards which will guide the parties, the
12 Indian tribes and the state and the United States as well,
13 in circumstances where the state asserts a need or a power
14 to regulate fishing by tribes who claim treaty rights to
15 fish outside the reservation boundaries.

16 There really are two temporal frames of reference,
17 the first one is the time of treaties, and we will go into that
18 to examine the promises made and the meaning of the terms.

19 The second temporal frame of reference is
20 modern times. We have an exhaustible anadamous fishery
21 source, I think all the parties are interested in con-
22 serving it. It is a question of how it will be conserved,
23 who will take from the resources and how they will take it,

24 Our legal frame of reference comes from a line
25 of many decisions, somewhat circuitous. The Supreme

1 Court has decisions dating from 1905 in the case of
2 United States v. Winans. We are told in that case that
3 the Indian treaty rights to fish is in the nature of a
4 reservation, that is, it is a reserved right.

5 Later in the Puyallup case in 1968, we are
6 told that the state by an appropriate exercise of police
7 power regulated the Indians in the exercise of their
8 treaty rights to fish outside their reservation boundaries.

9 There are three standards in that decision, the state
10 regulation must not discriminate against the Indians, it
11 must meet appropriate standards, and it must be shown
12 to be reasonable and necessary for conservation resource.

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1 Although there is some conflict among the parties
2 about this, in this case it is the view of the
3 United States that the burden to show that the
4 regulations are reasonable and necessary is on the
5 State. The United States thrusts that burden upon
6 the State by showing that the tribes in this case
7 are treaty tribes. We will also show that they
8 intend to fish and have been attempting to fish
9 at usual and accustomed places outside reservation
10 boundaries. Lastly, the important frame of con-
11 centration for the United States in this case is
12 how have the State agencies regulated the exercise
13 of the privilege of non-Indians to fish outside the
14 reservation boundaries. In our view that privilege
15 must be regulated and controlled as to provide the
16 Indian tribes and their members a fair share of the
17 resource.

18 Some comments, I think, are in order here to
19 respond to the pretrial briefs of defendants. First,
20 it is the view of the United States that because the
21 tribes' treaty rights to fish are distinct, are
22 based on federal law, and are in the nature of a
23 reservation for the future and present needs of the
24 Indian tribes, the State may exercise its police
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1 powers to regulate the exercise of the tribes' rights
2 only when it can show that their exercise of that
3 right will threaten preservation of the fish runs.
4 In our view this may not be done until taking the
5 tribes' statement of their own needs. The State has
6 limited all non-Indian fishermen within its juris-
7 diction to at least a share equal from the resource
8 to that of the Indians. As the Yakima Indian Nation
9 indicates in its trial brief, there lurks in the
10 back of every case involving a conflict between
11 State power and Indian treaty fishing rights, the
12 non-Indian assumption that Indian tribes and their
13 members cannot be trusted to regulate the fishing
14 and management by their own members. With regard
15 to the fishery resource, I believe our proof will
16 show over one hundred fifty years of the preserva-
17 tion instinct and practice by these treaty tribes.
18 This instinct in practice has not taken the form
19 of formal administrative procedures or written
20 documents. More often it has been the result of
21 custom and usage resulting from a deeply felt duty
22 by each of the tribes and its members to preserve
23 the resource for future generations.

24 In our view, this regulatory aspect, this
25

1 respect for the resource has been at least as
2 effective in preserving it as the State's regula-
3 tion of non-Indian fishery. Moreover, this preser-
4 vative instinct has not been confined just to
5 not taking too many fish, but in recent times has
6 gone to the extent of enhancing the fishery resource
7 itself and enhancing the environment of the fish
8 who swim in the rivers. The Department of Fisheries
9 indicates that this case is brought to quantify the
10 Indian rights. I think in some sense of that term
11 that is accurate to the extent it indicates that
12 this Court should fix some immutable percentage
13 which each tribe or all tribes may take. We contend
14 that that would not be commensurate with the Indian
15 tribes' preserved right to take according to their
16 varying and different needs. Also, the fisheries'
17 defendant implies that the commercial fishing
18 industry which has come into being since the treaty
19 somehow qualifies the Indians' rights because they
20 could not have anticipated that it would exist.
21 I think the law is clear that no subsequent events
22 after the treaty can qualify the right. In attempt-
23 ing to explain the United States' and the plain-
24 tiffs' theory that the Indians have a reserved right
25

1 to fish, we have had reference to the Winter's
2 case, and Arizona versus California in the Supreme
3 Court. The Department of Fisheries attempts to
4 explain away that case by four distinctions. First
5 it indicates that conservation of the resource is
6 important in fishery management but not in water
7 management. In our view that is no distinction at
8 all, because the plaintiffs are speaking in this
9 case only of the harvestable resource. That is
10 only that portion of the resource which may be taken
11 consistent with the preservation of the runs. That
12 distinction therefore does not hold.

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1 The Fisheries defendant indicates that the
2 present and future needs passes the definite objective
3 standard when confined to water rights, but not when
4 applied to the present needs in the Indian treaty
5 fishing.

6 We say that's not true, first because the
7 present needs of the tribes can easily be assessed
8 and determined by simply asking the tribe what it intends
9 to take from the resource and whether that's
10 commensurate with the tribe's needs.

11 In the plaintiffs' view, nobody except the
12 tribes can be competent, in the first instance, to
13 determine what their needs are.

14 Second, the question of future needs is no
15 problem in this case because, as the State Supreme
16 Court has said, each of the state agencies must annually
17 consider regulations of the Indian fisheries.

18 As a third distinction, the Department of
19 Fisheries indicates that the government had the primary
20 intention to make farmers out of the Indians and that
21 because of that the Winters doctrine is important
22 because the water in the Winters doctrine was used to
23 make arable land.

24 The Department of Fisheries indicates that
25 there is no analogous primary intention to make commercial

1 fisherman out of the Indians involved in this case.
2 That avoids the question.

3 The treaty says that the Indians were given
4 and reserved a right to take. It was not confined
5 to commercial uses. It wasn't confined to subsistence
6 uses.

7 The proof in this case will indicate that
8 all of the tribes had trade and barter activities going
9 on at the time of their treaties.

10 To suggest that the commercial aspect of
11 fishing which had developed since the treaties somehow
12 qualifies the right is again jumping back and saying
13 that some subsequent event can take away from the
14 Indians the solemn right granted by the treaty.

15 In our view, of course, they cannot do that.

16 Lastly, the water appropriation right is
17 restricted to waters on or bordering reservations for
18 exclusive use of the tribes. It notes in this case
19 the rights at issue are those to be exercised outside
20 reservation boundaries.

21 In response to that, the United States says
22 the Winans case tells us that the right to take wasn't
23 confined to on or off reservation. Winans tells us that
24 this right was in the nature of a reservation, and in
25 that sense this case is concerned with the reservation,

1 a reservation which wasn't confined to a fixed land
2 mass, but rather to a fluctuating and now exhaustible
3 resource which flows to the entire regulatory juris-
4 diction of the state.

5 That the reservation was a fluctuating
6 and moving resource doesn't make it any less a
7 reservation. It is true that in the treaty the
8 exercise of the right was made to be in common with
9 all the citizens of the territory. In the context
10 of the treaty that meant non-Indians.

11 In our view, the State's power to regulate
12 non-Indians and Indians to preserve the resource flows
13 from that in common with language. It does not and
14 cannot qualify the right to take.

15 Finally, the Department of Fisheries
16 indicates that this case must provide some definite
17 standard by which the parties -- that is, the state,
18 the United States and the Indian tribes -- may know
19 what is a legitimate regulation and what is not.

20 The United States agrees with that. It
21 would not have brought this case were it not for our
22 intention to do precisely that.

23 However, we do not think the answer and the
24 definite answer in this case, either in terms of what
25 the treaties gave and reserved or what the state is

1 allowed to do, must be in terms of some immutable
2 percentage. It should be commensurate with the
3 fluctuating resource, with the fluctuating needs of
4 the Indian tribes, and with the state's power to
5 regulate non-Indians.

6 Next, passing to the contentions of the
7 Game defendants, they indicate at the beginning of
8 their brief that the plaintiffs can't agree as to what
9 the law means. I would be the first to admit that the
10 plaintiffs disagree as to some points.

11 The plaintiffs are in constant and firm
12 agreement, supported by an uncharacteristically
13 unambiguous line of sixty years of Supreme Court cases,
14 that the Indians hold a special, distinct treaty right
15 to fish outside reservation boundaries.

16 The department of Game and the Game
17 Commission and Carl Crouse deny that that special right
18 exists, or that they need to respect it.

19 Plaintiffs are at one in saying that that
20 practice is a violation of the tribes' rights.

21 Secondly, we contend that the standards
22 laid down in Puyallup I have been consistently,
23 continually and ~~obdurately~~ violated by the GAME
24 defendants in the face of not only United States
25 Supreme Court decisions, but in the face of specific

1 directives from the Washington State Supreme Court.

2 The Game defendants, we believe, in this
3 case will attempt to hide behind state regulation
4 and state statutes which define a Steelhead as a game
5 fish.

6 This is no defense. This case was brought
7 against the State of Washington, which includes all the
8 executive agencies and the State Legislature. As we
9 understand it, the State Legislature has determined as
10 to Steelhead to rely upon the representation in this
11 case, of the Game Department.

12 It is no defense, however, to say that the
13 state law requires the Game defendants to do something
14 or to respect Steelhead as a game fish, because those
15 statutes, just as the regulations of the Game
16 defendants have been challenged as violative of the
17 tribes' rights.

18 In our view, the proof will show that those
19 state statutes and the game regulations have not met
20 the standards laid down by the courts.

21 The Game defendants go on somewhat in the
22 alternative that the evidence will show there are valid
23 reasons for distinction between Steelhead and salmon.

24 What they are really saying there is as to
25 regulating Steelhead they ought not to respect the

1 Indians' special right while the Department of Fisheries
2 can go its own way as to salmon.

3 In our view, all of the facts cited in the
4 brief of the Game defendants as to the so-called valid
5 reasons for distinguishing between Steelhead and salmon
6 will be shown to be either inaccurate, misleading, or,
7 by no means, relative to what's necessary for
8 conservation.

9 Further, the Game defendants and, to a
10 certain extent, the Fisheries defendant defined that
11 essential word, "conservation" as "wise use." By this
12 they mean to say that the state's determination, its
13 value judgments as to what's a wise use of the resource
14 as beyond what's preservative of the resource ought to
15 be utilized and be within state power to qualify the
16 Indians' rights.

17 In other words, as to the Game defendants,
18 it's been determined that it's wise that all Steelhead
19 be reserved for sport fishermen.

20 The treaty does not include any such
21 connotation of the state's ability or power to determine
22 what is a wise use of a resource.

23 We believe the evidence will show and a long
24 line of court decisions will support our definition of
25 conservation as being confined to the question of what

1 will continue to maintain and preserve the resource.
2 Any value judgments above and beyond those are fully
3 within the state political power to make, but are not
4 within the state power to regulate the Indians' treaty
5 right to fish.

6 Lastly, Game defendants suggest that if this
7 Court should rule against and say that Steelhead are
8 subject to the Indians' special treaty rights off
9 reservation boundaries, they ought to be allowed to
10 substitute salmon for Steelhead and again reserve
11 Steelhead for sport fishermen.

12 This is but another suggestion and request
13 and plea to the Court to allow the Game Department and
14 the Game defendants to continue to reserve that fish
15 just for sportsmen.

16 There is nothing in the treaty or any of the
17 court decisions to substantiate any such absurd
18 suggestion.

19 Finally, the important thing to convey on
20 this case is how the United States traded away
21 sovereign power. Historical documents and evidence in
22 this case will show there was no treaty giving away
23 sovereign power. All the United States gave away was
24 the promise to honor the terms of the treaty. In return,
25 the Indian tribes gave to the United States and the

1 citizens vast tracts of land and reserved to themselves
2 tracts of land and a right to take fish.

3 There is no question of the United States
4 trading away power. It was a question of the United
5 States taking land and giving solemn promises of a
6 superior sovereign.

7 In view of the United States, the meaning of
8 the terms of the treaty, in the modern context of an
9 exhaustible and moving resource and altered environment
10 and expanding non-Indian fishing pressure on the resource
11 means that the state is going to hang its hat on the
12 words "in common with" and attempt to regulate the
13 Indians' treaty right to fish.

14 It must be prepared to come forward to show
15 that it has exercised that power in a means and in a
16 context commensurate with the Indians' reserve right
17 to take fish from the resource.

18 What this case is all about is whether the
19 State has met that test. We believe the proof will show
20 clearly that it has not.

21 THE COURT: Mr. Getches.

22 MR. GETCHES: May it please the Court, David
23 Getches representing the Muckleshoot, Squaxin,
24 Suak-Suiattle, Skokomish, and Stillaguamish tribes.

25 Not far from where this courthouse now stands,

1 approximately one hundred twenty years ago, the first
2 of several treaties negotiated by the United States of
3 America with Indian tribes was signed. It was language
4 within that treaty concerning fishing rights that this
5 trial is all about.

6 The meaning of that treaty language has never
7 been definitively made clear. At first this was
8 unnecessary.

9 At the treaty proceedings, the parties spoke
10 in three different languages. The two sides did not
11 speak the same language. That has been agreed to by the
12 parties to this case.

13 After that time, the Indians were able to
14 fish as they had before. There was no pressure on the
15 resource.

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1 It was not until nearly a half century later that the
2 real pressure came. It was not until that time that the
3 state began asking Indians to cut back on their fishing
4 and later forcing the Indians to cut back on their fishing.
5 A hodge podge of cases followed that. Those cases all in some
6 measure or another recognized a distinct right in the Indians
7 to fish, but none of them again definitively arrived at a
8 meaning for the language in the treaties concerning
9 fishing rights.

10 This case will then rest on an interpretation of
11 those words. Hopefully, this case will provide that
12 definitive interpretation, and in order to do that, we
13 must turn the focus in this courtroom to that spot not far
14 from this courthouse and to that time nearly one hundred
15 twenty years ago to find out just what the Indians and
16 parties to that treaty intended, just what was said at
17 those treaty negotiations, and the Supreme Court has
18 helped us in doing this with some reules of treaty constuc-
19 tion.

20 First of all, the Supreme Court has said that
21 treaties must be construed as the Indians must have
22 understood them. Secodly, the Supreme Court has

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1 said that ambiguities in the treaty language must
2 be construed in favor of the Indians and, finally,
3 the Supreme Court has told us that those treaties
4 must be construed liberally in favor of the Indian
5 parties, and it is in that context in which those
6 treaties were negotiated that makes these rules
7 of construction necessary.

8 Once the intent and purposes of those treaties
9 have been determined, the rest of this case will
10 follow.

11 The supremacy clause of the United States
12 Constitution says that the laws of the State must
13 fall to the supreme law of the land. These treaties
14 that we are interpreting here, we are asking the
15 Court to define, are the supreme law of the land,
16 and as the counsel for the United States has pointed
17 out, the United States Supreme Court has said that
18 this very treaty language is treaty language re-
19 serving to the Indians a right, a right to fish
20 at their usual and accustomed places as they did
21 before the time of the treaties. The language of
22 that treaty said the right is further secured, a
23 right that was already there was further secured,
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1 The reserve right, the defendants have suggested,
2 present some problems of allocation. We will be the
3 first to admit there are problems of allocating fish today.
4 The fisheries defendants have suggested that a fair and
5 equitable share should be allocated to the Indians. We
6 resist that notion, that is not what the Indians bargained
7 for.

8 It is very difficult for a lawyer sworn to
9 uphold the Constitution to argue against fairness and
10 equity, that is not what we are arguing against. We are
11 arguing under another part of the Constitution, the
12 supremacy clause. To talk about fairness and equity,
13 maybe we would sue under a civil rights case or a case
14 where the court was trying to make some social adjustment
15 between parties that came to the court in equal position.
16 These parties do not.

17 One party comes with a right secured under the
18 supreme law of the land reserved by them one hundred twenty
19 years ago. The other party comes with rights that are
20 really privileges, privileges that run from the state to
21 the fishermen, and it is in this context that the case must
22 be viewed..

23 There aren't three parties to the case, there
24 aren't sport fishermen, commercial fishermen,
25

1 Indian fishermen, there are not treaty fishermen
2 and non-treaty people who seek rights on the rivers.
3 They do include commercial fishermen, they do in-
4 clude sport fishermen and include anyone else who
5 has a claim or believes have a claim to the fishery
6 resource.

7 This might well include those loggers who would
8 like to pollute the rivers in order to further their
9 economic goals. This might include people who want
10 to divert water for irrigation purposes. This might
11 include some as yet unforeseen use, some new use
12 for fish oil perhaps. Do each of these new users,
13 another user group, is it a group which the Indians
14 must catch up on their supposed share of the fishery?
15 No, the Supreme Court has said that a reserve right
16 is a right to be present in future needs, and it's
17 on that basis that we reject this very pleasant
18 sounding notion of fair and equitable share.

19 In urging the reserve right, these Indian
20 tribes do not claim, as the defendant fisheries
21 have said in its brief, "A monopolistic position
22 in a commercial fisheries industry."

23 Some of these people, as the seine brief
24 recognizes, only want to take fish for subsistence.
25

1 Others do want to take fish for commercial purposes
2 as they did at and before the time of the treaties
3 and for years thereafter, but they don't seek a
4 monopoly, they seek a satisfaction of their needs.

5 Now, this may mean that other fishermen, other
6 users, and, indeed, other people who carry on ac-
7 tivities which may affect the fishery resources may
8 have to change their activities. It may mean they
9 will have to emphasize their fishing at places other
10 than the usual and accustomed places of these
11 tribes. It may mean that they will have to take
12 less fish, it may mean that they will have to do
13 less polluting of the rivers.

14 The difficulty of quantifying the reserve right
15 can be alleviated somewhat and the tribes are will-
16 ing to assist in this. The tribes perhaps could give
17 advance notice of the estimates of the types of
18 gear, the number of fishermen, number of days, the
19 location, the times and the content of their current
20 tribal off reservation fishing regulations.

21 The State has said and evidence will show that
22 it has already been admitted in this case that this
23 State has the capability of allocating fish once
24 they know who should get how much. We will show that
25

1 the Indians can demonstrate approximately how much
2 they need each year, and the State from there should
3 be able to allocate the fish to those within its
4 jurisdiction, the remaining fish.

5 Certainly this task of regulating is no more
6 difficult than regulating a reserve right to water
7 in a semi arid southwest. The parched lands there
8 are desperately in need of water, a need that exists
9 for both Indians and non-Indians, yet the United
10 States Supreme Court has carried forward the princi-
11 ple first enunciated in the Winter's case, a reserve
12 right principle as applied to the fishing rights to
13 water rights and that reserve right in the context
14 of water rights known as the Winter's right has
15 meant that people along the Colorado River, an
16 already over drafted river, will have to get in
17 line behind the Indians, that the Indian had a re-
18 serve right share to all water they need for the
19 present and future uses, and the Supreme Court
20 fairly recently in Arizona versus California has
21 rejected the equitable apportionment doctrine because
22 of the reserve nature of the Indian right.

23 Now, the State has said that this acceptance of
24 the reserve right will present a parade of horrors,
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that there will be destruction of the fishery. Let us make it clear now that the Indian tribes don't claim every fish in the river under the present circumstances. It's only the harvestable fish we are talking about. It's only those fish that are not necessary to spawn in escapement that are harvestable, and it's only those fish upon which the claims of the Indians can draw.

Now, this is analogous again to the Winter's right where there might be a prior user prior to the reservation of the Winter's right, prior to a reservation created by the Indians and that segment of the water right cannot be infringed by Indians under the Winter's right either.

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1 It is no harder to regulate these off-
2 reservation fishing rights by commercial Indian fishing
3 than it is by any commercial fishermen. It is done
4 by regulating those rights. Many of the tribes in this
5 case have tribal regulations.

6 Now, the state has said that it is amazing
7 that just over half of the tribes in this case have
8 off-reservation fishing rights. It is rather
9 incredible that that many do, in view of the fact that
10 so few have been able to exercise those rights.
11 Why should there be regulations when there is no
12 exercise, when there can be no exercise? There is a
13 long history of Indian regulation of fishing rights,
14 first by ritual and custom, ritual that dictated that
15 the water be kept clean and that certain fish be
16 allowed to escape upstream for spawning.

17 A sort of natural understanding of the
18 biological aspects of the anadromous fish, later became
19 rules enforced by social pressure, were enforced by the
20 tribes. Now there are modern regulations. Joint
21 Exhibit 2 is a compendium of those regulations. Those
22 regulations were prepared by the tribes according to
23 information that they know, with the assistance of the
24 United States Bureau of Sport Fisheries and Wildlife
25 and, yes, the assistance of the state, and also the

1 assistance of the tribes' own biologists, in some cases
2 biologists retained by the tribes; in other cases, other
3 biologists retained by Indian organizations to which
4 the tribes belonged.

5 In addition to this evidence of this history
6 of tribal regulation and the present modern tribal
7 regulation that obtains, we will also show evidence of
8 the unfavorable effects of the state's regulation of
9 this anadromous fish resource.

10 We will show evidence of a wide suppression
11 of an Indian treaty fishing right that the highest courts
12 in this land have recognized for half a century. We
13 will show also a history of imprecise management, of
14 many examples of overescapement of fish, the practice
15 that the parties to this case, agree are not consistent
16 with conservation.

17 We will show a history of damage to wild runs
18 of fish through attempts of the state to artificially
19 propagate the anadromous fish resource, and we will show
20 very clearly a management of the resource, not for
21 conservation purposes, but for purposes of meeting the
22 needs of sport and commercial fishermen. These tribal
23 regulations must be considered for other reasons.
24 They must be considered because of the history of
25 sovereignty of these tribes with whom the United States

1 entered into solemn treaties. The United States Supreme
2 Court as recently as the last term said that these
3 treaties must be viewed in the context of this history
4 of sovereignty, and the Supreme Court in the Puyallup
5 Tribe v. Department of Game case said that regulations
6 of the state must be necessary for conservation before
7 they can be enforced against Indian treaty fishermen.
8 How can they be necessary for conservation until the
9 state has taken account of the conservation effect of
10 tribal regulation?

11 Today the Indian fishing right is very much
12 alive, but it is in chains, and we ask this Court to
13 emancipate those fishing rights, and in doing this we
14 don't ask the Court for any radical judicial legislation.
15 We ask the Court only to enforce the solution that the
16 United States Congress and the executive found for
17 resolving the problem of Indian claims, aboriginal
18 Indian claims, and continuing Indian subsistence and
19 livelihood, one hundred and twenty years ago.

20 The problem has been solved by Congress and
21 the executive. It remains for the Court to enforce it
22 and to implement it. We will hear from the defendants
23 allegations that Indian culture has changed, that it
24 isn't the same as it was one hundred twenty years ago
25 and therefore, through some trick of history some of those

1 legal rights that the Indian reserved to himself
2 one hundred twenty years ago he changed.

3 This is the first time I have heard a
4 notion of legal rights, contractual rights, property
5 rights altering merely because people wear different
6 clothes, travel about in different conveyances or speak
7 a different language. Cultures borrow from each other.
8 This culture that we are in has borrowed from the Indian
9 culture, and the Indian culture has borrowed from it,
10 and it has altered no legal rights as between those
11 parties.

12 Furthermore, we could question the assumption
13 of the state that there has been a substantial
14 cultural change. This case was born out of the rancor
15 of cultural conflict three years ago, a cultural conflict
16 that we ask this Court to resolve, and to answer the
17 question of whether or not a very real, a very live
18 culture can exist within a dominant culture and can have
19 the respect for its legal right from that dominant
20 culture.

21 Thank you.

22 MR. ZIONTZ: May it please the Court, counsel.
23 I am Al Ziontz, and I am here representing three tribes,
24 the Makah Tribe, who live at Neah Bay, Washington, the
25 Quileute Tribe at La Push, Washington, and the Lummi Tribe

1 at Marietta, near Bellingham.

2 We each of us have a heavy responsibility
3 in this case. I think all of us have sensed this
4 throughout the entire long pretrial period.

5 Certainly, as attorneys for the plaintiff, we
6 are cognizant of the fact that at stake is the welfare
7 of almost eleven thousand Indian people, six thousand
8 Yakimas on the east side, five thousand Western
9 Washington Indians.

10 The evidence will show, I believe, that all
11 of these people remain to this day more or less involved
12 with fish and dependent upon fish.

13 Fish permeate the life of the Indian people
14 of Western Washington, and certainly to some extent,
15 maybe to a major extent, the Yakimas as well, so that
16 for us as attorneys for the plaintiffs, there is a
17 grave responsibility.

18 Likewise, on the attorneys for the United
19 States there is the weight of the trust responsibility
20 which it is carrying out here, and on the United
21 States must fall the burden of whatever praise or
22 criticism will follow for its handling of that trust
23 responsibility.

24 I think the Court will come to see that there
25 has been a vacuum in years past in which the United

1 States has simply not feased, not acted in carrying out
2 that trust responsibility, and that has led to
3 aggravation of the situation which finally culminated
4 in litigation.

5 Certainly the state people feel a
6 responsibility to their constituency, the sports
7 fishermen, tourists, the entire economy of the state.
8 They are representing those interests. They would
9 like to add another class to their constituency, namely,
10 the Indians, and perhaps ungratefully the Indians don't
11 wish to be included under that vast umbrella. I think
12 the reasons will become clear to the Court. There is
13 a heavy responsibility in this case, and I suggest
14 that the responsibility is particularly heavy for three
15 reasons.

16 This is no mere contract dispute. It is
17 a dispute involving human rights, involving the very
18 life, not mere property rights of the Indian people.
19 For that reason, a second factor is involved, which is
20 peculiarly appropriate to a United States District Court
21 judge. That factor is the national honor of the United
22 States. That is certainly involved in this case.

23 And finally, the situation is difficult, I
24 believe, for the Court because the law is unsettled.
25 I believe, as I pointed out in my brief, that the

1 United States Supreme Court has not given clear guidance
2 to the parties, or to the lower courts, that there is
3 a great deal of area left to be defined, and the fact
4 of the last decision of the United States Supreme Court
5 in this case, the situation of the Puyallup decision,
6 was, as I view it, a de minimus kind of emergency
7 decision, saying that if truly we are confronted with
8 a clash between treaty rights and conservation, and we
9 must make a choice, and there is no alternative, then
10 said the court, we will opt for conservation, but if
11 the Court will examine the facts of the case, the Court
12 will note that the only facts upon which the United
13 States Supreme Court gave its decision and placed a
14 binding decision was the prohibition against netting
15 at the mouth of rivers where the fish were milling.

16 Beyond that, the court would go no further,
17 and said it would leave the matter back to the state
18 court, to decide whether upriver netting was actually
19 a danger to conservation, and left undefined the nature
20 of the conservation, which was the heart of its decision.
21 I think the fact that brought the matter to a head,
22 the court meant conservation to mean the last step in
23 the preservation of the species, it would not permit
24 action which would endanger the very preservation of
25 the species. Beyond that, the matter was not resolved,

1 and I submit that it was for this reason that this
2 case is particularly important, because I don't believe
3 that in the entire history of litigation in this area
4 any court has ever been presented with a full record,
5 which is going to be presented in this trial, dealing
6 with what the state is actually doing in the nature of
7 conservation, namely, management of resource, a
8 management program which became necessary when a
9 commercial industry sprung up and threatened to destroy
10 the resource, and management for purposes of distribution.

11 In a sense, it reminded me of the Texas
12 Railroad Commission, which distributes oil and allocates
13 oil so that the industry could be stabilized. This is
14 not conservation for preservation of beauty. It is
15 conservation for allocation of dollars, and it
16 distributes those dollars among the various competing
17 groups in the state.

18 Now, the Makah Tribe numbers about eight
19 hundred people. The Lummi Tribe numbers about fifteen
20 hundred. The Quileute Tribe about four hundred and
21 fifty.

22 Neah Bay, Bellingham, La Push are fishing
23 villages. I should say that Bellingham is not a fishing
24 village, but certainly the Lummis are fishing people,
25 and these three communities of Indians are fishing

1 people now as they were at the time of the treaty.

2 And they are governmental authorities now, as
3 they were at the time of the treaty. They are organized
4 today under a tighter form of government, recognized
5 by the government of the United States.

6 They were recognized by treaty. I am aware,
7 and I think the Court should be aware that the state
8 would denigrate those treaties and say that somehow
9 they should be treated as not having the status of
10 treaties, which is established in our law.

11 I think that argument was thrown out as long
12 ago as 1832 in Worcester v. Georgia. The court has never
13 acted to the state's argument that somehow Indian
14 treaties are not entitled to the dignity and the status
15 of treaties. I view this essential law as an
16 international law case. The Indian tribes are not here
17 as supplicants, as one small body of citizenry within
18 the state would like to be included in the state's
19 allocation. Not at all. The Indian tribes in this
20 state have the same status as Indian tribes throughout
21 America, that status is established as law, and as
22 recently as the McClanahan decision this spring is the
23 status of a body retaining self-government authority.

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25 (Continued on the next page.)

1 They come before this Court, if you please,
2 on the same plane as the State of Washington, as a
3 governmental unit entitled to the dignity and status
4 of a governmental unit.

5 I think it is significant that in 1953 when the
6 United States Congress was considering terminating
7 all these tribes and was considering measures to
8 achieve that over a long period of time and passed
9 what we know now as Public Law 280 transferring to
10 the States the right to take authority over Indians,
11 it specifically reserved out the authority over
12 treaty hunting and fishing rights, and it shall
13 in no wise be construed as granting the authority
14 to the States, even if the States were to take
15 full jurisdiction over the Indian reservations.

16 The last time we have a definitive decision from
17 Congress, Congress recognized that the States were
18 never to touch the reserve area of Indian treaty
19 fishing rights.

20 Now, our position, the position I assert on
21 behalf of the three tribes that we represent,
22 sharply differs from that of the United States.
23 We think that this Court has a unique duty and
24 responsibility to settle a rule of law which we
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1 know as lawyers grows out of the facts of the case.

2 The rule of law we submit that the Court must
3 conclude is that the treaty right is a federally
4 reserved right which in no wise may be regulated,
5 governed or in any way infringed upon by State
6 authority.

7 If this were to become the law, the settled
8 law of the land, it would be an exception, an
9 anomaly to the entire body of treaty law, which in
10 no way yields to the State the right to regulate or
11 infringe on a federally established treaty right,
12 which under our Constitution is dominant over
13 State law.

14 The two instances we cite, Missouri versus
15 Holland the Migratory Bird Treaty with Canada, the
16 Court should have laid to rest the State's right
17 to interfere in this area.

18 We will see in this case that the State of
19 Washington itself, in the case of the International
20 Pacific Salmon Treaty, does not attempt to override
21 international authority, but instead, accedes to
22 the treaty between the United States and Canada and
23 says that it will accept those regulations as domin-
24 ant in the field for the period in which they are
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1 in force. So, we say there is no authority in
2 the State.

3 The Puyallup decision is certainly to the
4 contrary, but the Puyallup decision, we submit, the
5 Court will have no difficulty in finding was based
6 upon a completely inadequate record, no showing
7 as to what the State regulatory scheme consisted of
8 and was in the nature of an emergency decision to
9 protect a destructable resource in which the Court
10 was presented with no alternative.

11 I would call attention to the footnote in
12 Puyallup in which the Court even considered the
13 stipulation, the rather wild and dramatic stipula-
14 tion, made in the Nisqually case: that the Indians
15 would destroy the resource if given the opportunity.
16 Even there the Court refused to authorize a blanket
17 injunction prohibiting Indian fishing in violation
18 of State law.

19 The State comes before the Court asking the
20 Court to give it the full mantle of authority, give
21 it the policeman's badge, and it will do a good job
22 of being fair to all parties, says the State.

23 I have no quarrel with the State's expertise.
24 I'm confident that they have a competent biological
25

1 establishment. They are expert in managing fisheries.

2 The evidence which the State will unfold will
3 have to do with its motto, how it proposes to do the
4 job if the Court will simply give it the authority.

5 In a sense, it reminds me of the employer who
6 would say, "Allow me to set wages. Just give me
7 a standard. Fair share or fair wage. I can assure
8 you I'll do a fair job in setting wages."

9 History is to the contrary. The law is to the
10 contrary. The employer has no such legal right.
11 They will never be given such a legal right.

12 Now, what the Indians would face if the State's
13 position were accepted is to be told that they are
14 entitled to a percentage and they would be sent out
15 in this courtroom and told hereafter to argue with
16 the State in administrative hearings. "Go present
17 your case to them. They will hear you, and they
18 will decide whether they want to make any adjustments
19 in the regulations or not."

20 The State asserts that only in this way can
21 the Indians be sent out of court permanently so that
22 they won't ever come back.

23 What the State is asking the Court to do is
24 to legislate, to establish some kind of percentage
25 which is somehow to resolve the problem for all time.

1 That is not what the Court is here to do. The
2 Court is here to establish a rule of law, a law
3 based upon a factual showing.

4 Now, we contend that when the facts are in ,
5 the Court will apply the established principles of
6 treaty construction and will come to the conclusion
7 that the supremacy clause is dominant and the State
8 does not get that mantle of authority.

9 The construction of the treaties is governed
10 by well established principles of law, that the
11 treaty must be construed liberally with the pre-
12 sumptions going in favor of the Indians, who are
13 illiterate and dependent people and who have relied
14 very heavily on what the United States told them.

15 In this connection, secret intent is not
16 relevant. If the United States has some private plan,
17 this is not to govern in the construction of that
18 treaty.

19 What governs is what the Indians were told,
20 what was said, and what was understood by them.

21 Finally, in connection with the reserve right
22 doctrine in the Winter's case, I think it's pecu-
23 liarly appropriate that the Court take note of the
24 reason for that rule.

25 The reason for that rule of reserve right, a

1 right which nowhere appeared in any treaty or in
2 any legislation, but was simply constructed by the
3 Court, was very clear. It was that the Court could
4 not conceive that the United States would confine
5 these Indian people to a land area which was arid
6 and barren, from which they could draw no sustenance
7 without death, and simply condemn them to what would
8 amount to a death camp.

9 The Court said it must follow that the United
10 States intended to reserve along with that land
11 area sufficient water so that they could make their
12 livelihood, so that they could live there as a people
13 indefinitely.

14 The Court will recall at one time it was
15 thought all of the area west of the Mississippi
16 would be permanent Indian country. Certainly by
17 1855 that had changed. But in no account was it
18 intended that these people would be sent to these
19 reservations to starve or just wait out their time
20 until they could move into white society. The
21 treaties were not a contract to be assimilated into
22 the white culture.

23 The reserve right principle applies to fish
24 as it does to water. The reservations were not
25 selected with a view to their fish resources.

1 I wouldn't venture to go into all of the details
2 that went into the land selection.

3 The reservation for the fish selection was
4 the same as the water rights. Without that fishing
5 right these people could not survive, and they
6 knew it, and they would not enter into such treaties
7 if they did not have a reserve right.

8 In summary I would say the Court's main
9 responsibility in this case is to arrive at a rule
10 of law which will settle this question, a question
11 which the State would like to have settled in its
12 favor by giving it the permanent mantle of authority
13 and submitting or subjecting the Indians to that
14 regulatory authority for all time.

15 I submit that that can't be done consistent
16 with the law.

17 THE COURT: Mr. Hovis.

18 MR. HOVIS: If the Court please, Counsel,
19 I am James Hovis, and I represent the Yakima Indian
20 Nation, six thousand forty strong, a nation that
21 has never been involved in a fish-in, marched on
22 a courthouse, had a demonstration but a nation that
23 has been involved in every major Indian fishing
24 case in the Western part of the United States,
25 either as a party, intervenor, or amicus.

1 This is a sovereign nation of fourteen tribes
2 and bands that ceded 10 million acres of land that
3 they exercised absolute dominion over to the State
4 of Washington, in which many of us reside, and it
5 is a nation that once ranged in the Western United
6 States from the Umpah River almost to the Califor-
7 nia border to the Canadian border and to the east
8 to the Rockies and covered all of the State of
9 Washington.

10 This is a nation that all parties have agreed
11 have usual and customary places within the Puget
12 Sound area. We are here in this place not only
13 because of those fishing locations within the Puget
14 Sound area, Puget Sound drain, but we are here
15 because we believe that this case will have a great
16 effect on fishing and Indian treaty rights every-
17 where.

18 For the first time we are taking actual exten-
19 sive, factual testimony, and we must make a factual
20 determination as to what Article III of these
21 treaties and of the Yakima Treaty really means.

22 Now, in this regard at the time the people
23 ranged 20,000 acres, the Yakimas ranged these
24 20,000 acres, fourteen tribes that made up the
25 Yakima Nation ranged these 20 million acres, rather,

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all this territory, not just because they liked to travel, but because they needed this land for survival. They needed to take the foodstuffs, the food gathering practice in this land, to survive.

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1 Now, ~~would~~ those people, ~~would~~ those people
2 at the time of the signing of the treaty, ~~reserve one~~
3 million acres or less than 5 percent of the total land
4 without feeling that they had a right to fish off and
5 away from the reservation as they did before, because
6 they certainly weren't living as a statement would be,
7 high on the hog, at the time that the treaties were
8 signed. They were at a subsistence level.

9 We will show that their promises and the
10 understanding and reliance of the Indian people was at
11 that time with the Yakimas, that they could maintain
12 a viable interest in the community, they could survive,
13 and that they could fish at their usual and accustomed
14 places as they had before, and they could gather roots
15 and berries as they had before, and they could hunt as
16 they had before, at their usual and accustomed places
17 as they had before.

18 Our evidence will also show that the Yakimas
19 were responsible and, as they are now, with their
20 tribal obligations in maintaining conservation at these
21 usual and accustomed places on their reservation because
22 the Yakimas most firmly believe, your Honor, that to
23 maintain a right, you must also exercise a
24 responsibility for that right.

25 The tribes must be responsible, we feel this

1 very strongly, because we know that if we don't conserve
2 that fishery, in the first place it will disappear and
3 it will be lost to the Yakimas who are yet unborn.

4 We also know of a more practical thing, that
5 if we do not conserve that fishery, Congress can amend
6 our treaty rights, and has the plenary power, the
7 State of Washington will go back there to Congress and
8 the Congress will take the rights away from us. We
9 must be responsible, we have to be responsible, and
10 we wish to be responsible for the maintenance of our
11 treaty fishing rights.

12 We also believe that the nation must be
13 responsible and maintain and keep its promises. The
14 state even in its brief seems to indicate that the
15 United States of America is something different from the
16 State of Washington.

17 Now, I don't know, but when I read that
18 Constitution, I believe that the United States is
19 composed of the union of states, and the people of the
20 State of Washington are a part of this United States,
21 and that they have a duty to the people that our nation
22 made promises to. I see fifty stars on that flag, I
23 don't see forty-nine.

24 I feel very strongly as a citizen of this
25 state, as a citizen of this nation, that we should keep

1 those promises and they should be what Mr. Getches has
2 talked about, interpreted liberally for the Indian
3 people who did not speak or could not communicate or
4 who did not write, who did not know the interpreters,
5 they knew none of the court reporters, none of the
6 actual things at the treaty grounds.

7 Now, the state has brought forward a lot
8 of things about how the fisheries have a lot more
9 problems. We have got lumber, we have got pollution,
10 we have over-fishing, a lot of problems. We have the
11 Japanese here, we have the Russians that are taking, and,
12 therefore, the Indians must recede back from their
13 traditional share from the amount they need for their
14 survival to more or less make a fair and equitable share
15 with the rest of the people in the United States and
16 the State of Washington. I would say perhaps that might
17 well be true if all of the treaty promises had been kept.

18 Mr. Coniff is going to make the Indians all
19 spud farmers, he believes they all ought to be that,
20 that's what the treaty meant, they are all going to be
21 agriculturalists. Perhaps if all the promises were
22 kept, if they were in economic parity with the rest of
23 the people in this country, maybe they should recede back
24 from some of their fishing rights and they should share
25 with some of the other problems in the state. But they

1 have not, and our evidence will show that they are
2 way, way down on the economic ladder, that other
3 promises have not been kept, and we do not feel that
4 they should also now have to recede back from what
5 treaty promises were made.

6 Fair and equitable share is, you know, and
7 I read Mr. Taylor's brief, it was an excellent one, a
8 trial brief, and I thought to myself, he repeated it
9 four times on each page, and I thought to myself, I
10 kidded him about it, about him going to law school at
11 Madison Avenue and with repeating it, and as I stand
12 here today, Judge, just trying to look at that fair
13 and equitable share situation all the time, I hope I
14 will be able to be helpful, because it certainly is
15 an attractive doctrine to go for, a fair and
16 equitable share doctrine.

17 So, therefore, I have called mine to be
18 equally attractive, the God and country doctrine, that
19 because a great country, like great men, as Justice Black
20 said in the Tuscarora case, keep their word, and as a
21 citizen of the United States and as a representative of
22 this court, the representative of the Indian people,
23 I would like to ask the Court to help the United States
24 keep its word.

25 Thank you.

1 THE COURT: Mr. Taylor.

2 MR. TAYLOR: May it please the Court, I am
3 Michael Taylor, and I am here to represent the Quinault
4 Tribe of Indians.

5 I would like to speak briefly about a matter
6 which is, I think, at the root of many of the problems
7 the courts have had in deciding Indian fishing cases,
8 and that is that the courts have seen Indian tribes,
9 Indian people, as not being what they are, and that
10 as counsel for the tribes have talked about this morning,
11 those tribes are governments.

12 The Quinault Tribe today governs that large
13 orange pie-shaped area of the Olympic Peninsula that
14 has 200,000 acres. It governs several of the important
15 river systems on the Olympic Peninsula. It is a
16 government, and I today come here as a representative
17 of that government of the Quinault people, yes, but also
18 of a government which, as the other attorneys have
19 pointed out, existed a long time before the treaty and
20 exists today.

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21 Now, the government of the Quinault reservation
22 of the Quinault Tribe has changed. It has changed as
23 the fishing has changed, as the population of the
24 state has changed. It has changed to meet the
25 challenges that it has with regard to the fisheries

1 on the reservation. I come in the same fashion as I
2 believe these attorneys for the state come, and the
3 United States, as a representative of a government, and
4 we feel the Quinault Tribe feels that it is important
5 to show this Court what it has done as a government,
6 because the state wishes this Court to believe that
7 only the State of Washington as a government and its
8 agencies may regulate the fisheries in the State of
9 Washington. But they failed to understand that the
10 Quinault Tribe as a government of its reservation, of
11 its people and of its off-reservation and usual
12 accustomed fishing places is entitled to the same power
13 and authority in governing those fisheries as is the
14 state.

15 Now, the Quinault Tribe for many years, as
16 I said, governed its fishing by tribal custom, by
17 ritual. Over the years that has changed. In 1925
18 the Tribe wrote down its first regulation for fishing,
19 and those regulations covered not only the on-reservation
20 fishing, but the off-reservation fishing of the Tribe,
21 but later because of the continued harassment from the
22 state, the Quinault Tribe withdrew within its boundaries
23 where it had total jurisdiction and did not go outside
24 those boundaries and regulated only on the reservation.

25 The Tribe has fought many fishing battles, not

1 only off reservation fishing battles, but on reservation
2 fishing battles, where the state and federal government
3 have attempted to come in and regulate on reservation
4 fishing. The Federal Government itself at one time
5 attempted to come in and regulate the Quinault people
6 on the reservation.

7 The Tribe strenuously fought that in the
8 courts and won, and it today regulates very successfully
9 on the reservation.

10 The state contends that Indian people cannot
11 regulate, their government cannot regulate. We will
12 show that the Quinault Tribe today has approximately
13 eleven hundred blood members of the Tribe. They employ
14 on the reservation four fishery biologists, people
15 with degrees who work directly for the Tribe and no
16 other agency, that they have their own fish hatchery
17 program, two hatcheries that they have very close
18 relationship with, the United States Bureau of Sports
19 Fisheries and Wildlife; that the Bureau of Sports
20 Fisheries and Wildlife has established another hatchery
21 on the Quinault Reservation. So there are three hatchery
22 programs there.

23 The Tribe employed several fish patrolmen to
24 make sure that its fishery provides not only a
25 commercial fishery for the Indian people, but excellent

1 sports fishery for the non-Indian people on the
2 reservation in in Lake Quinault.

3 The Tribe also employs other technical people
4 who are directing their skill toward the management,
5 proper management of logging, the proper management of
6 streams, and all the problems that go along with
7 successfully managing a fishery.

8 Now, how is this done? It is done in the
9 same manner that the state does it, that the Tribe
10 establishes an agency to do this for itself on the
11 reservation because fishing is the life of these people,
12 and it is their most important resource at this point,
13 and they wish effectively to use it. But they cannot
14 effectively use it if the State of Washington is given
15 what the state is asking for now, which is power over
16 another government, power to say how many fish the
17 Quinault fishermen will catch, power to say when they
18 will fish and where they will fish. That is why today
19 the Quinault Tribe of government sent me into this
20 courtroom to represent their needs and their rights
21 under the treaties. They say that they only should
22 regulate their fishermen, whether it is on reservation
23 or off reservation in their usual and accustomed fishing
24 places. Only their fish patrolmen, hired, paid by the
25 Tribe should be out there on the rivers making sure

1 that their people fish properly, only their court, the
2 Quinault tribal court should be deciding whether these
3 people fish under regulations properly, and in the
4 long history of Indian fishing struggle, the courts
5 have not realized or recognized that the Indian tribal
6 governments and the Indian people who elect and
7 subscribe and live under those governments have the power
8 and the authority and the right to deal with fishing
9 in their usual and accustomed places, and this is
10 important because you will hear the state say over and
11 over again that only they have the technical expertise
12 to make sure that the fish continue to run and
13 propagate. But the Quinault Tribe, the Quinault tribal
14 government will show that they have the power, the
15 authority, the will, and today in existence the staff
16 people to make sure that their fishery is properly
17 regulated.

18 Thank you.

19 THE COURT: Mr. Stritmatter.

20 MR. STRITMATTER: Your Honor, counsel, I
21 represent the Hoh Tribe, which is probably one of the
22 smallest, at least, of the member tribes that are
23 involved in this action.

24 At the time of the treaty in 1855, I believe
25 the Hoh and the Quilleute together, the Hoh being a

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sub-tribe of the Quileute, were only about five hundred members. As of today, the Hoh Tribe is probably limited to about one hundred members, of which only about five are full time fishermen, and about ten are part time fishermen.

(Continued on the next page.)

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1 Consequently certainly the amount of damage that
2 these fishermen can do to the total fisheries of
3 the State of Washington is very, very minimal. The
4 Hohs are in a peculiar position in that their reser-
5 vation is exactly one mile square, and the way the
6 State has been operating, in order to avoid State
7 regulation the Hohs have had to confine their
8 fishing to this one mile square area. Consequently,
9 the minute that they went beyond that one mile square
10 they were subjected to arrest by the representatives
11 of the State of Washington. Their nets have been
12 confiscated in the past with no indication of who,
13 what, why or when they were taken. Whether it is
14 by representatives of the State of Washington or
15 someone else it is hard to tell, but at least there
16 is no question that the State has been very active
17 in trying to keep the Hohs from fishing beyone their
18 one mile reservation except under the jurisdiction
19 of the State rules and regulations. The yearly
20 income of these fishermen does not exceed five or
21 six or seven thousand dollars at the most. Now, it
22 is just interesting to note that in spite of all of
23 the talk about the damage that is done to the
24 fisheries by Indian fishermen, and I do not have
25 figures, and I am not prepared as far as other

1 fishing tribes are concerned, but the State itself
2 has put out figures in regard to the Hoh River
3 where the Hoh fishermen live and fish, and their
4 figures show that over a two year period, as I
5 understand their chart, a total of 77,000 fish
6 left the spawning areas to sea. Out of those which
7 eventually returned, a lot of them were caught by
8 white fishermen out in the ocean, but of those which
9 returned only 6,000 were taken by Indian fishermen,
10 so out of the total of 77,000 that left the Hoh,
11 the Hoh Indians took approximately 6,000. Is that
12 a destruction of the fisheries' resource as far as
13 the Indians are concerned? There was a spawning
14 escapement of 18,000 during the same period, so the
15 escapement was three times the amount that the
16 Indians themselves took during that same period.

17 Now, I have to assume that this same type of
18 figure applies to all of the other Indian tribes
19 and Indian nations involved in the lawsuit. I would
20 like to get to the Winans case. To me the Winans
21 case sets out very clearly that this right was a
22 reserved right, but it went even further than saying
23 that the Indians were not granting rights to the
24 whites. They were reserving to themselves certain
25 rights and granting to the whites other rights,

1 and in addition to saying that they reserved those
2 rights the Supreme Court stated that they not only
3 reserved the right to fish, but they reserved the
4 right to cross the white man's land to get to their
5 fishing. It was implied in the treaty that whites
6 would eventually own these lands, and that the
7 Indians would have to get to the rivers in some
8 manner, and therefore implied in this reservation was
9 the right to cross the white man's land for the
10 purpose of getting to their fishing stations. So
11 we have gone a long way from the Winan's case down
12 to the Puyallup case. The Puyallup case states that
13 the State does have a right of regulation. Now,
14 unfortunately I left behind me the Washington
15 law review that covers this, but two years ago
16 a University of Washington professor, I think it
17 was Johnson, reviewed the Puyallup case, and in that
18 he came to the conclusion that the Supreme Court
19 in the Puyallup case had gone so far afield that
20 they had not properly researched the problem, and
21 they accepted dicta from other cases in reaching
22 their conclusion in the Puyallup case, and that
23 that dicta implied that the State had rights of
24 regulation, but that had the Supreme Court thorough-
25 ly researched the problem they would have found

1 that there is no way in which the States have any
2 power at the present time to regulate Indian fishing,
3 that it is merely a usurpation of a power that does
4 not exist in the State as of today, and I submit
5 that we must get back to the research on this
6 matter. Professor Johnson is correct that this is
7 the time to correct the errors which have been made.

8 Now, twenty years ago I was in the State of
9 Washington Supreme Court in a case called In Re:
10 Wind's Estate. I won the case in the lower courts,
11 and with about 80 years of decisions that sustained
12 my position in the matter. The Washington State
13 Supreme Court in that case said, "For 80 years we
14 have been wrong. There is no reason to perpetuate
15 the wrong. Today we are reversing our 80 years of
16 wrong decisions, and we are going to get on the
17 right track." I submit that this is the case on
18 which we need to get on the right track as far as
19 Indian fisheries are concerned.

20 Now, one thing further. The State, in essence
21 the State Fisheries Department at least is proposing
22 this fair share doctrine. I submit that if we are
23 going to use a fair share doctrine let's go all the
24 way with a fair share doctrine. Back in 1855 the
25 Indians ceded to the United States roughly -- and

1 I am using rough figures, I would say ninety-nine
2 and nine-tenths percent of what they owned at that
3 time and retained one-tenth of one percent of what
4 they owned. That included fisheries resources and
5 reservations and things like that. Now, the proposi-
6 tion for a fair share is to the effect that we now
7 take a fair share of one-tenth of one percent that
8 was reserved by the Indians. We don't say anything
9 about giving them a fair share of the ninety-nine
10 and nine-tenths percent that was ceded. We only
11 talk about taking a fair share of what they reserve.
12 I submit if we are going to do the whole job, let's
13 go back to 1855. Let's take the whole United
14 States of America and let's give the Indians their
15 fair share of the United States of America and not
16 just take from them their percentage that they had
17 at that time. I submit that is the only real way
18 of applying a fair share doctrine at this time. Thank
19 you.

20 THE COURT: I believe that concludes the
21 opening statements for the plaintiffs.

22 MR. PIERSON: It does, Your Honor.

23 THE COURT: We will take a 15-minute
24 recess at this time.

25 (Recess.)

1 THE COURT: We will now hear the opening
2 statements for the defendants, and I believe Mr.
3 Coniff is going to speak first, representing the
4 Department of Game.

5 MR. CONIFF: That is correct, Judge. Thank
6 you.

7 I have altered my prepared remarks somewhat
8 in light of the opening statements made by counsel for
9 the plaintiff. I would like to respond just briefly to
10 a few points that they have raised to clarify, if you
11 will, the position which the Washington Department of
12 Game is taking before this Court.

13 I think one of the fundamental points that
14 should be borne in mind is that we are not here
15 contending to this Court, making any contention that we
16 have any jurisdiction within the boundaries of an
17 Indian reservation. In a nutshell, our position is that
18 the line of demarcation, if you will, for the application
19 of state conservation law and regulations is the
20 reservation boundary.

21 What is at issue in this case is the claim
22 being advanced on behalf of the various plaintiffs that
23 the state is somehow impaired or is impeded in its
24 ability or its right to apply state conservation laws
25 and regulations to claimed usual and accustomed fishing

1 grounds and stations in off-reservation waters.

2 I think it is important that this fundamental
3 premise be borne in mind by the Court.

4 Secondly, your Honor, in response to several
5 arguments made by counsel for the plaintiffs, the
6 point is constantly made that these are reserve rights.
7 Citations are given to the Winters or water rights line
8 of cases. Citations are given to the Winans decision and
9 reliance is placed thereon.

10 I recognize that in an opening statement it
11 is perhaps somewhat technically improper to present
12 legal arguments. But to clarify our position, at least,
13 for the Court's information, our position is that the
14 treaties are intended to secure a right in common with
15 other citizens.

16 We believe that the evidence will show that
17 in 1855 and 1856, when the Stevens party made these
18 treaties, that the Indians were not citizens, and that
19 there was a real problem. They did not wish to be
20 excluded from their usual and accustomed grounds and
21 stations, particularly during the intervening period
22 that lay between the time that Governor Stevens signed
23 the treaties and Congress could, in fact, ratify them
24 and appropriate monies for the Indians to concede the
25 various items and various other things that were promised

1 them in those treaties.

2 In this same vein, I would like to point out
3 just briefly to the Court that the law, based on Chief
4 Justice Marshall's decision in Johnson v. McIntosh,
5 1832, as followed by the United States Supreme Court
6 in Ward v. Racehorse in 1896, which in turn has been
7 expressly reaffirmed by the United States Supreme Court
8 in 1973 in the Mescalero Apache decision, clearly
9 uphold the proposition that when Indians move outside
10 of their reservation boundaries, within which areas I
11 will stipulate they have sovereignty, if you will, a
12 residual sovereignty, subject of course, to the
13 paramount power of Congress, the court I believe has
14 made crystal clear in its opinions that the line of
15 demarcation is that boundary line.

16 I do not wish the Court to be confused at
17 all as to the basis of our ultimate legal position in
18 this lawsuit. In that connection, I was very interested
19 to note that several of the opposing counsel took great
20 pains to either, (a) attempt to distinguish Puyallup
21 or to suggest that the United States Supreme Court in
22 its first Puyallup decision in 1968 was wrong when it
23 said that the state may regulate off reservation fishing
24 activities by Indians claiming these rights.

25 Further, I would point out to the Court that

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the United States Supreme Court language indicated that the state method of management was concerned.

As the Court has been advised that in a prior case in a memorandum submitted which is now under advisement, the Puyallup I decision is again under review by the United States Supreme Court. We expect that the Puyallup II hearings will be held in Washington, D.C., in either October or November, and, therefore, I would then reiterate to the Court the first proposition, which Game stated to the Court in its opening brief. That is that while this record should be made, and it should be a complete record, and this Court will, of course, have jurisdiction of all pertinent parties before it, that it should defer its decision, its final decision pending the ultimate second review by the United States Supreme Court of these variations of issues, being that of the treaty interpretation vis-a-vis state police power to regulate in off reservation waters.

I have been personally involved in Indian fishing rights litigation for approximately twelve years as an Assistant Attorney General for the State of Washington. I can state to the Court that if I felt that there was proof, adequate proof, that the Indians possessed a right to catch every harvestable fish,

1 as has been contended, then I would recede from my
2 position.

3 IF there is such evidence of such an
4 exclusive right, then I would ask the Court to carefully
5 review the evidence in this record and ask the question,
6 first, then why after one hundred twenty years has it
7 just been discovered? Two, if it really exists at all.

8 I would submit to the Court that when Governor
9 Stevens and his party were given instructions by his
10 superiors in Washington, D.C., Commissioner Manypenny,
11 that he was not authorized, and did not, in fact purport
12 to deal away the governmental authority of the United
13 States to these tribes and bands of Indians residing in
14 the Puget Sound and Western Washington area.

15 I further submit that, in fact, he did not
16 purport to acquire sovereign or governmental power,
17 which resided in the paramount authority of the United
18 States, by virtue of entering into these treaty agreements.

19 I can agree and freely admit under the
20 supremacy clause, that if this treaty phraseology is to
21 be interpreted the way counsel interpreted it, that the
22 state laws must fail.

23 But as I pointed out, the United States
24 Supreme Court in a number of decisions, only a few of
25 which I mentioned in my opening statement, have always

1 drawn the line at the reservation boundary. They have
2 not allowed Indian citizens to move into off-reservation
3 areas and claim immunity from the application of other-
4 wise valid state laws and regulations.

5 In this connection, I would like to point
6 out to the Court that the very phraseology with which
7 you are concerned, Judge, and with which we are all
8 concerned appears in another context in a Governor
9 Stevens treaty. I am referring to Article III of the
10 Treaty of the Yakima Tribe, where the phrase, "in common
11 with the citizens" appears in another context.

12 In the Yakima Treaty, Governor Stevens inserted
13 this clause to secure to said Indians the right to travel
14 upon the public roadways in common with the citizens
15 of the territory.

16 I would submit, your Honor, that we will
17 certainly see some rather, in my view, astounding
18 results should we apply the argued-for rationale of
19 plaintiffs' counsel to that treaty language which appears
20 in the treaty with the Yakima.

21 I would like to point out, and we will submit
22 to the Court that the evidence will show that the
23 game department in the State of Washington is a creature
24 of statute. We don't make laws. We are under an
25 obligation to attempt to enforce them to the extent that

1 we are able to do so. We were created by an act of the
2 State Legislature in 1933.

3 Frankly, we do not like the task and the role
4 of impairing or interfering with treaty rights. If
5 these rights exist, we will certainly recognize them
6 and give them the fullest possible effect, and I wish
7 to assure the Court that that is the case.

8 What is presently before the Court is a,
9 if you will, new claim, an attempt to rehash or
10 relitigate the Puyallup decision.

11 Should we lose in our contentions which we
12 will be making to the Court, we merely want to point
13 out that we as a state originally derived our power
14 upon our admission into the union from the United
15 States, and we are fully bound by the supremacy clause
16 to the United States Constitution and by whatever rights
17 that are, in fact, secured to the plaintiff Indian
18 tribes by virtue of these treaties.

19 The question yet remains, is there a right?
20 If so, where may it be exercised? If it may be
21 exercised by Indians in off-reservation waters, then
22 under what terms and conditions?

23 I must respectfully disagree with my
24 counterparts in the United States Government regarding
25 the burden of proof on these issues. We are the

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defendants. The plaintiffs are making these claims against us based on their interpretations of the treaties in question.

I would submit to the Court that you, Judge, should keep firmly in mind in reviewing the evidence that the plaintiffs do have the burden of establishing these facts.

(Continued on the next page.)

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1 The evidence to establish, Your Honor, that there
2 are basically four levels of management that can
3 occur on any renewable natural resource that we have
4 in this State, such as anadromous fish. The first
5 level management which man is able to achieve is
6 no regulation. That was the situation as far as I
7 have been able to determine from all of the evidence
8 in this case at the time of the treaties. There was
9 no need to even limit the commercial taking at that
10 time, because I am confident that neither Governor
11 Stevens nor the Indians could have foreseen the
12 fantastic growth in this area and the fantastic
13 increase in the demand for this perishable resource.
14 So, therefore, Your Honor, the evidence will show
15 first in terms of man's ability to manage or regu-
16 late a resource, but the first level of regulation
17 is no regulation.

18 The second level that man is able to manage is
19 the level of beginning to limit, if you will, the
20 commercial aspects or the commercial taking of the
21 resource. This is the situation that we are in in
22 the State with regard to salmon. We still have
23 enough salmon. There are still abundant enough
24 salmon to sustain commercial industry and yet
25 provide sports and recreational interests on the

1 part of people, and yet maintain the resource
2 itself. That is the level, of course, of salmon.
3 The third level that man is able to regulate a
4 renewable resource is to prohibit commercialization.
5 This is the next to the last level of management.
6 This is the level that steelhead are. The evidence
7 will show that steelhead in terms of numbers do not
8 nearly approach the populations of the five species
9 of salmon which we are fortunate enough to have in
10 our State. The limitation is a recreational or
11 personal use fishery, prohibiting and outlawing
12 under State law the use of commercial gear and
13 any entry into the commercial market, knowing that
14 man's insensitivity where dollars are involved is
15 quite high, and therefore that is the level of
16 management that steelhead are on. The final level
17 of management that under any stretch of the imagina-
18 tion can occur is simply total prohibition against
19 any taking. We have reached that area with certain
20 endangered species where we have a few bald eagles,
21 we have a few certain, you may say more exotic
22 species which formerly were hunted species but they
23 are now prohibited from any type of hunting or any
24 type recreational taking because there are so few
25 of them left. We have to try to keep them from

1 extinction. We have to try to preserve them for
2 non-consumptive uses. The evidence will show there
3 are non-consumptive uses and values to our fish and
4 wildlife in this State. For example, the mere fact
5 that we know that there are fish and that our
6 children will hopefully be able to see them or
7 enjoy them is a benefit itself. It is a non-quantifi-
8 fiable benefit. It is an esthetic value, yet this
9 is a value that these natural resources have, so
10 therefore when I use the term, and I believe when
11 the Game Department witnesses use the term pro-
12 conservation, to find its widest use that Your
13 Honor should keep in mind the four levels of possible
14 management by man of these natural resources.

15 In summary, Your Honor, our position is that
16 treaties that are in question provide the Indians
17 a right to be equal to share in equal opportunities
18 to engage in fisheries, in off reservation waters.
19 We believe alternatively that in this Court's
20 discretion, and consistent with the position of the
21 Fisheries Department based on their reading of the
22 first Puyallup decision, that in any event this
23 Court should place a constitutional interpretation
24 upon the legislative classification of steelhead as
25 a game fish. Certainly, and we would submit to you,

1 Your Honor, it would be an abuse of your discretion
2 not to do so when you contrast the habits, the
3 populations and the various physical properties,
4 characteristics of the steelhead run and population
5 as contrasted to the salmon runs and population.
6 Therefore, as an alternative to the main thrust of
7 my contentions which I have just outlined to you,
8 we would submit that Your Honor should adopt what
9 is known as the fair share doctrine as advanced
10 by the Fisheries Department, that you recognize
11 the legislative classification of steelhead as a
12 game fish and require under appropriate terms and
13 conditions that the Fisheries Department substitute
14 a fair share of this salmon to make up for an
15 equivalent share of the steelhead, should this
16 Court adopt what is known and referred to as the
17 fair share approach.

18 Finally, I simply wish to reiterate that we
19 do not abandon our contentions regarding the desir-
20 ability of this Court's deferring its decision until
21 the United States Supreme Court has an opportunity
22 to decide the Puyallup Two decision, which involves
23 the very language of the treaties we are all concerned
24 with. Secondly, we reiterate our position that this
25 Court has no jurisdiction over this matter, because

1 Congress has limited jurisdiction to the Indian
2 Claims Commission. The evidence will show that the
3 Indians have been paid for the value of the lands
4 which were ceded under the treaties, and that these
5 were the subject of decisions of courts created
6 by Congress, and that included in the value of
7 those lands which were ceded the various treaties
8 in question, with a value of alleged off reservation
9 fishing and hunting rights. Therefore, alternatively
10 we submit that this would operate as a bar to the
11 bringing of the claim which is being brought by
12 the various plaintiffs and by the United States
13 in their behalf.

14 Two final footnotes, Judge. Harking back to
15 the burden of proof, it is my view that the evidence
16 will show that the term "usual and accustomed
17 grounds" as used in the treaties has specific
18 meaning, and that generalized descriptions of entire
19 watersheds, the entire salt water area of the
20 Strait of Juan De Fuca, the marine areas of Puget
21 Sound, are inadequate and do not satisfy the plain-
22 tiffs' burden of establishing by competent evidence
23 before this Court the locations, the claimed usual
24 and accustomed locations where the claimed fishing
25 activities should occur.

1 A final footnote is to simply reiterate, as
2 we stated in our opening brief, that we do seriously
3 contend and believe that the evidence will establish
4 the following tribes who do not occupy the legal
5 status of a "treaty tribe" the Muckleshoots, the
6 Sauk-Suiattle, Stillaguamish and Upper Skagit.
7 Detailed evidence will be offered regarding these
8 tribes and the legal conclusions to be reached from
9 that evidence will of course be covered in the
10 post trial briefs previously authorized and ordered
11 by the Court.

12 THE COURT: Thank you. Mr. McGimpsey?

13 MR. MCGIMPSEY: May it please the Court.

14 THE COURT: You are speaking for the
15 Fisheries Department.

16 MR. MCGIMPSEY: My name is Earl McGimpsey
17 and I speak for the Fisheries Department. The
18 Fisheries Department would agree with United States
19 that this case involves two temporal aspects, the
20 period of the treaties and modern times. You are
21 being asked to interpret treaties -- 1855 was the
22 year of the treaties. In that year there was a
23 settlement at Olympia. Port Townsend had already
24 been founded. Four years earlier the Denny party
25 had arrived at Alki and Seattle had its beginnings.

1 Three years earlier Nicholas Devin had
2 been the first to settle on Commencement Bay and the
3 first settlers had arrived in Bellingham.

4 There was no railroad, in fact, to the south,
5 and there was little more than a footpath leading to
6 Fort Vancouver and Portland.

7 The tin can had not yet been invented, and
8 the perfection and consequent development of the
9 commercial fishery would await another thirty years.
10 The projected non-Indian population of the whole
11 territory on both sides of the mountains could not have
12 been more than 6000 settlers. Twenty-four years earlier
13 the United States Supreme Court had ruled in Cherokee
14 Nation v. Georgia that Indian tribes within the
15 boundaries of the United States are not foreign nations
16 and were under the complete sovereignty of the United
17 States.

18 In that year neither settler nor Indian drove
19 automobiles on roads, gravel for which had been taken
20 from our streambeds, ate packaged foods and the variety
21 and quantity available to Indian and all citizens in
22 our supermarkets today, and fished with nylon gillnets
23 from aluminum boats powered by outboard motors spewing
24 their oil discharges on the water, nor did the settler
25 or Indian purchase products whose manufacturers pollute

1 our streams, live in houses built from trees, the
2 logging of which has deteriorated our stream environment,
3 nor were there houses heated with refined oil, the
4 manufacture of which pollutes our environment, or
5 lighted with electricity generated from dams that have
6 destroyed or damaged our fish runs.

7 I do not point out these contrasts to challenge
8 the legal rights of the plaintiff tribes to fish at the
9 usual and accustomed stations in common with all
10 citizens, but rather to urge the Court to keep these
11 contrasts in mind as the evidence comes in from what
12 was in the minds of the men who negotiated the treaties
13 and what the evidence will be as to the effect of
14 environmental pollution.

15 Simply stated, we believe that the evidence
16 will show that the intent of the parties in the treaties
17 was to secure the Indians and their right to continue to
18 take fish, which was a staple of their diet, for their
19 sustenance; that there was an exchange of fish among
20 tribes for the consumption uses of the tribal members,
21 and that a limited trade in fish was carried on with
22 the settlers. But there will be no evidence of any
23 extensive commercial fishery comparable to what takes
24 place today, nor could it have been imagined.

25 The commercial fishing industry and the

1 consequent need for regulations, over which, we contend
2 in this trial, was a product, as well as all the contrasts
3 that I have drawn, with the industrial revolution which
4 was only beginning to feel its birth pangs in 1855.

5 The evidence will lead to the inescapable
6 conclusion that it was not the intent of the United
7 States in 1855 to secure to the Indians a monopolistic
8 position in a commercial fishing industry; that was
9 not even conceived in the minds of the treaty
10 negotiators.

11 The Department of Fisheries recognizes the
12 distinct right of Indians, not shared by citizens
13 generally, to take fish at their usual and accustomed
14 stations. But the treaty declared, and the Courts have
15 affirmed, that that right to fish was to fish in common
16 with all citizens, and, therefore the United States
17 Supreme Court and the courts of this state have
18 continually upheld the authority of the state to
19 regulate the exercise of that right off reservation as
20 provided; that state regulations are reasonable and
21 necessary for conservation and meet appropriate
22 standards and do not discriminate against the Indians.
23 Although the plaintiff tribes continue to challenge
24 the authority of the state to regulate off reservation,
25 the law on that question is well settled. The treaty

1 rights, fishing rights, as the Supreme Court noted
2 in Puyallup, was not a reservation of an Indian tribe's
3 sovereign prerogative. We are not challenging what
4 Mr. Taylor would seem to indicate, the exercise of the
5 tribe's jurisdiction to regulate on its reservation.
6 We are merely asserting that among the authorities
7 to regulate off reservation, that the state power is
8 preeminent, and that tribal regulations off reservation
9 cannot be in conflict with state -- valid state
10 regulations.

11 In its brief to the United States Supreme
12 Court in the second Puyallup case, which is pending
13 this fall, the United States has represented to that
14 court that the purpose of this lawsuit is to quantify
15 the treaty rights. We agree. What this lawsuit is all
16 about is the scope of the Indians' rights to fish off
17 reservations. We are asking this Court to lay down
18 guidelines that should govern the state in regulating
19 that right. The present guidelines, though fine in
20 principle, have not resolved the continuous litigation,
21 the claims and charges, they are too vague to acquire
22 the confidence of the Indians, the state government
23 or the public generally.

24 There is a need for an objective, definite
25 understanding that all parties and the public will respect

1 and think fair; a standard by which courts, when
2 judicial review is sought, can objectively measure the
3 performance of the state agencies.

4 Unfortunately, both the United States
5 Government and the attorneys for the plaintiff tribes
6 urge upon this Court vague standards which will only
7 be rallying points for another round of litigation and
8 achieve for Indian fishermen little more than a hollow
9 victory.

10 One other court has attempted to do what we
11 are asking you to do, in many respects this case is a
12 replay of proceedings in Oregon.

13 In that Oregon case, Judge Belloni announced
14 the principle of fair and equitable share. That
15 principle is subscribed to by the Department of
16 Fisheries. The fair and equitable share rule helps
17 clarify the requirement that state regulations be
18 necessary for conservation, because it recognizes a
19 fundamental principle; that conservation regulations
20 necessary for one user group are interrelated to the
21 regulations for every other user group, and in the
22 case of the Department of Fisheries management of salmon
23 fisheries of the state, we recognize three user groups;
24 Indian fishermen, sports fishermen, and non-Indian
25 commercial fishermen. But the whole regulatory plan is

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1 interrelated, and the conservation necessity of each
2 of its component parts cannot be examined without
3 examining the whole.

4 In part this is because of the very nature
5 of where the fishery takes place. If we look at the
6 map, we will see that the non-Indian commercial fishery
7 takes place in the marine areas in the Sound and in
8 the ocean; that the sport fishery takes place largely
9 in the marine areas, and that the Indian fishery is
10 a place oriented fishery on the rivers. As the salmon
11 run from the sea through the Sound and into the rivers,
12 they pass through each of these fisheries.

13 If we are to regulate the last fishery only
14 by standards that are necessary for conservation, we
15 cannot escape having whatever regulation we make there
16 also affect the regulations that we make for each of
17 the other fishery groups that fish on the fish before
18 they reach them, and in that sense, all of our
19 regulations are interrelated.

20 Now, the plaintiffs would define conservation
21 merely as the preservation of the salmon, in other
22 words, assuring that enough salmon in their stream escape.
23 But the problem is that there are many streams and that
24 the other people who fish on those salmon fish in areas
25 where the different salmon from the different streams are

1 mixed, and thus the mere regulation for one stream may
2 adversely affect the conservation of the salmon in
3 another stream.

4 So for each tribe to say that its regulation
5 has to be only necessary for conservation of its
6 fish runs is not a sufficiently broad enough concept
7 of conservation that will protect the overall salmon
8 resource.

9 Another problem and complication as an
10 example of the difficulty of defining conservation
11 summarily is that salmon runs of the five species tend
12 to come at different times, but at certain points in
13 time, more than one run will be in the same body of water.

14 For example, this fall there is a very weak
15 Chinook run of salmon coming into the Sound, coming
16 into the rivers right now. It will be followed by a
17 fairly strong run of Coho salmon. At certain times
18 in the river there are going to both be Chinook and
19 Coho salmon. It might be conservationally necessary
20 to preserve the Chinook salmon, to restrict all fishing
21 on it, and at the same time conservationally necessary
22 to allow fishing on the Coho salmon in order to prevent
23 an over-escapement which can also be damaging to
24 spawning grounds. My point being that a simple extension
25 of the species definition for conservation does not

1 reflect the reality of the salmon resource, and I,
2 believe the biological testimony will demonstrate that.

3 If one harvesting group were to be given
4 priority over every other harvesting group, then the
5 conservation regulations necessarily involve an
6 allocation of the resource. It is for that reason that
7 the fair share principle is the heart of this lawsuit.
8 No matter what standard this Court sets for achieving
9 a fair share of fish for the Indians, it will be
10 effectively allocating the resource between Indian and
11 other user groups.

12 Now, while the fair share principle of the
13 Judge Belloni decision should be applied by this Court,
14 the evidence and the admitted facts will show that the
15 Columbia River allocation of it is not appropriate.

16 In effect, on the Columbia River, where all
17 the fisheries are that were subject to the fair share
18 limitation are on the same river and fish the same
19 stocks, and we have a different situation than what
20 we have in Puget Sound and the coastal streams.

21 First, on the Columbia River the fishermen
22 are fishing, by and large, the same stocks of fish,
23 and so a shared fishing time does give them an equal
24 opportunity to catch a fair share. But on the Puget
25 Sound area, the stocks of fish are mixed when the non-

1 Indians fish on them and segregated when the Indians
2 fish on them. Equal fishing time will not necessarily
3 assure either group of a fair share.

4 And another difference is that the Columbia
5 River is punctuated with dams, and these dams provide
6 stations where fish can be counted. There are no
7 strategically located dams on the coastal rivers or the
8 Puget Sound rivers, so that there is no way to assure
9 that an adequate escapement of fish for the upriver
10 fisheries and for spawning occurs before you allow an
11 equal time for the downriver fisheries.

12 For those reasons we believe that it was
13 necessary for the Department of Fisheries to design a
14 fair share model that would suit and be conservationally
15 sound to reflect the Puget Sound and coastal streams,
16 and the model that we offer to this Court is such a model.
17 This model is a product of thinking and the research
18 of Dr. Steven Matthews of the University of Washington
19 College of Fisheries.

20 While it is based on sound principles of
21 salmon population dynamics, and is patterned after
22 the highly successful International Pacific Fisheries
23 Salmon Commission, its development for the Puget Sound
24 and coastal rivers of this lawsuit is a technological
25 breakthrough for the Indian fishing problem.

1 This model would enable the Department of
2 Fisheries to provide to the Indians a percentage
3 of the available harvest, to be set by this Court.

4 Now, why did we choose a percentage share? We
5 chose it first because it is an objective share.
6 The continuous litigation in this area and the
7 continuous controversy that exists between all of
8 our citizens and the Indians over fishing rights
9 in this area makes it abundantly clear that whatever
10 this Court does in defining and quantifying the
11 Indian treaty right, it must give us an objective,
12 definite standard which all parties can respect and
13 which will win the confidence of all.

14 Secondly, the percentage share is the only
15 sound conservation method of allocating the resource
16 in the case area. If the Court would go to a
17 fixed quota, the Fisheries Department would be faced
18 with the prospect that in any given year, in order
19 to achieve an Indian quota, even though it may have
20 shut down all of the other fisheries, it would have
21 to dip into spawning escapement, and then limit the
22 development of the resource for future generations.

23 If the Department were to take the standard
24 offered by the plaintiffs as being the needs of the
25 Indians to be determined in some sort of hearing

1 process, that standard would be constantly subject
2 to argument and constantly challenged, and we would
3 only be substituting one set of legal arguments for
4 yet another, and the effect would be that the
5 Department of Fisheries would have established a
6 plan based on what was determined to be Indian
7 rights, only to find that plan challenged in the
8 court and perhaps, if it were overturned, to throw
9 the complete harvest of salmon into turmoil by
10 discarding the regulatory pattern at the very end
11 of the line where it becomes most critical.

12 The plaintiffs have urged the doctrine of
13 economic parity, and they would blame the low estate
14 of the Indian economy all on the Departments of
15 Fisheries and Game and assert that the fishermen of
16 this State should alone, among the citizens of this
17 country, be responsible for making up to the Indians
18 what the United States has apparently not given them.

19 I would suggest to the Court that, in reviewing
20 the treaty, the Court will not find in it any
21 intention or language to indicate that the parties
22 negotiating looked upon fishing as the sole or
23 exclusive means of achieving economic parity for
24 the Indians.

25 Finally, I think fairness requires that it be

1 a percentage share. A percentage share will allow
2 the harvest to fluctuate with the size of the runs
3 and truly in treaty times fishing runs fluctuated
4 and the Indians ^{harvest} /fluctuated with those runs. The
5 same would be true today.

6 The United States and the plaintiff tribes
7 object to the percentage share motto as setting
8 immutably the Indians' share. If that share is fair
9 then they need not worry.

10 But there is nothing that denies this Court
11 the jurisdiction to review the standards it has set
12 when justice and equity require.

13 There are four basic elements in our fair share
14 plan, and I have outlined these in my brief, and they
15 are discussed in great detail in the exhibits that
16 we have submitted of our written testimony and
17 Dr. Matthews' studies. I will just briefly state
18 the four.

19 The first is that as part of the computations
20 fish which originate in our rivers and go out into
21 the ocean and are caught in international waters over
22 which the State can exercise no control of the harvest
23 should not be counted as part of the harvestable
24 share for the non-Indian fishermen. This is simply
25 because there is nothing that the State can do to

1 control that harvest. If it were to count such
2 large numbers of fish as are caught in the ocean
3 fishery, it might well be impossible for the State
4 to even provide the Indians with their share of the
5 fish, having cut down every other fishery.

6 Second, that for the Indians, only the fish
7 that enter commercial channels should count for
8 their fair share. They should be secure in their
9 right to take all the fish that are necessary for
10 their personal use. We believe that is what the
11 treaties intended.

12 Third, that the reservation catches should count
13 toward the fair share: first, because we are only
14 considering commercial catches, and, second, because
15 fairness requires it, fairness to the Indians who
16 live on reservations that have no streams in which
17 salmon run, fairness to the tribes because there
18 is a great disparity on their reservations as to
19 which tribe has the best fishing locations, and
20 fairness to all of our citizens.

21 Finally, for those Indians who have fisheries
22 in marine areas, a fair percentage share on the
23 river of origin would not work, and we suggest that
24 the rule of law should be that their fair share
25 can be provided by extended fishing time, a practice

1 that has already been done by the Department to
2 achieve a fair share.

3 I would urge that the Court in its preparation
4 to allow sufficient time to review Mr. Lasater's
5 testimony and Dr. Matthews' testimony as well as
6 Dr. Matthews' two studies because these studies
7 are the part of our case and because they will take
8 an amount of time to read them, as I can tell you,
9 being a layman.

10 To conclude, I can only say that the Department
11 of Fisheries hopes as fervently as to do any of the
12 parties to this lawsuit that the Court will take
13 the bull by the horns and give us a judicial re-
14 solution to this perennial problem that will end
15 the necessity for continuous litigation and let
16 the Department of Fisheries and the fishermen, both
17 Indian and non-Indian, get on with their business
18 of fishing.

19 Thank you.

20 THE COURT: Mr. Rhea.

21 MR. RHEA: May it please the Court, Counsel,
22 I am David Rhea, representing the Reef Netters.

23 When I heard the statistics of the various
24 tribes as recounted by their counsel in the
25 plaintiffs' opening statements, it was suddenly

1 borne in on me that I am representing the smallest
2 tribe of all in one sense. In fact, I should
3 think we are almost an endangered species. The
4 Reef Netters' licenses issued last year totaled
5 only 61; this year, 72. I think we are almost
6 on a de minimus level, but it isn't de minimus
7 to these individuals who sought their livelihood
8 in this fashion for many years.

9 Interestingly, there is a form of fishing
10 that was previewed by the pre-treaty Indians, which
11 they have chosen also to call reef netting. Basicall-
12 ly, the only similarity exists in the fact that it
13 is done by suspending a net between two boats.
14 However, the methods of anchoring now, the use of
15 the cables, the size of the boats, the ability to
16 withstand strong currents and high winds is radically
17 different now from what it was in those days when
18 they used small canoes and they fished with nets
19 made of bark and the anchoring was little or nothing.

20 In the last analysis, this net suspended be-
21 tween two boats gets raised as fish pass over in
22 the course of one of their runs.

23 We have for guidance in this particular case
24 pinpointing just where these activities can be
25 pursued. They are defined right in statute that has

1 been cited in my brief the exact locations where
2 they may be pursued in the open waters of Puget
3 Sound. Also, the manner of doing it is defined
4 by a separate statute. So, we have this guidance.

5 Since these acts are all of longstanding --
6 by the way, R.C.W. 75.12.140 and R.C.W. 75.12.150
7 specifies the distances to be maintained between
8 rows and so forth.

9 In any event, these activities have been pur-
10 sued for many, many years. It is a technique of
11 catching that has been successful within these
12 particular areas where it is followed. It does
13 require a certain area. But all of them are open
14 marine locations.

15 At this point we submit that in itself can
16 distinguish this particular fishery from that which
17 is involved in much of the rest of it. It is one
18 thing to say accustomed grounds and stations and
19 think of it as meaning locations along streams that
20 has been a source of fish for the Indians for a long
21 time, but when the whole concept of open seas and
22 the regulation of international fishing comes into
23 play, there has to be different treatment for fish-
24 ing that is done in the relatively open waters of
Puget Sound.

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The very fact that the word "association" is used in the names of the parties should not be misleading. It certainly is a loosely formed group. I supplied a request in the Interrogatories for the names and addresses of the members, and they do not equal the number of licenses that have been issued. I think the association has just been sprung into being. They had to withstand an attack from Initiative 77. Similarly, a different branch of the commercial fishing industry sought to have them banned on the theory they were a fish trap.

The precedence in our state, Pirak v. Schoettler, it was an act of considerable activity in peril of being put right out of business. This arose similarly, and to that extent only they are conducted as an association.

On behalf of the Lummi Tribe, the state sought to have these waters in which they pursue their form of fishing declared to be accustomed grounds and stations of the Indians and sought to have the state banned from having control thereover.

There has been a switch in the final pretrial order, but you know they ask an allocation of these locations that there are in these areas that are utilized.

We submit, your Honor, that none of these are

1 called for by the factors that must control in a legal
2 sense the disposition of this case.

3 I will agree completely with the remark that
4 Mr. Getches made. Contractual rights don't change with
5 the times. How true, and how readily we accept that.

6 It is to be noted that there are various
7 cases on the federal level to point out, although in
8 some respects they are treaties, they are not the same as
9 treaties with foreign nations. In any event, these
10 treaties have a language so simple that to disregard
11 it is to only create problems where none may exist.
12 It says they may continue to take their usual and
13 accustomed fishing stations. That would give an
14 exclusive right, if that is where the treaty has
15 stopped, but what is so often ignored, what is so often
16 disregarded in the name of the cause of the Indians is
17 that it says, in common with the citizens of the
18 territory.

19 The Indians, they have since become citizens
20 too, a fact that didn't exist at that time. "In common"
21 means they are utilizing a jointly shared resource.
22 The plans can be the same for each side, each group
23 taking.

24 They attempt as has been frequently asserted
25 in various trials related to these issues, Indian treaties

1 must be interpreted liberally. We must extend to them
2 special meaning, but as I cited in my pretrial brief,
3 several very respected judges of the Supreme Courts,
4 Justices Reed, Murphy and Douglas, in regard to the
5 Puyallup case, particularly Justices Reed and Murphy,
6 well, we must resolve treaties in a fashion that will
7 try to give the benefit of any doubt to the Indians,
8 but a clear meaning of the word shall not be disregarded,
9 and that is all that is being asked in this case, that
10 they have the right to take their fish at their usual
11 and accustomed fishing grounds, but in common with
12 others is the rule, and at no time has any member of the
13 Reefnetters sought to exclude them.

14 They wouldn't exclude them tomorrow, haven't
15 excluded them in the past. They should have their
16 right to come down to those grounds and fish precisely
17 as do these reefnetters. These Reefnetters have to pay
18 the state a \$100 license fee for this privilege.

19 Due to a precedent of the United States
20 Supreme Court acting on a Washington case, the Indians
21 would not have to pay the license fee. They could come
22 in and fish in the same manner that the industry has had
23 to pursue in the past. One of the things that has
24 insured the survival of this method of operation from
25 season to season, anyone who wanted to reefnet would

1 come back to the prior location. He leaves a portion of
2 his gear to the next season. They take a grappling
3 hook, they put their boats back into place, but they
4 have to follow that. There is no regulation, there is
5 no law. It is common sense.

6 They couldn't have an Oklahoma land rush
7 every time it was the beginning of the fishing season.
8 They couldn't have somebody taking another fellow's
9 500 pound anchor that represented time and money.
10 If there were a dozen people that had one parking lot
11 and observed common sense, they would say I will go
12 to this stall each morning, you go to that stall.
13 They have followed this practice and therefore they have
14 viable existing rights to fish.

15 Without it, I repeat, there would be a land
16 rush. It would be as dramatic as any wild television
17 script, if they didn't have the practice they do.

18 Very well, let the Lummi Tribe come out with
19 the same practical method. They have to have limitations.
20 You can have gear that will foul the others.

21 There has to be strength of anchor, strength
22 of cable and so forth. Come out, use the locations. There
23 are some available. There are some being fished now
24 that haven't been used for two or three years. That is
25 all that would be necessary to meet the requirements

1 of the language, "in common with." That would be it,
2 that we fish in identically the same terms. They
3 would have the one advantage, in not having to pay the
4 fee. Our testimony eventually will show they have
5 been offered positions on the crews of these, because
6 it takes four or five, and sometimes six to operate
7 these reefnets. They have not manifested a consistent
8 interest in so serving. They have been offered, and
9 friendships exist, they were urged to do it.

10 We submit as to our group there should be
11 no uprooting or altering of that practice conducted on it.
12 They are under state control. The state has its right
13 to control. In every case it ever had, starting with
14 some in our own jurisdiction, in 89 Washington, and on
15 through the recent Puyallup cases, they all mentioned
16 the police power of the state.

17 Police power has been exercised for all these
18 years that I have referred to. In letting there be some
19 order in practicing conservation and so forth in this
20 method of fishing, and of course an additional point
21 over and above the police power that has been recognized
22 and granted to a state, the power of controlling the
23 fisheries.

24 Now, as to salmon, at least, it is to
25 a substantial degree a created resource. The University

1 of Washington has a school of fisheries second to none
2 in the entire world. The Fisheries Department has an
3 able staff. They know more about the runs of fish
4 in this area than any other source. It is proper to
5 have them then preserving this with their special
6 knowledge. We don't even have to rely on the old idea
7 that the state has all its fish and game under a
8 natural right. This is now a created resource, and
9 with that creation should be the power to allocate the
10 uses of it. It can be maintained and preserved. I have
11 no quarrel with the gentleman representing the Quinault
12 Tribe who speaks of their regulations there. I think
13 that is wonderful. They are enhancing their resource
14 on their own reservation.

15 Similarly, the Lummi, they have a right to
16 have their own reservation, that upper right one on that
17 exhibit over there. They have areas within it where
18 they have fish traps no one else can have, and they
19 catch their fish with that.

20 Your Honor has undoubtedly heard of the
21 aquaculture they have. They are also growing their fish.
22 That is all on reservation, and it is still in common
23 with the reservation grounds.

24 One final closing comment. This fair and
25 equal share of the fishery department causes us rather

1 considerable concern because of the peculiar problems
2 of this particular branch of the fisheries, utilization
3 methods, shall I say.

4 I noted that he does concede in point number
5 one, it shall not be deemed to include those taken out
6 on the high seas. There are other controls if that
7 would be true, and that were to be a controlling
8 principle in any fair share doctrine. I don't think it
9 would interpose barriers that would be almost
10 insurmountable in practice on the utilization of these
11 reefnet stations, permanent as they are throughout the
12 season.

13 Perhaps I am a little needlessly concerned
14 there, but I would suggest otherwise the matter of
15 allocating of fair share as they pass through a particular
16 fixed station, well, it would be impossible and almost
17 ridiculous. One would have to concede the thought of --
18 everybody owns the gear, it is the same gear he has
19 used for years, and maintained it all the time, and for
20 one or two days a week is he supposed to turn it over
21 to the crew from the reservation? That is ridiculous,
22 but how else would it be a fair share? Perhaps they are
23 excluding fishing from the open water and the marine
24 areas. That may solve that. Other than that, I would
25 have a deep concern, but in my final summation, your

1 Honor, I know your Honor will read these briefs. I
2 would draw the Court's attention to the fact that our
3 Supreme Court has and the United States Supreme Court
4 has several times sounded a warning that one not depart
5 from the fair meaning of words, and the meaning of these
6 words in these treaties is so clear, it creates problems
7 where none should exist, to attach some exotic meaning
8 to what "in common with other citizens" means in the
9 taking of fish.

10 THE COURT: I believe that concludes the
11 opening statements, on behalf of the intervenor
12 defendants.

13 It should be noted, and the pretrial order
14 records, that the Washington State Sportsmen's Council,
15 the Association of Northwest Steelheaders, the State of
16 Idaho Fish & Game Department, and Purse Seine Vessel
17 Owners Association have all sought and been granted
18 the status of amicus curiae, friends of the court, with
19 leave to submit memoranda upon any issue in the case
20 they deem appropriate.

21 These fine opening statements in every
22 instance have reminded those of us who are to try the
23 case, which include the counsel and the Court and
24 others directly concerned, and highlighted for us the
25 essential issues and contentions of the parties. This

1 is all with a view of our having them in mind as we
2 hear and evaluate the testimony that is presented.

3 At the first pretrial conference with
4 counsel in this litigation back in 1970, I expressed
5 the hope that at long last the case had been brought
6 in the federal court in which all parties having or
7 claiming interest in fishing and fishing rights, both
8 Indians, and non-Indians had been brought. I indicated
9 that I would allow the most liberal interventions,
10 to be sure that all of the tribes concerned or the
11 groups claiming to be tribes, and on the other hand,
12 all others who had or claimed some rights in these
13 serious problems were included, and I think we have
14 achieved that.

15 Even the contentions of some who are not
16 parties directly, at least, are stated as issues in the
17 first pretrial order. I am not aware of any issue or
18 any phase of an Indian fishing treaty controversy that
19 is not within the orbit of this case.

20 With that comprehensive representation in the
21 case, we must all assume a high degree of responsibility
22 to see to it that we confine ourselves within
23 those issues, in the first place, and secondly that
24 each of us does everything that he or she can do to
25 present all the available evidence concerning these issues

1 expeditiously, but fully, and to do all that we
2 can in our profession to bring about a sound presen-
3 tation of evidence, argument, briefs. To the best
4 of my capacity and experience, I will render decision
5 that when reviewed by the Circuit Court and the
6 Supreme Court, as I expect and hope will be the
7 case, that we may have provided all of the informa-
8 tion that is obtainable on these questions, that we
9 will have made fact findings upon all issues where
10 there are genuine issues of fact, relevant or possibly
11 relevant, and that we will give to the reviewing
12 courts a record upon which, perhaps for the first
13 time, these issues and controversies that have
14 plagued this area from shortly following the
15 execution of the treaties with increasing vigor,
16 sometimes violence, throughout the years, can be
17 resolved.

18 (Continued on next page.)
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1 It is an awesome task to undertake, but compensation
2 of course, for all of us, myself included, is to
3 know that we have a tremendously interesting case,
4 we have able counsel who are vigorously going to
5 present everything that can possibly be presented
6 and that the reward for those efforts will be
7 something above and beyond the compensation in our
8 respective positions. At least that's the way I
9 feel about it. you may be sure, to the utmost of
10 my ability, I will give every moment of my time
11 to this case to the exclusion of other matters
12 until we have concluded this first phase of the
13 trial of the issues in the case.

14 I think we will now take just a short recess
15 and then carry on with the first witness. Take, say,
16 ten minutes or so to get ready to carry on with the
17 first witness.

18 (Brief recess taken.)

19 THE COURT: I understand for some reason
20 Mr. Stiles, who is representing the Upper Skagit
21 River Tribe, as we call them in the pretrial order,
22 is not here. I think we should go ahead. We have
23 a limited time before the agreed break hour when we can
24 consider what the occasion of his not being here is.
25 After all, he can read the transcript of these

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15 minutes and bring himself quickly up-to-date if he gets here.

MR. CONIFF: Yes, Your Honor.

Your Honor, pursuant to the agreement with Mr. Pierson as plaintiffs liason counsel, we are offering as the first witness in the trial Mr. Carl Crouse, Director of Game, who would be very difficult for him to be available next week. So I would propose to call Mr. Crouse to the stand and have him sworn for the purposes of adoption of his prepared direct testimony.

THE COURT: Mr. Crouse, please.

CARL CROUSE,

called as a witness on behalf of the plaintiff, being first duly sworn was examined and testified as follows:

THE CLERK: State your name in full, please and spell your last name.

THE WITNESS: Carl Crouse, C-r-o-u-s-e.

DIRECT EXAMINATION

BY MR. CONIFF:

Q. Mr. Crouse, are you the same Carl M. Crouse

1 who has prepared a direct testimony consisting of
2 22 typewritten pages and which has been marked as
3 identification Exhibit Number G-14?

4 A. I am.

5 Q. And, Mr. Crouse, if you were asked the same ques-
6 tions, which appear on your prepared direct testi-
7 mony today, would your answers be the same?

8 A. Yes.

9 Q. Are there any corrections or additions that you
10 would care to make to the preparation of your direct
11 testimony at this time, Mr. Crouse?

12 A. No.

13 MR. CONIFF: Your Honor, I do have one
14 correction, which appears in a question at the bottom
15 of page 9. I would like to change the question to,
16 "Do you consider off reservation commercial netting
17 compatible with the Department's management objec-
18 tives?" That would be the corrected question. The
19 answer as given was not -- the question was not
20 properly drawn making the answer unresponsive, which
21 Mr. Pierson objected to. So we want to redraw the
22 question.

23 THE COURT: Put the question to Mr. Crouse.
24 Do you have it in mind as he read it now?

25 THE WITNESS: Yes, sir, I do, Your Honor.

1 THE COURT: You may answer, please.

2 THE WITNESS: The answer is the one that
3 I prepared in the brief that Mr. Coniff has.

4 MR. CONIFF: I would then, therefore, move
5 at this time, Your Honor, the admission into evi-
6 dence of what has been marked as Exhibit Number G-14
7 and as prepared of the direct testimony of Carl
8 M. Crouse.

9 Mr. Pierson has noted objections to several
10 of the questions and portions of the answer, which
11 I believe he will desire to argue to the Court at
12 this time on.

13 THE COURT: Do I have a text of that?

14 MR. PIERSON: It is G-14, Your Honor.

15 THE COURT: I have it.

16 MR. PIERSON: The first objection to the
17 testimony appears on page 6.

18 THE COURT: Yes.

19 MR. PIERSON: As the question and there
20 from lines 20 through 27 indicate, Mr. Crouse is
21 asked to give an answer with respect to the abundance
22 of steelhead trout in the river. His answer would,
23 we contend, be inadmissible for three reasons,
24 first, because he speaks in terms of historical
25 facts, and he is not qualified as an historian

1 and anthropologist.

2 Secondly, he is not competent to state what
3 happened before the regulatory authority of the
4 Department of Game vested in approximately the
5 Thirties and Forties.

6 Lastly, there is no stated foundation for this
7 statement, and we contend that such a foundation
8 is necessary before we can call it sufficiently
9 reliable to be admissible.

10 THE COURT: Excuse me, I have page 6 but
11 I do not see that.

12 MR. PIERSON: Page 7, excuse me.

13 THE COURT: I have it.

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1 MR. CONIEFF: Your Honor, my response is
2 simply that in the qualifications of direct or
3 cross, he states that he had been employed by the Game
4 Department for approximately thirty-two years; that
5 he holds a bachelor of science degree in zoology from
6 Washington State University, and a master of science
7 degree in wildlife management from Washington State
8 University.

9 Then on page 2 you will see in his testimony
10 his general description of his thirty-two years of
11 experience with the Game Department and with their
12 programs which would, of course include the subject
13 matter called for by the Answer.

14 I would submit that the objections would go
15 to the weight and not the admissibility of this witness'
16 testimony in this regard.

17 There are a number of other similar objections
18 which are made by counsel regarding what he contends is
19 a lack of proper foundation. My argument in response
20 to each of those objections will be the same as I have
21 just presented to the Court.

22 THE COURT: I take it your position on each
23 of them would be the same, as well?

24 MR. PIERSON: That is correct. It states, no
25 foundation.

1 THE COURT: Each of the objections will be
2 overruled. I consider the evidence admissible, and
3 the only question involved is the weight and value of
4 it, the experience and the data upon which it is based.

5 So ordered. An exception is allowed, of
6 course, for the overruling of the objection in each
7 instance noted.

8 MR. PIERSON: Very well, your Honor.

9 There is one objection that is really
10 different in kind, and that appears at pages 10 and 11,
11 the bottom of 10, from line 29 to the top of 11, line 3.

12 The essence of our objection is that Mr.
13 Crouse is attempting to interpret a Supreme Court
14 decision and the legal meaning of it. My understanding
15 is that he is not a lawyer, nor is he in a position with
16 the state to act as a lawyer.

17 THE COURT: I don't think you need to be
18 worried about that. I will let the answer stand. Of
19 course, I understand that Mr. Crouse is giving his
20 view of a decision. I will have to make my own mind
21 up with regard to the decision as to what it means.

22 MR. PIERSON: I think from the two rulings of
23 the Court we have expeditiously done away with all
24 of the objections of the plaintiffs.

25 THE COURT: Very well.

1 MR. CONIFF: I therefore, formally move the
2 admission into evidence of what has been marked as
3 G-14.

4 THE COURT: The entire direct testimony is
5 admitted with the qualifications indicated in ruling
6 on the objections.

7 Proceed, please.

8 By the way, I think for the record, because
9 it might not appear elsewhere, that we have in pretrial
10 conference discussed this method of presenting evidence
11 in a number of instances, and all parties have agreed
12 that it may be done in the instance that it has been
13 done, with a view of speeding up the trial process and
14 conserving the time of all.

15
16 CROSS EXAMINATION

17 BY MR. PIERSON:

18 Q Mr. Crouse, directing your attention now to your
19 testimony, I would like to ask you a number of questions.
20 Let us proceed, if you will, to page 3.

21 At the top there your answer indicates that
22 as Director of the Game Department you have overall
23 responsibility for the operation and management of the
24 Game Department, under policy direction of the State
25 Game Commission.

1 My question is really directed towards your
2 meetings of October 2, 1972 and just recently, August
3 20, 1973.

4 As I understand it, with respect to any
5 Indian treaty fishing rights and the regulation thereof
6 by the Game Department, the action of the Game
7 Commission and the Game Department at that session, those
8 sessions, was consideration of a policy for conservation.

9 My question is really directed to whether
10 that was an item that the GAME Commission wanted to take
11 up in its general policy overview, or whether it's
12 something that the Game Department wanted to take up or
13 just who was the moving factor in taking up that policy
14 consideration for conservation.

15 A Which meeting are you referring to, or which one would
16 you desire that I discuss first?

17 Q Let's start with October 2, 1972.

18 A The October 2, 1972 meeting, the problem of off-
19 reservation fisheries by Indians was discussed on the
20 basis of the immediate past decision, and was discussed
21 from the standpoint of attempting to reach what the
22 court had concluded in this.

23 Our preparation and our determination to the
24 Commission was that we would discuss this and the need
25 of a policy decision to change directions if it appeared

1 that it was not necessary for conservation to prohibit
2 net fisheries in the Puyallup River.

3 Q Now, with respect to this most recent meeting of August
4 20, 1973, your consideration then of off-reservation
5 treaty Indian fishing, and the regulation thereof,
6 would your answer be the same?

7 A At our meeting in August of this year, the August
8 meeting is the one and only meeting that the State
9 Game Commission normally considers fishing seasons.
10 The August meeting of this year was to consider the 1974
11 fishing seasons in the state.

12 We did in establishing our seasons at that
13 time begin carefully reviewing what court decisions we
14 had pertaining to this.

15 We did present to the Commission from the
16 Department our recommendations for or recommendation
17 which you have a copy of pertaining to the runs of fish
18 that we anticipated of Steelhead in the Puyallup River
19 for the 1974 season.

20 On the basis of the information we had and
21 again, in accordance with the court decision, we
22 recommended and determined that for conservation
23 purposes the Steelhead could not stand net fisheries
24 on the Puyallup River.

25 Q Was the recommendation of the, and the decision of the

1 Game Commission as a result of this August 20 meeting
2 effective as to other Indian tribes besides the
3 Puyallups?

4 A Our primary emphasis was on the Puyallup River. It did
5 cover all other streams in the State of Washington
6 with the Steelheads.

7 Q Is it accurate to say, also, that one of the judicial
8 decisions that you were following on August 20 was the
9 May 4, 1972 decision of the Washington State Supreme
10 Court in the Puyallup case?

11 A This would be correct.

12 Q In a little further down in your written testimony there
13 on page 3, Mr. Crouse, you say in answer to a question
14 that general management of the Game Department is to
15 preserve, protect and perpetuate the game fish and
16 wildlife for the people.

17 Over at page 10 -- pardon me. What page are
18 you on?

19 I was just on page 3, lines 7 through 9.

20 Then over at page 10, at lines 10 through 16,
21 the question is asked you what is the primary management
22 objective of your department.

23 Your answer is that the primary objective
24 of the Department of Game for Steelhead is to preserve
25 the resource. Following this, those that are needed for

1 this purpose are allowed to be taken to a recreational
2 fishery for enjoyment by all people of the state who
3 desire to participate in this type of recreational
4 activity.

5 I would like you, if you would, Mr. Crouse,
6 to compare those statements with some others that have
7 been made and stipulated to in this case.

8 We have in the Joint Biological Statement,
9 which is Exhibit JX-2A, a statement regarding the
10 management purposes and objectives of the Department
11 of Game.

12 At page 89, the second sentence in paragraph
13 2.7 reads:

14 "It's" -- being the department of game --
15 stated purpose is 'to preserve, protect, perpetuate
16 and enhance wildlife through regulations and
17 sound continuing programs to provide the maximum
18 amount of wildlife-oriented recreation for the
19 people of the state.'"

20 And there are some other statements which I
21 would also like to compare. These are in the admitted
22 facts in the Pretrial Order. The first appears at page
23 59. I am referring to paragraph 3-428 on page 59,
24 where it is stated and admitted as a fact that in
25 formulating policy establishing regulations and

1 attempting to conserve fish resources under their
2 jurisdiction, the Game Department and the Game
3 Commission consider as the ultimate purpose in managing
4 those fisheries a maximum sustained recreational
5 experience for sports fishermen.

6 Then at page 62, in paragraph 3-436, it is
7 again stated as an admitted fact that the Game Department
8 fishing regulations and propagation operations are
9 designed both to preserve the resource and to enhance
10 the fish supply for sportsmen.

11 Now, after that long preface, Mr. Crouse,
12 my question is is it not true that the purposes and
13 objectives of the management program of the Department
14 of Game are designed entirely for the use and
15 enhancement of the source within harvestable limits
16 for sportsmen?

17 A The Department of Game as a department and state
18 organization is not commercially oriented. The
19 Department of Game's responsibility is in the area of
20 preserving, protecting and perpetuating the wildlife
21 resources of the state that come under their jurisdiction
22 to use those species, where possible, for recreational
23 enjoyment.

24 The majority of the species that we manage
25 are totally and completely protected, also a number of them,

1 including certain game animals, and including certain
2 sports fish, there are seasons.

3 Q Maybe more directly I can say when you are confronted
4 with a claim in a treaty that Indians have a right to
5 take from the Steelhead resource, and you compare that
6 against the statements I have read about the ultimate
7 recreational use for sportsmen, isn't it true that
8 you concentrate and consider only the interests of the
9 sportsmen?

10 A When we are confronted with what we claim are treaty
11 rights for fishing -- and I think you understand that
12 we do not claim any jurisdiction on reservations for
13 any type of wildlife, including the fish we are
14 responsible for -- we have, and we will continue to
15 follow any legislative act, any congressional act, or
16 any ruling of any court that we have these cases before
17 that come up. We are extremely pleased when we can
18 get a clarification of what our position is.

19 To this date, we do not feel there has been
20 a ruling within the parameters that we are responsible
21 to allow commercial fishing by a special group on the
22 rivers.

23 In referring to the specific Puyallup case,
24 we feel this because we feel that in the matter of
25 conservation that we are within the parameters of that

1 court order.

2 Q With respect to the decision which I am sure you are
3 familiar with in the District Court of Oregon by Judge
4 Belloni, known often as the So Happy case, the Department
5 of Fisheries has said that this follows that decision.

6 That decision was specific, not just for
7 salmon, but for Steelhead resources in the Columbia
8 River. Would you explain why the Department of Fisheries
9 follows that decision and the Department of Game does not.

10 A I don't really know if I should talk for the Department
11 of Fisheries. Certainly, I would give you my impression
12 of why.

13 The Department of Fisheries is a commercial
14 group. Everything they manage is commercial. Steelhead
15 is likewise a commercial fish in the Columbia River, due
16 to the impact and due to the fact that they are taken
17 in the Columbia only in Oregon commercially.

18 So, it would properly follow that if
19 Steelhead are taken -- and, again, I am putting my
20 interpretation on it -- it would properly follow that
21 if Steelhead are a commercial fish in the Columbia River
22 that they would follow this in setting of their seasons
23 and seasons in the Columbia River have allocated a share
24 of the fish to the Indian fisheries within the Columbia
25 River as part of the commercial take.

1 Q If I understand you correctly, it is only the fact
2 that the Washington State Legislature had classified
3 Steelhead as a game fish and has said that it may not
4 be commercialized outside of reservation boundaries
5 which prohibits or states the position of the Department
6 of Game not to follow the So Happy decision?

7 A In my opinion, as any state department I am sure does,
8 at least speaking for the Game Department we follow
9 the rules or the laws passed by the Legislature, unless
10 these are changed by some other authority, which would
11 be a court or which could be changed by the United
12 States Congress.

13 Q My question really is, I want to know what distinction
14 there is as between the jurisdiction of the Department
15 of Fisheries and the Department of Game, or the
16 difference between the relative nature of the fish resource
17 that they regulate.

18 As I understand, your answer is that because
19 the Washington State Legislature classifies Steelhead
20 as a game fish, and says that it cannot be commercialized
21 outside the reservation boundaries, that is the only
22 reason that the Department of Game does not follow
23 the So Happy case; is that correct?

24 A You have asked several questions at once. I will see
25 if I can get them for you.

1 The reason we have not is because the State
2 Legislature has classified Rainbow Trout as a game fish,
3 which Steelhead is.

4 The second response to your question is the
5 one that pertains to conservation, that I believe you
6 alluded to earlier in the Puyallup decision. We have
7 considered this.

8 The first part of your question, which is a
9 rather long explanation as to the difference between
10 Steelhead and salmon, do you desire to have me go into
11 that at this time and explain to you what I feel are
12 the basic differences between these two?

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14 (Continued on the next page.)
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ET15

1 Q If that's the reason why the Department of Game
2 does not follow, I would like to --

3 MR. CONIFF: Your Honor, I really am going
4 to object. It seems to me we are being cross-
5 examined on the basis of a decision of which we were
6 not a party.

7 THE COURT: Well, if the witness has
8 familiarity with the So-Happy case, and I take it
9 from the testimony up to now that you are familiar
10 with it, you have read the So-Happy decision?

11 THE WITNESS: I would say, Your Honor,
12 I'm only reasonably familiar with it as it affects
13 the Columbia River. We have not considered that
14 a binding case in this State. We have no jurisdic-
15 tion on the Columbia River as a Game Department
16 as it pertains to commercialization of steelhead.

17 THE COURT: That is the answer.

18 Q (By Mr. Pierson) Mr. Crouse, if your staff indicated
19 to you that the steelhead resource could be pre-
20 served and maintained by allowing a certain recrea-
21 tional fishery on steelhead and also by allowing
22 an Indian net fishery of steelhead outside the
23 reservation boundaries, would you feel that the
24 Washington State statute, which prohibits commer-
25 cialization of steelhead, would bar you from

1 authorizing a net fishing season for Indians pur-
2 suant to that treaty outside reservation boundaries?

3 A. I do feel that the Washington State statutes pro-
4 hibit us from setting a commercial or a gill net
5 season for steelhead for anyone. I do feel that
6 this has been amended by the Puyallup decision,
7 and this we are taking into consideration and will
8 attempt to follow this decision in any future
9 seasons we set after we had our August meeting of
10 this year.

11 Q. Let's go back, if we could, to October 2, 1972,
12 which is approximately five months after the Washing-
13 ton State Supreme Court issued a decision relative
14 to the regulation of Indian net fishing for steel-
15 head. Let me direct that question to that meeting.

16 If your staff, or the evidence presented to
17 your department, had indicated the resource of
18 steelhead in the State of Washington could be pre-
19 served and maintained while having an Indian net
20 fishery, regulated or unregulated, outside reserva-
21 tion boundaries, would you have allowed your depart-
22 ment to recommend to the Game Commission that such
23 net fishing seasons be authorized?

24 A. Certainly, if it fell within our legal right to do,
25 and this we covered very carefully again as it

1 pertains to the steelhead runs in our meeting of
2 August of this year.

3 If it pleases you, the Game Department did
4 attempt to inform all tribes of interest that the
5 season was coming up. We set a special meeting
6 for these tribes in the office to discuss with them
7 what our recommendations would be, to receive any
8 comments that they desired. We advised yourself and
9 counsel, you indicated biologists of the Fish
10 & Wildlife Service and attempting to find out if
11 we had missed anything. It was significant in
12 setting our seasons in August of this year.

13 Q. Do I understand you to say, Mr. Crouse, and getting
14 back to the October 2nd date, that you had a legal
15 right as the Game Commission to recommend, as the
16 Game Department to recommend to the Game Commission
17 the authorization of Indian net fishing outside of
18 reservation boundaries if the evidence presented
19 to your department showed that such a net fishery
20 by Indians outside the reservations could be carried
21 on while maintaining and preserving the steelhead
22 resource?

23 A. It was our feeling at that time that we followed
24 the directive of the Puyallup decision, and we did
25 this on the advice of our attorney and we did

1 it on the basis of conservation, and I feel that
2 we did follow the directives of the court at that
3 time. I felt that in August of this year we had
4 further information, and it again refined our
5 procedures and had gone through them very carefully,
6 and it again followed the directions established
7 in this court decision.

8 Now maybe I can try this one more time, I want
9 to know what besides the concern for the preserva-
10 tion and maintenance of the steelhead resource
11 would enter into the decision of the Game Depart-
12 ment whether to recommend authorizing an Indian
13 net fishing season outside of reservation boun-
14 daries? We know that you say that the conservation of
15 the resource, which I say -- I'm terming preservation
16 and maintenance was a factor, and if I understand
17 you correctly, another factor was the existence
18 of the State statute which prohibited net fishing?

19 A. This is correct.

20 Q. What I want to know is if you had a positive and
21 an affirmative on the factor of preserving a
22 resource, would that State statute still have pre-
23 vented you from recommending an Indian net fishing
24 season?

25 A. The positive that we used in the Puyallup River

1 in reaching our decision for the 1974 season was
2 that established by the court in its decision, and
3 the court at that time stated that in their opinion
4 there should not have been a commercial season or
5 a gill net season for steelhead in the Puyallup
6 River in the year, I believe, of 1970. We tried to
7 rationalize to this as the base of what our run
8 would be this year and try to follow that rationale
9 in reaching a decision.

10 Q Did you do that October 2nd of 1972?

11 A On October 2nd, 1972, we attempted to do that, but
12 did not have as much data as we had this year. It
13 did turn out that our predictions at that time were
14 for a low run. It turned out the run of steelhead
15 in the Puyallup River that year was lower than we
16 had anticipated even, it was a very poor year.

17 Q One more time, October 2, 1972, and I'm just trying
18 to nail down the factors which made Mr. Millenbach
19 recommend for the Game Department no net fishing
20 season anywhere in the State by Indians outside the
21 reservation boundaries on steelhead, and I'm asking
22 you if the facts available to you at that time had
23 indicated that you could preserve and maintain the
24 steelhead resource and still have such a fishery.
25 Was there any other single factor, and I would like

1 you to itemize them for me, which would have
2 prevented your recommending authorizing an Indian
3 net fishing season?

4 THE COURT: I'm sure, Mr. Crouse, you
5 understand that when you assume what the counsel
6 suggests, however unassumable you think it is, you
7 are required to assume that as a fact and your
8 answer to it, of course, will be on the basis that
9 it is correct even if you knew or believe it was
10 not correct. This is the obligation of a witness,
11 and that is a little difficult to understand some-
12 times.

13 THE WITNESS: Yes, Your Honor. I never
14 faced that question, which I think is quite obvious,
15 because the data did not indicate that. If the
16 data had indicated that the run was of sufficient
17 magnitude on the Puyallup River, if the data had
18 indicated this, we would have followed what the
19 Court's decision had determined we would do in this
20 case. We had never reached that decision, we had
21 never assumed that because there was no data really
22 that said it.

23 But the purpose of the meeting and the purpose
24 in gathering the data was to determine what position
25 we should take and what strength the run was. So

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if it had shown, as you assumed it to be, an extremely large run, then we would have faced the issue of a net season in the Puyallup River and to what magnitude it would have to be in keeping with this decision.

ET16

(Continued on next page.)

1 Q Do I understand you then to say that if this
2 had been large enough for you and the Game Depart-
3 ment to say that a run could withstand an Indian
4 net fishery for steelhead outside Indian reserva-
5 tion boundaries, if the run had been that large
6 you would have authorized a net fishery?

7 A It is my interpretation of the Court's decision
8 that it said this. Certainly we would.

9 Q Moving to page 4 of your written testimony, Mr.
10 Crouse, line 23, beginning at line 23 you were
11 asked the question: "What factors does the Game
12 Department utilize in estimating the return of runs
13 of steelhead to any given river?" And throughout
14 your answer -- that goes over to page 5, you give
15 some indications. Now, we have been talking about
16 the meetings that you have had on October 2nd, 1972,
17 and August 20 of this year. Do you recall that in
18 the August 20 presentation by Mr. Clifford Millen-
19 bach that he indicated to the Game Commission that
20 the Game Department had no accurate way to predict
21 steelhead returns?

22 A I don't know if this is his exact statement, but we
23 do have no accurate way, and I know of none that
24 have been developed in any State to accurately
25 predict returning runs of steelhead.

1 MR. PIERSON: Your Honor, at this time
2 I have located this. With counsel for the defendant
3 I have marked this PL-78, which is entitled, "Review
4 of Facts and Data Relative to the 1973-74 Winter
5 Steelhead Run." It is seven pages long, and it is
6 typewritten, signed Clifford Millenbach, 8-10-73.
7 It is a new exhibit.

8 THE COURT: Don't bother to mark it now.
9 We will mark it in a few minutes. Let's give it
10 to the witness.

11 Q. My reference, Mr. Crouse, with respect to Mr.
12 Millenbach -- so we know accurately what he said --
13 first is to page 1, first paragraph, third sentence,
14 "The lack of information on steelhead during their
15 ocean residency on the very limited interception
16 of adult by either sports or commercial fisheries
17 in salt water precludes any firm and reliable fore-
18 cast of run size." Is that an accurate statement
19 of the position of the Game Department?

20 A. Yes, it is.

21 Q. Then at the last page, 7, the last sentence, the
22 first part, Mr. Millenbach says, "We have no capa-
23 bility of accurately forecasting run size; know of
24 no agency, federal or otherwise that can; and on the
25 basis of the data we do have cannot recommend a

1 commercial net season for steelhead." Is that also
2 the position of the Game Department?

3 A. Yes.

4 Q. Okay, turning back to your testimony, at page 4
5 and 5 you indicate a number of factors which you
6 use to estimate a run. Now, can we say accurately
7 that these factors are very imprecise and that
8 however many of these factors you may have in a
9 season you can't accurately predict run size?

10 A. Well, I think maybe the term "accurate" may be some-
11 what misleading. We can get ideas and we can get
12 trends. No, we cannot accurately predict run size.
13 The things I alluded to in my answer here on page
14 4 I believe are covered in the review of Mr.
15 Millenbach in indeed considerably more detail and
16 considerably more area. These are indicators of
17 run size.

18 Q. Under "Current Data - Compilation" the date that
19 you normally have available to you from year to year,
20 are you able, as the Game Department, to determine
21 whether a run in a river is large enough to support
22 an Indian net fishery off reservation boundaries?

23 MR. CONIFF: Objection. Unless he defines
24 the scope and intensity of that fishery it would be
25 impossible to answer the question.

1 THE COURT: You may answer in a general
2 way if you wish what data you would need in order
3 to do that.

4 A. This would be biological data, and I would not
5 presume to list it off, but my answer really would
6 be that it would be at this time from the informa-
7 tion we have. I think a fishery that could sustain
8 a reasonably viable net fishery in the river would
9 have to be almost in addition a completely artifi-
10 cial one, because steelhead are taken no place
11 else except within the river itself. They are not
12 taken commercially anyplace in the State, and they
13 are not taken commercially on the high seas at the
14 present time. Because of the inherent low numbers
15 steelhead come in in, I would suspect unless we had
16 a major biological change, which could happen, that
17 would increase the runs it would be difficult to
18 sustain a viable, acceptable amount of net fishery
19 off reservation. This does not preclude the present
20 reservation fisheries that is carried out on most
21 of the streams.

22 Q. Let's consider the Puyallup River, which we all
23 know at this present time, at least down river from
24 the Muckleshoot Reservation, ^{has} no reservation; is that
25 correct?

1 A That is correct.

2 Q And let's direct our attention to October 2, 1972
3 where you considered an off reservation Indian net
4 fishery for steelhead in that portion of the river.
5 My question is: Isn't it true that you admit that
6 the Game Department could regulate such a fishery?

7 A Could regulate such a fishery?

8 Q Right.

9 A At the present time on the Puyallup River?

10 Q Yes.

11 A Is this one of these questions where I presume
12 what you are saying is a possibility?

13 Q Maybe I can refresh your recollection.

14 THE COURT: When you say, "could" do you
15 mean capable of or authorized?

16 MR. PIERSON: Well, I want to use the
17 word "could."

18 Q If I may, I would like to turn to page 60 of the
19 pretrial order and the admitted facts. This is
20 paragraph 3-432. This paragraph states some of the
21 positions of the Department of Game and of the
22 Director personally, and it begins, "The Game
23 Department takes the position that State law pro-
24 hibits it from considering recommendations in favor
25

1 of Indian net fishing at usual and accustomed
2 places outside reservation boundaries. Game's
3 position is also predicated upon its view of con-
4 servation and of requirements of appropriate Court
5 decisions." Then it states policies of the Director.
6 "As a matter of policy the Director takes the
7 position that such fishing is not a wise or prudent
8 use of the steelhead resource. He believes a net
9 fishery is more efficient than a hook and line
10 fishery because a net can take more fish than a
11 hook and line during the same time with less effort.
12 In his opinion if the Department were required to
13 permit net fisheries for steelhead on rivers out-
14 side reservation boundaries, the Department could
15 regulate the net fisheries to conserve the resource
16 but all other fisheries for steelhead would be
17 subservient to such regulated net fisheries." My
18 question again is with respect to October 2, 1972
19 in the Indian net fisheries that you were consider-
20 ing as to the Puyallup River, was it your position
21 then that you could regulate such a fishery?

22 A. The Game Department would have the capability of
23 regulating a net fishery, certainly this is true.
24 I think -- I think in going back to my statement,
25 yes, a net fishery on any river of the State

1 for a fish that comes in in such limited numbers
2 as steelhead. If it was a viable, meaningful
3 fishery it would be at the expense of any other
4 use of the resource.

5 Q Could you tell the Court what you mean by "viable"?
6 Reasonable?

7 A I mean some net fisheries that have a magnitude
8 that would be generally acceptable under what net
9 fishery is considered as acceptable to salmon, one
10 that is a monetary or a commercial fishery.

11 Q As to Indian net fishery, did you have any idea on
12 October 2, 1972 what a viable, reasonable fishery
13 by the Puyallup Indians would be?

14 A We have not discussed with the Puyallup Indians
15 either at that time or in our meeting in August
16 this year their Indian fishery, because the Puyallups
17 did not come to the meeting nor did not come to the
18 Commission meeting.

19 Q Before October 2, 1972, did anybody in your staff
20 ask any Indian tribe who was involved in the decision
21 recommended, made by the Department of Game and the
22 decision made by the Game Commissioner, did you
23 consult any tribe with respect to their anticipated
24 fishing efforts, the place of fishing, the gear of
25 fishing, the fish that they had been after, or the

1 number of fish?

2 A The Game Department met, and I believe you have a
3 copy of the report, with a number of Indian tribes
4 in Western Washington approximately two years ago.
5 I think you even have an exhibit on this. I think
6 you will see that we did not meet with the Puyallups
7 at that time. We attempted to contact them and
8 contacted them on several occasions, had gone out
9 one night to a meeting, and it was determined by
10 the Indians at that time probably they were not
11 ready to meet. We have left it up to them and have
12 not heard from them since the effort we made. We
13 have talked, I think, probably to most of the other
14 tribes within the Puget Sound area about fisheries,
15 net fisheries, various things that affect them
16 and attempted to cooperate with the tribes where
17 they have asked for it.

18 Q Let me ask you this: In your October 2, 1972 meet-
19 ing with the Game Commissioner, is it not true
20 that the only presentations on this issue from the
21 Game Department were from the Game Department's
22 counsel, yourself and Mr. Millenbach?

23 A I believe that this is correct. I believe this is
24 also correct of the August meeting this year.

25 Q Now, isn't it true that all statistics and

1 information and date of regarding fisheries and
2 management of the fisheries were given by Mr.
3 Millenbach?

4 A. This is correct.

5 Q. I refer to page 63 of the admitted facts in the
6 pretrial order, paragraph 3-440, and I will start
7 with the third sentence. It is referring to the
8 presentation by Mr. Millenbach on that date, and
9 it says, "Prior to his presentation to the Commis-
10 sion Mr. Millenbach did not discuss the facts and
11 data or recommendations he presented with any of
12 the plaintiff tribes, and he had not consulted with
13 any of those tribes concerning their fishing prac-
14 tices or techniques. He had not estimated how many
15 Indians would fish, how many fish would be in the
16 coming run on the Puyallup River, or what specific
17 level of escapement would be best for that run."
18 Isn't it true that the Game Commission did not have
19 available to it at that meeting any information
20 regarding the anticipated, expected or proposed
21 level of any of the Indian fisheries which you
22 there recommended prohibiting?

23 A. To the best of my knowledge this is correct. No
24 Indian showed up at that meeting, and we had not
25 had any correspondence with any. In attempting to

1 alleviate this difficulty, if it is such, we did
2 go to considerable effort at our meeting this year
3 to see that this did not happen. However, the same
4 thing happened. There was none of them apparently
5 came in and made any presentations to the Game
6 Commission. Three tribal members showed up at our
7 pre-Game Commission conference.

8 Q Let's switch to August 7, 1973. At that time had
9 Mr. Millenbach compiled any of the information we
10 have just read off that he did not have for October
11 2nd?

12 A Would you state that again?

13 Q We have indicated that as to October 2, 1972, Mr.
14 Millenbach did not discuss the facts and data nor
15 recommendations he presented with the plaintiff
16 tribes. He had not consulted with those tribes
17 concerning their fishing practices or techniques.
18 He had not estimated how many Indians would fish,
19 how many fish would be coming in the run in the
20 Puyallup River or what specific level of escapement
21 would be best for the run. Is that also true to the
22 best of your knowledge as to the August 20th
23 meeting?

24 A The August 20th meeting, to the best of my knowledge,
25 the Puyallup Indian tribes as well as every Indian

1 tribe that had been requested to be notified were
2 notified at the meeting. They were notified prior
3 to the meeting they could come in and discuss and
4 have their input into the Game Department recommenda-
5 tions. This was a week prior to the meeting. The
6 Fish & Wildlife Service was also notified. To the
7 best of my knowledge the Puyallup tribe did not
8 come in or did not appear at the Game Commission
9 meeting or did not make any presentation at that
10 time, either at the week prior or the week later.

11 THE COURT: Aside from that, I think the
12 thrust of the question is, did Mr. Millenbach have
13 any of that information specified for the previous
14 meeting? Did he procure it from any source for
15 the meeting this year? That is the substance.

16 THE WITNESS: From the Game Department
17 sources, and I presume that the Fish & Wildlife
18 Service had some input into it. We have asked them
19 on several occasions for the information they have
20 on Indian fisheries.

21 Q. My question is, let me see if I can understand this
22 correctly. Mr. Millenbach did have such information
23 that you said he didn't have prior to the October
24 2nd meeting?

25 A. Any information he would have had -- and again I

1 am talking for Mr. Millenbach, but I presume any
2 information he would have had would have been
3 information from people in the Game Department,
4 and in addition any information that the Fish &
5 Wildlife Service had as it pertains to this type
6 of fishery, to my knowledge he did not have any
7 information and had not been able to meet with the
8 Puyallup Indians.

9 Q Okay, now, one further question with respect to the
10 August 20 meeting. Was the regulation that you
11 passed for the continued prohibition of Indian
12 net fishing that you recommended continue go to
13 the Game Commission on August 20th? Did that
14 affect all of the tribes in Western Washington?

15 A Yes, it did.

16 MR. PIERSON: This appears to be a breaking
17 point, Your Honor.

18 THE COURT: We are a little bit out of
19 our proposed schedule. I think we will recess then
20 until, say, 1:15 and possibly carry on to the end
21 of our session of the day without a break, unless
22 someone suggests it.

23 (Continued on next page.)
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AFTERNOON SESSION

August 26, 1973

1:15 o'clock p.m.

EXAMINATION (Cont'd)

BY MR. PIERSON:

Q Turning again, Mr. Crouse, to the October 2, 1972 Game Commission meeting, do you know whether the Game Department had sufficient data available to estimate run size on the Puyallup River?

A We had all of the data that was available at that time. We used all available data. This again is biological data that Mr. Millenbach estimated on the river. We had any data that was available to us, anything that we could gather at that time, we did have that in front.

Q The question I really had is in view of Mr. Millenbach's statements that you can't accurately restrict run size, could you on October 2, 1972 have predicted run size in any way from the data you had available?

A From the data we had available we had an idea of the run size. From the data that we presented and from our estimate of the run size, this proved to be -- I would say our estimate was a little high, probably. The run size ended up in the Puyallup River that year being a

1 little bit less than we predicted.

2 Q I see. So you did have predictions in terms of numbers?

3 A We had relatively good predictions. Again, you are
4 referring to biological data, you are referring to things
5 that Mr. Millenbach will testify to when he comes on
6 the stand. He can probably do a better job in detail
7 than I can.

8 Q Is it accurate to say the Game Department did estimate
9 run size of the Puyallup River in preparation for that
10 October 2, 1972 meeting?

11 A We made an estimate from our best available data as to
12 whether there would be a strong enough run in the river
13 or not to support a fisheries -- net fisheries for
14 Steelhead, our best estimate at that time was that it
15 would not.

16 Q Okay. Did the Game Department have available to it on
17 October 2, 1972, sufficient data to estimate run size
18 in other rivers of the state?

19 A We had the same basic data, that varies from river to
20 river, that is used as our basis of estimating run sizes.
21 We cannot -- and I hope I can explain this to you,
22 we cannot give an accurate estimate of the run size of
23 Steelhead. That has never been done, it has never
24 been accomplished anyplace.

25 As our biological information increases, we

1 get more information, we will become more capable in
2 this area. But we are never going to reach this as a
3 precise science any more than we can reach a precise
4 science of what the deer population is when the season
5 opens, elk or any other.

6 Q Do you know of any other state or jurisdiction that
7 estimates run size of Steelhead?

8 A I know of none.

9 Q They do not estimate run size in the Columbia River?

10 A I used that advisedly, I think a number of estimates
11 of run size have been made, but I know of none that
12 have been an accurate measure of run size for Steelhead,
13 including the run on the Columbia River.

14 This becomes accurate, and does have an
15 indication in the Columbia River when the fish go over
16 Bonneville Dam, because then you have a count as they
17 come up over the ladder and go across the counting board,
18 you have a count, and at that point you do have this,
19 but prior to that you do not.

20 Q Is the Columbia River Compact Commission, do they estimate
21 the run size of the Steelhead in the Columbia River,
22 to your knowledge, before they reach the Bonneville Dam?

23 A They have estimates of run size again that are based
24 on the same premise and parameters that ours are. I am
25 not sure. Again, our biological data will indicate we have

1 more information on it.

2 Q To your knowledge, isn't it true that the Compact
3 Commission, on the basis of those estimates prior to
4 the Steelhead going over Bonneville Dam establishes
5 commercial Indian net fisheries above the dam?

6 A The Game Commission or the Compact Commission does
7 establish a commercial net fisheries for Indians above
8 the dam. They do have accurate data on that because
9 it is above Bonneville Dam.

10 The seasons established down below are
11 established to have what I term a reduction in the
12 number of Steelhead taken by the commercial fishermen.

13 Q My question was, Mr. Crouse, whether the seasons that
14 are set for Indians above Bonneville Dam are initially
15 based upon estimates of Steelhead runs before the runs
16 get into Bonneville Dam.

17 A There are some estimates of runs before the Dam, but
18 these can only be confirmed, and this is the only
19 accurate place I know in the state where you know the
20 number of fish that are in the river and that then you
21 can realistically know what is taken.

22 The Columbia River is a different entity,
23 it is a river unto itself at that point.

24 Q My question was, Mr. Crouse, isn't it true that on the
25 basis of the estimates of the Steelhead runs before they

1 reach Bonneville Dam, the Compact Commission establishes
2 Indian net fishing seasons above the Dam?

3 A This is, to the best of my memory true. However, every
4 season on the Columbia River is subject to immediate
5 alteration by the Compact, and if the escapement goal
6 is not reached, which is counted at Bonneville, the
7 season can be closed. This is again a unique situation
8 where they do have complete control of the fish going
9 above Bonneville at the numbers controlled by -- by
10 controlled I mean they known the exact numbers.

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12 (Continued on the next page.)

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1 Q Now, isn't it true, then, in your testimony that
2 you indicate that the Game Department estimates
3 run size from catch data, with the exception of
4 some racks and fish traps?

5 A We estimate run size on all of the available
6 information and indicators that we can get.
7 I think these are spelled out in the various exhi-
8 bits you have by Mr. Millenbach. It is not just
9 racks, because some of the rivers we have none on.
10 Very few can we do this. So, they are based on the
11 number of factors, and I believe you have these
12 in your exhibits.

13 Q Mr. Crouse, does the Game Department at any time
14 have available to it sufficient information to
15 estimate the take by sportsmen in the coming year?

16 A The take in the coming year?

17 Q Yes.

18 A Only an estimate. There are, again, so many variables
19 in this.

20 The take by sportsmen are dependent upon, of
21 course, the run and the magnitude of the run. They
22 are dependent upon many things.

23 But from past experience and from almost
24 30 years, I guess, 25 years of punchcard data by
25 rivers, we can make a reasonable estimate of what

1 we anticipate the sports catch would be. That is
2 only a reasonable estimate.

3 Q Did the Game Department do that on October 2, 1972
4 as to the Puyallup River?

5 A I don't recall that specifically. If it did, it
6 would have been a part of Mr. Millenbach's testimony
7 which he can allude to.

8 Q Do you recall whether the Game Department did it
9 on August 20th of this year?

10 A Estimate the take by sports fishermen?

11 Q That's right, on the Puyallup River.

12 A I don't believe so. Normally our report to the
13 Commission is at its January meeting when we have
14 a month of the season behind us as to the trend.

15 Q Now, in all the other rivers of the State as to the
16 October 2, 1972 meeting, to your recollection did
17 the Game Department estimate in advance the sports-
18 men's take?

19 A I can't recall the question coming up, and I can't
20 recall it being there. If the question was raised,
21 we would give an estimate because we commonly
22 attempt to do this.

23 Q As to the August 20 meeting this year, all the other
24 rivers in the State, to your knowledge did the Game
25 Department indicate the sportsmen's take in advance?

1 A. I don't recall this because, again, this normally
2 comes at the January meeting as to how the season
3 is going. At the April meeting we give a precon-
4 ceived idea on how the trout season will go. At the
5 October meeting we give a preconceived idea as to
6 how the hunting season will go, and cover again for
7 the Commission what has happened at the hunting
8 seasons.

9 Q. Mr. Crouse, how can the Game Department determine
10 whether there is enough fish in the river for a
11 viable and reasonable net fisheries unless it
12 estimates what the other fisheries are going to take?

13 A. These estimates can be arrived at. The sports
14 fisheries, per se, as all fisheries, will take fish
15 in an abundance. Net fisheries very possibly would.
16 We can give estimates. We can give you -- and I
17 think you have in your record -- steelhead catches
18 by rivers for the past 25 years. We can give you
19 averages by rivers for that time. All of the data
20 has been supplied to you.

21 The only thing we don't have and the only thing
22 we do from our basis of experience and from the
23 indicators we have is give an estimate as to what
24 their catch will be or what their run will be for
25 the coming year.

1 The place that we are weak in this -- and we
2 are noticeably weak -- is that steelhead are not
3 taken in any manner before they reach the river.
4 This is data that they have on salmon from the
5 commercial fisheries, from the off shore fisheries,
6 from the sports fisheries. They have this data.
7 As they keep getting this, they get an idea of the
8 magnitude of the run.

9 None of this data is available to the Game
10 Department because steelhead are not taken commer-
11 cially anyplace. When they come into the river,
12 this is the first time that you begin to get an
13 indication of the magnitude of the run.

14 Q Is it possible for the Game Department to determine
15 whether it's authorized and viable and reasonable
16 to have Indian net fisheries off reservation boun-
17 daries in the absence of an estimate of a sport
18 take?

19 A I think if your question is directed can we give
20 you a sports take, I believe I indicated we can
21 give you an estimated sports take.

22 Yes, this would be true, and we can do this.

23 Q My question is really directed to the Game Department
24 in its recommendations to the Game Commission on
25 October 2, 1972, and August 20 of this year.

1 I am asking you as a Director of the Game
2 Department whether it is possible for the Game
3 Department to determine whether to recommend an
4 authorized Indian net fisheries off reservation
5 boundaries in the absence of an estimate of sports
6 take.

7 A. We can make this estimate. Now, this estimate is
8 based on --

9 THE COURT: I think you misunderstand the
10 question.

11 THE WITNESS: Maybe I do, Your Honor.

12 THE COURT: I think so. What he means or
13 what he asked is can you predict with respect to
14 the net fishing on the reservation without having
15 some estimate of some sort as to the take by sports
16 fishermen?

17 Isn't that it?

18 MR. PIERSON: That's right, Your Honor.

19 A. The net fishing on the reservation -- and I hope
20 I can get at what you're saying, Judge -- the net
21 fishing on the reservation does not become a viable
22 fisheries until the fish start coming in the river
23 in December.

24 Now we have not been able to obtain from the
25 people who do this fisheries the number of fish

1 they catch. We made the request and made the
2 request through the Fish & Wildlife Services that
3 work on that. So, that is not an indicator that
4 we have had, how many are coming through the
5 reservation to get up into the sports fishing area.
6 We have not had that indicator.

7 Our only indications are from receipts from
8 fish buyers that have bought from the Indians.

9 THE COURT: Whatever those difficulties
10 may be, I think Mr. Pierson wants to know whether
11 you think you can make any reasonable judgment
12 concerning that if you do not have some reasonable
13 information concerning what the sportsmen's take
14 is.

15 MR. PIERSON: My concentration is authoriz-
16 ing an off reservation fishery.

17 A. I think, then, Mr. Pierson, if I can get at your
18 question -- and I'll honestly try to do it -- if
19 I can get at your question, yes, we can give a
20 reasonable estimate on what the sports catch is
21 going to be in any given river system based on our
22 estimate, again, and judgment as to what the strength
23 of the run is going to be and base it on the years
24 of experience we have.

25 These estimates will be made from the

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information we have available and would be made on the basis of past experience. They would be made by Mr. Millenbach of our Fisheries Management Divison.

Q. My question is really wouldn't you have to have such an estimate of sport take before you could properly determine whether to authorize or whether to prohibit net fishing by the treaty Indians outside reservation boundaries?

A. Yes, we can do that, and this would be proper.

THE COURT: You answered that question, but then you qualify it or add something that might obscure the answer.

Read the last question, please.

(The question was read.)

THE COURT: To that, as I understood it, your answer was yes?

THE WITNESS: Yes. I added that this would be proper.

Q. Looking, then, at your October 2, 1972, meeting, isn't it true that the Game Commission couldn't properly have passed upon your recommendation because it had no such estimate of sport take?

A. What the Game Commission had in front of it at that time was information that indicated that we felt

1 the run would be one that was smaller than the
2 base run of 1970, which the court said would not
3 support a net fisheries. On that basis one would
4 not consider it.

5 Q Did you information and data that you presented to
6 the Game Department on October 2, 1972, include
7 an estimate of sport take?

8 A No, not to my knowledge.

9 Q And on August 20, 1973, was there an estimate of
10 sport take?

11 A Not to my knowledge.

12 Q Directing your attention to the way the recommenda-
13 tions for seasons come up to the Game Department,
14 as I understand it, they originate at the bottom
15 level with the agents ; is that correct?

16 A This is correct.

17 Q Do you know any circumstances where any of your
18 agents have recommended an Indian net fisheries
19 for steelhead?

20 A No, they have not.

21 Q Have they been asked to consider this?

22 A This year as part of the consideration they were
23 asked to get any available information on the
24 numbers of steelhead that would be in the river.
25 Then this consideration was handled by Mr.

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Millenbach in making his overall recommendation
to the Commission.

(Continued on next page.)

1 Q Let me see if I understand. This year, for the first
2 time, the regions were told to consider Indian net
3 fisheries for Steelhead?

4 A We asked them to gather all available information they
5 could to make estimates of run size.

6 Q Were these estimates in consideration, the gathering
7 of data to be directed toward consideration of
8 recommending an Indian net fishery outside reservation
9 boundaries?

10 A This information, when it came into our office, was
11 considered in the context of the Puyallup decision.

12 Q Were the regions asked to consider Indian net fisheries?

13 A No, I don't believe so.

14 Q Where did it go from the regions?

15 A It comes into the office, Mr. Millenbach as Chief of
16 Fisheries Management.

17 Q From there it is put into the form of recommendations?

18 A This is correct.

19 Q Do you know anybody in the Game Department staff at
20 a central location who has been asked to consider Indian
21 net fisheries outside reservation boundaries besides
22 Mr. Millenbach?

23 A I have discussed it with Mr. Millenbach, who is Chief
24 of the Fisheries Management Division. We have discussed
25 it carefully, and we have discussed with our attorneys the

1 court case, and we attempted to meet our responsibilities.

2 Yes, I have discussed with Mr. Millenbach.

3 Q Yourself, Mr. Millenbach and not counting counsel, has
4 anybody else on the Game Department staff been asked
5 to consider Indian net fisheries of Steelhead outside
6 reservation boundaries?

7 A Mr. Millenbach is the one I work with. He is Chief of
8 Fisheries Management. He may have asked other people.
9 He probably discussed it.

10 Q In your testimony, written testimony, Mr. Crouse,
11 you speak of indications of potential run size, and
12 the first is an allusion to jack or pimmature fish.
13 How long has the Department been keeping data on jack
14 fish of the kind which you would use?

15 A I think that is a biological question. I would prefer
16 that Mr. Millenbach answer it.

17 Q Is the same true as to the factor you have there regarding
18 Silver salmon?

19 A Yes, that is a biological question.

20 Q Do you have any idea whether the information on jack
21 salmon and jack fish and Silver salmon is specific as
22 to rivers?

23 A On jack salmon it is. On Silver salmon or jack
24 Steelhead -- on Silver salmon you are talking of the
25 information developed on a total run, it shows up in

1 a commercial fisheries and sports fisheries and the
2 ocean, and this is an overall indication. Although it
3 doesn't always follow the same correlation, they have
4 somewhat a similar pattern.

5 Q Now, you have indicated that you made relative estimates
6 by comparison to previous catch on what Steelhead runs
7 may be. What are your statistics based on?

8 A On a punchcard.

9 Q And approximately how many punchcards on the average
10 in the past few years have been issued?

11 A Oh, speaking off the top of my head 140,000 a year,
12 125,000 or 140,000 a year.

13 Q And when you obtain the return of these punchcards you
14 then estimate the catch of the previous year?

15 A Then we work up a statistical figure that gives the
16 catch by rivers.

17 Q All right, and do you have any ability during the
18 season to monitor catch?

19 A A very limited one.

20 Q All right, how do you do that on a very limited basis?

21 A I presume your question is still related to punchcards?

22 Q No, I thought you indicated that a month after the
23 season is in swing that you talk to the Game Commission
24 about how the runs are going, and I want to know what
25 your basis for information in that respect is.

1 A This is based on the indications from the regional
2 fisheries biologist as to the success of catch by sports
3 fishermen that they and the wildlife agents check on
4 the river.

5 This is again a rough indicator of the
6 magnitude of the run.

7 Q Okay, and can you give me an indication of what
8 percentage of the catch they monitored?

9 A Normally, to the Game Commission, normally we don't
10 give it in that detail. We give just general detail as
11 to what generally our impressions are of the run to date,
12 what our general impression is that the run will be
13 for the remainder of the season.

14 Q All right, as to punchcards, what is the highest
15 percentage of punchcards you have had?

16 A I couldn't answer.

17 Q Isn't it under 50 percent?

18 A I would think so. Again, Mr. Millenbach has that data
19 and works on it and can give you exact figures.

20 THE COURT: Is that 50 percent of the total
21 number of cards that are printed and distributed, or
22 is it an estimate of the number of cards that are
23 missing from the books when you get the books back?

24 THE WITNESS: No, this would be the number
25 of cards that are taken by fishermen, and actually used.

1 THE COURT: Yes, thank you.

2 THE WITNESS: Then we arrive at a
3 statistical computation as to the total number.

4 Q All right, moving on to your testimony where you
5 described briefly your hatchery program on page 5,
6 lines 15 through 25, as I understand your hatchery
7 program, you began with egg taking from a particular
8 river?

9 A Maybe I am in the wrong book.

10 Q Which book are you in? Your testimony, page 5. It is
11 that one right there, I think, Mr. Crouse, and it is
12 marked G-14.

13 A G-13 and 16.

14 THE COURT: No, G-14 is the one he is
15 referring to.

16 THE WITNESS: I don't seem to have a 14.

17 Q All right, at page 5 then, now Mr. Crouse.

18 Now, at lines 15 through 25, you briefly
19 discuss your hatchery program. I just understand you
20 have an egg taking facility that begins your program, is
21 that right?

22 A That is correct.

23 Q Where is that egg taking facility?

24 A We have several in the state. The primary egg taking
25 station has been at Chambers Creek in Tacoma.

1 Q Where are the other egg taking facilities?

2 A Oh, we take them at a number of places.

3 Q You can name some.

4 A I will probably miss some. Mr. Millenbach could cover
5 them in detail, but --

6 Q That is not necessary. Do you have an egg taking
7 facility at all in the places where you raise and
8 rear the Steelhead?

9 A Not all of them, no.

10 Q Is it accurate to say that in many cases the eggs you
11 take from Chambers Creek or wherever are taken to
12 hatcheries away from the river that they were taken from?

13 A The Chambers Creek eggs are taken to a number of
14 different rivers. This is correct.

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1 Q And would it be accurate to say that the stock that
 2 comes from the hatchery planting is Chambers Creek
 3 stock?

4 A This is correct.

5 Q For example, if you take the eggs from Chambers Creek
 6 and you take them up to a hatchery in the North Sound,
 7 you will have basically Chambers Creek run in another
 8 river?

9 A The run in Chambers Creek, if my memory is correct is
 10 in itself an artificially established run. This is
 11 the basis of the stock we use in many of our
 12 installations.

13 Q And installations outside Chambers Creek on other rivers
 14 are basically a Chambers Creek stock that is moving
 15 in and out of the rivers?

16 A With some exceptions, this is correct.

17 Q Now, after you take the eggs out of Chambers Creek --

18 THE COURT: Incidentally, I take it that
 19 you don't take all the eggs out of the Chambers Creek
 20 necessarily, so that the original Chambers Creek, from
 21 which you take them, still continues as a run? You just
 22 take some of those eggs and start another Chambers
 23 number two or number three or whatever?

24 THE WITNESS: What we do, your Honor, is take
 25 eggs at Chambers Creek and hatch a number of Steelhead,

1 raise them to migratory size, a portion of them, and
2 put them back in Chambers Creek to keep the run coming
3 back. It is not a wild fish run, it is one that is
4 raised in our installation and planted back in the creek.

5 Q (By Mr. Pierson) Let's assume you have a hatchery in
6 the Northern Sound and you take Chambers Creek eggs
7 and you take them up to that hatchery, raise them and
8 you then thereafter release them into the river, I take it?

9 A Yes.

10 Q And many of your hatcheries release plants to other
11 rivers than the rivers they are situated on?

12 A This is correct.

13 THE COURT: Wherever the eggs come from, the
14 fish always return to the river from whence they came?

15 THE WITNESS: No, this is not quite correct,
16 your Honor. Where the fish are planted in the river,
17 they go to the ocean, even though they are Chambers
18 Creek stock and raised in Chambers Creek water. You can
19 plant them in the Green River and they will tend to
20 return to the Green River.

21 Q All right. Now, these hatchery or artificial fish, those
22 eggs come from Chambers Creek and planted in another
23 river, isn't it true that in most cases the run of
24 that hatchery fish has a different timing than the
25 natural runs?

1 A Again, you are getting into biological data, but if
2 you desire, I will attempt to answer your question.
3 I am not sure my answer would be as good as Mr.
4 Millenbach's.

5 Q I think we can wait for him.

6 Let me ask you another question, Mr. Crouse;
7 in your understanding, isn't it the purpose of the
8 Game Department, whenever possible, resources and
9 facilities to raise your Steelheads in hatcheries to
10 one year old?

11 A Yes.

12 Q And the object, I take it, in doing this is when you
13 plant them in the river, they will go as directly as
14 possible to sea?

15 A Yes. Our purpose -- the normal life cycle of a Steelhead
16 in a native stream is that it takes him two years because
17 of the low productivity of the stream to reach the
18 smolting age or the age of size at which you would
19 migrate to salt water.

20 We have been able to raise them in our
21 hatcheries under artificial conditions to such a size
22 that they smolt or are ready to go to salt water in one
23 year. This greatly enhances our ability to get at a
24 lower cost a higher production from our stations, and
25 this has been a feeling of the major fisheries management

1 of a breakthrough when they reach this stage.

2 Q Would it be accurate to say that the hatchery bred stock
3 in those cases is smolted one year and the natural
4 stock is smolted in two years?

5 A Yes.

6 Q To your knowledge, has the GAME Department ever
7 been criticized for planting sub-smolt size in the rivers
8 of the state?

9 MR. CONIFF: Objection, I don't see whether
10 or not the criticism of a program has anything to do
11 with it.

12 THE COURT: You can re-frame the question
13 without putting it in your language.

14 Q (By Mr. Pierson) Do you recall a recent report by a
15 fellow by the name of Lloyd Royal that was done for the
16 Game Department?

17 A I do.

18 Q And it was completed within the last year?

19 A That's correct.

20 Q Do you recall him criticizing the Game Department for
21 planting sub-smolt size Steelhead in the rivers of the
22 state?

23 A Yes, I recall his statements on that.

24 Q Has the Game Department undertaken at all to change its
25 planting programs to plant only smolt size fish?

1 A We have.

2 Q How long has it been since you changed your program?

3 A Well, a change as far as the Lloyd Royal report is
4 concerned, which is a report that -- incidentally, we
5 employed him to do that for us because of his knowledge
6 and expertise in the field, this has been out the past
7 winter, it will probably take some time to implement
8 all of the recommendations in that report. We have
9 started in that direction now, and Mr. Millenbach is
10 working towards attempting to meet the portions of
11 this report, or to test portions that he suggested in
12 there, and we intend to test them all and to work with
13 all of them that give us a proper improvement in our
14 fisheries management.

15 Planting sub-smolt was one.

16 MR. PIERSON: For the Court's information, I
17 think that is Exhibit G-13.

18 Q Moving on, Mr. Crouse, to page 6 -- before we get there,
19 I think I have another note to myself, aren't the
20 official and statutory meetings of the Game Commission
21 in January, April, June and October?

22 A No.

23 Q When are they?

24 A January, April, July and October.

25 Q All right. So that the August meeting this year was a

1 special meeting?

2 A The Game Commission sets special meetings as needed,
3 and they traditionally have set special meetings for
4 the consideration of the hunting seasons and fishing
5 seasons. They traditionally set the third Monday in
6 May to consider the big game seasons, and early bird
7 seasons.

8 They set the third Monday in August to
9 consider the next year's fishing season, the waterfowl
10 seasons and the overall upland bird seasons.

11 Q Moving on to page 6, the bottom there, lines 31 to the
12 end and over on page 7, you state in answer to a
13 question, this is part of your answer:

14 "The case of the establishment of Steelhead
15 seasons, the Indians asked the federal attorneys
16 that they will be notified when the Steelhead
17 seasons are established in the August meeting of
18 the Commission each year. This will be the first
19 time the Game Department has received official
20 notification from these groups that they desire a
21 specific letter on the establishment of these
22 seasons."

23 My first question, Mr. Crouse, is, you didn't
24 notify any Indian tribes about your October 2, 1972
25 meeting, did you?

1 A Not directly.

2 Q Did you notify any sportsmen?

3 A Not to my knowledge.

4 Q Isn't it true that your mailing list at that time that
5 was utilized included the names of twenty-three
6 sportsmen, identified as such?

7 A Yes. I think possibly I made an error under the
8 new notification of the public disclosure law. What
9 we had done prior to that was notify them of meetings
10 that they had asked to be notified of, which some of
11 them were interested in the hunting season, some in the
12 fishing seasons. It is entirely possible, and I can't
13 answer you yes or no, that they were notified of that
14 meeting by letter. I would guess that probably they
15 were not. I am only guessing in that case, Mr. Pierson.

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17 (Continued on the next page.)

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1 Q Do you have in the Department of Game references,
2 letters or any other notes or any other written
3 documents indicating the request from each of those
4 sportsmen to be placed on the mailing list?

5 A I doubt if we have them any more.

6 Q Did you ever have them?

7 A Yes. We have had letters from time to time come in
8 asking people to be placed on the list. We have had
9 them verbally. We have attempted to meet that
10 obligation.

11 Most of the ones from sportsmen come from the
12 duck hunters who are interested in the seasons that the
13 duck seasons are established. They are not interested
14 in other season meetings.

15 The bass fishermen, when this season is
16 established.

17 I suppose over the years we have gotten in the
18 habit of notifying these people who requested when
19 these things are considered; not of all of our meetings.

20 Q Isn't it true that many of the names on that mailing
21 list we are talking about of sportsmen include steelheaders
22 identified as such?

23 A I am sure there are steelheaders on it. How many, I
24 would have to look at the list. I could identify them
25 for you.

1 Q Did any of your staff attempt to compile a list of
2 Indian tribes that might be interested in your meeting
3 on October 2, 1972 prior to the meeting?

4 A No, we did not.

5 Q Did you allude to a request from federal attorneys about
6 placing Indian tribes on lists?

7 I believe without looking at the letters now
8 that we can agree, can't we, that these requests were
9 in December of '72 and January of '73?

10 A Yes.

11 Q When the requests were made to you, did you put the names
12 of the tribes on the list?

13 A I told the secretary to notify them when the fishing
14 seasons for 1974 were established. It was my feeling
15 that it was redundant and really a waste of their time
16 and ours to notify them of a statutory meeting in April
17 that they had no interest in, and so on down the line.

18 This is the practice we had commonly
19 followed, and I felt that it would suffice in this case,
20 and that they did not care to be notified of every meeting.

21 Q My next question is between the time you received the
22 letters and your deposition on March 27, 1973, had you
23 effectively put the names of those tribes on the list?

24 A I verbally instructed my secretary at that time.

25 Q Do you know whether their names were put on the list?

1 A No. We hadn't reached the stage where they would have
2 been mailed a notification of the August meeting yet.

3 Q And in the letter from the federal attorneys, did you have
4 any indication that the Indians' interest was confined
5 to fishing seasons?

6 A No. That was a presumption on my part. I felt it was
7 a proper one, but I did presume that the whole thrust
8 of what we were doing related to fishing seasons, and
9 not to all meetings of the Commission.

10 Q As a matter of fact, isn't it true that the letter asks
11 you for notice of all meetings?

12 A I believe that it did. In this I believe I was in
13 error that I didn't recognize that.

14 Q And did you attempt to indicate to the tribes and the
15 Federal attorneys before your deposition that you
16 presumed that their interest was only as to fishing
17 season?

18 A No, I did not.

19 Q Page 7, line 20, you were asked the question:

20 "How abundant is the Steelhead trout in the
21 rivers and streams of the State of Washington?"

22 You say:

23 "Historically Rainbow trout and Steelhead
24 would not be abundant fish in the streams of
25 Washington."

1 What data do you base that opinion on, Mr.
2 Crouse?

3 A I think generally from information that I have heard
4 in the past of Steelhead runs, from the early history of
5 runs on the Columbia River, and I believe Lloyd Royal
6 alludes to the report you have entered in here as to
7 the numbers of fish.

8 Further, since the Game Department has had
9 records -- and it goes clear back into the thirties --
10 the total take of Steelhead have been quite minimal
11 if you compare it to the total take of other anadromous
12 fish. I wouldn't really guess how many total salmon
13 are taken. There are five to eight million or six to
14 nine million, in there.

15 Q In your indication of the abundance of steelhead and
16 the numbers that have been taken in the years since
17 1930?

18 A That and based on the early commercial records on the
19 Columbia River.

20 Likewise, as a judgment decision, any fish
21 that has this life history would in itself be in small
22 numbers. Some animals are in large numbers; some are
23 in small numbers.

24 But the overall history of a Steelhead would
25 indicate of necessity that it would have to be in small

1 numbers in these rivers because the rivers would not
2 have the capability, even historically under the best
3 conditions, to produce these in the abundance that
4 they produce salmon.

5 This is a basic difference in the life cycle
6 of the various species.

7 Q Do you have any records available to you in the
8 anthropological documents that indicate an abundance of
9 Steelhead, as compared with salmon prior to 1855?

10 A No.

11 Q Do you have any such statistics with respect to the
12 abundance of Steelhead as compared to salmon from 1855
13 to 1890?

14 A Well, I would have to think back. I believe the
15 commercial fisheries moved in on the Columbia River
16 within that time, and there were indications at that
17 time of the steelhead runs and what they amounted to.

18 Again, I believe this is one of the reports
19 you have. It is alluded to in there. But this was
20 the first basis of really firm, written data on the
21 abundance of Steelhead.

22 Q are you saying that the abundance of Steelhead in the
23 Columbia River is an indication of the abundance of
24 Steelhead in other rivers in the state?

25 A The abundance of Steelhead in the Columbia River, without

1 question and in my judgment decision on the environment
2 and the habits of these fish would be higher than it
3 would be in the Puget Sound rivers.

4 This is predicated on the fact that the
5 Columbia River did have more feed in it. It did drain
6 the eastern part of the State, which was more
7 productive. You were not trying to raise them in a
8 semi-sterile environment such as was found on the
9 Puget Sound and rivers that drain directly into the
10 coast.

11 As your feed was more abundant, you had a
12 higher ratio, and I believe the first indication of
13 numbers in the Columbia River was that salmon made up
14 about 90 percent of the anadromous fish runs. If my
15 memory is right, Steelhead were about 10 percent.

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17 (Continued on the next page.)

ET22

1 Q This is based again on catch data?

2 A This is what?

3 Q This is based on catch data?

4 A This is based on the general information as I
5 recognized and remember that it was available at
6 that time.

7 Q Then what does that include besides catch data?

8 A I think this was primarily catch data.

9 Q Do you have any data covering the years 1855 to
10 1890 which compared the feed capability in Puget
11 Sound and Columbia River?

12 A No direct.

13 Q Do you have any information that compares the other
14 habitat factors which are favorable to steelhead,
15 including Puget Sound and the Columbia River?

16 A Not to my knowledge. You do have by and large a
17 different race of fish that comes into the Columbia
18 River. I say a different race, a large run of
19 steelhead down there is a summer run, historically.
20 I know of no records that indicate a summer run fish
21 into the Puget Sound except for a very limited
22 number of streams.

23 Q I am trying to find out, Mr. Crouse, what your data
24 is. We are trying to osmose the abundance of
25 steelhead in the Puget Sound area, and you don't

1 have any comparative figures about factors indicat-
2 ing relative to the Columbia River. Maybe you can
3 tell me what is it that makes you conclude that the
4 Columbia River steelhead abundance in the early
5 commercial years was higher than the Puget Sound?

6 A. Because of the life history of the steelhead,
7 because of the fact that they had to reach a size
8 for smolting, and because the waters of the Colum-
9 bia River system were richer, which allowed the
10 fish, more fish to reach the necessary size to
11 smolt. The rivers of the Puget Sound streams
12 again were in many respects very low in producti-
13 vity. In some cases, virtually a biological desert
14 as it pertained to fish food, and although your
15 numbers of salmon were abundant, because they
16 did not take as much out of the stream and left
17 early, a steelhead to reach maturity and reach
18 a size in its stream, to spend the two years that
19 was necessary or possibly three, this in itself
20 is a limiting factor. Is is a limiting factor
21 on any wildlife population, and this in my judgment
22 is why these races had to be low in numbers.

23 Q. You say, "life history of steelhead." You mean
24 the life cycle?

25 A. Life history or life cycle, yes.

1 Q Now, you say that by far the abundant steelhead
2 in the Columbia River is summer run, is that correct?

3 A Yes.

4 Q Would you be surprised if in 1971 the total take
5 of summer steelhead was 71,000 and the total take
6 of winter steelhead was 97,000?

7 A The primary run of fish in the Columbia River
8 that goes by Bonneville Dam is a summer run. Your
9 winter runs are in the rivers below, and I presume
10 that you are not talking about commercial fisheries,
11 you are talking --

12 Q I am talking about total takes.

13 A Yes.

14 Q Isn't it true that the winter run goes above
15 Bonneville?

16 A Very limited --

17 Q Isn't that because there is a large sport take
18 below Bonneville?

19 A No, they do not go into the rivers up there. You
20 have some that go up -- again, you are getting into
21 biological data. You have some that go up as far
22 as the Klickitat. I don't believe there is a
23 significant winter run of fish that come in in
24 December, January and February, into the rivers
25 above this. This is about the breaking line.

1 Q In terms of total take, Mr. Crouse, isn't it true
2 that the summer and winter run steelhead on the
3 Columbia are the same size?

4 A In terms of total take?

5 Q Yes.

6 A That would be total commercial and sport take?

7 Q That is correct.

8 A I would suspect -- and you have the information
9 in front of you -- I would suspect that the summer
10 run fisheries is a larger run than the winter run
11 fisheries. I would suspect that. I do not know
12 for sure. I am sure that we can answer that under
13 the biological data.

14 Q Mr. Crouse, do you have any limit on the number
15 of sport fishing licenses and punchcards you issue
16 every year?

17 A No, we do not.

18 Q Are you allowed to limit that number?

19 A No.

20 Q Do you have bag limits on the number of fish that
21 sport fishermen can take?

22 A Yes.

23 Q What is the limit?

24 A Two per day, 30 per season.

25 Q If you reduce the bag limit to one per day and

1 10 per season would you have over-escapement of
2 steelhead?

3 A. I would think not, no.

4 Q. You mean to say that all the other sportsmen would
5 take up what might be the over-escapement?

6 A. No, I am trying to shake my memory on the sports
7 fishing for steelhead, and I do not think that a
8 reduction of this type would result in a over-
9 escapement of steelhead. I would feel that this
10 may, even though the bag limit is exceedingly small
11 now, may further distribute it a little bit finer
12 among the people who sport fish on the average.
13 I think it is about three days fishing now, to
14 catch one fish using average figures for average
15 sportsmen.

16 Q. And you have seasons, don't you, for sport fishing
17 for steelhead?

18 A. Yes, we do.

19 Q. As a general matter -- let's take the Quillayute
20 River. When does the season open for steelhead on
21 the river?

22 A. Oh, as a general matter -- I would have to refer
23 to the pamphlet. I would suggest it is the first
24 Sunday in December.

25 Q. And without the date being exactly precise, how

1 long does it extend?

2 A. The Quillehute, that would run through April.

3 Q. And there are peaks in that run, are there not?

4 A. Yes.

5 Q. If you shorten the season and allow the outside
6 permissible season, would you have an over-escape-
7 ment of steelhead in the Quillayute system?

8 A. I don't know what you are driving at. I don't know
9 that you can have a over-escapement of steelhead
10 possible. If you would define what you mean by
11 an over-escapement I would better reach what you
12 are --

13 Q. More steelhead than you need to preserve and
14 perpetuate the resource for spawning?

15 A. I have never known this to happen. I am sure that
16 you could by manipulation of the season reach a
17 stage where you would have more steelhead in the
18 watersheds than was necessary to perpetuate this
19 run, but in setting regulations and in our respon-
20 sibility we attempt to err on the side of conser-
21 vation, and I would hope that we always would have
22 more up there than are necessary. I don't like to
23 think that we would have fewer under any of our
24 regulations.

25 Q. Would you say that it isn't a wise use to have

1 more steelhead than you need in the spawning
2 grounds?

3 A. I think it is wise and prudent use to be sure
4 that when you reach this magic breaking point that
5 I can't tell you what it is, that you don't go
6 below that, so we attempt to be above the minimal
7 escapement and hope that we can do this at all times.
8 To the best of my knowledge we have succeeded in
9 this.

10 Q. All right, so you say, if I understand you correctly
11 that because your regulations are imprecise and
12 your data is incomplete and your predictions are
13 inaccurate that you allow no regulations for the
14 Indian net fishery and hope that your sport fishery
15 will not take too many.

16 MR. CONIFF: I object to the form of the
17 question. There is no evidence in the record to
18 support that.

19 THE COURT: Yes, I think so. That is putting
20 your characterization on it.

21 Q. Mr. Crouse, do you know how long steelhead has been
22 classified as a game fish?

23 A. It was classified a game fish when the Game Depart-
24 ment was formed in 1933. I believe under the
25 County system it may have been a game fish in some

1 areas prior to that. I can't give you the historical
2 date without looking it up.

3 Q In this State has steelhead ever been taken
4 commercially outside Indian reservations?

5 A I am certain back in 1855 there was no regulation
6 on any game or game fish or anything in the State
7 as to what would be done.

8 Q Not the State, Mr. Crouse. Has steelhead ever been
9 taken lawfully commercially?

10 A I am sure that we were -- again, I am calling on
11 my memory.

12 Q And has steelhead always been classified separate
13 from salmon?

14 MR. CONIFF: I will stipulate that steel-
15 head was made a game fish by the legislature in
16 1933, and the prior limitations on the commercial
17 usage go back as far as 1925. These statutes have
18 been already set forth in the brief. I will stipu-
19 late to their authenticity and to their admissi-
20 bility.

21 MR. PIERSON: I appreciate Mr. Coniff
22 trying to anticipate my question, but that is not
23 where I am going.

24 Q Mr. Crouse, has steelhead ever been classified as
25 a salmon under State law?

- 1 A Not since there has been a State Game Department.
- 2 Q Do you know whether it ever has been classified
3 as a salmon?
- 4 A No, I don't. Are you speaking scientifically?
5 It never has. If you are speaking of some other
6 type of classification, it is entirely possible.
7 Scientifically steelhead have never been classified
8 as salmon.
- 9 Q In that red book, that is JX-2a that you have there,
10 let me direct your attention to page 61. This
11 portion is basically a recitation of fishery and
12 anadromous fish management in the State of Washing-
13 ton, and it is signed by your chief fisheries
14 biologist from the Game Department. The last
15 sentence in the incomplete paragraph there, speak-
16 ing of early legislation, and it indicates -- this
17 early legislation --
- 18 A Where are you?
- 19 Q 61 at the top, the last sentence in the incomplete
20 paragraph, speaking of the legislation between
21 1875 and 1890, "This early legislation as well as
22 the successor legislation for many years defined
23 salmon as including steelhead." Now, do you know,
24 Mr. Crouse, why the Legislature, or why the Game
25 Department concludes that as a matter of

1 conservation the steelhead must be separately
2 managed from the salmon?

3 A. What you asked me, if they were classified as
4 salmon and scientifically, again, to the best of
5 my knowledge they have never been classified a
6 salmon. The Legislature may have defined them, and
7 in this case defined the salmon, I would presume
8 that in 1875 to 1890 that they may have been defined
9 by the Legislature, because there was no particular
10 interest in them, and no one in the Legislature
11 had bothered to classify them at that time, or no
12 one really understood the life history of them.
13 I think you had many in those days that had a
14 different connotation than they do now, Mr.
15 Pierson.

16 Q. Do you know whether in 1875 and 1890 the Indian
17 tribes involved in this case or their predecessors
18 had any interest in taking steelhead?

19 A. To the best of my knowledge, I would not know.

20 Q. You said there was no interest in them. I take it
21 that doesn't apply to the Indian tribes?

22 A. I said there was no interest in them. Commercially
23 there could not have been by the relative number
24 of steelhead and the time they could come in, not
25 as much interest in them as there was in salmon,

1 so I would suspect on this basis there was not
2 the interest in these as with such species as
3 Chinook salmon and the larger run species. I have
4 no information. I recall of nothing that indicates
5 to me that there was any substantial take at that
6 time, although if there was I'm not aware of it.

7 Q Haven't you said you don't have any data?

8 A I have no information or have never received any
9 that indicated there was any particular interest
10 or any substantial taking at that time. If there
11 was any, I am not aware of it.

12 Q All right, when you say that steelhead is more
13 abundant than salmon, you mean more abundant than
14 all species or than any species of salmon?

15 A If I have said steelhead were more abundant --

16 Q I am sorry, less abundant. Are you speaking of
17 all species of salmon or just any one?

18 A I cannot think offhand of any of the five native
19 species of salmon that would be less abundant than
20 steelhead.

21 Q Now, is this general proposition or are you speaking
22 about each individual river system?

23 A You have variations in each river system, variations
24 of salmon. I think possibly Fisheries can answer
25 as to the abundance of certain things. Spring

1 Chinook, summer Chinook, fall Chinook may be in
2 one river system in greater abundance, and the
3 same thing is true of steelhead. There is no evi-
4 dence of any summer run steelhead, for example,
5 in the Puyallup River, but there is in the
6 Stillaguamish.

ET 23 7

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1 Q My question, though, was MR. Crouse, in your opinion
2 is Steelhead less abundant than salmon or to any one
3 of the other species?

4 A When you take salmon as a whole, there is no question
5 about it. I do not know of any salmon species that
6 is in less abundance than Steelhead.

7 THE COURT: Is that overall?

8 THE WITNESS: Overall. There may be some,
9 but I know of none.

10 Q (By Mr. Pierson) Might there be a difference in river
11 systems, river system to river system?

12 A Certainly.

13 Q Do you know of any river system where Steelhead outnumber
14 any species of salmon?

15 A Well, you have some river systems that you don't have
16 some races of salmon in, yes. I presume you can find
17 all types of indications like this. I know of no
18 Sockeye Salmon that go into the Puyallup River, so
19 obviously, Steelhead outnumbered Sockeye Salmon there.
20 Yes, you can get examples of this.

21 Q All right, let's take a Chum run in the Quillayute
22 River system, the Steelhead run, isn't it true that
23 the Steelhead run just by catch data far outnumbers the
24 Chum run in that river?

25 A I have not received or seen any catch data except the

1 sports catch on the -- you say Quinault or Quillayute?

2 Q On the Quillayute.

3 A The Quillayute, I don't know what Indian fisheries,
4 what the catch is. If you have it, why you have more
5 information than I do.

6 Q Let's talk just about the sports catch on the Quillayute
7 River system, isn't it true they far outnumber the
8 number of Chum salmon in that river?

9 A Very possibly. I gave you that example on the Puyallup
10 River, and I am sure you can find many examples like
11 this, Mr. Pierson, as it pertains to individuals.

12 The total run of anadromous fish in the
13 Quillayute system will be in the majority salmon, but
14 you do have some rivers that you don't have some races
15 in.

16 Q Mr. Crouse, your distinction between salmon and
17 Steelhead as the reason why you need to avoid or
18 prohibit Indian net fishing outside the reservation
19 boundaries was partially based, was it not, on the
20 relative abundant numbers of salmon and Steelhead
21 statewide?

22 A Would you repeat that.

23 Q As a distinction for why you prohibit net river Indian
24 fishing off reservation as opposed by the Fisheries
25 Department, which allows it on salmon, you proposed or

1 set forth one of the reasons as the relative lower
2 abundance of Steelhead statewide on salmon, is that
3 correct?

4 A Yes, that is one of the reasons.

5 Q In those rivers where Steelhead outnumber a species
6 of salmon and the Department of Fisheries allows an
7 off reservation fisheries for the salmon, would that
8 argument and that justification still apply?

9 A Well, I don't know what example you are thinking of,
10 but yes, I think it would, because your criteria in
11 my opinion, is the number of steelhead you have coming
12 in the river, and if this could stand a commercial
13 fishery by anyone.

14 Q Moving on to page 8, Mr. Crouse, lines 23 through 30,
15 you are speaking about figures of take of Steelhead
16 on the Nisqually River, you indicate 6800 Steelhead
17 were bought by fish buyers, and 1000 steelhead were
18 taken by sportsmen. I take it this is for the year '72-
19 '73?

20 A Yes.

21 Q All right. Do you know whether all of those 6800 fish
22 that were bought by buyers down on the Nisqually by
23 fish buyers came out of the Nisqually River?

24 A To the best of our knowledge, they did.

25 Q On what is your knowledge based? Do you have information

1 from the fish buyers that indicates that each of the
2 sellers took the fish from the Nisqually River?

3 A The information is based on the assumption that the
4 fish buyers were correct in saying that these fish come
5 off of the Nisqually River.

6 THE COURT: Are these made in some written
7 report, or are they taken orally, or how are they taken?

8 A No, what we have done, and our enforcement people can
9 answer this in greater detail, we asked three people,
10 which are the majority of the fish buyers on the
11 Nisqually River that buy fish from the reservation
12 Indians. We asked them if they would keep a record for
13 us of the fish they bought from the Nisquallys. I
14 would presume on the basis of that, and this is where
15 they pick up their fish, that they kept track of what
16 they bought there.

17 Now, I would not attempt to say that some
18 of these fish were not brought in from some other
19 river, but I would suspect that they are Nisqually River
20 fish, because that's where they were bought, on the
21 Nisqually River from the reservation.

22
23 (Continued on the next page.)
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1 Q The fish buyers are on the reservation?

2 A This is where they buy their fish. They bought basically
3 in the area known as Frank's Landing, which is an
4 Indian allotment, and they buy them from the reservation.

5 Q Do you have any indication that the run of Steelhead
6 that these numbers were taken from has been decimated?

7 A I would think this should be under the biological
8 examination.

9 Q I am just asking whether you have any information.

10 A The run in the Nisqually River?

11 Q Right.

12 A No, I don't. I would ask that you defer this under
13 the other.

14 Q Have you asked your staff to determine that?

15 A Our staff has attempted to count the number of fish that
16 were up above, insofar as we could, spawning grounds.

17 A After you discussed those figures, you say on page 8:

18 "I do anticipate in such systems as the
19 Quilbyute, where we have recently established a
20 rearing pond as part of our propagation facilities
21 that the Indians take on the Quileute reservation
22 has substantially increased because the runs in
23 the river have substantially increased."

24 I want to just look at the Quillayute system
25 for a minute, Mr. Crouse.

- 1 It is true, is it not, that the Quileute
2 reservation spans the lower part of the river?
- 3 A The Quileute reservation is at the mouth of the
4 Quillayute River, yes.
- 5 Q Further to the east of there there is a park boundary?
- 6 A Yes, that's correct, national park.
- 7 Q And the state doesn't exercise any jurisdiction through
8 the Game Department on the reservation ^{or} within the
9 parks, does it?
- 10 A This is correct.
- 11 Q And, to your knowledge, is there a reservation net
12 fishery for Steelhead on the Quileute reservation?
- 13 A Yes, there is.
- 14 Q And are those fish commercial in Washington?
- 15 A Yes, they are.
- 16 Q Now, where is the sport fishery on the Quillayute River?
- 17 A The sports fishery on the Quillayute River is above
18 the park boundary or the reservation line up to the
19 various forks. I think there are probably two miles
20 of Quillayute outside the reservation. The remainder
21 of the river, I believe, is in the reservation.
22 I am talking from memory. Then you go into the various
23 forks of the Quillayute River.
- 24 Q That would be the Bogachiel and Calawah?
- 25 A The Calawah is on the fork of the Bogachiel.

- 1 Q And you have sports fishery on all the tributaries of
2 the Quillayute?
- 3 A Yes, we do.
- 4 Q Has that sports fishery been taking fish in recent year?
- 5 A Yes, it has.
- 6 Q Isn't it true that all of the plants that you made from
7 that river are above the park boundary?
- 8 A This is correct.
- 9 Q And isn't it true that those fish, when they migrate
10 to sea, must pass through the reservation on their way
11 out?
- 12 A This is correct.
- 13 Q And isn't it true that the sport fishery above the
14 reservation and the park would not be taking any fish
15 if the Indians overfish the run in the reservation?
- 16 A This is correct. If they took all the runs, there would
17 be none coming through. The only ones coming through
18 to the sportsmen are those that the Indians do not take.
- 19 Q Have you told or asked the Indians on the reservation to
20 let some fish go through?
- 21 A No. We have not met with the Quileutes. We do not
22 feel that we have any authority on the reservation.
- 23 Q In view of the fact that you have by the state an
24 unregulated Indian net fishery spanning that river and
25 a continuing maintenance of the sport fishery above the

1 river, is there not some indication that the Indians
2 might be able to regulate their own net fisheries
3 outside the reservation boundaries?

4 A I don't believe that the two are comparable.

5 Q Why?

6 A Well, you're talking about a rather confined area of
7 reservations. Now, I presume that you are talking about
8 an Indian net fishery in the watershed of the
9 Quillayute system? If you would define--

10 Q Outside the reservation boundaries. Let's talk about
11 that, yes, above the national park boundaries.

12 A Which would be within the watershed of the Quillayute
13 River.

14 You are talking about an area that has
15 expanded from several square miles where the Indians
16 live to an area of many hundreds of square miles that
17 would then have an off-reservation fisheries. I think
18 it would be extremely difficult for the Quileute
19 Indians themselves to regulate a net fishery that
20 extended into this area.

21 Q Have you ever asked the Quileute Indian Tribe whether
22 they intend to fish all of the length of the Quillayute
23 River system outside the reservation boundaries if
24 allowed to do so?

25 A I have not discussed it with the Quileute Tribe.

- 1 Q And on what do you base your feeling that the Indians
2 would fish the whole length of the river outside the
3 park boundary?
- 4 A I have not had any indication that they would fish
5 anyplace else. That's why I prefaced the question or
6 clarification to you, if we were talking about the
7 watershed.
- 8 Q Are you aware that the Fisheries Department has an
9 off-reservation net fishery for Quileute Indians on
10 salmon outside the national park?
- 11 A Yes, I am.
- 12 Q And do you understand that that season is limited in area?
- 13 A Yes, I do.
- 14 Q Could the Game Department do that?
- 15 A If you're asking me whether we can do it or not, or
16 if you're asking me the desirability is two different
17 things.
- 18 Q Let's answer the first question.
- 19 A The Game Department, if we could do this, I presume
20 under the existing laws, and if it was proper for us
21 to do it, yes, we could.
- 22 Q I'm just talking about managing the resource. Could
23 you have a net fishery for Steelhead by Quileute Indians
24 outside the reservation confined in the same area that
25 the Department of Fisheries regulations permit the

1 Indians to net fish salmon?

2 A I'm not sure of where their boundaries are.

3 I wonder if I could make this point, and it
4 would be this, again: The difference between Steelhead
5 and salmon is based on the fact that the salmon that
6 the Fisheries give this season have come through every
7 conceivable fisheries up to an Indian fisheries, and
8 this is the remaining quantity.

9 When you come into the Quileute reservation
10 with the Steelhead, they have there the first chance
11 to take fish, and these are the first fish that are
12 taken. No one else has had an opportunity to take any
13 of these fish.

14 As you go on up the river and expand, I
15 rather suspect if we had figures on the total take of
16 what the Indians have, it would be a substantial
17 fisheries, and the reservation fisheries would probably
18 have to be reduced to accommodate the net fishing, if
19 that was expanded.

20 Q Are you aware of a recent proceeding in this case, a
21 temporary restraining order, where we talked about the
22 Quillayute River system?

23 A This was the restraining order brought two years ago?

24 Q Yes, approximately two years or so ago.

25 A To restrain the Game Department from off-reservation

1 fisheries by the Indians on the Quileute system?

2 Q To restrain the game Department from enforcing this
3 regulation outside the park boundaries.

4 A Yes.

5 Q Do you recall what the relative numbers of estimated
6 take was by the Indian reservation fishermen and the
7 sports fishermen on that river?

8 A Not off the top of my head.

9 Q Over on page 9 of your testimony, Mr. Crouse, you were
10 asked the question:

11 "Does the Department have information
12 available to it as to the type of nets used by
13 Indians on reservations?"

14 Your answer is:

15 "Only from the standpoint that on the
16 reservation nets are readily observable. They
17 are gillnets, and are used as set nets in the rivers."

18 Now, do you know, Mr Crouse, what the basis
19 of that opinion is?

20 A Well, from my own personal knowledge. I have observed
21 many set nets that are gillnets in the rivers on Indian
22 reservations. These are readily observable from many
23 places, including Highway 101 on the Peninsula, during
24 the fishing season.

25 Q There are approximately fifteen Indian reservations in

1 the western part of the state, as I understand it.

2 Have you observed nets used by Indians on each of those
3 reservations?

4 A I would assume that I have not personally.

5 Q So that you can't say that all of the nets used on those
6 reservations are gillnets or set nets?

7 A My personal observation, no.

8 Q Are you aware that there is an estuarine trap operated
9 by the Swinomish Indians on their reservation?

10 A I have heard that. I have not seen it.

11 Q Are you aware that the Makah tribal members fish by
12 troll gear?

13 A I have seen some of them fishing up there. If I did,
14 I didn't differentiate them from other fishermen.

15 Q Can you tell us what reservations you have observed such
16 gillnets?

17 A The Quileuetes, Queets, Hoh, Quinaults, Chehalis,
18 Nisqually, Tulalip.

19 Q Do you know whether any of those reservations also have

20 THE COURT: What was the last one? Tulalip?

21 THE WITNESS: Yes.

22 Q Do you know whether any of those reservations that you
23 have maintained fish hatcheries for Steelhead?

24 A The Quinault. I believe there was testimony on it today.
25 The Quinault has developed a fisheries program. The

1 Nooksack has come into one. I'm aware of these because
2 the Game Department has furnished Steelhead fry ~~rights~~
3 to the Indian tribes of these two areas.

4 Q How many tribal-put set gillnets have you seen?

5 A Tribal-put?

6 Q Right.

7 MR. CONIFF: Object to the question unless he can
8 restrict it to some time or area.

9 THE COURT: I am not sure that his personal
10 knowledge of these data necessarily is very significant,
11 unless you have in mind some lack of being personally
12 informed.

13 MR. PIERSON: I think, your Honor, I am trying
14 to test his statement on page 9. He is asked the
15 question how large are these nets on the reservations,
16 and his answer is that they vary in size. Some are
17 quite short, some fifty feet in length to substantial
18 nets of several hundred feet in length.

19 THE COURT: I see.

20 Do you know that they are fifty feet in length?

21 THE WITNESS: I'm making an estimate from
22 looking at them. They vary in size, and they vary in size,
23 of course, into the area that they are fishing.

24 Incidentally, if I could add one more to that
25 list, the Skokomish, that list that you previously

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asked me.

THE COURT: Where he has seen nets?

Q Have any of the nets that you have seen, Mr. Crouse,
extended more than one-third of the way across the river?

A Yes.

(Continued on the next page.)

ET25

1 Q Where?

2 A I can recall nets in the Hoh that extended to
3 mid-river.

4 Q Have you ever seen any that were more than halfway
5 across the river?

6 A No. You don't have any equal run of fish coming
7 up on a level amount. I don't recall that you would
8 have this in anyplace either. The nets are normally
9 set, and any net fisherman will set them where you
10 can catch the most fish in a given run, and in
11 some places you have fish that concentrate. So it
12 is not necessary to really set one clear across the
13 river to take 100 percent of the fish, and if you
14 only set it at 90 percent, you take 90 percent.

15 Q Do you know of any river flowing through an Indian
16 reservation where 90 or 100 percent of the steelhead
17 resource has been taken?

18 A No.

19 Q Now, you say that the nets are nylon nets, some of
20 them are monofilament nylon, which is illegal to
21 use in locations other than Indian reservations.
22 The others are a type of nylon net that are commonly
23 used for gill netting salmon commercially in Puget
24 Sound.

25 How many nylon gill nets have you seen or have

1 been reported to you on reservations?

2 A. How many nylon gill nets?

3 Q. Yes.

4 A. I have seen one, I have heard that they have been
5 used.

6 Q. Who have you heard that from?

7 A. Various members of the Game Department at times
8 that have said they were used, and this is the
9 basis of my evidence on that. The evidence on the
10 other nets is based on a common presumption and
11 information that I have heard that very often they
12 will sell gill nets that are used in commercial
13 fishing, in commercial fisheries in the ocean, and
14 they will be cut into separate lengths and reused
15 in rivers.

16 Q. Does the Game Department have a comprehensive or
17 even a consistent basis to record the number of
18 nets for fishermen on a reservation?

19 A. No.

20 Q. So your examination and this testimony is just
21 from casual observation?

22 A. This is observation from that standpoint. We have
23 never claimed any jurisdiction on reservations.

24 Q. Going on to page 9 in answer to a question, you
25 say, "There have been at least two fish hatcheries

1 developed on Indian reservations in the State of
2 Washington. The Department of Game supplied
3 steelhead fry to these hatcheries to aid building
4 a run of steelhead via artificial propagation
5 of the Indian fisheries."

6 The first question is, what reservation
7 hatchery are you talking about?

8 A. The Lummi and the Quinalts.

9 Q. All right. Do you know whether any -- either of
10 those two hatcheries has utilized its own egg
11 source?

12 A. I didn't hear the question.

13 Q. Do you know whether either of those two hatcheries
14 has used its own egg source on the reservation for
15 steelhead?

16 THE COURT: Eggs.

17 A. Egg sources. Obviously, what they are attempting
18 to do is to build a run, such as our Chambers
19 Creek run, as an example, to build a run that will
20 come back to the hatcheries and develop their own
21 egg sources, and to get into this and to get into
22 it, I presume, as rapidly as possible, they desire
23 to start with an egg source. The Game Department
24 source is readily available to them for an
25 available supply of eggs.

- 1 Q The question is do you know whether they develop
2 their own egg source?
- 3 A Whether they have?
- 4 Q Yes.
- 5 A To my knowledge, they have not yet, and I believe
6 possibly this winter the Quinalts will have a brood
7 year coming back. I believe it's next year for the
8 Lummis, and I could be wrong in this contention,
9 but they should have their own. They may have had
10 it last winter, but I believe that this winter
11 hopefully they will have a return and will have
12 their own brood stock and own egg source.
- 13 Q Now, let's take the Quinalts, there is a sports
14 fishery above the Quinalt Reservation?
- 15 A Yes, there is.
- 16 Q Does that sport fishery benefit by an Indian hatchery
17 program on the reservation?
- 18 A I would think not.
- 19 Q Why do you say that?
- 20 A Well, I presume that the decline of fish is going
21 to be on the substantial number of miles of river
22 that the Indians have within the reservation and
23 that the steelhead will tend to come -- return and
24 school at the hatchery area and that there will be
25 none of these fish come up and through the lake

1 into the area that is off reservation. If there is
2 a spring there, it will be exceedingly limited
3 and I personally can't conceive of this happening.

4 Q Do you know whether those facts are also true of
5 the Lummi hatchery?

6 A The Lummis have put a hatchery up river, which is
7 not on a reservation. This could under proper
8 fisheries management -- this could add to the run
9 in the Nooksack River above the reservation.

10 Q For sport take?

11 A Yes.

ET26

(Continued on next page.)

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1 Q On page 10, Mr. Crouse, in response to a corrected
2 question by the counsel, you state you do not consider
3 off reservation netting as being compatible with
4 sustained yield Steelhead, coupled with the public
5 recreational use of Steelhead in the rivers of the
6 state. Do I understand by that that you have to have
7 a sustained sport take of Steelhead before you will
8 consider Indian net fishing for Steelhead outside
9 reservation boundaries?

10 A I think it means what it says. To begin with -- and
11 I have pointed this out before -- Steelhead are only
12 taken once they come in the river, and I do not believe
13 that a net fishery would be compatible with maintaining
14 a recreational fishery on the river.

15 The two would be in complete, total conflict.
16 They would be in the same area at the same time. It
17 would be difficult to regulate, and I do not believe
18 that this type of a fisheries is conducive to a sport
19 fisheries.

20 Q You are aware that on the Columbia River they have
21 sport fisheries and Indian fisheries?

22 A Yes, I am, in the Columbia River. Again, this is a
23 completely different type of river.

24 Q Are you just saying here in this first sentence, Mr.
25 Crouse, that the reason you don't want to allow Indian

1 net fishing for Steelhead off the reservation is
2 because you don't want to give them any greater share
3 of the resource than they are now taking on the
4 reservation?

5 A I do not know what share they are taking on the
6 reservation. I think that would be a consideration,
7 if this is a supposition question of when off-
8 reservation fisheries had to be allowed by the
9 Department, and that supposition -- I think it would
10 be extremely important for us to have all the
11 information and data as to what is being taken on the
12 reservation. I don't look at the two of them as two
13 separate entities.

14 Q Would you be more inclined to allow an Indian net
15 fishery for Indian tribes who don't have a reservation?

16 A It would again depend on which one it was, and
17 certainly using the supposition question, if we were
18 required to do this by a court we would do it.

19 Q Your second statement is the efficiency of a gillnet
20 fishery and the relatively low numbers of Steelheads
21 normally returned would make it difficult, if not
22 impossible, to carry on a public recreational activity
23 for Steelhead if gillnetting was allowed off the
24 reservation.

25 Let us return again to the Quillayute River

1 system. There is a monofilament, nylon net fishery,
2 unregulated by the state on that river, and there is
3 a viable sport fishery above the reservation.

4 What is it about the fact that the boundary
5 of the park comes where it is that prevents you from
6 considering an off-reservation net fishery above the
7 reservation?

8 A At the present time, to the best of my knowledge, the
9 runs of steelhead and the numbers of these runs in the
10 Quillayute River system, after those are taken out by
11 the commercial net fisheries of the Indians, would not
12 sustain an additional gillnet season, and still have
13 a sports fisheries on the river that would be a viable
14 or acceptable sports fishery.

15 Q By that don't you mean that you expect a sports fishery
16 would take less?

17 A I would. I think it goes without saying that any time
18 you take a fish off of this end, and add it on the other
19 you are losing on one if you put it on the other.
20 There is a limit, a finite number of fish, and if you
21 took more by gillnet fisheries, or if you expanded
22 the gillnet fisheries there would be less fish, and
23 the gillnet fisheries would be the first fisheries
24 that took them, not the sport fisheries.

25 THE COURT: Do you think we might be able to

1 conclude Mr. Crouse today, Mr. Pierson?

2 MR. PIERSON: No, your Honor, I do not.

3 Q Are you aware of any commercial net fisheries which
4 fish for Steelhead besides Columbia River?

5 A And on reservation fisheries, besides the Columbia
6 River, oh, I know of none in this state.

7 Q Are you aware of a commercial net fishery that takes
8 Steelhead on the Frazier River?

9 A I am not familiar with it.

10 Q Looking at page 12 of your testimony, Mr. Crouse, did
11 you say you are describing, in answer to a question about
12 the operations of the Game Department, the question,
13 "Is a hook and line fishery apt to endanger a steelhead
14 run." Your answer is, "We have had no evidence that a
15 hook and line fishery would reach even the capability
16 or magnitude of destroying a Steelhead run."

17 Do you have any information that an Indian
18 gillnet fishery has every destroyed a Steelhead run?

19 A I have no personal information.

20 Q But does your Game Department have any such information?

21 A That it has destroyed a run? I do not know of any that
22 have been completely destroyed, no.

23 Q Then you say, "We are always careful to review our
24 punchcard data to determine the number of Steelheads
25 that are taken in the river system," and I take it this

1 is the return of punchcards that is less than 50 percent
2 of what you issued.

3 A Well, I think in alluding to this, I would like to make
4 this point, that we review them on a statistical basis
5 which I think is a common accepted basis for any
6 sampling technique.

7 Yes, this is what we would do.

8 Q Then you say if you feel that too many Steelhead are
9 being taken, the season is curtailed or cut back or
10 otherwise limited to allow a sufficient escapement.
11 Let me ask you a question. My first question is,
12 do you set escapement goals for Steelhead in any rivers
13 of the state?

14 A No, we do not have definite escapement goals, and I
15 think again biologically, this area could be explored
16 better, but I would say this, that we do have within
17 our regulations, fishing period times, things like this,
18 to regulate the sports catch of fish.

19 Q Do you have any indication, any set indication of what
20 sufficient escapement for any river system in this
21 state for Steelhead is?

22 A I think you could answer that on biological information,
23 because I think the answers would be better than you
24 get from me.

25 Q To your knowledge, do you have any figures?

- 1 A Any set goals?
- 2 Q Right, anything that would indicate what sufficient
3 escapement is, as you have used that term.
- 4 A Yes, we do have goals in our Steelhead management from
5 the standpoint that we have been and are increasing the
6 parameters of our ability to get spawning ground counts,
7 to get other information to indicate that we are
8 getting sufficient numbers of fish, and we have been
9 working in this direction, I guess, really going back
10 twenty some odd years.
- 11 Q If you ever get an indication that the last year's
12 fishery has depleted the resource beyond sufficient
13 escapement, do you plant more fish in that river?
- 14 A We have not done it on that basis. To my knowledge,
15 we have not had the occasion.
- 16 Q Never in the history of the Game Department have you
17 had any indication that you have had an underescapement
18 of Steelhead?
- 19 A To my knowledge, and I am sure that someone can come
20 up with a different set of facts on that.
- 21 Q To your knowledge, have you ever had an overescapement
22 of Steelhead?
- 23 A I know of no escapement of Steelhead that has ever
24 been in the magnitude to do any damage to the run, to the
25 best of my knowledge. I think I made this point, that

1 we attempt to have, in effect, an overescapement each
2 year.

3 Q Do you recall any time in your period with the Game
4 Department when the season has been curtailed or cut
5 back?

6 A No.

7 Q Is it accurate to say that you don't expect it to happen
8 in the future?

9 A I would hope that it would not. I think that I have
10 said in the testimony you are looking at that at one
11 time we seriously considered it, but it did not develop
12 to the point that we had to make a cutback, and I
13 would hope that we would not have to do it.

14 Q Would you tell us about that time, please.

15 A Well, this is referring to the Columbia River and some
16 losses of fish, primarily due to the impoundment.
17 Idaho had come in with a cut, and they had asked
18 Washington Game Department to consider this.

19 We did at that time, but finally we
20 concluded it was not necessary and it so worked out
21 that our information was correct at that time.

22 Q Turn to the bottom of page 12. You say that most
23 fishermen who fish for Steelhead do not catch a limit
24 of fish, and the limit is two. Do you know whether
25 most fishermen for salmon catch their limit?

1 A I would rather you asked that of the salmon people.
2 They are responsible in that area.

3 Q Were you not comparing salmon and Steelhead in that
4 testimony?

5 A In what context?

6 Q Well, it starts up at the top and proceeds down where
7 you are talking about hook and line fishery, and the
8 question, you say, "To date I know of no information
9 that shows that any Steelhead run has been destroyed
10 by hook and line fishery," and it says why is this so,
11 and you go on to say, "Steelhead, when they enter the
12 rivers, are not inclined to bite or feed. This makes
13 them more difficult to catch."

14 You said, "Most fishermen who fish for
15 Steelhead do not catch their limit of fish."

16 A This is correct.

17 Q Is that a distinction between Steelhead and salmon?

18 MR. MCGIMPSEY: I will object. There is
19 no foundation for this witness' expertise on salmon.

20 THE COURT: Do you mean to compare steelhead
21 with salmon in that particular; namely, whether most
22 fishermen for salmon get more of a catch than the
23 fishermen for steelhead do?

24 MR. PIERSON: As compared to a limit.

25 THE WITNESS: I don't read the comparison there.

1 I read it as a statement, and certainly most fishermen
2 who angle for Steelhead do not catch the limit, period.

3 Q On page 13 --

4 THE COURT: I think I can take judicial
5 notice that the same is true of salmon.

6 Q Page 13, line 10, you are asked why is there a limit
7 of two fish per person per day, and the answer is:

8 "The limit of two fish per person was
9 established primarily as a way of broadly
10 distributing the catch among more people."

11 You say two fish per person is recognized by people
12 who fish for Steelhead as a good limit and a good day's
13 fishing. Do you have any survey or any documents which
14 indicate that you found out that two a day is just fine?

15 A When we made this recommendation it was supported by
16 the Game Commission, a possibility for regulation. It
17 was supported by people who fish for Steelhead. To the
18 best of my knowledge, since this regulation has been
19 in, I do not recall of any request to raise the limit
20 to three. There may have been some. If there were, it
21 had to be an individual at some time, because there
22 has been, to the best of my knowledge, no request for
23 this, so I think that this is an acceptable limit by
24 those who angle for Steelhead.

25

1 Q. Have you ever consulted the Indian net fishermen
2 whether two a day would be sufficient for them?

3 A. No, sir.

4 Q. On page 14, beginning on line 13, you say:

5 "Steelhead runs that have been increased by
6 the Game Department's programs have reflected an
7 increase of number of fish that are available to
8 Indians on the reservation fishery. Although we do
9 not have exact data on the Indian take there is no
10 question but that rivers that are managed by the
11 Game Department have provided an increased take by
12 Indians on reservations. I think, likewise, the
13 success of the Game Department program in this area
14 can be measured by the fact that at the present time
15 at least two Indian tribes are in the process of
16 developing similar programs of artificially produc-
17 ing steelhead to come back to the reservation."

18 Do you have any figures to indicate or studies
19 to indicate that the Indian reservation fisheries
20 are benefited by your stocking?

21 A. No; because I think I have told you previously that
22 we have had marking studies. We have done all of
23 these things, but we have never had information off
24 of the reservations as to what the take was and as
25 to what the marks were.

1 I think the only way this could be measured
2 -- and this would be a presumption that I'm sure
3 would be correct -- is that as you have more fish
4 coming in the river with the same effort more would
5 be taken by the Indians within the reservation
6 boundary.

7 I have no reason to feel that it would be any
8 other way. I think it's just logic.

9 Q Do you have any way of knowing whether the Indians
10 who fish by nets on reservations attempt to catch
11 only the natural stock?

12 A I don't know of any way that you can separate these
13 runs out.

14 Q You don't know of any way you separate natural stock
15 from hatchery stock?

16 A When they're coming in a river netting, no.

17 Q You can't do it by different times of fishing?

18 A No. You have certain runs that come in at certain
19 times. You have some fish that come in early. By
20 and large, our hatchery stock tends to come in
21 December and January. Some of the wild stock tend
22 not only to come in during this period, but peak
23 up later. We are attempting to develop a hatchery
24 fish that will come in later in the year, very
25 frankly, to allow substantial runs coming in the

1 river at all times.

2 The only way I know you can a wild fish
3 from a hatchery fish with any degree of confidence
4 is if they were marked in some way.

5 Q Are you sure that it is the succes of your hatchery
6 program that has induced the tribes to construct
7 hatcheries?

8 A I would presume in doing this, as they are with
9 the advice and consult of the Fish & Wildlife
10 Service, that their information on steelheads is
11 based on our hatchery programs.

12 Now, if they have any other information, to the
13 best of my knowledge, it is the outstanding program
14 in the country. It has been developed in this State,
15 and I think this would almost have to be the basis
16 of it.

17 Q Let's talk about the Quinault Reservation.

18 Has it occurred to you that the reason for the
19 hatchery on that reservation might be the Game
20 Department had at the request of sportsmen refused
21 to stock that river?

22 A I was trying to think if we did have a request from
23 sportsmen not to stock the river.

24 I suppose this would be true in a general
25 context. We have had some requests from some

1 people who fish for steelhead that we attempt to
2 keep a native run of fish in certain rivers. We
3 have attempted to do this.

4 The Quinault is a river that I don't believe
5 we have stocked at any time. We may have. There
6 are other rivers that are in this category, the
7 Queets also being one.

8 These people seem to differentiate in their
9 own mind that fish from a wild fish that comes up
10 out of the gravel is a different fish that one that
11 comes from a hatchery and goes to the ocean.

12 The Cedar River going into Lake Washington is
13 another of these. We have some of these that we
14 have not stocked on that basis. We have some lakes
15 we do this to.

16 Q Mr. Crouse, the pretrial order on your right, if
17 you could refer to page 75, paragraph 3-474, line
18 16. I am reading, if you will permit me:

19 "The Game Department has avoided stocking the
20 Quinault and Queets River system because of limita-
21 tions in their hatchery program and because
22 of opposition by sports groups, among other reasons."

23 Can you think of any other rivers which run
24 through Indian reservations where you have avoided
25 stocking because of opposition of contributing to

1 the Indian reservation net fishery?

2 A. That run through reservations? The Cedar does
3 not go through a reservation. I don't know of any.
4 I think you have the complete stocking records,
5 and Mr. Millenbach would probably again have these
6 on his fingertips. I don't recall of any. I think
7 we had some discussion of the Nooksack before,
8 which is being stocked by the Department now.

9 Q. Was there ever a time that you avoided stocking
10 the Nooksack because of opposition from sports
11 groups?

12 A. Yes, it was. I believe we have disussed this in
13 here, and we have reached the stage where we had
14 some fish and planned to stock it and received rather
15 strong opposition from some people and rather strong
16 urging to stock it from others with Game Department
17 stock.

18 I made an arbitrary decision in the spring of
19 one year to delay the stocking. The next year we
20 stocked it.

21 I wanted to take a further look at the problems
22 involved and the number of fish we had. We had
23 sufficient fish, and we made our stocking that year
24 and have stocked it since.

25 Q. In your view as the Director of the Game Department

1 would you consider it discrimination against the
2 Indians to take requests of sportsmen against
3 needs of the Indians on the reservation for the
4 stocking of steelhead?

5 A. What?

6 THE COURT: Would you read the question,
7 please.

8 (The question was read.)

9 A. I don't recall.

10 THE COURT: If that were done, would you
11 consider it discriminating against the Indians?

12 THE WITNESS: No; because I don't think
13 that is the purpose of the request.

14 THE COURT: Go ahead. Let's finish this
15 subject, and then we will recess.

16 MR. PIERSON: Very well, Your Honor.

17 Q. Just to get this accurate, Mr. Crouse, I am referring
18 to pages 118 and 119 of your deposition of March
19 27 in which I believe you are being questioned by
20 Mr. Ziontz and he asked:

21 "Let's move to the Nooksack River. Is there
22 a steelhead run on the Nooksack River? A Yes,
23 there is. Q Has the Department operated a program
24 of augmenting that run? A Yes, we have. Q How long
25 has that program been in operation? A This is the second

1 year in recent years. Q. Is there some reason why
2 there is no such program prior to the commencement
3 of two years ago? A. Yes. There was a strong feeling
4 by the people there because of the Indian fisheries
5 that they should not attempt to build up the runs
6 of steelhead in the river. Q. What people, Mr.
7 Crouse? A. People in Whatcom County."

8 Isn't it true, Mr. Crouse, that the Nooksack
9 until two years ago, the precise reason for not
10 stocking that river was because sports fishermen
11 and non-Indian people in Whatcom County didn't
12 want you to increase the Indian catch?

13 A. No, sir. The reason was that we didn't have suffi-
14 cient steelhead to expand in this area. When we
15 received and had sufficient steelhead and were
16 capable of raising enough, we proposed to stock
17 the Nooksack River. When we proposed to stock the
18 Nooksack River, this situation did come up, and we
19 had people say exactly that.

20 It was on this basis that we delayed the
21 planting for one year. The next year, in spite of
22 this, we proceeded with the planting and have done
23 this since.

24 (Continued on next page.)
25

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1 Q Mr. Crouse, do you know how many hatcheries you
2 could draw from to plant the Nooksack River?

3 A Oh, not off the top of my head, but again I think
4 you are getting into biological data. When you make
5 a plant on a river like that, you want to put
6 sufficient in that so that you can have a fairly
7 good assurance you are going to get a return. As
8 we have increased our hatchery program, we have
9 expanded the planting of these streams. Our original
10 program was in one river. From that now we plant
11 almost every river in the State, and some rivers
12 we would like to raise the river and in some, lower
13 them.

14 Yes, we could have stopped planting one and
15 planted the Nooksack, but in our orderly development,
16 we went this way, and we have planted Indian streams
17 prior to this. But there was -- the point I am
18 trying to make, there was no discrimination on the
19 basis of the Nooksack being an Indian stream, the
20 discrimination was on the basis of the return we
21 felt we could get from that and the availability of
22 the fish, and when we reach this stage, we did for
23 the reasons stated in here delay the planting for
24 one year.

25 Q Mr. Crouse, if you changed your priorities to where

1 you would stock, could you have stocked the Noon-
2 sack River with sufficient fish?

3 A. We could have started with the Nooksack River as
4 number one stream in the State to stock, but we
5 did not.

6 Q. Would that have planted sufficient fish --

7 A. Pardon me?

8 Q. Planted sufficient number of fish, you are talking
9 about you would like to plant?

10 A. Anytime we stock one river, we want to put a
11 sufficient number of smolt in there so it will have
12 a measurable impact on the river, and we can tell
13 what it does. We don't want to run up with five
14 or ten thousand fish.

15 Q. My last question, then it is accurate to say that
16 you changed your priorities of stocking, there is
17 no other limitation, you could have stocked the
18 Nooksack?

19 A. Well, certainly we could, we could have cut the
20 amount on the Puyallup River or the Chehalis River
21 or any other.

22 MR. PIERSON: That's all today, Your Honor.

23 THE COURT: You may step down, Mr. Crouse.
24 Return, please, tomorrow, and we resume sharp at
25 9:00 a.m. I hope that won't get you up too early.

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THE WITNESS: I will be here, Your Honor.

MR. PIERSON: Your Honor, I wonder if I might take up a matter with the Court in chambers at about 3:30?

THE COURT: Yes, you may.

Before we conclude, it just came to my mind that I neglected to mention for the record at the beginning of the trial that due to the cooperation and fine overtime work of the lawyers in the case, I entered an order admitting the vast majority of the exhibits in the case. There are only a very few as to which objections are outstanding, and if it had not been done this way, we would have had to spend several days time doing it the old fashioned way. I wanted the record to show that this was done.

I hope you have a pleasant afternoon, get your wind up for tomorrow and that all goes well with you while we are apart. Good evening.

(At 3:07 p.m. the Court recessed for the day.)

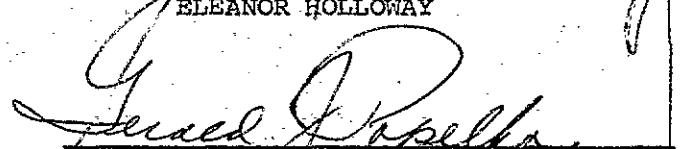
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C E R T I F I C A T E

We, the undersigned official court reporters in and for the United States District Court for the Western District of Washington, do hereby certify and affirm that the foregoing transcript of proceedings is a true and accurate transcription of our shorthand notes of the matters herein reported.


ELEANOR HOLLOWAY


GERALD J. POPELKA


DONNA M. DAVIS

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WITNESSES

Direct

Cross

CARL CROUSE

101-C

107-P

C=Mr. Coniff
P=Mr. Pierson