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## Docket Entry 416B - Filed Transcript of Proceedings Volume II

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,  
Plaintiff,  
QUINULT TRIBE OF INDIANS,  
et al,  
Intervenor-Plaintiffs,  
v.  
STATE OF WASHINGTON,  
Defendant,  
THOR C. TOLLEFSON, et al,  
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 28, 1973  
Tacoma, Washington

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

416 *[Signature]*

Vol. II

P R O C E E D I N G S

August 28, 1973  
9:00 o'clock a.m.

(Appearances as heretofore  
noted in volume I.)

(All parties present.)

THE COURT: Good morning, everyone. Are  
you ready to proceed with your cross-examination  
of the witness?

MR. PIERSON: Yes, Your Honor, we are.

THE COURT: Please do.

CARL CROUSE, resumed the stand and  
testified further as follows:

CROSS-EXAMINATION (Continued)

BY MR. PIERSON:

Q Mr. Crouse, I wonder if, according to your under-  
standing, you can explain to the Court briefly what  
the varying jurisdictions in the rivers of this  
State are as between the Department of Game and the  
Department of Fisheries as to specifically what dates

1 the Department of Game is primary law enforcement  
2 agency, what dates the Department of Fisheries is  
3 the primary law enforcement agency.

4 A. The Department of Game's jurisdiction pertains to  
5 what is classified as game fish, which includes  
6 trout, steelhead. We have an agreement that is not  
7 a part of law between the two departments. The  
8 Department of Game has primary jurisdiction during  
9 the time of the year that steelhead are primarily  
10 the anadromous fish in the river.

11 During the time that the salmon are, the  
12 Department of Fisheries has the lead jurisdiction.  
13 This does not take away any of the laws or rights  
14 of either department to enforce their laws. Now,  
15 the Department of Game normally assumes lead or  
16 primary jurisdiction from the first of December  
17 until the end of March as this corresponds with the  
18 primary steelhead runs.

19 Q. Now, that is as to winter steelhead run, is that  
20 correct?

21 A. Yes.

22 Q. How about the summer steelhead run, do you have a  
23 primary jurisdiction over those?

24 A. No. As I pointed out, we do not give up any of  
25 our jurisdiction over the species we are responsible

1 for, which again, I presume you are referring to  
2 steelhead and I'll confine my remarks to that unless  
3 you wish them expanded, we do not give up any  
4 jurisdiction over any steelhead at any time. The  
5 Fisheries, of course, does not give up any juris-  
6 diction to the Game Department at any time. But  
7 the primary emphasis during this period is on  
8 when there is a run of steelhead, they are the  
9 principal fish in the river. During the other  
10 periods of the year, the principal fish tends to be  
11 salmon, and they take the lead in this type of  
12 enforcement during that period.

13 Q And it is accurate to say the Department of Game  
14 enforcement officers and Department of Fisheries  
15 enforcement officers attempt to enforce both game  
16 and fisheries laws throughout the year, is that  
17 correct?

18 A Yes, we tend to cooperate with them and they cooper-  
19 ate with us, and we do with other law enforcement  
20 agencies.

21 Q Now, looking at the Game Code, which is USA 39,  
22 it is a little green book, turning to page 27, as  
23 I understand it, the Game Code that you have in  
24 front of you is the Game Department's compilation  
25 of relevant State statutes with respect to its

1 jurisdiction?

2 A. Yes, that's right.

3 Q. All right. On page 27 you have the provision,  
4 77.16.060, and as I understand it that provision,  
5 briefly summarized, is a prohibition against taking  
6 steelhead by net, among other things, is that  
7 correct?

8 A. Yes, it's not only steelhead, it's game fish and  
9 steelhead is a game fish.

10 Q. Under the second sentence there says, "It shall  
11 be unlawful to lay, set, or use a net capable of  
12 taking game fish in any waters of this State except  
13 as permitted by regulation of the Department of  
14 Fisheries."

15 My first question to you, Mr. Crouse, is: If  
16 the Department of Fisheries decided to authorize  
17 a net fishing season and allowed commercial usage  
18 of the take at any time of the year except the  
19 time when the Game Department has lead jurisdiction,  
20 would that regulation or season be lawful in your  
21 view?

22 A. The Department of Fisheries would not have the  
23 authority to establish a season for the taking of  
24 steelhead. They would have the authority to  
25 establish a season for the taking of salmon.

- 1           Again, I'm speaking for Fisheries, but this is my  
2           opinion on their laws.
- 3           Q.    If they established a season for the taking of  
4           salmon during the period I have outlined and steel-  
5           head were incidentally taken in that fishery, ac-  
6           cording to your understanding of the law, could  
7           they be commercially marketed from outside Indian  
8           reservations?
- 9           A.    No.
- 10          Q.    Is there any provision of State statute or Game  
11          Department regulation which supports that view?
- 12          A.    The fact that steelhead are a game fish and cannot  
13          be taken in a net.
- 14          Q.    If the Game Department or the Department of  
15          Fisheries is aware of net in a fishery primarily  
16          designed to take salmon outside reservation boun-  
17          daries and they are aware that net is capable of  
18          taking steelhead and in fact does take steelhead  
19          incidentally, would that net be confiscated and its  
20          operator arrested?
- 21          A.    Probably not unless they were taking primarily  
22          steelhead. I think, Mr. Pierson, you have to look  
23          at the fact that I know of no place as a season  
24          set even in the Columbia River primarily for steel-  
25          head. There you have a classic example of runs

1 coming in intermingling, and in this intermingling  
2 steelhead are taken, precautions are taken in many  
3 of the seasons to allow an escapement of steelhead  
4 on size and things like that. They are commercially  
5 sold down there. When they are taken commercially  
6 in such fisheries as the Fisheries Department sets  
7 within Puget Sound, the steelhead are released by  
8 the fishermen. If it reaches a stage where steel-  
9 head in any of these fisheries become the predominant  
10 fish, Fisheries has closed the seasons.

11 Q Looking at the Nisqually River for a moment, is it  
12 accurate to say that the primary and lead jurisdic-  
13 tional role vests in the Game Department on Decem-  
14 ber first?

15 A That's correct.

16 Q And isn't it true that during late November of  
17 every year there is a very large salmon chum run  
18 in that river?

19 A As my understanding there is a dog run in the river  
20 or a chum run that comes in November and December.

21 THE COURT: Do you use "dog" and "chum"  
22 to mean the same thing?

23 THE WITNESS: Yes. I will refer to it as  
24 chum. I'm sorry.

25 THE COURT: That's perfectly all right.



- 1 I just wanted to be sure I understood you.
- 2 Q (By Mr. Pierson) Do you understand the peak of that  
3 chum run occurs after December first in the  
4 Nisqually River?
- 5 A I would suspect Fisheries would have better infor-  
6 mation. It would be my calculated opinion that it  
7 probably does. It is a late run of fish.
- 8 Q Are you aware that the principal, if not the only  
9 fishery on the Nisqually River chum run is an  
10 Indian net fishery?
- 11 A I believe this is correct.
- 12 Q And are you aware that the Department of Fisheries  
13 has closed its season for Indians outside reserva-  
14 tion boundaries on that chum run on November 20  
15 of every year?
- 16 A I'm not aware of the exact date, but it is closed  
17 before December.
- 18 Q Are you aware of any facts indicating that the  
19 catch by nets in late November on the Nisqually  
20 River is primarily chum and only secondarily  
21 steelhead?
- 22 A I would presume that as you get into November, you  
23 would have primarily chum salmon. As you get into  
24 December, your steelhead run would start to build  
25 up.

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I have discussed this with members of the Nisqually Tribal Council and discussed possibilities with members of the Nisqually Tribal Council of -- from our standpoint, and I'm not speaking for Fisheries in any way, the possibility of a gill net season if the net size is large enough to allow escapement of steelhead through it going into the first several weeks, first couple of weeks of December. Predicated on the fact that if this is a viable season, if the Fisheries can set this, if the run can stand this take and if it allows escapement through the net of steelhead, we would consider that from our standpoint.

ETI

(Continued on next page.)

1 Q. Would that be an off reservation fishery you are  
2 speaking of?

3 A. I am only speaking of a season that the  
4 Fisheries Department decides whether there is  
5 sufficient fish to allow -- there is a sizable  
6 take, I am aware, of chum salmon on the Nisqually  
7 Reservation at this time. Whether it can stand  
8 the larger fisheries or not, I am not sure.

9 Q. The question is, this discussion that you had with  
10 members of the Nisqually Tribal Council.

11 A. Yes.

12 Q. Would that be off reservation fishing?

13 A. Yes, because we don't have any jurisdiction and  
14 don't attempt to tell them what to do on the  
15 reservation.

16 Q. What tribal members did you speak with?

17 A. I spoke with the Chairman of the Tribal Council,  
18 which was --

19 Q. Hal Ikebe.

20 A. Hal Ikebe that has been killed in a car accident.  
21 His mother Mildred was there. I believe Fred Kover  
22 was there.

23 Q. Fred who?

24 A. Kover, I believe that was his name. I am speaking  
25 from memory now.

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THE COURT: How would that be spelled?

THE WITNESS: I think it is C-o-v-e-r

Your Honor, and I believe his wife was Secretary to the Tribal Council and she was there at that meeting.

Q. According to your understanding of the regulating mesh size, would the mesh size which you had in mind for passing steelhead also pass chum?

A. In discussing this and discussing seven and a quarter or seven and a half inch mesh size, one gentleman stated that with this type of regulation he could fish drifts on the lower Nisqually with set nets and take the males at that location because they would not go through the net. He felt that some of the females would with steelhead because of the size involved. He also indicated that he would be able to pick these up on the reservation.

Q. When you say he would fish the drift with a set net, you don't mean he is drift net fishing?

A. He would use a gill net and set it in the river, set net, if you understand what I mean by set net.

Q. A set gill net?

A. This is right.

Q. Would it be accurate to say, Mr. Crouse, that at least as to the chum run on the Nisqually River

1 and the steelhead run in November and December you  
 2 have recognized as the Department of Game that it  
 3 is possible to regulate an off reservation Indian  
 4 net fishery to conserve the steelhead resource?

5 A We have discussed with them only from our stand-  
 6 point of steelhead trout, the possibility of further  
 7 off reservation fisheries that establish, by  
 8 fisheries for dog salmon, and possible ways in  
 9 this case for them to take the salmon without taking  
 10 steelhead. We did not and we cannot and we will  
 11 not commit Fisheries to any type of season because  
 12 they have the conservation, the have the expertise  
 13 in this field, and this was not part of the conver-  
 14 sation.

15 Q What I am really talking about, Mr. Crouse, is your  
 16 conversation with the Tribal Council and your under-  
 17 standing. I am just saying, doesn't your discussion  
 18 show that you as the Director of the Game Department  
 19 recognize that at least as to chum and steelhead  
 20 runs on the Nisqually River in November and December,  
 21 that the State can regulate an off reservation  
 22 Indian net fishery to conserve the steelhead resource?

23 A The proof of this would be in the season. We dis-  
 24 cussed the possibility, we discussed this, in all  
 25 due respect, experimentally with members of the

1 Tribal Council, and we discussed it only as an idea.  
2 Now, whether the Tribal Council members would even  
3 be interested in that, I do not know. They did not  
4 request us to make it.

5 Q I am going to ask the question just one more time,  
6 Mr. Crouse. I am going to get your understanding  
7 and I am trying to find out if your discussions with  
8 the tribe don't show that as the Director of the  
9 Game Department you recognize that at least as to  
10 the chum and steelhead runs in the Nisqually River  
11 in November and December, it is possible and feasible  
12 to regulate an off reservation Indian net fishery  
13 to conserve the steelhead run.

14 A What my discussion did, and the purpose of my  
15 discussion was --

16 THE COURT: Mr. Crouse, excuse me, I think  
17 it will help if you will answer that question cate-  
18 gorically yes or no if in your judgment that is  
19 possible, and then add any explanatory note that  
20 you wish. I often tell witnesses about this because  
21 they don't know that they can do that. It is  
22 permissible for any witness, provided he answers  
23 the particular question, to add any qualification  
24 or addition that he thinks appropriate to fully and  
25 fairly answer the question.

1 THE WITNESS: Yes, would you read the  
2 question back?

3 (The last question was read by  
4 the Reporter.)

5 A. The answer would be yes.

6 Q. Would you like to explain your answer further?

7 THE COURT: You don't have to ask for  
8 permission to add to it or not as you please.

9 A. Thank you, Judge. In the first place --

10 THE COURT: Off the record.

11 (Off the record discussion.)

12 A. (Continuing) The steelhead run in the Nisqually  
13 River normally is not as strong the first of  
14 December as it is in the middle of December and  
15 later on. The Nisqually River is unique to my know-  
16 ledge from the standpoint of having a substantial  
17 run of dog salmon and this was the purpose of our  
18 investigating whether it was possible to not take  
19 steelhead and still allow a fishery, a net fisheries  
20 for dog salmon on which is an unusual river in the  
21 State because of this late run, for the Nisqually  
22 Tribe. Again, I qualify all of my remarks, as I  
23 was not talking conservation, which is a Fisheries  
24 prerogative.

25 Q. With respect to your meeting on October 2, 1972,  
were you aware of the facts about the chum and

1 steelhead runs on the Nisqually, and timing of them?

2 A I don't recall that my thoughts have carried that  
3 far at that time.

4 Q How about August 20 of this year?

5 A August 20 of this year I was aware of it.

6 Q Can you explain, please, Mr. Crouse, why at that  
7 August 20 meeting there was no mention of this  
8 possible off reservation Indian net fishery on the  
9 Nisqually?

10 A Yes, because it is not a net fishery for steelhead  
11 and would not be considered as such and would not  
12 be set by the Game Department or Game Commission.

13 Q Did you advise the Game Commission of the possibility  
14 of such a net fishery?

15 A No, I could see no reason to advise them. Frankly,  
16 I do not know even if Fisheries feels the run is  
17 strong enough to carry such a season.

18 Q Have you inquired?

19 A I have not to date. I have discussed it with the  
20 Tribal Council and we had at that time talked about  
21 the possibility of going over it with Fisheries.  
22 Whether they have or not, I do not know.

23 Q Mr. Crouse, do you recall whether at any time in the  
24 past you or any member of your staff has asked any  
25 of the plaintiff tribes in this case what they



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think would be a viable and reasonable off reservation net fishery during the period that your department has primary jurisdiction of the rivers?

A. No, I did not. If I could explain that farther, the instance on the Nisqually River is based on the information I have received from my knowledge that this is a unique late run of dog salmon, and this is why we were talking, and it came up in discussions with the Tribal Council. I do not know even if they were interested in it.

(Continued on next page.)

1 Q Looking, Mr. Crouse, at your testimony on page 14 and  
2 beginning at line 24 --

3 A Just a second, which exhibit is that?

4 Q G-14.

5 A Which line?

6 Q Page 14.

7 A Yes.

8 Q Beginning at line 24, you are asked, "How is the Game  
9 Department hatchery program financed?" And I believe in  
10 response to that you mentioned as far as federal funding  
11 or funding that goes through the federal treasury, the  
12 Dingell-Johnson and Pittman Robertson funds. To your  
13 knowledge, are those all of the federal funding acts  
14 from which the Department of Game receives money?

15 A No, we do not -- was your question predicated on the  
16 Fisheries money or all monies?

17 Q My question was whether the Game Department receives  
18 from the federal treasury any money for any part of its  
19 budget that would be besides that coming under the  
20 Dingell-Johnson and what you call the Pittman-Robison  
21 Act?

22 A Oh, yes.

23 Q What other acts?

24 A I don't know if I can really recall all of them. We  
25 receive of course mitigation funds. I think these have

1           been discussed. There is an Anadromous Fish Act that  
2           provides 50 percent funding to the state that we  
3           receive some money under.

4                       We receive money for enforcement now under  
5           the Marine Mammals Act, or under agreement with the  
6           Federal Government on that to carry out their  
7           enforcement responsibilities in this area.

8       Q     Let's talk if you will about the Anadromous Fish Act.  
9           Isn't it true that funding under that act has been  
10          utilized for construction and maintenance of your  
11          steelhead hatcheries?

12      A     For construction and operation in the amount of 50  
13          percent. I believe there is a restriction on those  
14          funds that they are not to be used in the maintenance.

15                       I am not sure of that. There is a restriction  
16          from different ways on all federal funds.

17      Q     Okay, referring to what you term on page 16 as the  
18          Pittman-Robison Act, would that be the Pittman-  
19          Robertson Act that has to do with the tax on game,  
20          hunting equipment?

21      A     Yes, the Pittman-Robertson act relates entirely to  
22          wildlife, and there is a restriction that none can be  
23          used for fisheries.

24      Q     So none of the funds from that Act are used for your  
25          steelhead or anadromous fish programs?

1 A No, they are not.

2 Q Looking over at page 17 and 18, Mr. Crouse, beginning  
3 at the bottom of your testimony, the question is,

4 "Other than commercial taking of steelhead  
5 on Indian reservations, is there any other  
6 commercial taking of steelhead of which you are  
7 aware?"

8 You indicate there is no commercial taking of steelhead  
9 in the State of Washington, and I take it by that you  
10 mean outside Indian reservations?

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(Continued on the next page.)

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1 Q Then you indicated the State of Oregon, that there are  
2 Steelhead taken in the State of Oregon, commercial  
3 catch in British Columbia, and to a lesser degree, in  
4 the Alaskan waters.

5 And I believe at page 20 of your testimony,  
6 at lines 7 through 15, especially lines 12 through 15,  
7 you state the State of Washington, because of the number  
8 of rivers it has flowing into the ocean has as high  
9 a Steelhead run in total numbers as any other geographical  
10 area of comparable size where Steelhead are found.

11 Now, isn't it accurate to say, Mr. Crouse  
12 that at least three jurisdictions having a smaller  
13 source of Steelhead to which you have alluded in your  
14 testimony allow commercial take of that species?

15 A Yes. Also these jurisdictions, the steelhead are taken  
16 incidental to seasons that are set for salmon. I know  
17 of no specific steelhead that are taken in the area  
18 that I am aware of. The State of Washington does have  
19 the highest steelhead population.

20 In fact, I am extremely pleased that we have  
21 this. In the late twenties and early thirties, I think  
22 probably steelhead were about to go the way of the  
23 Buffalo for the same basic reasons, commercialization  
24 and destruction of the habitat, and I think the first  
25 corner was turned on this when the legislature in their

1 wisdom put them on a game fish list, and prohibited the  
2 commercialization of them. This is one reason that the  
3 State of Washington not only has the highest number  
4 of steelhead, but probably has the most information,  
5 and it has done more for steelhead than any other  
6 state, because this is the basis of the population.

7 Q In the other three jurisdictions with commercialization  
8 of steelhead, are the steelhead taken during the peak  
9 of the winter runs?

10 MR. CONIFF: I object to the form of the  
11 question. The witness has testified that the other  
12 jurisdictions, to the best of his knowledge, do not  
13 allow commercialization of steelhead, rather the seasons  
14 are set for salmon and only incidental at that time are  
15 steelhead taken.

16 THE COURT: He has made that clear, but you  
17 might reframe the question.

18 Q (By Mr. Pierson) Of the incidental take in these other  
19 jurisdictions of steelhead, are they commercially  
20 marketed?

21 A Yes, they are commercially marketed.

22 Q And of those commercially marketed steelhead, are any  
23 of them taken during the winter run of steelhead  
24 to your knowledge?

25 A The only way that I would be sure of, and the only place

1 steelhead are taken commercially in Oregon is in the  
2 Columbia River, and that would be some limited take  
3 when the spring Chinook season first opens on the  
4 Columbia River.

5 Q Look at U.S.A. 36.

6 THE COURT: Do you want me to hand this one  
7 to the witness?

8 MR. PIERSON: Mrs. Waterman has it, your  
9 Honor.

10 MR. CONIFF: I'll object to any use of  
11 USA-36, which consists of the written testimony of Mr.  
12 Heckman, inasmuch as the Fisheries and Game objections,  
13 which are just being noted now are not -- have not  
14 been ruled upon by the Court.

15 THE COURT: Well, call attention to the  
16 particular portions you expect to have him look at,  
17 then I will rule.

18 MR. PIERSON: It's page 11, your Honor, and  
19 your Honor, I will have it just identified, and I want  
20 Mr. Crouse to be able to look at some figures which Mr.  
21 Heckman has attempted to gather as to the steelhead  
22 taken in the Columbia River.

23 THE COURT: He may do that, then put a  
24 question to him.

25 MR. CONIFF: I do have an objection noted to

1 that entire line of testimony for several pages, your  
2 Honor.

3 THE COURT: Well, I just wanted to find out  
4 what the question is. I don't know what it is yet, but  
5 before he answers, you will have an opportunity to  
6 present your views. I want Mr. Pierson to state the  
7 question, have him do what he has been asked to do,  
8 look at those figures, and then after he has looked at  
9 them, put a question.

10 Q (By Mr. Pierson) Mr. Crouse, I am referring to page  
11 11 and 12 where there are lists and figures purporting  
12 to indicate through the years '68, '69, '70 and '71  
13 for summer steelhead, '67-'68, '68-'69, '70-'71,  
14 '71-'72 figures for the take of winter steelhead, these  
15 are divided into the commercial take and the sport take.

16 THE COURT: At the moment you are just to  
17 look at them and not respond to them.

18 MR. PIERSON: My question would be directed  
19 to whether these figures are either directly or  
20 precisely conforming to your understanding of the take  
21 of steelhead as between sports and commercial on summer  
22 and winter steelhead in the Columbia River.

23 MR. CONIFF: I would object to the question.

24 THE COURT: I think he can answer that. He  
25 has looked at them.



1                   The only question, Mr. Crouse is whether  
2                   or not they are substantially what you understand to be  
3                   the approximate take of steelhead.

4           Q        (By Mr. Pierson) I confine it within the Columbia  
5                   River system as it flows between Washington and Oregon.

6                   MR. CONIFF: Well, your Honor, I do feel  
7                   this procedure --

8                   THE COURT: Show him the figure and ask him  
9                   if it conforms to what his understanding is. He can say  
10                  yes or no.

11                  THE WITNESS: Can I ask a question?

12                  THE COURT: Certainly, of course.

13                  THE WITNESS: You are talking about the winter  
14                  take of steelhead in the Columbia River between Oregon  
15                  and Washington?

16           Q        (By Mr. Pierson) Well, the two lists there, first the  
17                   one on page 11, is the summer steelhead run.

18           A        I see the two lists, one summer and one winter steelhead.

19           Q        Right.

20           A        You are talking about the Columbia River between  
21                   Washington and Oregon, my answer would be no, that I  
22                   don't think these figures are correct, from the best  
23                   of my knowledge.

24           Q        Can you give me some idea how you think they are in  
25                   error?

1 A Yes. Looking at the winter run of steelhead, I do not  
2 concede that 92,000 steelhead were taken out of the  
3 main stem of the Columbia River, winter run fish,  
4 between Oregon and Washington.

5 Q Are there any other figures there that you think are  
6 wrong?

7 A No, I think the commercial take indicates what I said  
8 in my testimony, that the commercial take of winter  
9 run steelhead is incidental to the take of salmon. I  
10 think I can probably straighten out where you are  
11 wrong on this, if I could do this.

12 Q Please do.

13 THE COURT: He wants your view about those  
14 figures, so you can say anything you want to about them.

15 THE WITNESS: I would suspect that the  
16 number of sports taken fish that you list as being taken  
17 from the main stem of the Columbia River are grossly  
18 in error for the main stem of the Columbia River, and  
19 without doubt reflected the take in tributary streams  
20 that come into the Columbia River, and not the Columbia  
21 River itself.

22 Q All right. And are we talking about tributary streams  
23 in Washington and Oregon?

24 A This I do not know.

25 Q If that included the tributaries in Washington and Oregon

1 would that conform with your understanding of these  
2 figures?

3 A I would think that they would probably be ballpark  
4 figures. I am not familiar enough to say yes or no  
5 off the top of my head.

6 Q Looking at page 11 at the summer steelhead figures, do  
7 those look in line or in the ballpark as far as your  
8 understanding is concerned?

9 MR. CONIEFF: Your Honor, I would like to  
10 renew my objection and state the grounds, if I might.

11 THE COURT: Yes, of course.

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13 MR. CONIEFF: The objection to this whole line  
14 of testimony is, and the data to which Counsel is asking  
15 the witness to refer, that is objected to, which has  
16 not been directly communicated to counsel as yet because  
17 we did not receive this testimony until a day or two  
18 ago, it is objected to on the grounds that the Columbia  
19 River and the Frazier River, there is a whole series of  
20 data and a series of questions and answers concerning  
21 the Frazier River data and the Columbia River data, and  
22 our objection is on the grounds of relevancy.

23 Our objections are simply that the Frazier River  
24 and the Columbia River as rivers are not comparable at  
25 all in any biological sense to any river within the  
case area. We are talking about extremely large bodies

1 of water with tremendous CFS and tremendously large  
2 runs of fish as contrasted to the size of the runs  
3 in both salmon and steelhead into the relatively smaller  
4 watersheds of the Puget Sound with which the Court is  
5 dealing in terms of subject matter of this case.

6 Therefore, I would like to state our objections,  
7 which I believe I am authorized to state, on behalf of  
8 the Department of Fisheries also, to any further  
9 examination of this witness on the Frazier River informa-  
10 tion or the Columbia River information.

11 Perhaps my colleague would like to expand  
12 on my comments with regard to salmon.

13 MR. MCGIMPSEY: Your Honor, Mr. Heckman's  
14 testimony regarding the Frazier River and the Columbia  
15 River deal largely in steelhead and not in salmon, so  
16 I really can't comment more than what Mr. Coniff has  
17 said other than to advise the Court that these are the  
18 two largest rivers on the whole entire west coast, and  
19 they are no-wise comparable factually to the rivers  
20 of this lawsuit, and I think it would be error to allow  
21 any analogies to be drawn from the statistics and  
22 facts of those rivers and be applied to the rivers in  
23 the case area.

24 THE COURT: This poses a problem that arises  
25 in almost every case, namely, relevance. In some

1 instances you can determine relevance right off the  
2 bat, the run in the Mekong River might be so remote,  
3 and the statistics so unreliable, it would be  
4 irrelevant. But in this instance, I can't make a  
5 judgment about relevance until I have heard most, if  
6 not all, of the evidence in the case.

7 There may be, for all I know, evidence in  
8 the case which will support a finding of relevance,  
9 and that would make it admissible, even though I don't  
10 agree with it. Admissibility is one thing, relevance  
11 is another thing, and the judge is bound to admit  
12 any evidence that may be relevant and withhold the  
13 decision of how relevant, if at all, until he has heard  
14 all the case.

15 I will have to make this same kind of a  
16 ruling probably, in other instances, and that is why I  
17 have taken the time to explain the ruling. I don't  
18 mean by admitting evidence to indicate in the slightest  
19 that I believe any of it.

20 I have admitted tons of evidence that at the  
21 time it was admitted it didn't sound very credible or  
22 acceptable to me. But I wait to make that kind of a  
23 judgment until I have heard all the evidence, and that's  
24 what I do in this case.

25 As far as the witness' answering with respect

1 to these figures, it's only to the extent that he feels  
2 that these figures in any way are, as the saying goes,  
3 ballpark figures. I have heard that figure of speech  
4 used before, you understand that, don't you?

5 THE WITNESS: Yes.

6 THE COURT: You are not required to answer,  
7 and if you don't know, just say, "I don't know." If  
8 you have some idea from whatever sources of information  
9 you have that enables you to answer the question, answer it.  
10 Go.

11 Q (By Mr. Pierson) There are summer run steelhead in  
12 some of the rivers in in the State of Washington  
13 within the case area of this case, are there not, Mr.  
14 Crouse?

15 A Yes, there are.

16 Q And looking at page 11 of USA-36, that purports to give  
17 figures for summer steelhead in the Columbia River  
18 and its tributaries within Washington and Oregon. To  
19 your knowledge, if you know, are those ballpark figures  
20 for the relative takes of commercial fishery and the  
21 sports fishery?

22 A The sports take I would be reluctant to make a comment  
23 on, the commercial take, I believe is ballpark figures.

24 Q According to your understanding of the Columbia River  
25 system and the take of summer steelhead, would you agree

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that the commercial take of steelhead -- summer steelhead is at least as much, if not more than the sport take?

A Are you talking about the sport take again in the Columbia River?

(Continued on the next page.)

ET3

- 1 Q On the Columbia River and its tributaries within  
2 the States of Oregon and Washington?
- 3 A Not Idaho? I don't know.
- 4 Q Looking at page 12 of USA-36 below the figures for  
5 winter steelhead there is a sentence which  
6 as between the two, and it says between 17,000  
7 and 24,500. Is that a ball park figure, if you  
8 know?
- 9 A I don't know. I would have to look up the record.
- 10 Q Referring, Mr. Crouse, to the meetings of October  
11 2, 1972 and August 20, 1973, where the Game Depart-  
12 ment recommended and the Game Commission agreed to  
13 continue the prohibition of Indian net fishing out-  
14 side reservation boundaries during the primary  
15 jurisdictional time of the Game Department, accord-  
16 ing to your understanding of the term "closure"  
17 would that ruling of the Game Commission be a season  
18 closure as to net fishing for steelhead?
- 19 A No, it is an entire closure. The Game Department  
20 does not authorize any net fishing for steelhead.
- 21 Q But it is a closure?
- 22 A Well, there is no way that I know that the Game  
23 Commission can open a season for net fishing on  
24 steelhead other than under the present Puyullap  
25 decision as it outlines it. Certainly, in accordance



1 with the present and existing statute that we  
2 read a while ago, this is prohibited by statute,  
3 not by State Commission regulations.

4 Q. Are you saying now, Mr. Crouse, that under no  
5 circumstances could you authorize an Indian net  
6 fishery for steelhead outside the reservation  
7 boundaries because of the prohibition of State  
8 statute?

9 A. With the exception of any Court order that comes  
10 up, and we have the advice of our attorney on that.

11 Q. How about the May 4, 1972 decision of the Washington  
12 State Supreme Court in the Puyallup case?

13 A. This is the one I referred to that is outside of  
14 that.

15 Q. Would you say that on October 2, 1972 and August  
16 20, 1973 that you were trying at least in some  
17 instance to follow the directives of that decision  
18 in the Washington State Supreme Court?

19 MR. CONIFF: I object to the form of the  
20 question because he is indicating that the Game  
21 Department is only attempting to follow in some  
22 instances the rulings of the Supreme Court in the  
23 State of Washington.

24 Q. Let me strike the words "some instances" and just  
25 ask him if during those meetings when you were

1           considering Indian net fishing off reservation you  
2           were attempting to follow the May 4, 1972 decision  
3           of the Washington State Supreme Court?

4    A.    We attempted to follow these decisions and we  
5           attempted to follow them on our judgment as to  
6           what they were and on the advice of our attorney.

7    Q.    And would it be accurate to say according to your  
8           understanding of the term "closure," that the  
9           result of those meetings was a closure of Indian  
10          net fishing outside reservation boundaries?

11   A.    Would you clarify that?

12   Q.    I want to know whether you would call the decision  
13          which prohibited Indian fishing outside reservation  
14          boundaries during the period of time the Game  
15          Department has primary jurisdiction of closure as  
16          you understand that term.

17   A.    The season was closed and it was not opened by the  
18          Game Commission.

19   Q.    Is your answer yes?

20   A.    Yes.

21   Q.    All right. Moving to that October 2nd meeting of  
22          1972, do you recall it being stated on behalf of the  
23          Game Department that the Game Department had no  
24          idea of whatever, where the Indian tribes usual  
25          and accustomed fishing places are?

1 A. Certainly I can't say that I can say where they  
2 are. Your question would be then, yes, we do not  
3 have any idea where they are.

4 Q. And you recall that being stated at the October  
5 2, 1972 meeting?

6 A. No, I don't.

7 Q. PL-37, Mr. Crouse. Unfortunately - Mr. Crouse,  
8 these are minutes of the October 2nd meeting which  
9 are in evidence as PL-37- and unfortunately they  
10 are not numbered by page. You can take and count  
11 from the back page. It is one, two, three, four,  
12 five, and the first complete paragraph in that  
13 page begins, "Mr. Coniff pointed out that" -- do  
14 you have that?

15 A. Yes, that is the second paragraph.

16 Q. Yes, and the second sentence reads: "As a practical  
17 matter, we simply do not know where these claimed  
18 usual and accustomed grounds are." Is that accord-  
19 ing to your understanding of what was stated to the  
20 Game Commission?

21 A. Was that in this paragraph you just referred to?

22 Q. It was the second sentence, I believe, Mr. Crouse,  
23 beginning: "As a practical matter ..."

24 A. I don't read it.

25 MR. PIERSON: May I approach the witness,

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Your Honor?

THE COURT: Yes, you may.

THE WITNESS: Maybe I am on the wrong page.

MR. PIERSON: You might be.

THE WITNESS: Oh, yes.

Q. The question was, Mr. Crouse, whether that sentence conforms with your memory of what transpired at that meeting.

A. These are verbatim minutes, and I am confident they are correct.

Q. All right, and you were at the meeting, were you not?

A. Yes, I was.

Q. Now, do you know of any time in the history of the Department of Game within your experience when the Department has attempted to determine where the Indians' usual and accustomed fishing places are?

A. No, we have not.

Q. Have you attempted to do so since October 2nd in that statement of the Game Commission?

A. No.

(Continued on next page.)

ET4t1

1 Q I would like to turn for a moment, Mr. Crouse, to page  
2 93 of your deposition, and it is an 8x11" copy you have  
3 there.

4 A I don't think this is it.

5 MR. PIERSON: I am finding, Mr. Crouse, that  
6 I do not have the reference on my copy, and with the  
7 Court's indulgence, I guess I am going to have to move  
8 on. I think I might come back to it later.

9 THE COURT: Very well.

10 Q Looking at page 20 of your written direct testimony, Mr.  
11 Crouse, lines 2 through -- I guess it is just line 2  
12 where you are speaking of the four levels of management,  
13 and you say that steelhead have gone through all except  
14 the final level of management?

15 A Yes.

16 Q In the view of the Department of Game, is it absolutely  
17 impossible to regulate the Indian net fishery off  
18 reservation boundaries where the steelhead resource  
19 is as it now exists?

20 A Yes, it is.

21 Q Why?

22 A It is based on the fact that, number one, the life  
23 history of the steelhead, the only place they are taken  
24 is in a river. There is no fishing before it gets there  
25 because of their limited numbers, and they are in limited

1 numbers, as anadromous fish are, because steelhead have  
2 the capability of biting or taking a lure, and it is  
3 the only place that they are taken by sports fisheries.

4 Because of the limited numbers, and because  
5 of the fact that a gillnet fisheries, or net fisheries  
6 in the river on this limited number of fish, if it was  
7 to be a fisheries of any magnitude, to be a viable and  
8 desirable fisheries for those that are doing it, would  
9 overfish the stocks or eliminate the recreational fishing.

10 Q Now, as a viable and reasonable fisheries, you have no  
11 idea of what that might be in the minds of the Indian  
12 tribes, do you?

13 A I don't know of any commercial fishing that -- first,  
14 no, I do not know of any commercial fishing, fishing  
15 that is done for sale of fish that is not done of a  
16 magnitude to give a return to the person that is doing  
17 it, and this would be my criteria in judging what a  
18 viable or meaningful gillnet fishery season would be.

19 Q Isn't it accurate to say that even including the Indian  
20 net fisheries for steelhead on reservations in the  
21 State of Washington, you have no information available  
22 to you indicating that any such net fishery has destroyed  
23 the steelhead run?

24 A They have not totally destroyed them, but certainly this  
25

1 reduces the other catch, and certainly we recognize that  
2 there is a commercial fisheries for steelhead on Indian  
3 reservations.

4 Q You say "reduce the catch." You mean reduce the sport  
5 catch?

6 A It certainly does.

7 Q Has the resource been preserved?

8 A We have preserved it, yes.

9 MR. PIERSON: I would like at this time, your  
10 Honor, to offer an exhibit which has been objected to.  
11 It is USA-42.

12 THE COURT: I have it.

13 MR. PIERSON: I think Mr. Coniff has an  
14 objection to it.

15 THE COURT: Yes, I understand.

16 MR. CONIFF: I do not feel that speeches  
17 made to the legislative committees, even though they do  
18 deal with the subject matter with which the Court is  
19 confronted, have any relevancy to the issues which are  
20 before the Court. I do not feel that it is competent  
21 evidence which would have any weight, be entitled to any  
22 weight by any court. I feel if we began to move into  
23 this legislative arena, if you will, that we will be  
24 going far afield in the course of this trial.

25 Therefore, I submit that what has been marked

1 for identification as USA-42, which consists of a four  
2 page document by Director Crouse to the chairman and  
3 members of the Joint Committee on Natural Resources of  
4 the state Council of REpresentatives and the State  
5 Senate should not be permitted to come into evidence.

6 THE COURT: This appears to be a statement  
7 by Mr. Crouse in his official capacity, and accordingly,  
8 it is possible that some portions of the text may be  
9 admissible. If you will indicate the portion that you  
10 intend to call to Mr. Crouse's attention without  
11 reading it, just indicating the line and the portions,  
12 I will then rule upon it.

13 MR. PIERSON: Your Honor, I have really two  
14 purposes in offering the exhibit. The first is to ask  
15 Mr. Crouse about some portions, and then to offer the  
16 exhibit as an accurate recitation of his statement to  
17 the legislature in full.

18 If I might speak to the objection, this  
19 purports to be a representation by the Director of  
20 the Department of Game on a bill very close to this case,  
21 and it has to do with Indian net fishing for steelhead.

22 In his presentation Mr. Crouse purports to  
23 give the position of the Department of Game. More  
24 importantly in this case, the United States has sued,  
25 not only the Department of Game and Fisheries. As a



1 matter of fact, they are intervenors. They sued the  
2 State of Washington, and by that have challenged the  
3 statutes.

4 It is evidence in this case that the statutes  
5 relative to the Game Department jurisdiction are being  
6 defended by the Game Department. That doesn't make it  
7 irrelevant to bring into this case the question of what  
8 the legislature has considered from the Game Department  
9 in passing on legislation relative to the rights of  
10 the Indians. I think it is very closely relevant, and  
11 may be the only evidence we have in this case of what  
12 information the legislature has had when it has passed  
13 a laws absolutely prohibiting that fishing by Indians  
14 outside reservation boundaries.

15 MR. CONIFF: Your Honor, there was a bill  
16 which was considered by the legislature, which this  
17 statement has to do with.

18 I do disagree with Mr. Pierson that the  
19 only representations made to the Senate and the House  
20 committees were made by Director Crouse or representatives  
21 of the Department of Game.

22 I can advise the Court for a fact that a  
23 number of attorneys who are sitting at counsel table,  
24 not Mr. Pierson personally, but other attorneys were  
25 present, made statements, a number of representatives of

1 Indian tribes, and if we begin to move into all of the  
2 matters which the legislature may have considered in  
3 not passing the bills which form the subject matter  
4 of his remarks, we are going far afield.

5 The legislature, if it amends the law and  
6 changes the law regarding the classification of steelhead  
7 as a game fish, and amends the law and allows commercial-  
8 ization on the part of Indians or other people, we have  
9 no choice if the Department, but to follow that law  
10 and administer and enforce it, to the best we are able  
11 to do.

12 What they are trying to inject into this  
13 lawsuit is the political arena, the matters which were  
14 called to the attention and which were presented for the  
15 consideration, if you will, of the state legislators.

16 As I have stated to the Court this bill, this  
17 proposal which did come up and was introduced and formed  
18 the subject matter of these joint committee hearings  
19 of which there were more than one, will of necessity  
20 in rebuttal require us, I believe, to come in with some  
21 sort of characterizations of testimony, at least  
22 regarding the entire transactions, so that your Honor  
23 has the full picture of what the legislature has before  
24 it in rejecting the proposal that Mr. Crouse spoke against.  
25

ET4

1 MR. PIERSON: Your Honor, this just one  
2 final answer to Mr. Coniff, I think his last state-  
3 ments do not argue against the relevancy but argue  
4 against the volume of testimony he may have to  
5 present to explain his side of the issue. I think  
6 if admitted, this item of evidence will show that  
7 the legislation being considered would allow Indian  
8 net fishing over reservation boundaries, and Mr.  
9 Crouse with the Department of Game represented as  
10 an expert or somebody knowing about the conserva-  
11 tion issue to the legislature that the bill should  
12 not be passed, the bill was not passed, and it's  
13 very important, I think, in this case to show that  
14 relationship, one that exists between the Game  
15 Department and the State Legislature as to game  
16 fishing laws.

17 Secondly, the State with the position of the  
18 Department of Game vis-a-vis the State statutes  
19 regarding Indian net fishing is --

20 MR. CONIFF: It's not my understanding  
21 the purpose of this lawsuit and the issues as framed  
22 by the initial pleadings or by the pretrial order  
23 was to inquire into the minds of State Legislators.

24 THE COURT: The issue of Indian net fishing  
25 is clearly in this case, I cannot judge the

1       admissibility of this particular article without  
2       reading it. I will read it with a view of deter-  
3       mining whether there be anything in it at all  
4       that is relevant to the case. I think if you will go  
5       forward with something else for now while I do it,  
6       I will try to do it at intervals and get at it as  
7       promptly as I can.

8               MR. PIERSON: Very well, Your Honor. I have  
9       to say, Your Honor, that was going to be the last  
10       part of my examination.

11               THE COURT: All right, stay put a minute  
12       and I will scan it.

13                               (Brief pause.)

14               THE COURT: I think it is admissible.  
15       The objection is overruled.

16       Q       (By Mr. Pierson) Mr. Crouse, looking at the first  
17       page of that exhibit, would it be accurate to say  
18       first as a general matter that you described the  
19       nature of the legislation over on the second page --

20               THE COURT: I take it I need not mention  
21       again that admitting it in any manner indicates that  
22       I accept it for any purpose whatever. I may con-  
23       clude to disregard it entirely in the end. But at  
24       the moment I think it is admissible.

25               MR. PIERSON: Very well, Your Honor.

1 Q (By Mr. Pierson) Just as a general document itself,  
2 Mr. Crouse, I believe over at the top of page 2  
3 you indicate to the legislature your understanding  
4 of the act, and if I may, I will read that, "As I  
5 interpret this proposed act, it would allow persons  
6 of native American ancestry to take fish and wildlife  
7 throughout the State without restriction by the  
8 State."

9 Is that still your understanding of what that  
10 legislation would provide?

11 A I haven't reviewed it since this time, so this  
12 would be correct, yes.

13 Q Back to page 1, down maybe six, seven lines of the  
14 second paragraph you say, "I have often been asked  
15 and sometimes demanded to abdicate these respon-  
16 sibilities, and those are the responsibilities to  
17 the legislators and citizens of the State of Wash-  
18 ington for preserving, protecting, and perpetuating  
19 wild animals, wild birds, game fish in the State  
20 of Washington, to abdicate responsibilities to  
21 special interest groups for their exclusive commer-  
22 cialization of the State wildlife resources."

23 Is that accurate as you read it, Mr. Crouse?

24 A Yes. I would say you have done some paraphrasing  
25 or some other language in there that was not in here.

1 THE COURT: He just took the words from  
2 the preceding sentence.

3 Q (By Mr. Pierson) It goes on to say, "Directors  
4 before me have experienced similar requests and  
5 demands. Most of these have come from Indian people  
6 or from groups representing them. For obvious  
7 reasons, superior rights cannot be granted to any  
8 special groups of citizens under existing legisla-  
9 tive statutes."

10 Mr. Crouse, with that in mind and that being  
11 your presentation to the legislature on February  
12 8, 1973, is it accurate to say that you feel that  
13 any net fishing by Indians outside reservation  
14 boundaries, if allowed by you as Director of the  
15 Game Department, would be an abdication of your  
16 responsibilities?

17 A Yes, I feel that any net fishing for steelhead  
18 outside of the boundaries of the reservation would  
19 in effect be contrary to the intent of the legis-  
20 lature when they classified steelhead as a game  
21 fish back in the early Thirties and prohibited  
22 the net taking.

23 Again I recognize I have the Puyallup case  
24 in front of me, but this proposed bit of legisla-  
25 tion went way beyond that and also included all

1 wildlife of the State with no restrictions.

2 Q Let's talk about regulated Indian net fishery for  
3 steelhead directed at steelhead outside of Indian  
4 reservations. Do you feel as Director of the  
5 Department of Game that if you authorize it under  
6 the current understanding of the law, that you would  
7 be abdicating your responsibilities?

8 A With the exception -- yes, I do, with the exception  
9 I have pointed out of the Puyallup decision.

10 Q Well now, aren't the two in conflict?

11 A No, they are not, at least in any opinion they  
12 are not from the standpoint that the -- as I read  
13 and the advice I have on this from our attorney  
14 indicates to me that we can regulate for conserva-  
15 tion purposes, and we have not, in my opinion,  
16 reached the stage of steelhead magnitude in the  
17 Puyallup River since that time, and the records  
18 will show this is correct, total number of the run,  
19 that a steelhead season could be allowed in the  
20 Puyallup River.

21 Q You have agreed you cannot accurately predict the  
22 total number of any steelhead run?

23 A This is right. I'm talking about our predictions  
24 and what our experience was. Even though we cannot  
25 predict them, we have at least in the last year

- 1           been correct in what we guessed the run would be.
- 2           Q    Does that mean that if you can't predict the run
- 3           ever, you will never authorize Indian net fishing
- 4           for steelhead?
- 5           A    No, because certainly we will authorize any type
- 6           of fisheries that the Courts or the legislature
- 7           tells us to do regardless of what the consequences
- 8           may be.
- 9           Q    You only do it if the Court or the legislature tells
- 10          you?
- 11          A    This is one way we will do it regardless of the
- 12          consequences. The other is we do have this decision
- 13          to work under and we have not, in my opinion, reached
- 14          a sufficient number of fish to consider that to date.
- 15          Q    The next to the last page, Mr. Crouse, of your
- 16          presentation to the legislature, the paragraph
- 17          begins in the last two lines, it reads, "Verified
- 18          but not complete records show that Indians sold
- 19          6,454 steelhead from the Nisqually River in 1972.
- 20          These fish were legally taken by Nisqually tribal
- 21          members from within the boundaries of their reserva-
- 22          tion. Sports fishermen during the same time period
- 23          took 1,600 steelhead from the river. The Department
- 24          has no jurisdiction over any Indian fishery within
- 25          the boundaries of any reservation."



1           Mr. Crouse, did you advise the legislature  
2 at this time that the steelhead resource in the  
3 Nisqually River had been maintained even in the  
4 face of this fishery?

5     A. No, I did not advise them, and I'm not aware of --  
6 I was trying to think, very often if there was some  
7 question there of my testimony, I can't recall whe-  
8 ther it come up or not, it may have come up in  
9 some questioning because commonly in testifying  
10 before a legislative committee, there is from  
11 some to extensive questioning of the testimony.

12     Q. You don't recall when you advised them that the run  
13 had been maintained?

14     A. I don't recall the question did come up, no, I  
15 don't.

16     Q. According to your knowledge at that time, were you  
17 aware that the run had been maintained?

18     A. Well, yes, the run had been maintained and the run  
19 has been commercially fished. I think that the  
20 significance that I see in these figures is that  
21 the catch of steelhead on the Nisqually River within  
22 the Indian reservation are substantial, much greater  
23 than the sports catch. I would say without hesitation  
24 an expansion of this type of net fishery with the  
25 obvious limited number of fish we have left, it

1 would probably result in further destruction  
2 of the run, I don't think there is any question.

3 Q Upon what figures do you base that?

4 A I base that on a simple mathematical judgment  
5 decision that if you expand this fisheries past  
6 where it is now, you will take more fish or it would  
7 not expand or there would not be a desire to expand  
8 it. As you take more fish, you are further cutting  
9 into the total run. This is just basic wildlife  
10 management.

11 Q Must it necessarily be a take of more than harvest-  
12 able portion?

13 A Well, I can't tell you the harvestable proportion in  
14 the river, but I can certainly point out here on  
15 these figures at 6500 against 1600, I would suspect  
16 that the runs in the Nisqually River are not of  
17 the magnitude that would take much -- many more  
18 fish but what you would damage the run. Again this  
19 is a biological question. I cannot tell you the  
20 total run, but I'm sure that this run of fish is  
21 in a very narrow area.

22 Q At the last page of your presentation to the legis-  
23 lature, Mr. Crouse, you say, "In conclusion: Millions  
24 of public dollars have been invested over the years  
25 in the management, conservation, preservation, and

1 perpetuation of these valuable natural resources.  
 2 This public investment could be rendered meaningless  
 3 should persons of native American ancestry or any  
 4 single group be granted absolute immunity from  
 5 State conservation regulations."

6 My first question, Mr. Crouse, is by "public  
 7 dollars" you include federal dollars as well, do  
 8 you not?

9 A I think by and large the largest magnitude of the  
 10 money has come from, and I think this is a misnomer--

11 THE COURT: The question is, do you include  
 12 federal dollars?

13 THE WITNESS: Yes, this is correct.

14 THE COURT: Now you can comment about it.

15 THE WITNESS: I think that by and large  
 16 the public money I'm referring to, and I say by  
 17 and large, is public money from the sale of hunting  
 18 and fishing licenses and revenues derived directly  
 19 from this. I'm not referring to general tax fund  
 20 dollars from the State because we have not received  
 21 any of this at any time for management of the  
 22 steelhead resource.

23 (Continued on next page.)  
 24  
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1 Q Public dollars, you are talking about -- that does  
 2 not include funding you have received under the  
 3 Anadromous Fish Act?

4 A Yes, it does. The point I made, and the statement I made  
 5 is by and large that is an extremely small portion of  
 6 the money that goes into a wildlife program.

7 Q My last question, in this regard, Mr. Crouse, it is  
 8 true, is it not, that in view of the Department of  
 9 Game, Indians net fishing for steelhead on the reservation  
 10 have an absolute immunity from state conservation  
 11 regulations?

12 A Yes, and I believe you said netting for steelhead on  
 13 reservations?

14 Q Right. As a fact, have those fisheries on reservations  
 15 rendered meaningless the expenditures of public dollars  
 16 to the Department of Game for steelhead resource?

17 A I think that the Indian net fisheries on the reservation  
 18 is a viable resource, and we have recognized it as a  
 19 resource that the Indians have that has been given to  
 20 them, and I think properly we do, we have no quarrel  
 21 with this.

22 It does reduce the number of steelhead that  
 23 come through the reservation.

24 Q Has it rendered meaningless the expenditures of public  
 25 dollars?

1 A No.

2 Q A last question, and your Honor, I am sorry to have to  
3 bring this up, it's one I missed earlier, page 39  
4 of your deposition, Mr. Crouse, here we are talking  
5 about the interests of the Indians and the regulations  
6 you considered, or the policy of consideration that you  
7 undertook on October 2, 1972, and my question to you  
8 was, Mr. Crouse:

9 "To put it a little more directly, do you  
10 know whether the Game Department notified any of  
11 the plaintiff tribes in this case of the October  
12 2, 1972 meeting and the fact that they were going  
13 to consider the motion which we talked about  
14 yesterday"

15 Your answer was:

16 "To my knowledge, we did not. To my  
17 knowledge, we had no request at that time to notify  
18 them."

19 My next question was:

20 "Did you feel at that time the plaintiff  
21 tribes in this case were interested parties in respect  
22 to that issue?"

23 Your answer is:

24 "To be honest with you, I never gave it a  
25 thought one way or the other."

1 The question is, Mr. Crouse, is that still your  
2 consideration of the interests of the plaintiff tribes  
3 in this case?

4 A I never -- no. I never gave it a thought from the  
5 standpoint at that particular time of the need or the  
6 desirability to notify people because adequate and  
7 total, complete public notice goes out on meetings.

8 We have from time to time had Indian people  
9 from various tribes come to our Commission meetings.  
10 They had never asked for notification, they had seen  
11 the public notices, almost everyone else does who comes,  
12 and I do not recognize the desirability, nor did we  
13 have any special request for notice at that time.

14 Following that they have received it in total.

15 MR. PIERSON: Your Honor, that concludes  
16 my cross examination. Mr. Getches is next.

17 THE COURT: We will take the morning recess  
18 of fifteen minutes.

19 (Brief recess taken.)

20 ET5

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CROSS-EXAMINATION

1  
2 BY MR. GETCHES:

3 Q Mr. Crouse, you testified in response to questions  
4 by Mr. Pierson that it would be possible to have  
5 a net fishery for steelhead on the Nisqually River  
6 if there was a sufficiently large chum run; is  
7 that correct?

8 A Yes. My testimony was based on the fact that we  
9 would not object to a season that went first two  
10 weeks in December. However, I did not testify to  
11 the magnitude of the chum run or to Fisheries  
12 response as to whether a season like this would be  
13 a desirable season in accordance with the biologi-  
14 cal data of chums.

15 Q Did you communicate with the Department of Fisheries  
16 regarding that subject at a meeting with the  
17 Nisquallys?

18 A No, I did not, and I did not even get a response  
19 from the Nisquallys as to whether they were interested  
20 or not, and we did at that time discuss the possi-  
21 bility, and I said if you are interested I would  
22 suggest that you discuss with the Department of  
23 Fisheries this, as really I was not initiating the  
24 season but brought it up for their consideration.

25 Q You regularly communicate with the Department

- 1 of Fisheries concerning what seasons they will set  
2 which may overlap with steelhead runs?
- 3 A. This is done through Mr. Millenbach and his counter-  
4 part in Fisheries pertaining to their seasons. I  
5 do not directly confer with the Director of Fisheries  
6 on this.
- 7 Q. Are you aware as to whether or not the Department  
8 of Game requested that there not be a net fishery  
9 for chum on the Nisqually River in the year which  
10 you spoke to the Nisquallys?
- 11 A. I spoke to the Nisquallys in this spring. There had  
12 been no request from the Game Department at that  
13 time for the forthcoming season, which would be  
14 the coming up season on that.
- 15 Q. Was there later a request that there not be a chum  
16 fishery set by the Department of Fisheries?
- 17 A. Since I discussed this with the Nisquallys?
- 18 Q. Yes.
- 19 A. Not to my knowledge.
- 20 Q. So to your knowledge during that entire year there  
21 was no request made by the Game Department that  
22 there not be a chum fishery on the Nisqually?
- 23 A. This meeting was after the last chum run and before  
24 there had been one again.
- 25 Q. All right, yesterday you testified that the



1 Department of Game Commission was a study by a  
2 Lloyd Royal, which has been admitted into evidence  
3 as G-13, I believe, and it is entitled, "An Examin-  
4 ation of the Anadromous Trout Program - The State  
5 of Washington Department of Game," is that correct?

6 A. Yes.

7 Q. Are you aware of recommendations by Lloyd Royal  
8 in connection with that report concerning improving  
9 Game Department record keeping, coordination and  
10 unification and biological data and administration  
11 of the management of all salmonid fish and also  
12 eliminating the present practice of the Department  
13 which may be destructive of the resource?

14 A. Generally.

15 Q. What did you do with those recommendations?

16 A. These recommendations have been received by the  
17 Chief of our Fisheries management division.

18 Q. Is that Mr. Millenbach?

19 A. Mr. Millenbach. I have discussed them in general  
20 with them. We are proceeding to test the programs  
21 in there and will put them into full scale implementa-  
22 tion when we are confident they are correct.

23 Q. So it is Mr. Millenbach that is looking into those  
24 recommendations; is that correct?

25 A. That is correct.

1 Q How long ago was that report submitted?

2 A The report was submitted this past winter. I think  
3 really the report in total was submitted in December  
4 if my memory is correct.

5 Q In your written testimony, approximately page 15,  
6 you indicated that the Department of Game acts  
7 and expends large sums of money to preserve steel-  
8 head in many ways, and you go on to indicate some  
9 of these ways such as action under the hydraulic  
10 code, planning river changes, gravel, federal power  
11 commission proceedings, pollution abatement, stream  
12 improvement, removal of blocks on streams, stream  
13 diversion, et cetera. What is your estimate of the  
14 percentage of the Department of Game's total  
15 resources which are devoted to all of these facets?

16 MR. CONIFF: Your Honor, I wouldn't --

17 A I couldn't answer that off of the top of my head.  
18 I would say that if you are interested in this type  
19 of an answer that we spend fully the amount of  
20 revenue generated by steelhead.

21 Q Is it not true that most of your budget is devoted  
22 to propagation and administration and enforcement  
23 of the game regulations?

24 A Would you repeat these three things again?

25 THE COURT: Read the question.

(The last question was read  
by the Reporter.)

1  
2  
3 A. Yes, these are the areas that take the largest sums  
4 of money, particularly a hatchery operation is very  
5 costly when you have a large one.

6 Q. Can you estimate what percentage of your resources  
7 are devoted to these three areas?

8 A. I wonder if I could complete what I was saying?

9 Q. Certainly.

10 A. I was going to say past that, certainly we have  
11 strong, and I presume you include management func-  
12 tions in this. We have research programs that go  
13 on with this, and likewise I would make it clear  
14 that when you are talking about game, I am referring  
15 to game fish.

16 Q. You have no idea of the percentage devoted of your  
17 total budget, which is devoted to these three  
18 areas of activity?

19 A. Not off the top of my head. I would have to break  
20 them down. If I gave you an estimate it may not  
21 be --

22 Q. You say in your testimony that the Game Department  
23 has exclusive jurisdiction over steelhead. Are you  
24 aware of the regulatory jurisdiction of Indian  
25 tribes within the Indian reservation boundaries.

1 over steelhead taking?

2 A. Yes, and I think I have made it abundantly clear  
3 in the record that we have never asked or have never  
4 claimed or have never objected to the Indian reser-  
5 vations and the jurisdiction they have.

6 Q. Well, yes, I realize that. The reason I ask it is  
7 that in answer to the question, does the Game  
8 Department have exclusive jurisdiction over the  
9 steelhead trout within the boundaries of the State  
10 of Washington. You answered yes, at page 18 of your  
11 deposition, or your testimony, and I wanted to make  
12 that clear. You testified also at page 18, lines  
13 28 and 29, that the Department of Game is "the  
14 only agency that has any hatcheries that are  
15 producing steelhead in the State." Are you aware  
16 of any federal hatcheries that produce steelhead  
17 in the State?

18 MR. CONIFF: Objection, Your Honor, this  
19 matter has been gone into in great detail yesterday  
20 by Mr. Pierson, regarding the testimony on the giving  
21 of the eggs to the Quinault hatchery and the Lummis.

22 THE COURT: Yes. Is there some feature  
23 on that that wasn't covered yesterday? Try to avoid  
24 duplication, Mr. Getches. Is there something that  
25 you have in mind that wasn't covered yesterday?

1 Q One additional question. Are you aware of any  
2 Indian run hatcheries?

3 A Yes, the ones I alluded to yesterday.

4 Q In the admitted facts in the pretrial order at  
5 page 59 you indicate in paragraph 3-430 that, "As  
6 a matter of policy it's ..." that is, the joint  
7 biological statement. It is a long document --

8 THE COURT: It is in the pretrial order.  
9 The best way to find anything is by the page number  
10 at the bottom of the page.

11 THE BAILIFF: What page?

12 THE COURT: 59. Yes, go ahead, he has it.

13 Q All right, you indicate that as a matter of policy  
14 that it is the Game Department's position that the  
15 first concern in regulating the harvest of steel-  
16 head is the preservation of the resource. The  
17 second concern is prevention of commercialization  
18 of the steelhead. Now, in your deposition which was  
19 taken in April, you were asked the question, "Your  
20 primary interest in this department is toward the  
21 recreational user and recreational harvester?"  
22 And answer, "Our primary interests are the people  
23 as it pertains to the fisheries, not the resource,  
24 or again what use we can make of it and the user  
25 groups." Page 145 of the deposition.

1 A Would you give me a minute to follow this?

2 Q I am sorry, it is 144 of your deposition beginning  
3 at about line 9.

4 THE COURT: Are you reading these things  
5 preparatory to putting the question?

6 MR. GETCHES: Yes.

7 THE COURT: Did you find it?

8 THE WITNESS: Yes.

9 THE COURT: All right, go ahead.

10 Q The question and answer beginning at line 9, and  
11 turning over to page 145, "If we can go to harvesting  
12 particularly steelhead your primary interest ..."

13 A Would you hold just a minute, then. You are talking  
14 about page 140 of my deposition?

15 Q 145.

16 A 145.

17 Q "Your prime interest when it comes to the landings  
18 that can be made was that they shall be devoted  
19 to recreational sportsmen's use?" Answer, "This  
20 is right, yes." In the agreed facts the prime  
21 interest of the Department of Game is preservation  
22 of the resource." And in your deposition in April,  
23 a few months earlier, the prime interest was indicated  
24 as being the recreational user and the recreational  
25 harvest. Did the policy change? Did the

1 Department's policy change between April and July,  
2 August, when the pretrial order was signed?

3 A. No.

4 Q. Were you in error at one of the two times?

5 A. I don't find the one on page 40 that you refer to.  
6 Would you give me the page numbers again?

7 Q. The deposition, 144 and 145.

8 MR. CONIFF: Your Honor, I would like to  
9 advise the Court that the statements are taken out  
10 of context here, and there is a question and answer--

11 THE COURT: If that is contended you may,  
12 right at the time, add anything that you think should  
13 be included for the enlightenment of the witness.

14 MR. CONIFF: I would merely ask the witness  
15 to refresh his recollection of his deposition  
16 testimony, to read in their entirety deposition  
17 pages 144 and 145.

18 THE WITNESS: Yes, I looked at it. In 144  
19 the question was directed toward our constituency  
20 directly. I do not think any of the statements were  
21 in conflict and no, we have not changed our position.

22 (Continued on next page.)  
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1 Q Very well, in your written testimony you indicate that  
2 steelhead is at the next level of management before  
3 total closure. Aren't there other alternatives short  
4 of closure open to the Department?

5 A The broad levels that I referred to, and I believe I  
6 have covered this before is, number one, the broad  
7 level of no restriction; number two, the broad level of  
8 commercialization, and you have various degrees of  
9 commercialization until you reach a stage where your  
10 resource cannot stand commercialization, and then you  
11 get down to a personal use or a recreational use of  
12 the resource, and you have this to various degrees, but  
13 it is a recreational, not a commercial use.

14 Then the next step you go into is a complete  
15 closure of the taking of any of that resource, and we  
16 have a number of examples of wildlife that are in this  
17 category at this time.

18 Q So within the State of Washington we are in the second  
19 step; is that correct?

20 A In the State of Washington, as far as the State of  
21 Washington is concerned, and not as far as Indian  
22 reservations are concerned, we have been in the third  
23 step for thirty odd years.

24 Q Is it within the Department's contemplation that you  
25 may be in the fourth and final step in the future?



1 A I feel now that we have enough expertise that we can  
2 hold reasonable personal use steelhead as a recreational  
3 fish for the foreseeable future. I cannot guess as  
4 to what point that either the habitat law or some other  
5 reason will reduce the steelhead in any one system or  
6 in total system, so it will become necessary to go  
7 into the fourth step.

8 Likewise, I cannot conceive where we will  
9 back to a general commercialization of steelhead in  
10 the state.

11 Q So for some reason there was a complete closure on all  
12 or some of the steelhead rivers in this state. Would  
13 you continue on a long term basis with the planning  
14 and propagation efforts on those closed rivers?

15 A These fish, yes, these fish are important enough, they  
16 are unique enough, they are the only fish that comes  
17 into fresh water streams, anadromous fish that bites  
18 or strikes a lure readily. These are desired by people  
19 who like to recreational fish, and it is probably the  
20 highest and most important recreational fish in rivers  
21 in this country.

22 Q I understand that, but my question is whether or not  
23 you would continue arbitrarily propagating steelhead  
24 in the closed rivers.

25 A We would do everything we could to attempt to bring this

1 run back. In some cases this is correct. In some cases  
2 you cannot return something, depending on what happens.  
3 Buffalo are a classic example of something that will  
4 not be returned. It will be held as living museum  
5 pieces, and I don't anticipate the steelhead will go  
6 that way. I hope it would not.

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9 (Continued on the next page.)

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1 Q Aren't your plants really in excess of the various  
2 streams' rearing capacity for hatching eggs from those  
3 planted fish? Aren't they there for the harvest of  
4 sports fishermen primarily?

5 A Yes, this is true, and the reason we do this is because  
6 of the low productivity capacity of this species of  
7 fish as a wild fish. If this was not done, their numbers  
8 would be much more limited, even under natural conditions.

9 Q So isn't it irrelevant how many fish are taken in any  
10 particular stream if you can merely replant, if every  
11 single fish is taken, can't you replant fish from another  
12 stream the next year?

13 A I think you alluded to Lloyd Royal's report, and I think  
14 that this points out some of the problems.

15 There is a definite limit as to what you can  
16 put in the stream and get a return, and this was part  
17 of the reason we hired him, to find out what this was  
18 and where it was, and we would like to know what we can  
19 do to optimize their return.

20 Q Do you agree with Mr. Royal's conclusions concerning  
21 density barriers in the streams?

22 A Yes. At this time I would say that I do, based on his  
23 report and the illustrations. As I spoke previously  
24 we will test this, and we'll start immediately on  
25 selected streams and try to prove it as a field operation.

1 and if on a test basis as a field operation it is  
2 correct, we will proceed with it.

3 Q In your testimony at page 19 you indicate that management  
4 of the steelhead resource for Indian commercial  
5 purposes and game management, at the same time for  
6 recreation are incompatible, and you say the two  
7 philosophies would make it virtually impossible for this  
8 type of dual management to be carried out.

9 Are your management goals and your  
10 regulations concerning steelhead including the  
11 prohibition of net fishing for steelhead by Indians  
12 based upon both conservation and philosophy or just one  
13 of those?

14 A Basically our management of steelhead is based in  
15 attempting to preserve the resource, and then what we  
16 can allow to be taken.

17 Now, on your earlier statement, I cannot but  
18 agree with what I said, that a net fishing for steelhead  
19 in a river, and a sports fishing for steelhead in a  
20 river, because this is the only place they are taken,  
21 because they are jammed in together, is the basis for  
22 a conflict. You have a basis, a classic example of a  
23 conflict between two user groups for entirely  
24 different purposes at the same point, and basically at  
25 the same time.

1 Q Would you say then that your management goals and  
2 regulations are based both in conservation and  
3 philosophy?

4 A Yes.

5 Q Do you understand that the law, that is, the decisions  
6 of the United States and the Supreme Court allow  
7 philosophical considerations to justify prohibiting  
8 fishing by Indians exercising fishing rights under  
9 a federal treaty?

10 MR. CONIFF: Objection to the form of the  
11 question.

12 THE COURT: I think it is an interpretation  
13 of law that he is not qualified to make.

14 MR. GETCHES: I am asking him whether --  
15 Very well, I will leave it at that.

16 Q (By Mr. Getches.) Included in your philosophical  
17 considerations in managing and regulating the steelhead  
18 resource, is there any importance attached to the  
19 purposes behind several Indian treaties?

20 A I think -- yes, and I think I have made my position  
21 clear in this matter, that regardless of any  
22 philosophies, regardless of any feelings, we will  
23 follow whatever state law, congressional law, or  
24 court order, and I would carry those out explicitly as  
25 close as I could to the best of my ability.

1 Q So in your way of thinking, it is whatever the law  
2 requires of you as opposed to philosophical inclination  
3 towards meeting the purposes of Indian treaties,  
4 is that correct?

5 A I certainly could act no differently than that.

6 Q You say in your testimony that Indian net fishing for  
7 steelhead would necessarily be detrimental to the  
8 present recreational fishery on these rivers. The  
9 degree that it would harm the recreational fishery  
10 would be in direct proportion to the amount of fish that  
11 were taken in nets.

12 Do you mean by your references to detrimental  
13 and harm that sport fishermen would lose fish to the  
14 Indian fishery?

15 A What I mean -- yes. What I mean in the statement is,  
16 you refer to Indians, any time any steelhead or any  
17 animal is taken in any other way, there are less to be  
18 taken by the other method.

19 Q But the harm --

20 A In this case, the harm would be in the reduction in the  
21 total number of steelhead in the river, which would  
22 greatly affect the number that would be taken by  
23 hook and line fisheries. This would be, in my opinion,  
24 detrimental to the hook and line fisheries.

25 Q So when you are speaking of harm and detrimental effect,

1           it is to the recreational fishery and not to the resource  
2           itself, is that correct?

3       A     This is correct, but only to the extent that likewise  
4           depending on the number of fish that were taken by a  
5           net fishery, this could be detrimental to the resource.

6       Q     But in your testimony you were referring to harm as  
7           between competing user groups, is that correct?

8       A     I think that is correct in the passage of time.

9                         MR. GETCHES: I have no further questions.

10                        THE COURT: Mr. Hovis.

11

12                                 CROSS EXAMINATION

13       BY MR. HOVIS:

14       Q     Mr. Crouse, I think you mis-spoke yourself a moment ago  
15           when you said that steelhead was the only thing that bit  
16           on a lure in fresh water.

17                         I think you forgot, perhaps, sea run cutthroat?

18       A     You are correct, Mr. Hovis. I guess I have reached  
19           the stage where my thinking is generated so much on  
20           steelhead, but yes, sea run cutthroat are an anadromous  
21           fish.

22       Q     Where have you planted those, Carl?

23       A     Oh, we planted them in a number of rivers. We have not  
24           been as successful with them as we have with steelhead,  
25           and certainly Mr. Millenbach has a complete list of these

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1 I would rather you get them from him.

2 Q All right. Now, over the course of the years, at least  
3 in recent years, in my experience, is it true that the  
4 cooperation between the Game Department and the Yakima  
5 Indian Nation has been, in the field of hunting and  
6 fishing, rather good?

7 A Well, I guess my direct and indirect involvement with  
8 the Yakima Indian Nation goes back some thirty years.  
9 Yes, I think it has been very good.

10 Q And in that field, I think as you have said, you made  
11 it abundantly clear that within the exterior boundaries  
12 of an Indian reservation, that you would agree that the  
13 Indian nation itself has the exclusive right to both the  
14 hunting and fishing within those exterior boundaries?

15 A This is correct.

16 Q Now, the Yakima Nation has made available to other  
17 citizens of this state the right to both hunt and fish  
18 within certain parts of its reservation, is that not true?

19 A That is true.

20 Q And in regard to upland game birds, for example, and  
21 ducks, is it not true that an appreciable amount, a  
22 substantial amount of the upland game birds and ducks  
23 that are harvested are harvested within the exterior  
24 boundaries of the Yakima Indian reservation?

25 A I would guess that the majority of the upland birds,



1           certainly in Yakima County, both waterfowl and upland  
2           birds, come from within the boundaries of the Yakima  
3           Indian reservation.

4           Q    And do those areas being opened to this hunting and  
5           fishing assist you in the sale of hunting and fishing  
6           licenses within the State of Washington?

7           A    I don't know. I would suspect that if it was closed  
8           in its entirety, we would possibly lose some hunters.  
9           However, when the Yakima Indians closed their land to  
10          dove hunting last year, but opened the first of  
11          September, we did not see a drop in our dove hunters,  
12          we saw a shift. So I think it would be difficult for  
13          me to tie down directly how big an impact this would have.

14          Q    I see. Now then, with regard to the hunting and fishing  
15          within the Yakima Indian reservation, the Yakima  
16          Nation requires citizens of the state to conform with  
17          the state laws in regards to hunting and fishing within  
18          the exterior boundaries, is that not true?

19          A    Yes, on the species that they allow people to take,  
20          they require them to conform to the state regulations  
21          outside of the reservation.

22          Q    Now, if I might go to another area of cooperation in  
23          regard to off-reservation Indian fisheries, where the  
24          fishermen have been fishing both in violation of state  
25          law and tribal law, your enforcement division and our

1 enforcement divisions have worked very well together in  
2 arresting offenders?

3 A Yes. We recently had a case of joint patrol within the  
4 past month between your enforcement officers and the  
5 Game Department officers.

6 Q Is it also true that in regard to the Yakima Indian  
7 members that in many ways our enforcement officers  
8 have an advantage in regard to the apprehension of  
9 violators that sometimes your enforcement division does  
10 not have?

11 A This is true. I don't really feel qualified to answer  
12 because I'm not sure what direct area you were in, Mr.  
13 Hovis.

14 Q I'm talking about the recognition of the members and  
15 knowing a little bit more about where they fish and  
16 know who are the potential violators.

17 A Yes. You are talking now about Indian violators off  
18 reservation?

19 Q Yes.

20 A Yes, I would think that they very possibly could be  
21 privy to better information than our people because  
22 of their very nature, where they are.

23 Q Now, a tribe that is trying -- you have worked a large  
24 portion of your job both as Assistant Director and  
25 as Director, it has been involved in community relations,

1 is that not true, Carl?

2 MR. CONIFF: I will object to that, your  
3 Honor.

4 MR. HOVIS: This is preliminary.

5 MR. CONIFF: I feel we are going afield.  
6 I would object on relevancy. In this field we are  
7 outside the case area geographically.

8 THE COURT: It approaches at least, but get  
9 whatever your point is and see where we go.

10 Q (By Mr. Hovis) The reason I ask that preliminary question  
11 is my next one was going to be that the public has a  
12 difficult time in making a differentiation between someone  
13 who is fishing legally in conformity with tribal  
14 regulations and someone who is violating both tribal  
15 regulations and state regulations, is that not true?

16 In other words, what I am trying to get at,  
17 Carl, isn't it true in your experience that a tribe  
18 itself, the whole tribe itself gets blamed for the  
19 excess of any individual who is a member of that tribe  
20 or who may be a member of a neighboring tribe?

21 MR. CONIFF: I would object to the question,  
22 your Honor, we don't know who the public is here.

23 THE COURT: There is certainly no foundation.  
24 I think anyone could speak to that that has a general  
25 acquaintance with the subject matter, he could give an

1 opinion as to whether that was the case or not. I don't  
2 know how much relevance it has to our case, but the  
3 generality of it, can you speak to it generally?

4 THE WITNESS: Yes, I think maybe I would use  
5 a different example, if I could.

6 I think probably the Nisqually Indian tribe  
7 has in many cases in press releases been referred to as  
8 fishing off reservation when there were no members  
9 of the Nisqually Indian tribe involved in the fishing.  
10 So it is possible that this can happen.

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(Continued on the next page.)

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1 Q So it would be your opinion then in relation, based  
2 on your experience, that a tribe would have a legitimate  
3 tribal interest in regulating its members' fishing,  
4 both off and on reservation from violating conservation  
5 rules?

6 A I would think that a tribe of the size of the Yakimas,  
7 with the amount of policing they do have, would probably  
8 have a greater interest in this than some other tribes  
9 would.

10 Q Now, if I might go back to the Klickitat River  
11 Technical Committee, which was put together in 1957 and  
12 also in 1951, and has one member from the BIA, one  
13 member from the Bureau of Sports Fisheries, one Yakima  
14 Indian member, and one member from the Department of  
15 Fisheries, are you familiar with that?

16 MR. MCGIMPSEY: I think this is outside the  
17 case area and not relevant to this lawsuit. I object.

18 THE COURT: In what way do you suggest that  
19 it is relevant?

20 MR. HOVIS: The reason I am suggesting it is  
21 relevant, your Honor, I want to show during the course  
22 of this trial, if I may, the other alternatives toward  
23 regulating of an off reservation treaty fishery in  
24 cooperation with the various departments to serve the  
25 conservation interests of the public at large, as well

1 as the management agencies and the Indians themselves.

2 THE COURT: I don't want to spend any great  
3 amount of time being diverted away with respect to it,  
4 but if it is a general question of this witness'  
5 view of that method of proceeding, if he is familiar  
6 with it, he can state so. I don't want to go into a  
7 lot of detail about it, from this witness or anybody else.

8 MR. HOVIS: I am not so sure that this  
9 witness is even familiar with it.

10 THE COURT: He may not be.

11 If he is, he may have no opinion about it, too.

12 A I don't believe we were a party to those meetings in  
13 that agreement.

14 Q The Department of Fisheries pretended they had your  
15 authority for the Department of Game.

16 A I suggest that this pertained to salmon --

17 Q Salmon and steelhead.

18 A -- that you discuss it --

19 THE COURT: You don't speculate about it.  
20 If you don't have a memory about it, you obviously  
21 would hesitate to express any opinion about it, wouldn't  
22 you?

23 THE WITNESS: This is true.

24 Q All right, we will pass that.

25 Now, in regard to the Compact hearing that

1 regulates the fishery on the Columbia. The people who  
2 are members of the hearing board is one from the  
3 Department of Fisheries in Washington, and also the  
4 Fish Commission from Oregon. Those are the regulatory  
5 joint bodies, are they not?

6 A Yes.

7 Q And there is also an advisory committee that advises  
8 this Compact committee, which is composed of yourself  
9 for the Department of Game and the Department of Game  
10 of Idaho and the Department of Game in Oregon?

11 A And the Department of Fisheries in Washington and the  
12 Department of Fisheries in Oregon.

13 Q So the advisory committee has a five member group?

14 A Yes.

15 Q Isn't it true that throughout at least the last ten  
16 years that this advisory committee has been giving to  
17 the joint Compact Commission an approximate size of both  
18 the summer and winter steelhead runs for the consideration  
19 for that Commission?

20 A No.

21 Q You have never in any of the hearings during that ten  
22 years come forward and made a statement in regard to  
23 what the approximate run of the sockeye -- pardon me,  
24 of the steelhead, both winter and summer, would be in  
25 the Columbia River?

1 A The estimates that are provided there are the state's  
2 information and are developed by the Oregon Fish  
3 Commission, and primarily, the Oregon-Washington  
4 Department of Fisheries.

5 These estimates are presented to this  
6 particular board that you referred to, and if my memory  
7 is correct, are also likewise presented to the Indian  
8 people involved, to them, I believe, the day before the  
9 hearing, to the board the same day as the hearing, and  
10 are presented also to the public.

11 But these are not figures that are developed  
12 by in effect the Game Department. They are developed  
13 by and for the two agencies that have the primary  
14 responsibility on the Columbia River for establishing  
15 seasons.

16 If I could clarify a little bit further, the  
17 function of the advisory board, Mr. Hovis, this advisory  
18 board was appointed by the three governors of the three  
19 states involved about ten years ago for the purpose of  
20 being able to advise the two agencies as to what the  
21 advisory board as a whole's feeling was on commercial  
22 seasons in the Columbia River.

23 Q But there is an estimate made of the summer and winter  
24 steelhead runs at those hearings, and have been for the  
25 last ten years, but not by your department?



1 A No, the estimates -- again, I am speaking from memory,  
2 but there are firm figures there. I think I pointed  
3 this out before, and the thing that I have at this  
4 point, which was the day before the meeting, there were  
5 so many salmon of this type, depending on the season,  
6 going over Bonneville Dam.

7 These are firm figures, and there are firm  
8 figures of steelhead likewise that have been counted  
9 over the Dam and so on up the river, so these are the  
10 figures they used.

11 From this and from the commercial catch of  
12 salmon they give an estimate, and I presume, and I know  
13 they have a lot of things that they crank into this.  
14 They give an estimate of what they anticipate is coming  
15 in the river, but the proof is always there at  
16 Bonneville, and if they have erred on the side of being  
17 liberal they cut back the season. If they have erred  
18 on the other side again based entirely and totally on  
19 Bonneville counts, they may extend it for a day, they  
20 may cut a day off.

21 Q Now, you work with the International Treaties, do you not?

22 A No, I do not. I use that advisedly. I have been aware  
23 and have done some very minor work on some of the  
24 migratory bird treaties. I have not worked -- if you are  
25 referring to fisheries, no.

1 Q No, I am talking about basically the migratory bird  
2 treaties. In other words, certain guidelines are set  
3 to you, set for you by the Federal Government within  
4 which you work.

5 MR. CONIEFF: I object, your Honor.

6 THE COURT: Yes, let's not get off into  
7 anything but fish, unless it is directly applicable in  
8 some way.

9 Q Is there any provision made of legislation for Indian  
10 treaties like there is in state legislation for  
11 international treaties?

12 A I know of no provision as far as the Game Department is  
13 concerned for provisions for international treaties  
14 in our legislature.

15 Q Now, throughout your questioning, you have talked a lot  
16 about net harvested fish, but isn't it true that your  
17 department in both its policies and regulations is just  
18 as strong about the commercialization of hook caught  
19 steelhead as well?

20 A State law prohibits the sale of steelhead as it does  
21 other game animals and game fish, and yes, we do enforce  
22 laws against commercialization.

23 Q But in your planning, in your planning, would it not be  
24 true that you were just as adamant, just as strong in  
25 your planning against the commercialization of steelhead,

1           whether hook caught or net caught?

2       A     Yes.

3                       MR. HOVIS: That is all.

4                       THE COURT: Is there anyone else for the  
5       plaintiff?

6

7                                       CROSS EXAMINATION

8       BY MR. ZIONTZ:

9       Q     Mr. Crouse, yesterday you were testifying briefly about  
10       the Quillayute situation. As I understand it, the  
11       Quillayute River system is a steelhead bearing river  
12       system and stream, isn't that true?

13      A     Yes.

14      Q     The Quileute reservation is at the mouth of that stream?

15      A     Yes.

16      Q     And within that reservation you have steelhead,  
17       commercial steelhead netting going on in that river  
18       system?

19      A     Yes.

20      Q     And the steelhead resource in that river system is  
21       therefore shared between the Indian commercial fishermen  
22       and the sportsmen upstream of that reservation?

23      A     Right, yes.

24      Q     Now, you had a Game Commission meeting in October,  
25       October 2, 1972, and one of the items on your agenda was

1 the consideration of the Game Department for the first  
2 time authorizing the river net fishery off reservation  
3 for Indians, isn't that right?

4 MR. CONIFF: I would object, your Honor.  
5 This matter has been gone into quite extensively by other  
6 counsel.

7 THE COURT: If there is something that  
8 hasn't been covered, in your judgment, Mr. Ziontz, go  
9 ahead.

10 MR. ZIONTZ: I would not pursue it if I  
11 thought it had been covered.

12 THE COURT: I am sure you think so, until I  
13 find out otherwise, I will assume that it is not  
14 repetitive.

15 Q Do you recall the question, Mr. Crouse?

16 A Yes, the October meeting of 1972 we did, and I did this  
17 in our discussions with our attorneys.

18 Q The question was, was it not an agenda item on that  
19 meeting, that is, the subject of off reservation Indian  
20 fishing?

21 A I believe it was, yes.

22 Q And your counsel, Mr. Coniff, was present at that meeting  
23 and advised the Commission of the legal position of the  
24 Game Department, that they were in at that time?

25 A Yes.

1 Q And he read in the language from the Washington State  
 2 Supreme Court decision, advising that the Game  
 3 Department could no longer contend that the state  
 4 statutes were controlling, and that the statutes would  
 5 have to yield to Indian rights, and that the Department  
 6 would have to make a decision based upon supporting  
 7 facts and data, that Indian net fishery would not be  
 8 inconsistent with the necessary conservation of the  
 9 steelhead fishery.

10 Do you remember his advising the Commission  
 11 and yourself of that?

12 THE COURT: Of that general subject matter?

13 THE WITNESS: Yes.

14 Q All right now, I will ask you, Mr. Crouse, whether one  
 15 word of information, data, or supporting facts was given  
 16 to the Commission regarding the Quileute fishery?

17 A I can't answer that directly without referring back to  
 18 the testimony.

19 THE COURT: Well, offhand, you do not recall?

20 THE WITNESS: I do not recall.

21 Q We would refer to PL-37, which is the minutes of the  
 22 Washington State Game Commission, of their meeting of  
 23 October 2nd, and I would invite Mr. Crouse to peruse  
 24 that, if he wishes to.

25 A 37?

1 Q Yes. Have you found it, Mr. Crouse?

2 A Yes, I believe I have it.

3 Q Do you want to take a few minutes to scan those minutes  
4 and tell me if you can find any reference to the  
5 Quileute Tribe and the Quillayute River system fishery  
6 there?

7 MR. CONIFF: The exhibit speaks for itself.

8 THE COURT: Of course, but it is scanned  
9 quickly, and he can answer the question.

10 A In my scanning, I have not seen it. I have seen several  
11 other rivers referred to, the Queets, Quinault,  
12 Nisqually, Puyallup. If it is here, I have missed it.

13 THE COURT: All right, go ahead.

14 Q All right now, in order to allow an off reservation  
15 Quileute net fishery, there would be a necessary shift  
16 in the proportionate shares, is that right, between the  
17 Indian commercial fishermen and the upstream sportsmen?

18 A Yes, this would be provided they carried on the same  
19 type and efforts of fishing on the reservation.

20 Q Do you have any idea what the present sharing  
21 proportion is, that is, what proportion of that run is  
22 taken by the Quileute commercial steelhead fishermen  
23 and what proportion is taken by the sportsmen upstream  
24 in the reservation?

25 A Again, I would have to check the sportsmen's records,

1 but we have attempted, and I think the only information  
2 we would have, for what it is worth, is the report that  
3 was done in 1972 by Nielson. I believe you have it  
4 entered as an exhibit if my memory is correct, and when  
5 we attempted and recorded some real deficiencies, we  
6 pointed out in the report the way it is written, it  
7 gives us the best estimate we have on the take of fish  
8 by the Quileute Indians on the reservation. We have  
9 not been able to obtain figures that are reliable  
10 figures on this catch. I wish that we could.

11 Q Excuse me, taking the Nielson report for what it is  
12 worth, what sharing percentage does that require?

13 A We didn't attempt to make a sharing percentage. I think  
14 the Nielson report indicated with all of its  
15 deficiencies, in our best judgment, Indian take,  
16 exclusive of the Columbia River, was in the neighborhood  
17 of 50,000 fish a year.

18 Q You are not talking about Quileute alone, are you?

19 A No, I can't break that down, and again, I say the report  
20 has got some real deficiencies. My memory is that the  
21 overall estimated, for what it is worth, and the  
22 report speaks for itself, certainly, is that in the  
23 year of 1972 there were approximately 50,000 steelhead  
24 taken exclusive of the Columbia River steelhead taken  
25 within the State of Washington on Indian reservations,

1 and again I qualify that by saying the report speaks  
2 for itself, and points out the deficiencies in reaching  
3 this figure.

4 Q What was the sports take?

5 A Again, I believe you have to get figures, or I can  
6 refer this to Mr. Millenbach when he talks to the  
7 biological people.

8 THE COURT: If you don't have the figures  
9 you can't respond to that question.

10 THE WITNESS: This is correct. They have  
11 all been entered in the record.

12 THE COURT: There must be a record someplace.

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14 (Continued on the next page.)

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- 1 Q (By Mr. Ziontz) Now, referring to your meeting just  
2 this month, did you not also have Indian off reser-  
3 vation net fishing as an agenda item for that meet-  
4 ing?
- 5 A Yes, we did, and we attempted to rather carefully  
6 consider the Indians and their off reservation net  
7 fisheries. We went to the extent we informed all of  
8 the tribes, we went to the extent of preparing our  
9 written material ahead --
- 10 Q You are going beyond my question.
- 11 A Am I?
- 12 Q Yes, I just asked you about the agenda item.
- 13 A I thought I could clarify that. Okay.
- 14 Q Was it not the purpose of that meeting to consider  
15 whether or not to establish a season for net fishing  
16 steelhead by Indians off reservation?
- 17 A The purpose of that portion of the meeting was an  
18 attempt to meet the test set up in the Puyallup  
19 cour decision and to --
- 20 Q Can you answer my question yes or no under the  
21 next plane? Was it not the purpose of that agenda  
22 item to consider whether or not to set up an off  
23 reservation Indian net fishery?
- 24 A Yes.
- 25 Q Did you or any member of your staff at that

1 meeting bring up to the Commission the existing  
2 sharing going on in the Quillayute River system?

3 A. I don't remember.

4 Q. Now, do you share Mr. Millenbach's view that  
5 approximately 50 percent of the run of steelhead  
6 is needed for conservation purposes?

7 MR. CONIFF: Could we have a reference  
8 to what material?

9 MR. ZIONTZ: That is PL-37.

10 THE COURT: First of all, do you know  
11 whether that is his view?

12 THE WITNESS: No, I don't.

13 Q. (By Mr. Ziontz) What is your view?

14 A. On steelhead I would not give a biological view on  
15 it.

16 Q. Do you believe that the escapement necessary for  
17 conservation purposes is essentially impossible  
18 if a net fishery is allowed?

19 A. Yes, but again you have to qualify the net fisheries,  
20 and you have all degrees which I think has been  
21 alluded to before.

22 Q. Does that mean yes in general terms but sometimes  
23 no?

24 A. Well, it means exactly this, the quantity of the  
25 net fisheries, a five-foot net for five minutes

1 by one person, no, an unregulated total fisheries  
2 would wipe it out.

3 Q So that going from all extremes from a minimal net  
4 fishery to a maximum complete blockage of the river,  
5 your views would shift depending on what took place  
6 within those two extremes?

7 A Yes, if you are talking about a net fisheries and  
8 what effect it has on the fish itself.

9 Q All right. Now, under existing Game Department  
10 regulations, as I understand it, they permit a daily  
11 bag limit of two steelhead per fisherman, is that  
12 correct?

13 A That's correct.

14 Q And a maximum of thirty per season?

15 A Yes.

16 Q Per fisherman?

17 A Yes.

18 Q There is no present limitation on the number of  
19 steelhead fishermen who can enter the fishery each  
20 year?

21 MR. CONIFF: I object, this is very  
22 repetitive. Mr. Pierson has covered every one of  
23 these questions the last three questions.

24 MR. ZIONTZ: This is preliminary, Your Honor.

25 THE COURT: Well, let's not go too much

1 in detail over what has been covered under the  
2 guise of preliminary.

3 Q (By Mr. Ziontz) Now, as I understand it, you have  
4 approximately 145,000 licensed steelhead fishermen  
5 in the State of Washington as of this date, is that  
6 right?

7 A I think that's right, yes.

8 Q And you are allowing them by law to take up to  
9 thirty fish per man per season, and my calculations  
10 would indicate that would mean 4,350,000 steelhead  
11 are authorized by law by present regulation for  
12 recreational fishing, is that correct?

13 A That's correct. Now, could I enlarge on that  
14 statement a little bit?

15 Q No --

16 THE COURT: Yes, you may.

17 MR. ZIONTZ: I was going to take it to the  
18 very next step.

19 THE COURT: Every witness has a right to  
20 explain his answer if he chooses, but don't do it  
21 at great length. I have heard, I'm sure, what you  
22 are going to say before, but I will allow you to  
23 state it briefly again.

24 THE WITNESS: Well, very briefly, of the  
25 total that you mentioned as a possibility, we do

1 have our records that indicate what the catch is,  
2 which is in the neighborhood of 250,000 steelhead  
3 a year.

4 Q (By Mr. Ziontz) Now, Mr. Crouse, can you tell me  
5 what was in dollar amount the total budget of your  
6 department for this past fiscal year?

7 MR. CONIFF: Your Honor, I believe this  
8 matter has already been answered.

9 THE COURT: It must be in the record.  
10 Give us a round figure.

11 THE WITNESS: I'm sure that all of this  
12 has been entered, I would guess the past year  
13 the total budget for the Game Department for all of  
14 its operations and management was in the neighbor-  
15 hood of \$8,000,000.00.

16 Q (By Mr. Ziontz) Did any part of that come from the  
17 general revenues of the State of Washington?

18 A. Not of -- no.

19 Q The sources were, as I understand it, primarily  
20 license fees, mitigation funds, federal funds,  
21 those three main sources?

22 A. Yes, and license fees will account for 75 to 80  
23 percent, the rest of it comes from other sources.

24 Q All right. I take it you do not submit your budget  
25 to the Governor for approval? You are an

- 1 independent agency, is that right?
- 2 A. No.
- 3 Q. Well, what is the situation with regard to your  
4 budget?
- 5 A. Our budget goes through the same process as any  
6 State budget.
- 7 Q. Even though you don't use any monies from the  
8 State revenue?
- 9 A. This is correct.
- 10 Q. General revenue?
- 11 A. That's correct. The Governor goes through his process,  
12 it goes through the legislative process the same  
13 as any other State budget.
- 14 Q. Is it a fair statement to say the clientele of the  
15 Game Department are the sportsmen of this State?
- 16 MR. CONIFF: Objection, Your Honor, calls  
17 for -- the question is improperly framed.
- 18 THE COURT: Reframe it, please.
- 19 Q. (By Mr. Ziontz) Mr. Crouse, can you tell me what  
20 group you view your department as primarily and  
21 essentially serving?
- 22 A. Yes, I feel we are serving all the people who use  
23 the wildlife resources of the State that this  
24 department is responsible for. Now, our user group  
25 is hunters and fishermen and also non-consumptive

- 1 users, and they are as vitally interested in the  
2 wildlife resource, including the fisheries resource,  
3 as those that use it. This group probably numbers  
4 as large as those who hunt and fish now.
- 5 Q In your mailing list of notices for meetings, do  
6 you presently include any of these non-consumptive  
7 user groups?
- 8 A When we have a meeting that they have an interest  
9 in or they have expressed an interest in, I think  
10 the latest one was a year ago last May, we included  
11 a substantial number because the Commission was  
12 considering something that they had a vital interest  
13 in and they asked to come and asked when it was.
- 14 Q And in terms of the specific topic involving Indian  
15 fishing of steelhead, is it not true that your  
16 department has carried on a public relations cam-  
17 paign directed primarily to persuade the public  
18 that Indian fishing is incompatible with resource  
19 protection?
- 20 A No, I don't think we have.
- 21 Q Have you not produced a movie to that effect?
- 22 A We produced one I believe about ten years ago.
- 23 Q Are you still using that?
- 24 A Maybe it was fifteen.
- 25

(Brief pause.)

1 Q Are you considering the question?

2 A I'm considering the question. I don't know if it's  
3 still in our library or not. Normally these things  
4 are out before that.

5 Q Finally, Mr. Crouse, is it not a fact that the basic  
6 position of the Game Department has been that it is  
7 unwilling, unless absolutely forced to, to participate  
8 in the diminution of the share of steelhead available  
9 for sports fishermen?

10 A Yes, our position has been that we feel steelhead  
11 by the very nature are a fish that lend themselves  
12 to our recreational use, and this is a higher and  
13 better use for them than commercialization.

14 MR. ZIONTZ: Thank you.

15 THE COURT: Anyone else for the plaintiffs?

16 Mr. Taylor.

17  
18 CROSS-EXAMINATION

19 BY MR. TAYLOR:

20 Q Mr. Crouse, you discussed briefly yesterday your  
21 experience with regard to observing fisheries on  
22 rivers in the State of Washington, and you briefly  
23 alluded to the fact that you had observed the  
24 Quinault River and the Quinault net fisheries on  
25 that river. You said that you were aware of the



1 steelhead sports fishery on the upper Quinault  
2 River that is regulated by the State as a State  
3 jurisdiction that is off the reservation, are you  
4 aware of that fishery?

5 A. Yes.

6 Q. And are you aware that there is an Indian regulated  
7 steelhead net fishery by Quinault Indians near the  
8 mouth of the Quinault River?

9 A. Yes.

(Continued on next page.)

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1 Q Are you also aware that there is a hook and line  
2 sports fishery for steelheading by the Quinault  
3 Tribe mainly for non-Indians on the Quinault River  
4 within the boundaries of the reservation?

5 A Yes, and if I could expand a bit on that, I would  
6 like to compliment the Quinaults on it because  
7 I think they recognize this eventually will be the  
8 higher use for this resource. I think that this is  
9 an area that the Quinault Indians, because of their  
10 unique reservation, certainly can make more money  
11 from steelhead as a sports fishery comparable to  
12 what some other Indians have done in recreational  
13 use, and I think that this is an extremely compat-  
14 ible use. I encouraged them and I would like to see  
15 them expand it.

16 Q You also stated that you believed that the net  
17 fisheries for steelhead and sports fisheries for  
18 steelhead on the same river are not compatible,  
19 is that correct?

20 A I have said, and I think I can reiterate it again,  
21 that a sports fishery and a commercial fishery for  
22 steelhead on the same river and the same areas are  
23 not certainly compatible. Likewise, a net fishery  
24 for steelhead, depending on the magnitude, will  
25 certainly diminish the sport take or will diminish

1 the total number of fish.

2 If I could refer to the Quinault just a little  
3 bit, and I'm not sure how many are taken off the  
4 river, but from my memory and my judgment, I can  
5 give you a comparison, the area of the Quinault  
6 River that is outside of the Indian reservation,  
7 our data indicates, talking off the top of my  
8 head, normally take less than a thousand fish a  
9 year by sports fishermen. You drop down to the  
10 next river of comparable size, the Humptulips, and  
11 again I would presume the average is 14,000 a year,  
12 again I'm using figures off the top of my head, but  
13 a comparison, the Quinault River should have the  
14 capabilities of the Humptulips to produce sport  
15 fish. I'm making a presumption. My presumption  
16 is that the majority of these fish are taken  
17 commercially by the Indians.

18 Q. You have also said that the Game Department does  
19 not stock the Quinault River with steelhead because  
20 of objections by the sportsmen, is that correct?

21 A. No, that's not correct. What I said is that we have  
22 some rivers in the State, two of them that are on  
23 Indian reservations, the only two I know of are the  
24 Queets and the Quinault that we have not stocked  
25 fish. We have others that do not go through

1 reservations that we treat the same way, and our  
2 purpose in doing this is, number one, we have in  
3 the past not had sufficient money to raise enough  
4 steelhead smolt, but, number two, you have a user  
5 group that desires to feel they are catching what  
6 in their opinion is a wild fish. So they have asked  
7 that some rivers be set aside for that.

8 We have two that go through Indian reservations,  
9 these are the only two that I know of.

10 Q. And both the Quinault and the Queets River go through  
11 the Quinault Indian Reservation and you do not stock  
12 those rivers?

13 A. Yes, that is correct.

14 Q. You said that "we," referring to the Game Department,  
15 have preserved the steelhead, you made that statement  
16 about an hour ago, is that correct?

17 A. Well, it may be a loose -- yes. It may be a loose  
18 use of the term. Some State agencies, if steelhead  
19 are going to be preserved, will be managing them.  
20 With no management they would not be preserved. This  
21 is the responsibility of the Game Department, and  
22 I am extremely proud and think we have an outstanding  
23 ly good steelhead program in this State. I think our  
24 people have done an exceptionally good job on it.  
25 I might say better than any other state or any other

1 area that I know of.

2 Q. You agree then that the State has not stocked the  
3 Quinault River, and you are aware that the -- there  
4 is a sport fishery on the Quinault River both  
5 regulated by the State and regulated by the Indian  
6 tribe?

7 A. Yes. Likewise I might say we have furnished to the  
8 Quinault Indians steelhead to raise in their  
9 hatchery, and hope that they will be able from this  
10 start to not only develop their own egg supply but  
11 develop a good recreational fisheries because the  
12 demand is there for it. This would be a real bonus  
13 for the Quinault Indians moneywise.

14 Q. Would the sports fishery -- a few moments ago  
15 you congratulated the Quinault tribe on the fact  
16 that they are engaging in managing a sport fishery  
17 on the reservation; and you said that that sport  
18 fishery would be an economic benefit to the Quinaults,  
19 would that be a commercialization of the sports  
20 fishery if it were an economic benefit to the  
21 Quinaults?

22 A. It would be a commercialization in a sense that  
23 everything is done for money. The fish would not  
24 be sold by the pound, they would be sold by the  
25 sportsmen, and I could envision very easily

1 something like Warm Springs where the Umatillas have  
2 done a good job in making a recreational area there  
3 that would include a ride on the river. It in-  
4 cludes sports fishing, it would be carried out  
5 with lodging there at X dollars per customer that  
6 would come from -- I think this would attract  
7 people from all over the country. I don't think  
8 there's any question about it. They would then be  
9 in effect selling their steelhead at not fifty  
10 cents a pound, but at a price of whatever the people  
11 would pay for this for recreation, which normally  
12 is in the neighborhood of \$10.00 a pound, something  
13 like that, I believe.

14 Q How different would that be, the recreational  
15 sports fishery on the Quinault Reservation that  
16 you just described and congratulated the Quinaults  
17 on it, on managing or regulating so that it can  
18 exist? How different would that be from what the  
19 State does with the steelhead?

20 A Basically our program is one of recreational fishing.  
21 Their program is one of recreational fishing and  
22 they do not sell them by the pound, they would be  
23 corresponding very close to ours.

24 Q So would you say that what the State does in terms  
25 of what you call managing the steelhead for

1 recreational purposes is actually a commercializa-  
2 tion of the steelhead for the benefit of the people  
3 of the State of Washington?

4 A. It's not a commercialization as far as you normally  
5 term commercialization. Certainly, the wildlife  
6 resource managed by this department, which cannot  
7 be sold into commercial channels, is a business or  
8 industry in the State. Again, I can't quote you  
9 off the top of my head, and it's possibly in the  
10 record somewhere, but I'm sure that your last report  
11 in '68 indicated that it was in excess of \$300 million  
12 which is what people in effect pay for services in  
13 pursuing the hunting, fishing, and non-recreational  
14 use of the wildlife resources.

15 Q. You say then that steelhead within the jurisdiction  
16 of the State of Washington are not taken commer-  
17 cially, what do you mean by commercially? Do you  
18 mean that commercially taken is defined as steelhead  
19 are not taken in nets or steelhead are taken in  
20 nets for that economic value as fish? Is that what  
21 you define commercially taking as?

22 A. Yes. They are not taken in nets, they are not sold  
23 commercially under any circumstances regardless of  
24 what they are paying by the pound in a fish market  
25 or a meat market or a grocery store or from door

- 1 to door for only the value of the fish as it per-  
2 tains to what people will pay to eat it.
- 3 Q So steelhead then have no -- they are taken within  
4 the jurisdiction of the State of Washington have  
5 no economic value to the State?
- 6 A I think I covered that on the other side, all  
7 wildlife has a very substantial economic value  
8 to the State, and I'm trying to differentiate  
9 between something that is sold in the market or  
10 sold from door to door and something that people  
11 pay for the privilege of going out and taking  
12 themselves or a personal use.
- 13 Q And who benefits from the State fishery that you  
14 term as recreational, who benefits economically?
- 15 A I presume the list is rather endless.
- 16 Q Would it be the sports fishing industry, suppliers  
17 of gear and boats, guides, sports writers?
- 18 A It would be them, it would be the people that make  
19 the campers, the people that sell the gasoline,  
20 the State from the sales tax that it gets on the  
21 motels, the restaurants, I think the clothes  
22 manufacturers. I think the list itself would be  
23 virtually endless. If you desire to pursue it, any-  
24 thing that they use in the pursuit of this would  
25 certainly -- the people involved would be benefited.



1 Q. Does the Game Department take this substantial  
2 economic value into consideration when they make  
3 their regulation with regard to the steelhead?

4 A. I think I said in the past and again our first  
5 responsibility is to the preservation of the  
6 resource, be it anything, and this is the first  
7 consideration we take. This is why you have a number  
8 of species of animals you have no hunting season  
9 on.

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1 Q Do Indians benefit at all from this commercial --

2 A I presume the example you just used of the Quinaults  
3 and the sports fishing -- certainly the management of  
4 the Game Department of steelhead and rivers, if the  
5 number of fish are increased in a river, and if that  
6 river flows through a reservation, there are more  
7 fish that can be taken on a reservation by the Indians.  
8 I don't think there is any question about that.

9 THE COURT: Does anyone else have questions  
10 for the plaintiff? Are you ready with redirect?

11

12

REDIRECT EXAMINATION

13 BY MR. CONIFF:

14 Q In your cross examination, Mr. Crouse --

15 MR. CONIFF: There have been a number of  
16 references to the August meeting to seek the information,  
17 and I haven't discussed this, your Honor, with liaison  
18 counsel, Mr. Pierson, and I would like to first request  
19 permission of the Court to reserve as an Exhibit Number  
20 G-17, excuse me, 18, G-18.

21 THE COURT: Permission granted.

22 Q Mr. Crouse, could you provide for the Court's record  
23 at the earliest possible time the certified copy of the  
24 minutes of the State Game Commission meeting of August  
25 23rd to which you have referred in your cross examination?

1 A I will.

2 Q Excuse me, August 20, it is.

3 A August 20 is correct.

4 MR. PIERSON: Can we get an estimate of when  
5 that might be? Would it be before the end of the trial?

6 THE WITNESS: I would presume so, Mr. Pierson,  
7 if I can get off the witness stand, I would be glad  
8 to get down to Olympia.

9 THE COURT: You have heard of duplicating  
10 equipment, like Xerox, and such?

11 THE WITNESS: They have to be typed out,  
12 such as this, Judge.

13 MR. PIERSON: United States will undertake  
14 to make all copies if we can get an original.

15 Q With regard to the August 20 meeting, Mr. Crouse, did  
16 I understand your testimony correctly that there was  
17 a pre-meeting prior to that time?

18 A Yes, on all of the Indian parties that it had been  
19 requested by Mr. Pierson they be notified, were notified  
20 of a pre-meeting on Tuesday before the Monday Commission  
21 meeting.

22 Q And were all the parties and -- that Mr. Pierson  
23 requested you to notify notified of the meeting on  
24 August 20 when the State Game Commission would consider  
25 this on their agenda?

1 A Yes, they were.

2 Q Were you present at that meeting?

3 A At the August 20 meeting?

4 Q Yes.

5 A Yes.

6 Q Did any representative of any plaintiff Indian tribe  
7 appear before the State Game Commission regarding the  
8 subject of off reservation Indian net fishing?

9 A No, none appeared, and to my knowledge none -- none  
10 appeared to testify. To my knowledge none appeared,  
11 and none appeared on the registration for the meeting.

12 Q In any matter has the Washington State Game Commission  
13 received an oral or written requests for consideration  
14 by any of the tribes for the establishment of off  
15 reservation Indian net fisheries for steelhead?

16 A No, not to my knowledge.

17 Q Was any representative of the Federal Government present  
18 at either the pre-meeting or the August 20 Game  
19 Commission meeting?

20 A Yes.

21 Q Who was present, if you know?

22 A At the pre-meeting I am not sure. At the August 20th  
23 meeting Mr. Heckman was present for about twenty  
24 minutes. There was a gentleman with him. I don't  
25 recall, I don't know whether he was working for him or

1 not, and I believe the registration showed that there  
2 were two ladies there that I believe were employed by  
3 the federal attorneys' office. I would make a  
4 presumption they may have been summer interns.

5 Q You are referring for purposes of your answer to the  
6 August 20 meeting?

7 A August 20 meeting, yes.

8 Q At the August 20 meeting did any of the federal  
9 representatives who were present make any representations  
10 of any nature concerning the subject of off reservation  
11 Indian net fishing for steelhead to the Washington State  
12 Game Commission at its public meeting?

13 A No.

14 Q During the course of your cross examination, Mr. Crouse,  
15 you were asked to examine certain steelhead catch figures  
16 relating or developed allegedly from the Columbia River  
17 and the Frazier River.

18 First in your judgment, you believe that the  
19 Frazier River is comparable in terms of steelhead  
20 production to any of the drainages, watersheds within  
21 the case area?

22 A No, the Frazier River is probably comparable to the  
23 Columbia River, but not to the rivers in Western  
24 Washington and the Puget Sound Basin or on the coast.  
25 Its drainage is fast. It drains into your British

1 Columbia a large share of it. The Columbia River  
2 is the same thing. It drains portions of five states,  
3 and British Columbia. These are large rivers, with  
4 large watersheds, and probably the greatest anadromous  
5 fish run in the world was in the Columbia River,  
6 probably followed closely by the Frazier. They do not  
7 compare to the short run streams, of Western Washington  
8 in any way for fish production.

9 Q Would you as the Director of Fisheries, as the Director  
10 of Game, would you consider the data regarding steelhead  
11 catches or harvests from these watersheds pertinent  
12 or helpful to you in formulating a management scheme  
13 for the harvest of steelhead within the case area?

14 A No, I think you would have to take streams within the  
15 case area and work on it. There is such a vast  
16 difference that you could not compare the two.

17 Q Mr. Crouse, if you would turn to page 9, line 6 of your  
18 prepared testimony, I would like to ask you if on  
19 cross examination when you were asked several questions  
20 by Mr. Pierson regarding the basis of your opinions  
21 on the nets you have described there, if it was based  
22 entirely upon your personal observations?

23 A I have lost the reference. Would you --

24 Q Page 9, line 6.

25 A Which one?

1 Q G-14, which is --

2 THE COURT: Exhibit G-14, which was your  
3 direct testimony prepared in advance.

4 THE WITNESS: Page 14, line 6?

5 Q Page 9, line 6. My question is, Mr. Crouse, is the  
6 only basis for your opinion regarding the nets that  
7 you describe there, your personal observations?

8 A No.

9 Q What are the other bases for the opinions that you have  
10 expressed there?

11 A The opinions in this are not exclusively personal  
12 observations. They are observations that have been  
13 reported to me by our people, people in the Game  
14 Department.

15 And likewise, I believe a number of these  
16 are covered in the Nielson report that is entered in  
17 evidence.

18 Q Are these departmental reports that you referred to  
19 something that would ordinarily be called to your  
20 attention for your review as Director of the Department  
21 of Game?

22 A Not always. Very often they would.

23 Q But not necessarily. Now if we could turn quite briefly,  
24 Mr. Crouse, to the subject matter of USA-42, which was  
25 the speech that you made before the State Senate and

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House committees on natural resources in the Washington State Legislature, USA-42.

You will not need to refer to the exhibit, Director. Do you recall the occasion when you did make that presentation?

A Yes, I do.

(Continued on the next page.)

E10-1



- 1 Q Did the Department of Fisheries testify regarding  
2 the merits or demerits of Senate Bill 2141 together  
3 with its companion House Bill 140?
- 4 A Yes, they did.
- 5 Q What position did the Department of Fisheries take  
6 with regard to the merits of passing this legisla-  
7 tion?
- 8 A The Department of Fisheries was in opposition to  
9 this legislation.
- 10 Q And who testified on behalf of the Department of  
11 Fisheries expressing that view?
- 12 A The Director, Mr. Tollefson.
- 13 Q Thor Tollefon, the Director?
- 14 A Yes.
- 15 Q To your knowledge, at the hearings that you attended  
16 did any representative of the federal government  
17 testify regarding the merits or demerits of that  
18 proposed legislation?
- 19 A No, I can recall no one from the federal government  
20 testifying.
- 21 Q Did any Indians or Indian representatives testify  
22 regarding the merits or demerits of that proposed  
23 legislation?
- 24 A Yes.
- 25 Q And what position did the Indians or Indian

1 representatives take with regard to passage of  
2 that bill?

3 A They were in favor of the passage of the bill and  
4 testified so.

5 MR. PIERSON: Your Honor, just a point of  
6 clarification. I take the witness is testifying  
7 from his personal knowledge.

8 MR. CONIEFF: I have established that  
9 he was present and attended the meeting.

10 MR. PIERSON: Very well.

11 Q Do you know, Mr. Crouse, what action, if any, the  
12 State Legislature took with regard to the passage  
13 or non-passage of Senate Bill 2141 and its compan-  
14 ion bill, 140?

15 A They did not pass the State Legislature.

16 Q Did it pass either House of the State Legislature?

17 A My memory is it did not.

18 Q Now, there has been some cross-examination, Director  
19 Crouse, regarding the planning or conditioning  
20 of the steelhead run in the Nisqually River, parti-  
21 cularly regarding the proposals, or the considera-  
22 tions, I should say, that you gave to requesting  
23 that the Department of Fisheries establish a chum  
24 season. My question to you is this: Does the  
25 Department of Game plant the Nisqually River with

1 steelhead smolt?

2 A. Yes, we do.

3 Q. And do the plants occur above the reservation area  
4 on the Nisqually?

5 A. Yes, they do, to the best of my knowledge. I would  
6 only qualify that -- I am confident they do.  
7 Final records may show otherwise, that on occasion--

8 Q. Do the runs from these plants, therefore, benefit  
9 the on-reservation Nisqually Indian fishery on that  
10 river?

11 A. Yes, they come entirely through the Nisqually  
12 reservation.

13 Q. And what is the source of funds for the cost of  
14 producing and planting the steelhead smolt which  
15 are planted into the Nisqually River as you have  
16 described?

17 A. I believe all fish for the Nisqually River are  
18 planted <sup>/from</sup> our south Tacoma hatchery. The source  
19 of funds would be one hundred percent Game Depart-  
20 ment funds.

21 Q. In your opinion, Mr. Crouse, does the Washington  
22 Department of Game discriminate in any manner  
23 against citizens of Indian ancestry with regard  
24 to their fishing activities in waters outside  
25

1 Indian reservation boundaries?

2 A. No, we do not discriminate against anyone, regardless  
3 of ancestry in fishing or hunting or carrying out  
4 anything managed by this department of the State.

5 Q. My final question on re-direct, am I correct in  
6 assuming that you were not totally in agreement with  
7 the decision of the Supreme Court of the State of  
8 Washington in the Puyallup case which you have  
9 referred on a number of occasions in your testimony?

10 MR. PIERSON: Objection. I think counsel  
11 is testifying. This is redirect. Go ahead.

12 THE COURT: This is redirect. Go ahead.  
13 A. No, I was not, and to this -- and I asked the case  
14 be appealed to the United States Supreme Court.  
15 Presently this is under appeal.

16 Q. And to your knowledge the Court has granted a writ of  
17 certiorari?

18 A. Yes, they have.

19 MR. CONIFF: I have nothing further.

20 THE COURT: I think we should accomodate  
21 the witness by letting him continue to the conclusion  
22 of his testimony.

23 MR. PIERSON: I have some very short ones,  
24 Your Honor.

25 THE COURT: Go ahead.

## 1 RE-CROSS-EXAMINATION

2 BY MR. PIERSON:

3 Q Mr. Crouse, I am going to confine myself to the  
4 questions that Mr. Coniff asked you. You mentioned  
5 that there was a preliminary meeting on August  
6 14th of this year.

7 A Yes.

8 Q And that at least by one means or another Indian  
9 tribes were notified of that meeting, is that  
10 correct?

11 A Yes.

12 Q Now, Mr. Coniff asked you who appeared on August  
13 20. As to the August 14 meeting were there any  
14 Indian people there?

15 A I did not attend that. I can answer on hearsay  
16 evidence, or Mr. Millenbach did attend the meeting.  
17 You may ask him when he is on.

18 Q Do you have in the records of the Game Department  
19 a signed-in list for that meeting?

20 A As I said, I did not attend the meeting.

21 Q Okay, for purposes of clarification, Mr. Crouse,  
22 what is your understanding of whether Indian tribal  
23 representatives appeared on that day?

24 A It is my understanding that the members of the  
25 Skok.

1 Q By that do you mean the Skokomish Tribe?

2 A Skokomish and members of the island just off of  
3 Olympia --

4 Q Squaxin?

5 A Squaxin, and one other tribe, and I hesitate to  
6 give you the name of it, attended.

7 Q Mr. Coniff has alluded to the fact that you have  
8 received no requests from Indian tribes regarding  
9 off reservation Indian net fishing. He has also  
10 asked you your understanding, impression and dis-  
11 agreement with the May 4, 1972 Washington State  
12 Supreme Court decision in the Puyallup case. My  
13 question is: Is it your understanding of that  
14 decision that in order to follow its directives  
15 to the Game Department you must first receive a  
16 request from an Indian tribe?

17 A It is my understanding of that decision, Mr. Pierson,  
18 that I have attempted to follow advice of counsel  
19 in trying to deal with this situation, and I have  
20 attempted to deal with it in accordance with the  
21 Court's directions, in that manner.

22 THE COURT: Well, from that source are  
23 you of the impression that before you can deal  
24 with the matter you must have a request from an  
25 Indian tribe?

1 THE WITNESS: No, I don't believe so.

2 Q (By Mr. Pierson) Mr. Crouse, with respect to the  
3 hypothetical that you had received either on August  
4 14 or August 20th of this year representations from  
5 any of the plaintiff tribes in this case about what  
6 volume of steelhead they would like to take by  
7 nets off reservation, how they would fish, where  
8 they would fish, how many fishermen they might have,  
9 days they might fish, would it have made any  
10 difference in the recommendation of the Department  
11 of Game's staff to the Game Commission regarding  
12 off reservation Indian fishing for steelhead?  
13 Is there any chance it would have made any  
14 difference?

15 A Well, it is rather - - yes, I think there is a  
16 chance.

17 Q So that those type of facts are the kind that you  
18 ought to consider in determining whether to author-  
19 ize such fishing?

20 A If I could further qualify what I was going to say,  
21 yes, I think there is a chance, because I don't  
22 think we can preclude anything like this. The  
23 ultimate decision would have been the Game  
24 Commission's decision as a final determination.  
25 We have made recommendations to the Commission

1 virtually at every meeting that they have not  
2 followed, so I don't purport to speak for them.  
3 I would say in all fairness to your question, I  
4 think the chance would not have been good.

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1 Q My next question was would the type of facts  
2 I outlined be the ones that your department should  
3 consider before making your recommendation on  
4 off reservation Indian fishing?

5 A It's my feeling that we did consider them.

6 Q And that is not inconsistent with your testimony  
7 yesterday?

8 A No, I don't think so. What we considered was the  
9 steelhead resource and what in our opinion if an  
10 off reservation Indian fisheries would be detri-  
11 mental to the resource, and I think I have said  
12 here repeatedly that we think that it would.  
13 And we have not reached the stage that we feel now  
14 in attempting on the Puyallup River to follow  
15 exactly the case and following the 1970 run and  
16 ruling of the Judge. We do not see it at this  
17 time that we could have an off reservation fisheries  
18 and I think I have stated this before.

19 Q Let me just pass one more question in that line,  
20 the type of facts I'm talking about are the volume  
21 of fish the Indians might take, the places that  
22 they take, the days they take, the methods for  
23 taking and number of fishermen; my question is:  
24 are those facts that the Game Department should  
25 consider in determining whether to allow an Indian

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net fishery pursuant to the State Supreme Court decision?

A. Well, again, how you interpret the decision and how I as a non-lawyer attempt to determine it may be different. But really, what we attempted to do, number one, is to take care of the resource first.

Number two, we have felt that we had some criteria as established by the Court on a 1970 run in the Puyallup River, and we have not felt that the run of steelhead in that river is beyond that point.

Now, this is our best judgment at this time for the 1973-74 season.

Q. My question really talked about information you should consider. I want to make sure I understand your testimony before because you testified about it.

My question really calls for a yes or no answer, and it is, in order to make a recommendation concerning Indian net fishing off reservation boundaries, isn't it true that a proper compilation of such a recommendation by the Game Department and the Game Commission should consider the anticipated volume of fish taken by the Indians, the

1           number of fishermen, the places of fishing, days  
2           of fishing and the method of fishing?

3           A.   Yes. I might also add that you can reach a stage  
4           very easily in gathering this type of information  
5           to where the total volume of information and the  
6           total effort expended could be worth really more  
7           and the value of the resource you are talking about.  
8           I don't think any resource manager has ever felt  
9           they had all the information they needed. Certainly,  
10          I agree with you, I would like to have all possible  
11          information, and there is always a need for more.

12          Q.   Now, Mr. Coniff asked you about whether information  
13          on steelhead runs in the Frazer River and the  
14          Columbia River was pertinent to your determination  
15          about off reservation Indian net fisheries here  
16          in the State of Washington, in the Puget Sound area,  
17          and on the Olympic Coast. Did you say why it would  
18          not be pertinent, and if you did, could you tell us?

19          A.   I thought I did, but very briefly --

20                         THE COURT: Well, as I understood his  
21          testimony, it was because of the total dissimilarity  
22          between the Frazer and the Columbia and the streams  
23          in the case area. That is the substance of your  
24          testimony?

25                         THE WITNESS: Yes, that's right, Your

1 Honor.

2 Q (By Mr. Pierson) Do you know whether the volume  
3 of steelhead in the Frazer River system or the  
4 Columbia River system is any larger than the volume  
5 of steelhead in the entire Puget Sound watershed?

6 A I wouldn't venture a guess without looking at the  
7 records, and I don't know if I could answer it then.

8 Q So the dissimilarity you are speaking of is individual  
9 rivers in the Puget Sound and Olympic watershed and  
10 the entire river of Frazer and Columbia?

11 A The dissimilarity of the individual rivers against  
12 the total size of these two rivers.

13 Q Now, Mr. Coniff and you referred to your Nielson  
14 Report, which I think is USA-13, isn't it true that  
15 report includes an estimate of off reservation  
16 and on reservation Indian net fisheries?

17 A Yes, I believe the report again speaks for itself,  
18 and I stated there was some serious deficiencies  
19 pointed out by the person who wrote the report.  
20 But I believe it does, if my memory is correct, also  
21 cover that. I may be in error on that.

22 Q Let me ask you whether you know whether the staff  
23 of the Game Department consider that information in  
24 making their recommendations to the Game Commission  
25 regarding off reservation Indian net fishing on

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24  
25

October 2, 1972, or August 20, 1973?

A. I do not know.

Q. Do you know who would know?

A. I presume if it was staff recommendations, Mr. Millenbach would know.

MR. PIERSON: That's all for the plaintiffs, Your Honor.

THE COURT: Any other inquiry now of this witness by anyone?

(No Response.)

THE COURT: Mr. Crouse, you are excused and may leave whenever you wish subject only to providing us with that certified copy of the information that you have agreed to provide at your earliest opportunity. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: We will recess now until 12:45.

(At 12:15 p.m. a noon recess was taken.)

ET11

1 AFTERNOON SESSION

2 August 27, 1973

3 12:45 p.m.

4

5 CLIFFORD MILLENBACH,

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

8

9 THE CLERK: Please state your full name and  
10 spell your last name.

11 THE WITNESS: My name is Clifford Millenbach,  
12 M-i-l-l-e-n-b-a-c-h.

13

14 DIRECT EXAMINATION:

15 BY MR. CONIFF:

16 Q Are you the same Clifford Millenbach who prepared the  
17 direct testimony in connection with this cause and  
18 which has been denominated as Exhibit G-15?

19 A Yes.

20 Q And if you were asked the same questions today, would  
21 your answers be the same as those shown on Exhibit 15?

22 A Yes, with one exception. I notice a numerical error  
23 on page 7, line 6. I used a figure of 264,559, which  
24 I took from the joint biological statement as being the  
25 winter sports catch for the '70-'71 catch season.

1 That figure should be 215,955.

2 Q Are there any other figures or corrections that you  
3 care to make to your original testimony?

4 A No.

5 MR. CONIFF: Your Honor, I would propose  
6 before I move for the admission, I know there are  
7 objections regarding certain portions --

8 MR. PIERSON: As with Mr. Crouse, they are  
9 noted on the face of the document, and I don't know  
10 whether the Court has had an opportunity to examine  
11 them in advance.

12 THE COURT: I already read the direct  
13 testimony of Mr. Millenbach, and I have noted the  
14 objections.

15 MR. CONIFF: Does the Court feel it  
16 necessary --

17 Mr. PIERSON: I should state first our  
18 objection on page 3 is withdrawn. I think it probably  
19 is a very picky one and not well taken at this time.

20 As to the other objections, I think they  
21 are very similar to the ones I made to Mr. Crouse's  
22 testimony, and unless the Court would like to hear  
23 from me on each one, I will await the Court's ruling.

24 THE COURT: The ruling will be the same  
25 as previously made; namely, that the objections are

1 overruled. I will wait and decide whether or not to give  
2 attention to those exhibits in the light of the proof.

3 MR. CONIFF: I therefore move the admission  
4 of the direct testimony of Mr. Millenbach in total as  
5 shown on Exhibit G-15. It is my understanding that  
6 plaintiffs have not objected to any of the exhibits  
7 sponsored by this exhibit, and they are already admitted  
8 by virtue of the Pretrial Order.

9 THE COURT: The application is granted. The  
10 direct testimony as shown in Exhibit 15 is now a part  
11 of the record.

12 MR. CONIFF: The witness is available for  
13 cross examination.

14 THE COURT: Cross examine, please.

15  
16 CROSS EXAMINATION

17 BY MR. PIERSON:

18 Q You were present yesterday when Director Crouse testified,  
19 were you not?

20 A Yes.

21 Q And this morning?

22 A Yes.

23 Q And without going through the transcript, unless you  
24 feel we have to, would it be accurate to state in your  
25 understanding and recollection of that testimony that Mr.



1 Crouse testified that if your information that you had  
2 available to you prior to October 2, 1972, in the  
3 meeting on that date with the Game Commission that  
4 indicated that an Indian net fishery by treaty Indians  
5 outside reservation boundaries could be allowed and  
6 still maintain and preserve the resource, as I understand  
7 it, Mr. Crouse said that then the Game Department would  
8 be authorized, and it would be proper for the Game  
9 Department then to recommend such a fishing season to  
10 the Game Commission, is that your understanding of  
11 his testimony?

12 A Yes. I would like to just express a further clarification,  
13 if I may. I would like to review the position at the  
14 time of the October 2nd meeting because I think it  
15 elaborates a little bit on Mr. Crouse's recollection  
16 of the meeting.

17 I responded basically to direction from  
18 counsel and also some personal reading at least of the  
19 Supreme Court decision, and I had some personal problems  
20 of understanding the decision, and it was basically  
21 left to my judgment to develop the material which I  
22 presented at that meeting, and I think in so doing, we  
23 recognized as you have stated, that it should have been  
24 data and information available which would indicate that  
25 the net fishery on the Puyallup River would not

1 interfere with the conservation of the resource,  
2 and the take by other interests as of 1970, that we  
3 would have considered this a mandate of the court and  
4 expressed our recommendations at that time.

5 Q Was it your understanding that the recommendation you  
6 made then to the Game Department was specific, not  
7 only to the Puyallup River, but to all other rivers in  
8 the state?

9 A Mr. Pierson, in my personal understanding, I felt that  
10 we were tied specifically to the Puyallup River, and I  
11 know that my preparation for the October 2nd meeting  
12 was heavily predicated on that belief.

13 Q Transporting yourself, if you will, back to the  
14 understanding that you had when you made your  
15 recommendations on that date, was your understanding the  
16 same as the testimony given by Mr. Crouse yesterday?

17 A I would say essentially, yes.

18 Q And my question is really directed to whether you thought  
19 that no matter what data you had, the state law  
20 prohibited any net fishing for steelhead, prohibited you  
21 from recommending authorizing such a fishery?

22 A My answer to that would be that because of the fact that  
23 a decision had been appealed, and because of my own  
24 problem in reaching the conclusion of the court, that  
25 I would have to say as far as my own preparation was

1 concerned, I could -- I uncovered no evidence that would  
2 suggest the feasibility of allowing net fishery by Indians,  
3 and I would admit to a problem in that area as to a clear  
4 course of action on my part.

5 Q The question really is, Mr. Millenbach that you, who  
6 made the recommendation to the Game Commission feel that  
7 state law prohibited you from recommending, authorizing  
8 an Indian net fishery off reservation boundaries?

9 A I would say this was a background understanding, and  
10 that this weighed heavily in my decision, yes.

11 Q Isn't it a matter of fact, Mr. Millenbach, you have  
12 stated at previous times in the course of this case that  
13 you felt that the state law was an absolute prohibition?

14 A I don't believe I have stated it in those words, Mr.  
15 Pierson.

16 Q It is accurate to say, isn't it, that at the October 2,  
17 1972 meeting, that you did not have available from the  
18 Indian tribes an estimate of the volume of steelhead  
19 that they might take in an off-reservation net fishery?

20 A Yes, sir, this is accurate, we had no information  
21 available from any of the Indian fisheries on any of the  
22 rivers, and this is one of the problems of a management  
23 biologist. He doesn't have information on the total take  
24 within any resource. This is an area that has been  
25 particularly difficult to us, and I think is one of the

1 reasons that we find ourselves in the position of not  
2 being able to really accurately or, I say,  
3 appropriately predict what the future runs and takes  
4 would be.

5 Q Now, you did have available to you the Nielson report  
6 at that time, didn't you?

7 A Yes.

8 Q And doesn't that estimate, off and on reservation  
9 Indian net fishing?

10 A There is some estimate, but certainly it is not a  
11 complete record, as the record points out.

12 Q You did utilize that in making the recommendation to the  
13 Game Commission?

14 A I was totally unaware of the report.

15 Q All right. So you did have some information on the  
16 off-reservation Indian net fishing effort, and you did  
17 have some information about on-reservation Indian net  
18 fishing effort?

19 A We had some information, yes.

20 Q All right, and that included pounds of fish and numbers  
21 of fish?

22 A I believe that's correct.

23 Q All right. Now, did you have any estimate from any  
24 source prior to that meeting of the number of tribal  
25 fishermen who might fish if you authorized an off-

1 reservation net fishery?

2 A The Nielson report has some information as to the number  
3 of Indian fishermen based on the very limited survey  
4 that was made.

5 Q Was that your only source of number of fishermen who  
6 might fish -- was it at that time?

7 A I would say that probably from time to time I have  
8 received information in just general communications  
9 with other individuals as to the number of Indian  
10 fishermen, but I wouldn't say I had any really finite  
11 and positive data as to the numbers of fishermen relating  
12 particularly to any given streams.

13 Q Did you have any idea from any source of the type of net  
14 gear the Indian tribes might have used if you  
15 authorized such a season?

16 A I would say that I personally observed some of the Indian  
17 net fisheries, and am aware that they use nylon net in  
18 the fishery. I have not really looked at it in detail  
19 in an attempt to determine the total scope of the types  
20 of nets used, or anything of this nature.

21 Q You didn't have any idea what the length might be?

22 A No, I have not measured any of the nets.

23 Q Do you have any idea what the mesh size might be?

24 A No.

25 Q Do you have any idea what the depth of the nets might be?

1 A I made no measurements, only general observations on that.

2 Q Did you know for sure if you authorized such a net  
3 fishing season, that monofilament nets would be used?

4 A No.

5 Q Did you have any idea from any of the tribes how many  
6 fishermen there might be if you authorized such a  
7 season?

8 A I had no finite information, as I stated, on the  
9 number of fishermen that might fish or do fish.

10 Q Is it accurate to say that of the types of information  
11 we have been discussing, you and your staff made no  
12 attempt whatever to gather such information outside the  
13 Nielson report?

14 A No, that is not correct. There was an effort on the  
15 part of Jack Ayrest and two other individuals who met  
16 with a number of tribes to look into the problem of  
17 trading or getting information that would be of benefit  
18 to management.

19 I have personally had some communication  
20 with the Lummi Tribe which relates to steelhead population  
21 and management potential. I have discussed at least  
22 on one occasion with some members of the Nooksack Tribe  
23 the desirability of working cooperatively.

24 So we do have other areas that we have  
25 attempted to obtain, getting to your question, information

1 on the Indian catch, which had not been forthcoming  
2 from the Indian tribes. I think that is basically  
3 because of the real problem.

4 This is my opinion, that there is no one  
5 really keeping a complete and total and accurate record.

6 I also recall that in view of the  
7 construction of the Bogachiel rearing pond and  
8 anadromous fish ponds, and our interest in evaluating  
9 the program of that rearing pond, which is on the  
10 Quilleute River system, I personally wrote to George  
11 Feldshaw pointing this out, saying that information on  
12 the take of steelhead by the Quilleutes would be helpful  
13 in our management decisions, and the response was to the  
14 effect that his office did not have the capability of  
15 getting this information, and that we should attempt to  
16 get it from the tribes.

17 As Mr. Nielson pointed out in his report,  
18 he did have a contact with a fish buyer on the Quillayute  
19 River system, and was unable to get any substantial  
20 information.

21  
22 (Continued on the next page.)

23 ET12  
24  
25

1 Q All right, let's go back to some of the points, Mr.  
2 Millenbach, to be covered.

3 Do I understand you to say that you thought  
4 that your presentation on October 2, 1972, was confined  
5 to the Puyallup River?

6 A I feel that this was the basis of my comments, and that  
7 I really wasn't looking at the total framework of all  
8 the rivers in Western Washington.

9 Q But you were looking specifically at the Puyallup River?

10 A Yes.

11 Q Did you contact any members of the Puyallup Tribe or  
12 the Puyallup Tribal Council to determine what fishing  
13 efforts they might have, number of fishermen, type of  
14 nets?

15 A No.

16 Q All right, did you have any way to know whether the  
17 information you had about other net fishery might  
18 somehow be extrapolated and used on the Puyallup?

19 A I don't believe I reached this point in my consideration.

20 Q So that your recommendation was entirely without any  
21 information about what the projected or possible or  
22 proposed Indian net fishery might involve?

23 A I would say basically, yes.

24 Q Referring to what is PL-37, and it is at the tail end  
25 of your presentation in that case in that meeting, we



1 have, I think it is about the sixth page from the back.

2 These pages aren't numbered. I think I have  
3 a copy of it, if you will wait a minute.

4 MR. PIERSON: May I approach the witness now?

5 THE COURT: Yes, you may.

6 THE WITNESS: I have a copy of it, Mr.  
7 Pierson.

8 Q I think I might be able to help you find it. The  
9 point of this statement that I have, or minutes, PL-37  
10 that I have pointed to, Mr. Millenbach, that is the  
11 tail end of your presentation on that day, isn't it?

12 A Yes.

13 Q And you say, looking at your first full paragraph,

14 "I should like to emphasize the fact that I  
15 have referred to only a few rivers that are  
16 involved in the consideration of off reservation  
17 Indian fisheries, and the reason for this is that  
18 we do not have information on all rivers, but only  
19 a small portion of the number of rivers involved.  
20 We have attempted to obtain information on the  
21 Indian fisheries, saying that we need it for manage-  
22 ment purposes, and this could be the key to  
23 allowing the Department to maintain the highest  
24 run of steelhead possible, but we have received  
25 very little cooperation from the Indians fishing.

1                   In the figures that I have just read, there  
2                   is very clear evidence that the nets can without  
3                   question take a majority of the runs of the steel-  
4                   heads in the streams where they occur."

5                   I want to concentrate on that last sentence. You say  
6                   there is very clear evidence that the nets can take the  
7                   majority of the runs.

8                   Did you at the time of this presentation have  
9                   any information upon which you could reliably depend  
10                  which indicated that they would take the majority of the  
11                  runs?

12                A    Yes, I did have such information.

13                  This information related to the Nisqually River, which  
14                  I think director Crouse referred to this morning, in  
15                  which we obtained information on the steelhead catch  
16                  for the past two winter seasons, and my recollection is  
17                  that in 1971-72 season, these records indicated total  
18                  take by the Indian fisheries of 6800 fish, and that our  
19                  estimate of sports catch was, as Mr. Crouse said, 1600.

20                  We also, as I reviewed in making that  
21                  presentation, the past records of the two coastal rivers  
22                  in which substantial information is available, and I  
23                  referred to the Department of Fisheries records on the  
24                  Indian catch of steelhead for the period between 1950  
25                  and 1960 was fairly complete, and I believe that it is

1 worthwhile to note that the reason for this was that  
2 it was a commercial fishery, the taking of steelhead  
3 and that the Department of Fisheries was receiving  
4 information on the catch as a result of this  
5 commercialization aspect.

6 In the early sixties, with the initiation of  
7 the Puyallup litigation, there was a break in the receipt  
8 of this information as a result of that court trial,  
9 and it no longer was available, and had not been  
10 available since that time to the Department of Fisheries  
11 so in attempting to find some reference as to the  
12 reliability of a net fishery and a sports catch, I  
13 turned to the records on the Quinault and the Queets.

14 Neither of these rivers have been planted  
15 with steelhead. They essentially provide a fishery on  
16 the natural stock, and taking the average catch by  
17 the Indian fishery on the Quinault as contained in this  
18 report, and for the period of 1951 to 1959, we find  
19 that the average was 4180 fish a year in the Indian net  
20 fishery.

21 The average take by the hook and line  
22 fishery and by sportsmen during that same period,  
23 which of course is almost entirely, not completely so,  
24 but in the area of the reservation, an average sports  
25 catch was 1383 fish. I also looked at the record of the  
/outside

1 Queets River, because here again for the period of 1961  
2 to 1969 there appears to be a substantial record of the  
3 take in the Indian fisheries.

4 The average annual take for that period, as  
5 I reported, was 4936 in the Indian fisheries. Our  
6 punchcard data shows that the average sports catch was  
7 968 fish. I did relate these as part of the data which  
8 I assembled to attempt to make a recommendation to the  
9 Game Commission.

10 Q All right, so they were the rivers, the Nisqually and  
11 the Quinault and the Queets and some other rivers that  
12 you mentioned in your presentation, is that correct?

13 A I possibly could have mentioned others, yes.

14 Q And you compared what you estimated to be the Indian  
15 take on those rivers, and the data you have as to the  
16 sports take?

17 A Right, yes.

18 Q Did you tell the Game Commission that the resource has  
19 been preserved in all those rivers?

20 A I don't think I specifically alluded to it in that  
21 context.

22 Q Wasn't the fact of quoting those relative figures between  
23 commercial Indian take on the reservation and sports  
24 take intended by you to indicate that the distribution was  
25 already as equitable as it ought to be?

1 A No, I did not reach that conclusion, Mr. Pierson.

2 Q Referring to that same page which we have been reading  
3 off of, Mr. Millenbach, I believe you are talking about  
4 the regulations, and you begin the next paragraph by  
5 saying,

6 "I would like to cover briefly the utilization  
7 of the resource."

8 And down, I believe in the fourth sentence, you  
9 say:

10 "I think it is also important to point out  
11 that less than 1 percent of the successful licensed  
12 fishermen ever fill a card or catch a season  
13 limit of steelhead."

14  
15 In view of the fact, Mr. Millenbach, that  
16 you did not compare the actual and stated take of nets  
17 but only their capability with what you anticipated,  
18 might be the sports take, isn't it accurate to say that  
19 you were telling the Game Commission that an equitable  
20 distribution already existed as between reservation net  
21 fisheries and sports fisheries?

22 A No, I did not reach that conclusion.

23 Q Now, the fisheries of the rivers that you followed,  
24 none of them included the Puyallup, did they -- that you  
25 gave to the Game Commission?

1 A I did not review what information we had on the Indian  
2 catch and the sports catch on the Puyallup, if I remember  
3 correctly, for the reason that the record wasn't as  
4 complete as on the two rivers that I did use. There  
5 was not a significant, or let's say a large scale  
6 Indian netting operation on the Puyallup River in the  
7 early fifties.

8 This did not develop until late fifties, so  
9 there was not a comparable record. Certainly we could  
10 turn to the record and draw some conclusions as to the  
11 impact of the Puyallup River Indian net fisheries on the  
12 sports take if we were to review the years in which it  
13 was most active, which my recollection was in the late  
14 fifties, in the early sixties, prior to the injunction,  
15 I think in 1964, and this has been a matter of record  
16 in the Puyallup Trial in which the sports catch and the  
17 Indian catch was delineated.

18 Q I see, you have figures for sports take for the Puyallup  
19 River for the previous year, didn't you, at that October  
20 meeting?

21 A Yes.

22 Q And the figures you were using to tell the Game  
23 Commission about Indian net fisheries were from the  
24 fifties and sixties?

25 A Yes, and let me explain again, and reiterate what the

1 reason for this was; these were the most complete records  
2 available to us, and I believe had more value from that  
3 standpoint.

4 Q Well, let's go back. You mentioned earlier that the  
5 Department of Fisheries had some information about  
6 commercial take of steelhead on reservations?

7 A Yes.

8 Q Do you remember how late, the most recent year that  
9 you had that for the Puyallup River?

10 A Again, to reiterate, this information essentially let  
11 me say, dried up, if I may, at the institution of the  
12 Puyallup suite in '64.

13 Q You are saying there wasn't a Puyallup fishery that took  
14 steelhead on the Puyallup River after 1963?

15 A I forget the exact date, it was '63 or '64 that the  
16 injunction was obtained.

17 MR. PIERSON: Looking, your Honor, at USA-15,  
18 the Court can pass that to the witness.

19 Q And the documents we are looking at is an exhibit to your  
20 deposition, was it not?

21 A Yes.

22 Q All right, and it purports to list White River steelhead  
23 under columns, White River Indian catch?

24 A Yes.

25 Q Puyallup Indian catch, sports catch, and Buckley Dam?

- 1 A Yes.
- 2 Q All right, now, the Buckley Dam is on the White River,  
3 is it not?
- 4 A Yes.
- 5 Q All right, so the Puyallup Indian catch would take  
6 place below the dam?
- 7 A Yes, it would take place in the Puyallup River.
- 8 Q And the White River Indian catch would take place above  
9 the dam?
- 10 A No.
- 11 Q Below the dam?
- 12 A Right.
- 13 Q And the sport catch would take place the entire length  
14 of the river?
- 15 A Yes.
- 16 Q All right, and the last figure you have there is for  
17 the year 1963 as to the Indian catch, right?
- 18 A Yes.
- 19 Q Do you see anything in the figures for the Indian catch  
20 from the years '53 through '63 that indicates to you  
21 that the steelhead resource in the Puyallup and White  
22 Rivers would be destroyed if you allowed them off  
23 reservation Indian net fishery on the Puyallup River?
- 24 A I made the statement in the Puyallup trial that in my  
25 view, in my opinion, the records we are looking at here



1 indicated that the net fishery on the lower Puyallup plus  
2 the sports fishery, plus the net fishery on the  
3 Muckleshoot reservation on the White River appears to  
4 be overharvesting the resource, and I drew this conclusion  
5 from the no escapement at Mud Mountain Dam.

6 Q That is the Buckley Dam count, is it not?

7 A Yes.

8 Q And at Buckley Dam you catch the fish and transport  
9 them around the dam and release them?

10 A Yes.

11 Q Have you ever planted the Puyallup River system with  
12 hatchery smolts?

13 A Yes, since about 1950 or '51.

14 Q All right, and during the years 1954 through 1963 have  
15 you just a ballpark figure as to the number of smolts  
16 that you planted in the Puyallup River?

17 A '54 to '63, I think we have the record here. My  
18 recollection is that we started out at about 40,000 or  
19 50,000 and increased it to 60,000 to 80,000. I don't  
20 recall specifically. Yes, the plants are on, I don't  
21 see the page number, but two pages further on.

22 Q All right.

23 A And they start in 1951, -'52. Actually this relates to  
24 the planting, I think two years previously, because I  
25 attempted to relate the plants to the catch, and there

1 is a two year lag, and we show starting out a plant of  
2 33,000 and a magnitude of 70,000 and between 50,000.  
3 and 70,000 until 1969, where we approached 100,000.

4 MR. PIERSON: And this is USA-16, your  
5 Honor, I believe.

6 THE COURT: Yes, I am looking at it.

7 Q Mr. Millenbach, is it 16?

8 A I have 16 here.

9 Q Is 16 the one you are referring to?

10 A Yes, I am sorry.

11 Q And, looking at that, it is accurate to say, is it not,  
12 that not until after 1963 did your plants get above  
13 60,000?

14 A Yes.

15 Q Were the plants in the Puyallup River --

16 A Excuse me, Mr. Pierson, we do show in 1961,-1962, which  
17 still was a 1960 plant, a plant of 79,000. I am sorry.

18  
19 (Continued on the next page.)

ET13

20  
21  
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1 Q Okay. You started with 33,151 the first time you  
2 planted that river?

3 A Yes, it was actually planted in 1950. I tried to make  
4 that clear, the two year lag here and the way the record  
5 is arranged.

6 Q The plants are returning adults, is that correct?

7 A In the year referenced, yes.

8 Q Those aren't the dates you planted them, but the dates  
9 they returned?

10 A Yes.

11 Q All right. Now, has your planting of the Puyallup River  
12 taken into consideration at all the heavy pressure which  
13 you noticed from the two Indian fisheries and sport  
14 fisheries on the Puyallup River?

15 A I would say generally our planting schedules are  
16 determined as much by our capacity to rearing fish  
17 as anything, and commensurate as a secondary  
18 consideration is the size of the river, and the extent  
19 of recreational fisheries that it can support.

20 I would say that there was no direct or final  
21 decision made in regard to the plants. Let me say the  
22 primary decision was made, whether there was a net  
23 fishery on it or not.

24 Q Mr. Millenbach, what I am really after is, you noted  
25 to the Game Commission you thought that somehow these

1 two net fisheries by Indians and sports fishery altogether  
2 were threatening the resource or overfishing.

3 My question is whether as a result of that  
4 judgment your planting of the Puyallup River has  
5 increased or decreased at all.

6 A It increased.

7 Q As a result of that judgment?

8 A No, I would say more so because of increased ability to  
9 rear fish, and budgets to rear fish.

10 But certainly there is some consideration  
11 there. You will note, if you were to review the detailed  
12 planting records, that we have planted the White River  
13 I think in the last four or five years now, attempting  
14 to reestablish or to augment, rather, the steelhead  
15 runs in that area.

16 Q How many hatcheries could you take fish from to plant  
17 the Puyallup River?

18 A For the most part they come from the Puyallup hatchery.  
19 The fish are started at the South Tacoma hatchery,  
20 transferred as fingerlings to the Puyallup hatchery,  
21 reared until they are smolt size, and then released  
22 into the Puyallup River.

23 Q Are there any other hatcheries that you could draw  
24 smolt sized steelhead from for the Puyallup River if  
25 you wanted to?

- 1 A I am sorry, this is true, and the White River plant may  
2 have come from the South Tacoma hatchery. I wouldn't  
3 know, right offhand.
- 4 Q Could you give us a judgment of what a smolt hatchery  
5 capacity is of the Puyallup River hatchery?
- 6 A We have been rearing about 100,000 smolts a year at the  
7 Puyallup River hatchery.
- 8 Q And for the other hatcheries that you could draw upon  
9 for the Puyallup River if you wanted to, what is the  
10 combined capacity of those two hatcheries?
- 11 A Combined annual plants at the present time in the winter  
12 steelhead is about 3,000,000 smolts.
- 13 Q So you could draw from all the rest of your hatcheries  
14 for the Puyallup River, if you wanted to?
- 15 A I suppose that decision could be made. I don't think it  
16 is a totally practical thing to do, and one that the  
17 user wouldn't allow.
- 18 But you asked if it is possible, it is  
19 possible.
- 20 Q By users, do you include Indians who fish by nets?
- 21 A I include anyone who has a right to fish.
- 22 Q The question is, by users, do you include Indians who  
23 fish by nets?
- 24 A I would say it includes them.
- 25 Q And those who fish on reservations?

1 A Yes.

2 Q All right. Now, do you know whether there is a density  
3 barrier, as that term has been used by Lloyd Royal, for  
4 volume of smolts that you can plant in the Puyallup  
5 River system?

6 A I really thought Dr. Lloyd Royal, who in my view  
7 described an unknown area of fishery management rather  
8 adeptly, certainly he has, I think, the most extensive  
9 experience in the management of salmonid fish --

10 Q Maybe we can get to the point easier if you just told  
11 me whether you as a biologist understand that there is  
12 any kind of density barriers in the Puyallup River  
13 as that term has been used by Mr. Lloyd Royal?

14 A I believe that the potential for a density barrier is a  
15 real one.

16 Q Do you have any idea how high that density barrier would  
17 be?

18 A I do not.

19 Q Would it be over 300,000?

20 A I do not know.

21 Q Is it over 100,000?

22 A I do not know.

23 Q Do you know whether it is under 100,000?

24 MR. CONIFF: Your Honor, I believe the witness  
25 answered the question.

1 MR. PIERSON: What I am after, your Honor,  
2 is they have been planting about 100,000 fish, and  
3 I want to know whether he has any judgment of the volume  
4 he is planting, if it is over the density barrier --  
5 let me ask it that way.

6 THE WITNESS: Well, Mr. Pierson, to elaborate  
7 on your question a little bit, we have in the last two  
8 or three years, I think exceeded the 100,000 plant in  
9 the Puyallup River, and certainly the catches of the  
10 past two seasons have not yet equalled those of previous  
11 years.

12 Now, whether this is an indication of the  
13 so-called density barrier, I don't believe that we have  
14 complete enough records, or records of sufficient length  
15 to clearly determine this.

16 I think that the potential that exists is  
17 definitely there, and I would accede and agree to it.

18 Q You mentioned earlier that the Department of Fisheries  
19 gathered commercial data on the take of steelhead on  
20 reservations up to a period; do you know by what method  
21 they did that?

22 A To the best of my recollection, the information on the  
23 steelhead catch came in as a regular fish ticket source  
24 of field data to the Department of Fisheries in  
25 conjunction with the sale of salmon.

1 Q And did those fish tickets come from fish buyers who  
2 were located on the reservations?

3 A As far as I know, they did. I don't personally --  
4 I never handled that personally.

5 Q Has the Department of Game ever considered instituting  
6 such a reporting procedure on the reservation for  
7 commercial catch of steelhead?

8 A I would say that we have never had any authority to  
9 request this information, and, consequently, have not  
10 done so.

11 Q Did you ever ask the Department of Fisheries how they  
12 happened to come about it?

13 A I have had discussions with their section -- with their  
14 statistical section, and this is my understanding, that  
15 this information came along with the information on  
16 salmon catches, as I have indicated.

17 Q Have you ever asked the Department of Fisheries how  
18 they were able to get this information from fish buyers  
19 on the reservation?

20 A I think I have just stated they got it directly from  
21 them in their fish tickets.

22 Q All right. I would like to look, if you would, at  
23 JX-2A, it's the red book, the joint biological statement.

24 THE COURT: 2A or 2B?

25 MR. PIERSON: 2A.



1 Q (By Mr. Pierson) 2A, page 58. Do you have the page?

2 A I have the page, 58, yes.

3 Q At the bottom of the page, the last sentence says, under  
4 the section, "Regulations to decrease gear efficiency,"  
5 it says:

6 "Although the need for management and the  
7 methods used depend on biological analyses, the  
8 actual techniques, like the ultimate objectives,  
9 involve political and economical considerations."

10 Would that statement apply to the management  
11 policies as you understand them, of the Game Department?

12 A I think we have perhaps a much different situation with  
13 our game fish resources, and we don't have as broad a  
14 political structure generally involved in the harvest  
15 of the game fish resource, and I think there are other  
16 aspects of the biology of the fish which are different  
17 in our approach to management.

18 Q You signed the joint biological statement, didn't you,  
19 Mr. Millenbach?

20 A Yes, I signed it as agreeing to the information that we  
21 participated in developing. I did not personally  
22 develop this section and I have no preconceived  
23 attitude on it.

24 Q You didn't read the section before you signed it?

25 A I signed it only as to the information we provided on

1 steelhead. I did not peruse the statement for all of  
2 the facts and data and comments on salmon.

3 Q Did you notice that qualification in your signature on  
4 the statement?

5 A I couldn't say that I did. I don't remember.

6 Q Well, let's just look at the front, your statement,  
7 and I believe it is just past the title page, it says:

8 "This joint statement has been prepared by  
9 and under the direct supervision of, and has been  
10 reviewed by, each of the undersigned. Except as may  
11 be otherwise stated in said statement, the facts,  
12 opinions and conclusions set forth herein are those  
13 to which each of us would testify as an expert  
14 witness in the case for which the joint statement  
15 has been prepared."

16 Your signature is there as Chief, Fisheries  
17 Management, Washington Department of Game.

18 Now, as I read that, there is no qualification  
19 whatever in that statement as to your signature, is that  
20 correct?

21 A I would agree.

22  
23 (Continued on the next page.)  
24  
25

E14-1

1 Q All right. Now, back to the statement on page 58,  
2 do you now wish to amend your signature to the  
3 statement and somehow substitute a statement which  
4 would better reflect the Game Department policies  
5 as you understand them for that one which appears  
6 on the bottom of page 58? If you would please read  
7 that.

8 A I think I would support the same as my previous  
9 answer, that I did not give the salmon statements  
10 the perusal and consideration as I did the steel-  
11 head work, and I think there are differences in the  
12 management of the two fisheries and I think the  
13 answer to your question whether or not this particu-  
14 lar statement applies to the management of steel-  
15 head, the weight of the variations there, I would  
16 feel that, for example, that in the way of -- in  
17 the point of biological analysis, that we do not  
18 have as much information as is available to some  
19 of the salmon resources, and that our takes of  
20 harvest are certainly generally much more restricted  
21 than for a commercial fishery.

22 So I think the weight of these problems would  
23 be quite different for a recreational fishery.

24 Q Would it be accurate to say, Mr. Millenbach, that  
25 beyond the biological questions that the Game

1 Department undertakes, there are determinations  
2 of the techniques to be allowed and places for  
3 fishing economical and political considerations?

4 A I think there are, yes.

5 Q Looking at the joint biological statements, page 1,  
6 there is a paragraph there that speaks both in  
7 terms of salmon and steelhead. Now, as a preparatory  
8 question, you have in your testimony written  
9 for this case, Mr. Millenbach, have you not, com-  
10 pared salmon and steelhead in some degrees?

11 A Yes.

12 Q Mr. Crouse has done so, has he not?

13 A Yes.

14 Q And isn't one of your reasons for managing the  
15 steelhead resource different from salmon dependent  
16 on some of these differences you cited?

17 A Yes.

18 Q All right. If you will review with me from the  
19 bottom of page 1 through page 2 the stated similar-  
20 ities between salmon and steelhead --

21 THE COURT: I'm sorry. What page is that?

22 MR. PIERSON: Page 1 of the joint biological  
23 statement, bottom.

24 Q (By Mr. Pierson) "These five salmon species  
25

1 and steelhead are native to Washington State waters."

2 Do you agree with that?

3 A Yes.

4 Q Okay. And the salmon and steelhead are both an  
5 anadromous fish?

6 A Yes.

7 Q And over on page 2, the first complete sentence,  
8 it says, "On reaching the fresh water spawning area,  
9 the female excavates a nest or 'redd.' She then  
10 lays a portion of her eggs which are fertilized  
11 by the accompanying male. The female then moves  
12 slightly upstream and begins excavating another  
13 depression. This gravel movement causes the first  
14 eggs deposited to be covered. The process is  
15 continued until all eggs are deposited and covered.  
16 It is important to note that the redd is dug in  
17 the stream (riffle area) where there is good inter-  
18 gravel movement of water to supply the eggs with  
19 oxygen and to carry away waste material during the  
20 incubation period."

21 Is that accurate as to both salmon and steel-  
22 head?

23 A I would say it is a general description, yes.

24 Q All right. And then there was also a note that  
25 steelhead, some of them survive to spawn again.

1 or survive the rigors of spawning?

2 A. Yes. I think if I may, I would point out one  
3 difference too, we have made a general reference  
4 to the spawning procedures of anadromous fish, and  
5 I would like to point out summer steelhead don't  
6 begin immediately to spawn and neither do winter  
7 run of steelhead as soon as they enter the river.  
8 I think that is likewise true of summer and spring  
9 Chinook; there is a period of time before actual  
10 spawning begins.

11 Q. All right. Then beginning down the next paragraph  
12 it says, "Salmon and steelhead eggs develop and  
13 hatch while within the redd. When first hatched  
14 they are known as yolk fry and remain in the gravel  
15 until the yolk material is totally absorbed. Egg  
16 incubation, hatching and larval development require  
17 from 90 to 150 days, depending on water temperatures."

18 Would you agree that is an accurate statement?

19 A. And depending on the species, there is a difference  
20 in species.

21 Q. As comparing salmon and steelhead, they are the  
22 same in that respect as a general matter?

23 A. No, the salmon require a great deal longer incuba-  
24 tion than steelhead do.

25 Q. Are there any species --

1 A They generally fall close within that time frame-  
2 work; however, it is a long period of time given here.

3 Q Are there any species of salmon that have the  
4 same incubation period generally as steelhead?

5 A No.

6 Q Then it says, "Free swimming fry emerge from the  
7 gravel in early spring. Juvenile salmon and  
8 steelhead spend various lengths of time in fresh  
9 water (see following sections on general life  
10 histories), then migrate down stream to salt water."

11 Is that an accurate statement as to salmon  
12 and steelhead?

13 A No, this is a general -- well, varying lengths of  
14 time, I didn't note the varying lengths of time.  
15 Yes, steelhead generally spend two years in fresh  
16 water then migrate to salt water.

17 Q "In the marine environment they feed heavily,  
18 exhibiting rapid growth until they return to fresh  
19 water on their spawning migration."

20 That is accurate as to both salmon and steel-  
21 head according to your information, is it not?

22 A Yes.

23 Q Let's talk about the relative weights of salmon  
24 and steelhead, are there any species of salmon,  
25 to your knowledge, at the adult stage that weigh

1 the same as steelhead?

2 A Yes, the size range of coho or silver salmon is  
3 very similar to the size range of steelhead.

4 Dog salmon are somewhat similar, sockeye generally  
5 are on the average smaller, pink salmon generally  
6 on the average smaller.

7 Q Chinook salmon?

8 A Chinook generally are larger.

9 Q All right. Then are there any species of salmon  
10 which have approximately the same life cycle, and  
11 by that I mean time of leaving and returning?

12 A Coho salmon normally spend a year in fresh water  
13 and return in two years from the ocean. There are  
14 some steelhead that follow this same pattern, and  
15 of course, as we have pointed out here, the hatchery  
16 program is aimed at production of smolt, so the life  
17 cycle pattern is very similar.

18 Q Did you ever state as a general matter that the life  
19 cycle pattern includes a two year rearing period for  
20 steelhead before going to sea?

21 A In the nature of this, this is the most common in  
22 fresh water, two years.

23 Q And as to your hatching plants, aren't they designed  
24 to migrate to salt water as close as possible to one  
25 year after being hatched?



1 A. Yes.

2 Q. Now, are there any species of salmon which spawn  
3 in the same general area of the river as steelhead?

4 A. Yes, there is an overlap in areas used by coho  
5 and steelhead particularly. I think in some areas  
6 you might have some overlap of Chinook spawning  
7 areas and the other two species.

8 Q. Are there any species of salmon whose production  
9 are controlled similar to steelhead by the quantity  
10 and quality of stream discharge during growth  
11 periods?

12 A. Well, the stream reared species of the coho is  
13 very responsive to flows in the rivers the same as  
14 steelhead.

15 Q. Page 6 in your testimony, I believe you go through  
16 some of the differences between salmon and steelhead,  
17 and starting there at line 9 -- well, line 6,  
18 the question is asked of you, "From a biological  
19 standpoint, what would the characteristics of  
20 steelhead be in comparison to salmon which would make  
21 steelhead desirable as a game fish?"

22 My first question to you is: Do you as a  
23 biologist determine the desirability of whether a  
24 fish is a game fish or a commercially marketed fish?

25 A. As a biologist, I don't, no. The State Legislature

1        does.

2        Q     Now, as a member of the Game Department do you enter  
3        into or take any part in that determination of  
4        desireability as a game fish?

5        A     As a biologist?

6        Q     As a member of the Game Department.

7        A     Well, I would say that this has been established  
8        before I had any input into the determination. I  
9        don't know how to answer your questions.

ET14 10

(Continued on next page.)

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- 1 Q Well, my questions comes about because of the  
2 question that was asked you. It says, "From a  
3 biological standpoint what would the characteris-  
4 tics of steelhead be in comparison to salmon which  
5 would make the steelhead desirable as a game fish?"  
6 You said as a biologist you don't enter into  
7 desirability, I wonder whether in any official  
8 capacity of the Game Department you entered into  
9 such a determination.
- 10 A I think the point of the testimony is that steel-  
11 head are trout. They are harvested basically in  
12 the stream and environment so that they are avail-  
13 able to the general fishermen. They do bite freely  
14 in fresh water, and this makes them therefore --  
15 and in addition to freely biting they are very  
16 interesting to catch on hook and line by reason  
17 of their strength and agility, and I think it is  
18 for those reasons that they are desirable game  
19 fish.
- 20 Q Would the answer then be that as a member of the  
21 Game Department but not as a biologist you do enter  
22 into these judgments about desirability?
- 23 A I suppose so, yes.
- 24 Q Okay, let's go down the list. It says first, "Steel-  
25 head are a trout and do not necessarily die

1 after spawning as all salmon do. The number of  
2 fish that survive to spawn a second time is usually  
3 low, making up only five to ten percent of the  
4 run." The question is, Mr. Millenbach, what  
5 relevance is that to determining whether to authorize  
6 an off reservation Indian net fishery for steelhead,  
7 if any?

8 A. I don't believe I considered that in that direct  
9 context, but I certainly see the fact that all  
10 salmon do die. Therefore, if there are some to be  
11 harvested, why, they should be harvested, and if  
12 you can't protect your spawning escapement --  
13 whereas in the management of the steelhead fishery,  
14 which is a trout, you do have the opportunity  
15 of some survival, and therefore, larger fish in  
16 your fish runs, as a result of it, but this again  
17 makes a desirable characteristic as far as the  
18 recreational fishery is concerned.

19 Q. How about the Indian net fishery, if you have more  
20 steelhead in there than you do, than a comparable  
21 amount of spawners for salmon, that means more fish.  
22 Doesn't that militate in favor of additional fishery?

23 A. I missed the point of your inquiry.

24 Q. As I understand your answer, you say that because  
25 not all steelhead die at spawning you have more

- 1 steelhead in a comparable run of spawners than  
2 you do salmon.
- 3 A. No, I didn't make that statement.
- 4 Q. After the spawning you have more steelhead left  
5 over than you do the salmon?
- 6 A. There are some steelhead left over that reproduce  
7 a second time. In salmon this is not true.
- 8 Q. Do you plan and plant and manage your resource to  
9 augment this respawning percentage?
- 10 A. That is part of our steelhead program. It is part  
11 of our steelhead program. As part of our steel-  
12 head program we have a definite program involving  
13 the selection of repeat spawning fish and larger  
14 fish, with the hope that we can incorporate this  
15 desirable feature of a larger percentage of run  
16 being repeat spawners and larger fish available  
17 to the fisheries.
- 18 Q. To the recreational fishery?
- 19 A. To the fisheries.
- 20 Q. Right. Have you thought of using these excess  
21 steelhead who survive the rigors of spawning, in  
22 having sufficient fish to allow an Indian net  
23 fishery?
- 24 A. Well, I think at the five or ten percent level  
25 it would be insignificant.

1 Q Have you ever inquired of any Indian tribe whether  
2 they would be interested in cropping five or ten  
3 percent of your steelhead run?

4 A Not directly, no.

5 Q Let me go to the next item. "While in the marine  
6 area steelhead inhabit areas of the outer ocean  
7 rather than the coastal zones and generally are  
8 not available for harvest in numbers until they  
9 enter river on spawning migrations." My question  
10 is how is that important to determine whether to  
11 allow an Indian net fishery for steelhead harvest?

12 A It is important from the standpoint, we have no  
13 information on the magnitude of a year's run of  
14 steelhead as a result of inshore fisheries. There-  
15 fore, we have an unknown for management, and whereas  
16 in the salmon resource with a coastal marine fisheries  
17 there is frequent checks as to the magnitude of  
18 any given run of fish, and they can apply this to  
19 the setting of seasons and to the harvest of the  
20 resource.

21 Q What you are saying then is because you don't have  
22 any information from marine fisheries of steelhead  
23 with which you could predict run size, on that  
24 basis alone you will not take the step of considering  
25 an off reservation Indian net fishery.

- 1 A. I think, Mr. Pierson, that point is that we cannot  
2 accurately predict what the runs will be, and this  
3 would be one of the real problems to surmount if  
4 we were to appropriately recommend a net fishery  
5 ahead of the time that the fish hit the river.
- 6 Q. Can you give the Court any idea how long and by  
7 what methods you would attempt to get the informa-  
8 tion necessary to know enough about the steelhead  
9 runs to allow an Indian net fishery?
- 10 A. I would find it difficult to predict an accurate  
11 time frame, but I would say that we do need records  
12 involving several generations of steelhead in order  
13 to reliably anticipate what the resource will do  
14 under a number of different environmental conditions  
15 and a number of different fishing rates that might  
16 be imposed on it. I am confident that as we develop  
17 additional information on spawning escapement, as  
18 we develop additional information on the other  
19 factors which influence steelhead populations, that  
20 there might be at some future date the capability  
21 and management to more reliably or to reliably  
22 predict what the runs will be, and in that manner  
23 allow a more complete take of the resource, but we  
24 are dealing here basically with a natural resource  
25 in terms of numbers, and a resource that is very

1 restricted, very much restricted by a two year  
2 residency in fresh water.

3 Q Mr. Millenbach, I think maybe you are getting past  
4 my question.

5 A I am sorry.

6 Q Let me ask you directly. Have you ever had a program  
7 in the past designed to give you sufficient informa-  
8 tion on coming run size from which you could, in  
9 your position as a biologist and as a staff member  
10 of the Game Department, recommend authorization  
11 of an off reservation Indian net fishery for steel-  
12 head?

13 A We do not at this time nor have we in the past had  
14 sufficient evidence to reliably predict what a run  
15 of steelhead will be with the succeeding winter.

16 Q Do you have any plans for setting up a program to  
17 compile such information?

18 A We are working in that direction at the present  
19 time by increasing our efforts at spawning ground  
20 escapement, by increasing our effort of understand-  
21 ing the factors that determine the size of our  
22 steelhead populations, and for example, we are  
23 working diligently to determine the effect of some  
24 of the fish diseases that we know exist in the fresh  
25 water and there are a great many areas of research



1 that we are working at attempting to develop  
2 adequate measurements to allow more precise and  
3 total utilization of the resource.

4 Q. And as I understand it, there is no way that you  
5 could estimate at which time from now, two years,  
6 ten years, it would be that you would have suffi-  
7 cient information to reach a judgment as to off  
8 reservation Indian net fishery?

9 A. I would say it would be extremely risky to attempt  
10 to do so on our capability that we have today.

11 Q. Do you understand then, Mr. Millenbach, that it is  
12 absolutely impossible within your understanding to  
13 estimate when you would ever authorize an Indian  
14 net fishery for steelhead?

15 A. I wouldn't say it is absolutely impossible. My  
16 response is that it would require a very considerable  
17 amount of time, and I think associated with it is  
18 the amount of risk that you want to take in utiliz-  
19 ing what I would term insufficient evidence to  
20 reliably predict what the runs will be.

21 Q. The next statement is, "Steelhead generally bite  
22 more freely in fresh water than salmon and are more  
23 exciting to catch on rod and reel." Now, are  
24 you comparing them to salmon in that last statement  
25 there, more exciting to catch on rod and reel?

1 A Yes, in fresh water.

2 Q Do you have any surveys indicating the relative  
3 excitement that salmon and steelhead fishermen  
4 have when they catch the various fish by rod and  
5 reel?

6 A I have wide experience and association with others  
7 who fish that share this feeling.

8 Q Do you know of any salmon fishermen who catch the  
9 salmon with rod and reel that get a bigger kick  
10 out of it than steelhead?

11 A I wouldn't know.

12 Q How extensive is your knowledge of sport fishing  
13 for salmon?

14 A Fairly extensive.

15 Q Would you give us just a brief resume of what that  
16 is?

17 A It involved my life as a hobby of fishing for salmon.

18 Q Is that personal?

19 A Yes.

20 Q You haven't consulted the Department of Fisheries  
21 about the relative excitement in catching salmon  
22 and steelhead?

23 A I have never engaged in any discussion of it, no.

24 Q The next one, "Salmon, on the other hand, remain  
25 closer to shore in the marine areas and are available

- 1 both as a commercial and sports fish as they grow  
2 to maturity. Their numbers are sufficient to sup-  
3 port both a commercial and a recreational fishery."  
4 Now, Mr. Millenbach, according to your knowledge of  
5 comparison of salmon and steelhead, are there any  
6 rivers where in the rivers themselves the indications  
7 of run size indicate that the steelhead run is  
8 larger than the salmon run?
- 9 A. I don't think I have sufficient information on the  
10 salmon runs to say that for every stream in the  
11 State of Washinton, that they are greater than  
12 steelhead, but certainly as a general comparison  
13 of the two resources, when you take the overall  
14 information that is available, that there are  
15 a great many more salmon in this area.
- 16 Q. Let's compare species of salmon with winter steel-  
17 head. Do you know of any information indicating  
18 that the volume of salmon in the river is less than  
19 the run of steelhead of any rivers where that is  
20 true?
- 21 A. Again, I don't know, Mr. Pierson, the specific  
22 data on all the rivers in Western Washington as  
23 regards to salmon populations.
- 24 Q. The next statement, I believe, is, "Nearly mature  
25 salmon do not take a lure or bite a baited hook

1       nearly as freely as do steelhead in rivers." Is  
2       that based on your personal knowledge or some study?

3       A.    There is no specific study on that.

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4                               (Continued on next page.)

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1 Q Next you say,

2 "Also, it should be noted that steelhead  
3 depends on the stream environment for two years  
4 before migrating to the ocean whereas salmon  
5 generally spend less than one year in fresh water."

6 My first question is, do all the steelhead  
7 that you are familiar with spend two years in fresh  
8 water before migrating?

9 A The majority of the naturally produced steelhead  
10 spend two years in fresh water.

11 Q How about the hatchery bred steelhead?

12 A As we previously stated, we aim to produce a smolt in  
13 one year, and generally do so.

14 Q Okay, and haven't you estimated that approximately 50  
15 percent of the recreational catch of steelhead in the  
16 state is hatchery bred?

17 A Yes.

18 Q So only half of that statement is correct. In other  
19 words, only approximately half of the steelhead in the  
20 waters of this state spend two years in fresh water?

21 A Well, I think we are talking in two different contexts  
22 here. One is adult fish population, you are referring  
23 to, and the other is a juvenile population, and I am not  
24 so sure that you would have the same relationship between  
25 juveniles in a stream as you would have between adults.

1                   You may have a difference in survival.

2                   I don't think that you can make that complete a  
3                   comparison of the two.

4           Q       At any rate, that statement is inaccurate as to hatchery  
5                   bred steelhead.

6           A       Well, admittedly, we raise most of the steelhead in our  
7                   hatchery to smolt size in one year, and I am referring  
8                   here to the naturally produced steelhead that normally  
9                   spend two years in fresh water.

10          Q       You didn't say, you didn't confine your statement to  
11                   naturally bred steelhead?

12          A       Well, not, it is not confined, but it was intended  
13                   and implied.

14          Q       Okay, and the rest of the statement indicates, "Whereas  
15                   salmon generally spend less than one year in fresh  
16                   water."

17                               Are you thinking of one species of salmon  
18                   when you say that?

19          A       No, all species. Cohos and spring Chinook generally  
20                   spend a year in fresh water, and I say less than one  
21                   year. Why, I am well aware that these two species  
22                   can spend a full year in fresh water.

23          Q       Isn't it true that sockeye salmon spend anywhere from  
24                   one to three years?

25          A       This is true, in lakes. I meant, I am thinking of rivers.

1 Q Sockeye inhabit streams as well as lakes?

2 A Yes.

3 Q Do I understand that there are other species of salmon  
4 that spend more than one year in fresh water, to your  
5 knowledge?

6 A No.

7 Q How about spring Chinook?

8 A I would say Chinook. I said spring Chinook.

9 Q And Coho?

10 A Yes, spring Chinook, Coho and sockeye.

11 Q That is three of the five species of salmon?

12 A Yes.

13 Q Moving on to page 7, we will go a little faster. At  
14 the top of the page you are asked,

15 "What is the total catch of steelhead for  
16 the 1970-'71 season?"

17 And as I understand it, you have rewritten  
18 your answer to say, "The winter sport catch is listed  
19 at 215,955 fish."

20 A Yes.

21 Q That is not the total steelhead catch in the state?

22 A That is the total catch by the sports fisheries of  
23 winter steelhead in the state.

24 Q Do you have any idea of what the take by Indian net  
25 fisheries on reservations might be?

1 A Well, we have had an estimate, and as I understand in  
2 the Nielson report, of some 50,000 fish.

3 Q So we are talking about the original figure that was  
4 listed there. We are getting close to 260,000?

5 A Yes.

6 Q Okay, and by those figures, just on the winter steelhead  
7 run, you have a total Indian take as about 25 percent,  
8 or around 25 percent of the total state take?

9 A Yes.

10 Q Line 21. I think we have gone into this a little bit,  
11 but just so I understand your statement.

12 "Last year the Department expenditures on  
13 the hatchery program totalled approximately  
14 \$1,600,000. Approximately one-half or \$650,000  
15 was involved in the rearing of steelhead. Related  
16 activity involved approximately \$350,000."

17 Now, that first figure as to the total  
18 hatchery program of \$1,600,000, do you have any estimate  
19 of how much of that would be federal money?

20 A I am sure it is in the record, but I would be reasonably  
21 close at about \$300,000.

22 Q All right, and is the second figure, your \$650,000 for  
23 rearing steelhead, what percentage of that would you  
24 estimate is federal money?

25 A I just told you, \$300,000.



- 1 Q Of that. Okay, how about the \$1,600,000? Is it the same?
- 2 A Yes, because the \$650,000 is included in the \$1,600,000.
- 3 Q So that no federal money in that \$350,000 involved
- 4 the related activities?
- 5 A No.
- 6 Q Now, looking down the page at line 26, you are asked
- 7 the question, "Have any studies been made as to the
- 8 contribution to the economy of this state to the steelhead
- 9 program."
- 10 And your answer is:
- 11 "The 1968 study by Consulting Services
- 12 Corporation of Seattle (Exhibit G-12) relating to
- 13 the expenditures by sports fishermen in harvesting
- 14 steelhead indicated that for every steelhead caught
- 15 the sportsmen spent \$60 for fishing gear, travel,
- 16 licenses and miscellaneous expenses."
- 17 I take it all of the \$60 includes money for
- 18 motels?
- 19 A Yes.
- 20 Q And money for liquor?
- 21 A Yes.
- 22 Q And money for clothes?
- 23 A Yes.
- 24 Q Do you know how much of that \$60 would have been
- 25 contributed to the state's economy if they hadn't been

1 pursuing steelhead?

2 A No, I do not.

3 Q Suppose, Mr. Millenbach, you effectively could limit the  
4 number of steelhead taken by a steelheader or sportsman  
5 to one-half as many as they now take.

6 Wouldn't that figure jump from \$60 to \$120?

7 A It would if you have the same degree of participation,  
8 yes.

9 Q Wouldn't it be accurate to say, assuming you have the  
10 same degree of participation, you could get more money  
11 for steelhead fishermen the less fish they take?

12 A Well, I am sure there is a relationship, yes.

13 Q All right, at page 8, lines 11 through 15, I think you  
14 are speaking about the Lyre River, and you say:

15 "This is a relatively short stream which has  
16 limited natural rearing. The average annual  
17 catch prior to planting was 262 fish. Annual plants  
18 ranging from 10,000 to 25,000 have increased the  
19 average annual catch to 1725, or nearly six times."

20 Now, are you certain, Mr. Millenbach, as a  
21 biologist and as an expert in that field, that it was  
22 because of your plants alone that the annual catch was  
23 increased by that number?

24 A You ask if I am an expert. The evidence certainly  
25 supports it. We have had some creel census on the river

1 which have definitely identified hatchery fish in the  
2 catch, and for the purpose of developing the average  
3 catch, I used the catch as recorded for several years  
4 prior to the initiation of the planting program, and  
5 as far as the Lyre River and its physical characteristics,  
6 I think it has remained essentially the same through  
7 the period from which I drew the record, and I would  
8 feel very firmly that the increased catch is from the  
9 hatchery plants.

10 Q Do you know whether the number of fishermen who fish  
11 the Lyre River increased over the period you are talking  
12 about?

13 A I am certain that as the fishing, the success of fishing  
14 increased, that there was an increase in fishing effort.

15 Q And if the Game Department indicates as a public matter  
16 to sportsmen or steelheaders that fishing might be  
17 better after it has increased its plants --

18 A Sportsmen and all interested parties are regularly  
19 furnished with our information on plants, and a great  
20 many of them do put a reliance on this information, and  
21 respond to it.

22 Q Are there any other features or factors besides, let's  
23 say, the number of fish which might contribute to a  
24 change in your catch figures, such as, for instance,  
25 the water conditions at the time of catching?

1 A Well, I think in taking an average that you smooth such  
2 factors out, and so I think that the comparison remains  
3 essentially accurate.

4 Q You have had a rack on the Elochoman River and some  
5 other rivers previously, haven't you?

6 A At times.

7  
8 (Continued on the next page.)

ET15

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1 Q Have you, pursuant, kept catch statistics on actual runs?

2 A We did in the case of the Elochoman River, attempt on  
3 two different years, and I will try to get to the point  
4 of your question.

5 We did operate a trap and were successful  
6 in one, so that we were able to essentially enumerate  
7 the total run in the river, and then be able to compare  
8 our punchcard catch to that total run.

9 Q Do you have an indication of what you got as a  
10 correlation?

11 A Not as a correlation, but my recollection is that we  
12 showed a very high percentage in the catch as compared  
13 to the total run in the neighborhood of 70 percent.

14 Q What I am really talking about is whether as a matter  
15 of fact of this study on the Elochoman River, you are sure  
16 or you have any studies that indicate to you that either  
17 in the Elochoman River or statewide, the catch statistics  
18 are accurate statistics of the run size?

19 A Well, I think it has implied or supported the idea that  
20 the catch data as derived from the punchcards is useful  
21 in comparing the trends of steelhead populations, yes.

22 Q But you don't have any specific conclusions as to the  
23 amount of correlation in the studies?

24 A I have trouble reaching your correlation point.

25 Q How are you sure that your catch statistics in the rivers

1 accurately reflected the size of the run in the year  
2 of the catch?

3 A Well, we are not sure they do, but we feel that the  
4 catch information is collected in the same manner from  
5 year to year, and that there is probably some bias  
6 in the total statistics, but that that bias should  
7 be comparable year to year, and that as an indication  
8 of the trends of run of steelheads, that is useful for  
9 management purposes.

10 Q All right. Are you familiar with the report done for  
11 your department, I think it was 1970, by Duane O.  
12 Braaten?

13 A I recall that Duane Braaten.

14 Q Do you recall his conclusion that the single most  
15 influential factor in determining success of catch on a  
16 given day was water conditions?

17 A That could be, I don't specifically recall it.

18 Q Page 9, line 19, Mr. Millenbach, you say,

19 "I think the nets have the potential to take  
20 essentially all of a run, as it has been reported  
21 by the International Salmon Commission relating to  
22 sockeye salmon where there was a conclusion from  
23 their studies that the nets had the capability of  
24 taking 98 percent of a run."

25 Mr. Millenbach, isn't it true you are referring

1 to the 1956 annual report of the International Pacific  
2 Salmon Fisheries?

3 A Yes.

4 Q And in particular, the part of the report that you are  
5 talking about, that the Commission was talking about,  
6 the fisheries on the Frazier River in Canada?

7 A Yes.

8 Q And you feel that their conclusions about the  
9 capabilities of those nets are reliable?

10 A Yes.

11 Q Do you feel that their conclusions about how those nets  
12 might be regulated are reliable?

13 A I am certain in regard to the regulation of that  
14 fishery, yes.

15 Q Mr. Millenbach, I am looking at USA-19, which is a  
16 1956 report, and I refer you to pages 19 and 20 at the  
17 bottom of the page. As a preface, Mr. Millenbach, is  
18 it your understanding that the International Pacific  
19 Salmon Fisheries Commission attempts to regulate the  
20 harvest and management of pink and sockeye salmon runs  
21 to the Frazier River?

22 A Yes.

23 Q And isn't it accurate that this report was principally  
24 devoted to the take of sockeye?

25 A Yes.

1 Q And do you at the bottom of page 19, there is a title,  
2 it has a title saying, "The Canadian fishery." It reads:

3 "The basic problem in gear regulation in  
4 Canadian Convention waters has been created by the  
5 addition of Juan de Fuca Strait as an effective  
6 gillnet and purse seine fishing area."

7 Now, Mr. Millenbach, do you have any  
8 understanding of what the volume of gillnet and purse  
9 seines were in terms of fishing units in the Straits  
10 of Juan de Fuca at the time this report was presented?

11 A I don't know in detail. I know it is a large commercial  
12 fleet.

13 Q Wasn't it approximately 300?

14 A It could be; I don't know, Mr. Pierson.

15 Q The next sentence says:

16 "The historic Frazier River gillnet fishery  
17 for many years has been capable, when operating,  
18 of taking an estimated 98 percent of the fish  
19 available."

20 Now, that is, is it not, the source of your  
21 quotation in your testimony?

22 A Yes.

23 Q Do you have any idea how many gillnet fishing units  
24 there are in the Frazier River?

25 A No, I do not.



1 Q Would you be surprised to hear that it is about 1000?

2 A No, I would not.

3 Q The next sentence says, "In addition to this high  
4 efficiency, there has been a super-saturation of gear  
5 which allows a substantial reduction in the number of  
6 units of gear normally operating without any measurable  
7 reduction in the fishing efficiency."

8 It continues on page 20:

9 "A large fleet of gillnet boats can leave  
10 the Frazier River area for Juande Fuca Strait without  
11 reducing the 98 percent fishing efficiency of the  
12 residual Frazier River fishing fleet. The catch of  
13 the gillnet fleet in Juan de Fuca Strait is now  
14 reaching substantial proportions, and when  
15 combined with the increasing catch of purse seines  
16 in the same area, it is obvious that a substantial  
17 reduction must be made in the fishing time of both  
18 areas if adequate escapement is to be secured."

19 Down below, on the same page, under the  
20 title, "Escapement," the statement is made:

21 "The total 1956 run of sockeye to the Frazier  
22 River system including the commercial catch, Indian  
23 catch and the escapement was 2,743,000 fish,  
24 representing a decline of 14.4 percent over the run  
25 of the previous cycle in 1952. In spite of

1 substantial increases in fishing efficiency, the  
2 fishing regulations were so designed that the  
3 total escapement of 879,000 to all spawning areas  
4 actually increased by 3.2 percent over the  
5 escapement in 1952."

6 The question is, Mr. Millenbach, whether  
7 with that kind of 98 percent efficiency in the river  
8 gillnet fishery in addition to a marine gillnet and  
9 purse seine fishery, if the Frazier River can be  
10 regulated to provide an increase in the escapement,  
11 why could not the Indian net fisheries off reservation  
12 in this state be regulated to preserve the resource?

13 A I think basically, Mr. Pierson, you have a problem of  
14 two different resources, you have in the case of  
15 Frazier River a salmon resource, which is measured in  
16 millions, and which gives you more latitude than in  
17 the number of fish that you can provide an escapement.

18 You have developed in the management of that  
19 sockeye fishery and fishery generally a sophisticated  
20 procedure of determining optimum spawning escapements,  
21 and it is -- a great deal of money has been spent to get  
22 this information, and you compare to management of  
23 steelhead, which is a relatively small resource in terms  
24 of numbers of fish, and you have different spawning  
25 ground requirements, I think, in terms of steelhead, and

1 we have not because of financial structure; and I would  
2 say also related a little bit to need, perhaps ever  
3 attempted to establish a program to make the finite  
4 determination of spawning escapement that they have  
5 developed for the Frazier River.

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16-2

6 Q Mr. Millenbach, are you saying that the financial  
7 limitations of the Game Department prevented you from  
8 managing a gillnet fishery for steelhead as well as the  
9 Frazier River system manages a gillnet fishery for  
10 sockeye?

11 A My reference is that we have not had sufficient funds  
12 to attain that degree of sophistication in our  
13 management knowledge, and our efforts at getting  
14 information on the resource to attempt that type of  
15 fine management regulation.

16 Q Now, to your knowledge, is there a steelhead run in the  
17 Frazier River?

18 A I am sure there are steelhead in the Frazier River.

19 Q And have you examined any information about how that  
20 98 percent gillnet efficiency in the river affects the  
21 run of steelhead on the Frazier?

22 A NO, I have not.

23 Q Do I understand you to say then that the information  
24 about sockeye and the run of sockeye to the Frazier  
25 River system is more important to your determinations

1 and judgments than the run of steelhead in that river?

2 A No, I didn't make that statement, Mr. Pierson. I said  
3 I did not know the scope of the steelhead run in the  
4 Frazier River, nor the impact of the fishery on it.

5 The reference to the capability of taking  
6 gillnets was not inferred to relate to steelhead. It  
7 referred to the text as you have read it, and referred  
8 to the sockeye fishery.

9 Q At the time when you quoted that 98 percent gillnet  
10 efficiency, have you ever indicated that you were talking  
11 about efficiency of taking sockeye?

12 A There was no reference made to species.

13 Q And your presentation had to do with Indian gillnet  
14 fisheries for steelhead, did it not?

15 A This probably some time, yes.

16 Q Do you have any way of knowing whether the resource of  
17 salmon and -- steelhead and sockeye in the Frazier  
18 River has been preserved in the face of that 98  
19 percent gillnet efficiency?

20 A Yes, I am aware that the -- there was a very successful  
21 sockeye fishery of this year, and I am also aware that  
22 by personal contact with officials in British Columbia  
23 and from interested laymen concerning the steelhead  
24 resource that there is a great deal of complaint  
25 concerning the availability of steelhead for the

1 recreational fishery.

2 Now, as to specifics, as to the enumeration  
3 of those runs, I haveno information.

4 Q You don't have any definite information?

5 A No.

6 Q This is just information you received through various  
7 conversations?

8 A Yes.

9 Q Page 14, Mr. Millenbach, bottom of the page, I believe  
10 you indicate that "the Department regularly reviews the  
11 information on steelhead runs and the steelhead resource  
12 to comment on anticipated runs, but because we have  
13 no opportunity to measure the ocean survival, we have  
14 not made any predictions on run size."

15 Are you aware, Mr. Millenbach, whether the  
16 Department of Fisheries has any better information on  
17 ocean survival of salmon?

18 A Yes, I think <sup>/they</sup> we have considerably more information on  
19 the ocean survival of some species of salmon, perhaps  
20 all of them, as far as that is concerned, I don't know.

21 Q You don't know?

22 A On all species, but I do know they have on some species.

23 Q If they have a lack of information as to any species,  
24 according to your information, that has not kept them  
25 from estimating run size, has it?

1 A I think generally they make predictions on all species,  
2 yes.

3 Q Page 17, Mr. Millenbach, I believe there at the top  
4 you're indicating what you call prespawning mortality  
5 related to gillnet fishing, dip net, dragnets, drift  
6 nets, and I take it as a biologist and a fisheries  
7 management expert, you are familiar with what kind of  
8 marks these nets make on the fish?

9 A Yes.

10 Q And have you ever conducted a tagging study except for  
11 the <sup>Elochoman</sup> ~~lochoman~~ and fish trap arrangements you had before?

12 A Studies relating to what, survival of adult fish or what?

13 Q Let me ask you a little bit more directly; have you  
14 ever used gillnets to take fish for tagging studies?

15 A We have not.

16 Q Do you know anybody that has?

17 A Yes, I'm aware of a study on the Columbia River, I think  
18 in the -- it was in the fifties some time, in which  
19 the Department of Fisheries and the Department of  
20 Oregon Fish Commission conducted a gillnet fishery on  
21 the lower Columbia River, in which the steelhead were  
22 caught, tagged and released, and the result of that  
23 research effort was to attempt to get some measure of  
24 the total runs of winter steelhead in that area.

25 Q They used a gillnet to take the fish?

- 1 A Yes, sir, they were manned at all times, and even in  
2 spite of that, there was some mortality from the nets.
- 3 Q Do you know whether there is mortality in hook and line  
4 fishery?
- 5 A I would assume that on occasion there could be a  
6 mortality. But generally speaking, there is not.
- 7 Q Have you ever gathered information so that you might  
8 compare that with the relative prespawning mortality?
- 9 A I would say that --
- 10 Q As opposed to gillnets?
- 11 A I would say we have not.
- 12 Q Page 18, you are asked to comment in one of the requests  
13 for admissions, I think this was directed towards  
14 fisheries on the Nooksack River, your answer is that:  
15 "The Department has had an interest in the  
16 steelhead fishery on the Nooksack River,"  
17 and by this, I take it you mean the gillnet fishing?
- 18 A Yes.
- 19 Q By Indians?
- 20 A Yes.
- 21 Q On the reservation?
- 22 A Yes.
- 23 Q (Reading:)  
24 "-- and we would like to determine if the  
25 run is being maintained at its maximum level.

1                   Fundamental to such an interest is an accurate  
2                   record of the total annual take of steelhead."

3                   Now, isn't that true as to every run of  
4                   steelhead in the state?

5           A        I am certain it is.

6           Q        At the bottom of page 20 you are again asked to comment  
7                   on the request for admissions, and you are referring  
8                   to a hypothetical assertion that it is possible to  
9                   regulate an Indian net fishery by daily regulation of  
10                  the number and the type of nets used, the manner of  
11                  fishing and the location of nets. Then you say:

12                         "This is not feasible."

13                  Can you give the Court your reasons for  
14                  saying that?

15           A        Well, part of the reasoning behind this statement is  
16                   that the Department really has no finite and  
17                   substantial information as to the effectiveness of  
18                   gillnets, as to their daily take, the take related  
19                   to the number of species, of gear in use, if you will.  
20                   So this makes it difficult to attempt to predict the  
21                   take of such gear in any river, and it would be  
22                   extremely difficult to daily regulate the use of a net  
23                   fishery over any area. By that I mean it would require  
24                   substantial enforcement effort to be sure that the  
25                   regulations were complied with, and inherent in it I



1 think too is the -- I am sure is the comparison that  
2 with a hook and line fishery, the hook, when it's in  
3 the water, can only take one fish at a time, and if  
4 this limitation is kind of built in, irrespective of  
5 the number of gear that is used, you can only take one  
6 fish per gear, whereas with the gillnets, you could  
7 in effect, intercept a whole school of fish if it  
8 happened to be moving through the particular area of  
9 the net.

10 So this is basically the reason that we say  
11 that it would be a real -- it's not feasible to regulate  
12 an Indian fishery on a very tight day to day basis, and  
13 I think that was the reference here.

14 Q So summarizing, you are saying because you don't have  
15 information on any gillnet fisheries, because you don't  
16 have enough enforcement personnel --

17 A Additionally, you cannot adequately, in my mind, control  
18 the take by each unit of gear, so that gets probably  
19 at your first conclusion there.

20 Q Have you ever had experience with regulating gillnet  
21 fisheries for steelhead?

22 A No.

23 MR. PIERSON: Your Honor, I wonder if I might  
24 -- this is a new exhibit, I think Mr. Millenbach has seen  
25 it, certainly he is familiar with it, here is a copy of

1 the original, and copies for the Court, and I have marked  
2 it PL-79, and it's a portion of Mr. Millenbach's  
3 testimony in the remand trial in the Puyallup case, and  
4 it's from pages 62 and 63 of the joint appendix in the  
5 Supreme Court.

6 MR. CONIFF: I will stipulate to its  
7 authenticity.

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9 (Continued on the next page.)

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- 1 Q And up toward the top, Mr. Millenbach, you were  
2 talking about conservation, and then comes the  
3 question. "If we are trying to get the highest  
4 catch possible, why not cut back the number of  
5 fish in each catch," I think that is of sport  
6 fishermen, "and the number of days he is allowed  
7 to be out there." "How would that increase the  
8 catch?" Your answer. That was your answer.  
9 Question, "There would be --" seems like you are  
10 changing around question and answer. The question  
11 is, "There will be a much higher escapement and  
12 more fish would come back?" Your answer is, "There  
13 is no direct relationship to increasing the escape-  
14 ment automatically increasing runs of fish. No,  
15 there is no limit to the reproduction and rearing  
16 capacity of these streams --"  
17 A. Excuse me, Mr. Pierson, I think, there is no limit,  
18 it reads, "There is a limit."  
19 Q. "There is a limit," I am sorry." In other words, if  
20 you had no fishery at all you would have a popula-  
21 tion of fish that leveled off at about 6,000 fish  
22 in the Puyallup, if you had no artificial propoga-  
23 tion. There would be no more, no less." Question,  
24 "You are saying your regulations are perfect the  
25 way they are." Now, answer, "That is a pretty hard

1 conclusion to reach, not being capable of some  
2 improvement. To the best of our capabilities now  
3 and knowledge we have now they are the best that  
4 can be promulgated, yes." Question, "Let me ask  
5 you this. You said a net fishery would be absolutely  
6 impossible in terms of your definition of conser-  
7 vation. What if we cut down the number of fish a  
8 sportsman is allowed to catch, or the number of  
9 days, whatever, and we allowed a highly regulated  
10 self-regulating Indian net fishery. Would that be  
11 possible to still reach the same number of fish  
12 being caught now?" Your answer is, "It would be  
13 possible, yes." Question, "Why don't you do that?"  
14 And answer, "We do not have authority to do this."  
15 Question, "What do you mean you don't have authority  
16 to do it? You make the regulations." Answer, "By  
17 the laws of the State of Washington steelhead may  
18 not be taken with a net." Question, "If you could,  
19 would you do it?" And there an objection is ruled  
20 on by the Court. Question, "Again, Mr. Millenbach,  
21 does it make any difference to conservation whether  
22 two thousand or three thousand, whatever, fish are  
23 caught by the sportsmen or whether they are caught  
24 by Indians?" Your answer is, "Conservation alone,  
25 no, it makes no difference." That was your answer.

1 Question, "It makes no difference?" Answer, "It  
2 would be possible to rebalance the numbers caught  
3 and still maintain conservation. There is a surplus  
4 of fish or harvestable part that can be cropped  
5 in a system of conservation." Are your opinions  
6 any different today than they were when you  
7 gave that testimony, Mr. Millenbach?

8 A. No, they are not. Let me qualify, or not qualify  
9 but emphasize the point that I make here, that we  
10 were talking hypothetically, and the response was  
11 on the basis that any natural resource, a fish  
12 run normally has in it harvestable surplus, and  
13 whether that harvest purely is from a conservation  
14 or a resource standpoint was with a net or with  
15 a hook and line, really, you could have the same  
16 results as far as maintenance of the run.

17 Q. And your answer, that the reason that you don't  
18 allow such net fishery is because of the prohibition  
19 of the laws of the State of Washington?

20 A. Yes.

21 Q. Is that still your position?

22 A. I am mindful that we now have confronting us the  
23 Puyallup decision and that that decision reaches  
24 as to our requirements in developing our regulations  
25 concerning the steelhead take, and that there is

1 a new consideration that has been directed to us.  
2 Q. Which means that if in the interests of conserva-  
3 tion you could rebalance those numbers and still  
4 conserve the resource, that the State law is no  
5 prohibition?

6 A. If we talk hypothetically, this is true.

7 Q. Okay, now, I believe you made a presentation to the  
8 Game Commission on August 20th of this year?

9 A. Yes.

10 Q. And part of that presentation was a written presen-  
11 tation of, I believe, seven pages?

12 A. Yes.

13 MR. PIERSON: We marked that as PL-78.  
14 I would like to offer that at this time, Your Honor.

15 MR. CONIFF: I join in the offer.

16 THE COURT: It will be admitted, assuming  
17 no other counsel has any objection.

18 (Exhibit Number PL-78 was  
19 admitted into evidence.)

20 Q. Now, Mr. Millenbach, in addition to this written  
21 statement you gave some oral comments, did you not?

22 A. My recollection is that I paraphrased in one area.  
23 I almost read verbatim, but I believe that I added  
24 the comment that there frequently is a relationship  
25 between the runs of coho and steelhead, that this

1 is not always true, but frequently there is a  
2 relationship between the two, and that to my ob-  
3 servation of the coho fishery during this current  
4 season, particularly off the coast, the troll fishery  
5 and the sports fishery is that it is not an unusually  
6 large run, and that steelhead may follow the same  
7 pattern this year when the run approaches.

8 Q All right, now, you also answered some questions  
9 from some of the members of the Game Commission,  
10 did you not?

11 A I responded to a question from Mr. Galbreath  
12 (phonetic), and my recollection is that he inquired  
13 into the feasibility, if you will, of doing some-  
14 thing with hatchery operations to increase the  
15 steelhead runs in areas of Indian fisheries and my  
16 response basically said that it is a well-established  
17 fact that hatcheries can be used to enhance runs  
18 of anadromous fish, that from my experience with  
19 steelhead and knowledge of other species in fish  
20 culture that in my view the easiest and probably  
21 the area that would lend itself to the best return  
22 would be in the area of silver salmon.

23 Q Did you indicate at all that one of the reasons  
24 that you thought it would be feasible was because  
25 of the two year rearing life of steelhead?

1 A. Excuse me, this is a real problem of fish culture  
2 in rearing steelhead. To make the point very clear,  
3 as we stated many times, normally steelhead do not  
4 reach smolt size in less than two years in the  
5 natural environment. The production of smolt in  
6 one year is very difficult. For fish culture,  
7 it requires an experience, the development and  
8 the utilization of the best facilities, and I  
9 say, "best", I refer to the capability of fish for  
10 water temperatures, and the utilization of all of  
11 the factors that relate to the production of fish  
12 in a hatchery. My point is that it required the  
13 Department of Game many years of trial and error,  
14 and development of the steelhead hatchery program,  
15 to be able to rather consistently and reliably  
16 produce a one year smolt, or as compared to silver  
17 salmon, they normally have a one year fresh water  
18 cycle. The problem is not nearly as great.

19 Q. My question, Mr. Millenbach, is whether your answer  
20 to Mr. Galbreath wasn't based upon a statement that  
21 steelhead as a general matter have a two year  
22 rearing life before going to sea?

23 A. And I think my answer said yes.

24 Q. Did you state during that time that you had made  
25 contact with the Bureau of Sport Fisheries &



1 Wildlife to inquire about Indian fisheries?

2 A. To inquire concerning knowledge of the coming  
3 run next winter.

4 Q. Coming run?

5 A. Yes. Of steelhead.

6 Q. In any rivers?

7 A. Just generally what the steelhead runs will be next  
8 winter.

9 Q. Were you asking the Bureau of Sport Fishery and  
10 Wildlife for an authoritative opinion in that  
11 regard?

12 A. Yes.

13 Q. Do you normally rely upon their judgments about  
14 that?

15 A. No, I would say this was one of the first contacts  
16 of that nature, but in the interest of developing  
17 this statement and the reference that we are looking  
18 for, all searching for all data that could be used,  
19 I did have a telephone conversation with the  
20 Bureau of Sport Fisheries and asked if they did  
21 have any predictions on the coming run.

22 Q. And have you relied on such requests and the infor-  
23 mation that came from them in the past?

24 A. Well, frankly, we haven't had any.

25 Q. This was the first time you contacted them?

1 A. We have general contacts over the years. I wouldn't  
2 -- I would say it was the first time and that  
3 it was rather specific to this particular review  
4 and report.

5 Q. Do you remember when that was?

6 A. Yes, it was a week or so prior to the completion  
7 of this report. I couldn't specifically relate to  
8 it. I called Jim Heckman on another matter, one  
9 which related to a cooperative effort on taking  
10 wall-eye in the Spokane River, and during that  
11 conversation I asked him if he had any information  
12 on what the coming winter's run of steelhead would  
13 be, and he said no.

14 Q. And your inquiry was about all the rivers in the  
15 State of Washington?

16 A. It wasn't discussed in detail. It was discussed  
17 pretty much as I have related it here.

18 Q. I see. Did you indicate that as part of your element  
19 in prediction of coming steelhead runs, in your  
20 presentation to the Game Commission, that the  
21 fisheries in Bristol Bay, Alaska, on sockeye were  
22 indicative?

23 A. Yes, there is reference to the Bristol Bay fishery  
24 in this report.

25 Q. And that is the fishery on sockeye you are talking

- 1 A. Yes.
- 2 Q. Did you ever consider what the fisheries in Lake  
3 Washington on sockeye would indicate?
- 4 A. I haven't related the Lake Washington sockeye run  
5 to the steelhead runs, and my relation, my reference  
6 to Bristol Bay was specifically elaborated on, and  
7 I stated that because of the known comingling of  
8 steelhead and sockeye in the outer Pacific, and  
9 the fact that it is known that there are large  
10 scale foreign fleets operating on those species  
11 in that area, that there could be a relationship  
12 to next winter's steelhead run.
- 13 Q. There could be. Do you have any data that indicates  
14 that there is a correlation between Bristol Bay's  
15 catch of sockeye and the future runs of steelhead  
16 in Washington waters?
- 17 A. No, and I have not stated so.
- 18 Q. But you did represent to the Game Commission that  
19 this was some element that indicated what the  
20 future run of steelhead might be this coming year?
- 21 A. I related to the Game Commission exactly as I  
22 related it to you here, that we had a very deficient  
23 run of sockeye, that sockeye and steelhead were  
24 comingling in the outer Pacific ocean. There are  
25 known foreign fleets that operate on the species  
in that area.

1 Q Have you ever undertaken to inquire what the ocean  
2 steelhead catch was in those foreign fleets?

3 A None is available. I have talked to the members of the  
4 National Marine Fisheries Service. They advise me that  
5 they have not operated their high seas efforts for the  
6 past two years in the gulf of Alaska, and that  
7 information on the foreign fleet steelhead take is not  
8 available.

9 Q Are there any other data of catch of any other species  
10 of any kind of fish which you have used to estimate  
11 steelhead runs in Washington waters?

12 A Again, we do look at the silver salmon, the Coho fishery,  
13 and know that at times a definite relationship does  
14 exist. I don't think we can go beyond that to any other  
15 species.

16 Q Have you had a chance, Mr. Millenbach, to look at the  
17 written direct testimony of Jim Heckman?

18 A I frankly just glanced through it. I did not have time  
19 to really read it in detail. I had about five minutes  
20 yesterday to look at it.

21 Q Well, I would like to ask you some questions, and I  
22 will try not to take too much of your time. Have you a  
23 copy of it there?

24 MR. CONIFF: Your Honor, while the witness  
25 is reading the document, may I simply have a continuing

1 objection to the use of Mr. Heckman's testimony on the  
2 grounds as already stated to you this morning.

3 THE COURT: Yes, of course.

4 MR. PIERSON: In the meantime, your Honor, I  
5 would like to move the admission of Plaintiff's 79  
6 which is that excerpt from the Puyallup remand case  
7 that I was reading with Mr. Millenbach.

8 THE COURT: It has already been admitted.

9 Q Do you have the testimony of Mr. Heckman, Mr. Millenbach?

10 A Yes.

11 Q Page 7, where whoever was questioning him here is talking  
12 about the run in the Quillayute River system of steelhead,  
13 and he is talking about the '71-'72 run. Go if you  
14 will to line 14:

15 "During the 1971-72 winter steelhead run,  
16 which commences in strength in the Quillayute River  
17 system on about December 1 and extends in major  
18 strength in the lowerportion of the system through  
19 March."

20 Now, as to that portion of this statement,  
21 do you agree with that?

22 A I would add that there is considerable take of steelhead  
23 during April, March and April.

24 Q And then he says, "Approximately 20 to 30 Indian fishermen  
25 were engaged in fishing with gillnets," and I think his

- 1 reference is both on the reservation in the park and  
2 outside. Do you know whether that is true or false?
- 3 A To the best of my knowledge, there is no fishery outside  
4 of the park; that is upstream from the park.
- 5 Q It's just confined with in the boundaries of the park.  
6 Do you have any reason to doubt that figure as an  
7 estimate of gillnet fishing?
- 8 A I have no knowledge of the number fishing.
- 9 Q "Within the area then fished the Indians have established  
10 individual gillnet fishing sites."
- 11 Do you have any reason to doubt the truth of  
12 that?
- 13 A I have no knowledge.
- 14 Q "...where in the interests of conservation they prohibit  
15 set gillnets which extend more than one-third of the  
16 distance across the live stream channel."
- 17 Do you have any information contrary to that  
18 statement?
- 19 A No, I have no personal knowledge.
- 20 Q It says, "During the months of December, '71, January  
21 and February, '72, the catch was predominantly, if not  
22 entirely, steelhead." Would you agree?
- 23 A I would agree with it, but add that -- but there is a  
24 March and April catch.
- 25 Q "The nets are relatively small gillnets, not more than

1           30 fathoms in length." Do you agree with that statement?

2   A       I have no knowledge of it.

3   Q       Did you ever attempt to inquire about the length of  
4           of gillnets used on the reservation, on the Quillayute  
5           River?

6   A       No, I have not.

7   Q       It says, "An average night of fishing took about five  
8           steelhead per net."

9                       Do you have any reason to doubt that statement?

10   A       I have no knowledge.

11   Q       Does anybody on your staff have a reason to doubt that  
12           statement?

13                       MR. CONIFF: I object, your Honor.

14   Q       If you know.

15   A       I said I have no knowledge.

16   Q       And it says, "During this time of Indian net fishing,  
17           sportsmen fished the river system, both as bank fishermen  
18           and boat fishermen outside the park." Is that accurate?

19   A       Yes.

20   Q       Do you know whether there are any such fishermen inside.

21   A       I have only observed it on one location, where there is  
22           an occasional hook and line fisherman in the area of the  
23           park.

24   Q       They are in the park?

25   A       There is an occasional fishing effort there, but I don't

1 know the extent of it.

2 Q According to what knowledge you do have, are there nets  
3 and anglers there in the same water area?

4 A I would assume that if they are in the park it could  
5 be ,yes. I haven't personally witnessed it.

6 Q On page 8, starting on line 20, this written document  
7 purports to estimate the take of sport and Indian net  
8 fishermen on the Quillayute River System. I believe it  
9 says, "Based upon sports landing records in the Washington  
10 Department of Game, the average annual angler harvest in  
11 the Quillayute River system for the period from 1960  
12 through 1969 was 6733 steelhead, with a range between  
13 3914 and 9010."

14 Without getting too precise figures, Mr.  
15 Millenbach, is that a ballpark estimate?

16 A I think these would be reasonable.

17 Q And it says, "Records of annual Indian net harvesting  
18 are incomplete during the same period." It says, "We  
19 have estimated that the Quileute Indian fishery landed  
20 5300 steelhead in each of the years 1970 and '71. This  
21 was based upon information furnished by a fish buyer  
22 who purchased approximately 75 percent of the steelhead  
23 harvested by Quileute Indians. Taking these estimates  
24 and figures which are the most accurate available for  
25 those years, there appears to have been annual total



1 steelhead harvest in the Quillayute River system of  
2 approximately 12,000 fish." I think that is steelhead.

3 My question is, for that last portion which  
4 includes a number of thoughts and statements, do you have  
5 any criticism based upon your knowledge of the Indian  
6 net fishery on the Quillayute system?

7 A I would only comment this way, that there is not  
8 available detailed information on the Indian catch.  
9 I do recall that in the fall of '71-'72, that the  
10 Department feels there was a larger fishery than the  
11 5300 steelhead would indicate, and this was based on  
12 again a personal observation of some of the operations  
13 at La Push and some fragmentary information that we  
14 obtained on the purchase of fish.

15 However, I could not deny that or clearly state  
16 that 5300 is not reasonably close, within my view,  
17 based on what evidence I had available, I think it is  
18 a little bit short, so we are talking 12,000 fish or  
19 somewhat more.

20 Q How much more would you think it would be, in your  
21 opinion?

22 A I think it was closer to 7000 fish that winter. Again,  
23 I really don't --

24 Q And you have planted the Quillayute River system, had  
25 you not?

- 1 A Yes.
- 2 Q And the steelhead runs have been maintained?
- 3 A Yes. I would say further, if I may, I think they have  
4 been enhanced. We can make it a little more productive  
5 by the hatchery program.
- 6 Q And is it accurate to state that if the Indian net  
7 fishery on that reservation didn't let some fish get  
8 upriver to the sports fishery, you wouldn't have enhanced  
9 the sport fishery with your planting?
- 10 A It's certainly true.
- 11 Q Go over on page 9. It indicates at the top, the  
12 Washington Game Department predicted -- that is 1971-'72  
13 run of steelhead on the Quillayute River would be as  
14 large or larger than previously recorded runs, and this  
15 prediction held through according to the catch data  
16 compiled by the Game Department." Is that an accurate  
17 statement, to your knowledge?
- 18 A I have never personally predicted any runs of steelhead.  
19 I have certainly commented on what we expect, but  
20 certainly it has not been a prediction, and I would assume  
21 that we had commented that prior to the '71-'72 season  
22 that we would expect a reasonably good run of fish, and  
23 I think the records are not quite finalized yet, so  
24 I haven't been able to look at them as far as the  
25 punchcard data is concerned, but from our creel census

1 on the river, I would say that the '71-'72 run was  
2 comparable to the previous season.

3 Q You might just tell the Court what you mean by "creel  
4 census."

5 A A creel census is where we have an individual, a  
6 biologist usually, or even a wildlife agent, who makes  
7 direct contact with the fishermen while they are  
8 fishing on the river, and makes a real effort to contact  
9 them at the end of the day's fishing, and then we develop  
10 data as to number of fishermen, and how many fish they  
11 caught.

12 Q Now, Mr. Millenbach -- there is following on page 9, 10,  
13 11 and 12 some material regarding the Columbia River  
14 and Frazier River fisheries. I guess it goes beyond, to  
15 about page 17, and with the indulgence of Mr. Coniff,  
16 I would like to give you tonight, to look at that, and  
17 let some of my other brethren do their cross examination  
18 before the break.

19 MR. PIERSON: With the indulgence of the Court,  
20 I would like to ask him about his opinion.

21 THE COURT: That would conclude your cross  
22 examination?

23 MR. PIERSON: It would.

24 THE COURT: Mr. Getches.

25

## 1 CROSS EXAMINATION

2 BY MR. GETCHES:

3 Q Page 11 of your written testimony, Mr. Millenbach, you  
4 state in answer to a question, have you sought that  
5 information from the Indian tribes, and that information  
6 refers to on-reservation catch of steelhead by Indians,  
7 "We have unsuccessfully attempted to acquire this  
8 information from the Indian tribes."

9 Now, have you attempted to acquire that  
10 information by inquiries made to the leader of the  
11 Muckleshoot Tribe?

12 A I think if we could return to USA-14, which is the  
13 Ayrest report, I could probably specifically respond to it.  
14 I have not personally directly discussed steelhead  
15 management with members of the tribe.

16 Q To your knowledge, have members of your Department?

17 A Mr. Crouse mentioned here that he had discussions with  
18 members of the tribe.

19 Q Well, what I am trying to get at is whether this was one  
20 of the tribes you unsuccessfully attempted to acquire  
21 information from concerning steelhead catch?

22 A It would be specific if it was -- yes, if it's included  
23 in the Ayrest report, and I am talking rather generally  
24 in making that comment. Over the years it has been a  
25 problem of who to contact and where the response would

1           come from and where.

2                   Again I would like to reiterate, and really because  
3           I think this is the heart of the matter, there is no  
4           really finite or substantial report of those catches.  
5           I'm certain that there are certain fish tickets that  
6           relate to the Indian catches generally on reservations,  
7           but no one, no agency particularly maintained a detailed  
8           record, and this is one of the reasons that it has been  
9           a problem.

10    Q       Do you know which tribes Mr. Ayrest or your Department  
11           had contacted in preparation of the Puget Sound Indian  
12           Tribes Cooperative meetings report?

13    A       I don't recall offhand, that's what I'm looking for.  
14           I believe it's on page 9 of that exhibit that they state

15                   "Meetings were held with the Lummi, Nooksack  
16                   and Swinomish Tribes, while meetings originally  
17                   scheduled with the Muckleshoot and Puyallup were  
18                   cancelled at their option."

19                   Then he goes on to state:

20                   "The general reaction of the Tulalip Tribe  
21                   was negative, and no contact was ever established  
22                   with the Nisqually Tribe, although numerous  
23                   attempts were made."

24    Q       Perhaps to simplify this, within the last year or two years,  
25           have you made contact either in writing or personal contact

- 1 with members, that is, representatives of the Muckleshoot  
2 Indian Tribe concerning an attempt to acquire data  
3 regarding on reservation steelhead take?
- 4 A No, I havenot.
- 5 Q Or has your Department, to your knowledge?
- 6 A To my knowledge, they haven't, other than they mentioned  
7 in here that we attempted to schedule a meeting.
- 8 Q What about the Squaxin Island Tribe?
- 9 A I am sure that we made no attempt there by reason of the  
10 fact that they do not have a steelhead river on their  
11 reservation, and so essentially do not have a steelhead  
12 fishery.
- 13 Q How about the Skokomish Tribe?
- 14 A I don't see any reference to the Skokomish Tribe in this  
15 report.
- 16 Q I am also asking about -- since that report have there  
17 been any contacts with any tribes since that report?
- 18 A No, no special effort at it.
- 19 Q How about the Suak-Suiattle Tribe?
- 20 A No.
- 21 Q The Stillaguamish Tribe?
- 22 A No.
- 23 Q The Quinault?
- 24 A No.
- 25 Q The Makah?

1 A Let me elaborate on the Quinault Tribe, we certainly have  
2 had contact with the Quinault Tribe, particularly  
3 with their biologists, who were working on the salmon  
4 and steelhead resource, as Mr. Crouse mentioned.

5 We provided steelhead to them, and I have  
6 personally discussed with Mr. McMinds the desirability  
7 and the benefits that could result from having this  
8 information to evaluate our efforts in management and  
9 our efforts in enhancing the steelhead resource.  
10 But I have had no response.

11 Q Have you directly requested that information?

12 A I have discussed it with him personally.

13 Q And has he complied with that request?

14 A He never complied with it, he never complied with any.

15 Q How about the Makah Tribe?

16 A I have personally not had any contact, and I don't  
17 believe the Department has, either.

18 Q The Lummi?

19 A We have had contact with the Lummi Tribe as the report  
20 points out.

21 Q Have you requested any information since that October,  
22 1971 report?

23 A I don't believe there has been any recent contact.

24 Q When did you contact them?

25 A The report, as I recall, stated that they felt their

1           efforts on steelhead was not extensive, but essentially  
2           they weren't good records, and they didn't have them.

3       Q     How about the Upper Skagit Tribe?

4       A     No, we made no recent contact that I know of.

5       Q     The Hoh Tribe?

6       A     No.

7       Q     How about the Yakima Nation?

8       A     No, we haven't been as closely associated on our  
9           management with the Yakima Nation. We have worked with --  
10          as Mr. Crouse has pointed out, there has been contact  
11          between the Department and the Nation.

12                    We have not been -- there has not been a  
13                    specific effort concerning fish data and catch runs.

14                    MR. CONIFF: I object to the form of the  
15                    question. Perhaps I should ask counsel to make a  
16                    clarification, I assume he is referring to the Yakima  
17                    catch information in the case area, rather than the  
18                    Columbia River catch information? Am I correct in that  
19                    statement?

20       Q     (By Mr. Getches) Since the question has already been  
21           answered, does it apply to the case area?

22       A     We have not had a recent contact on that point.

23       Q     You mentioned that the Lummi Tribe didn't have adequate  
24           records to fulfill whatever request was made. Now, as  
25           yet, have you asked them to begin keeping records?



1 A I am sure that point was discussed, and I can't elaborate.  
2 I don't know the details.

3 Q You haven't checked back to see if they are now keeping  
4 records?

5 A No.

6 Q So would it be fair to say that with nearly all these  
7 tribes, you have not sought the information that you say  
8 that you unsuccessfully attempted to acquire in your  
9 direct testimony?

10 A Well, I have not personally, but the Department definitely  
11 has made an effort to obtain this information.

12 Q With most of these tribes?

13 A Yes, with the tribes that I mentioned in the Ayrest report.

14 Q I went down the list of the fourteen plaintiff tribes  
15 in this case, and I believe that with the exception of  
16 one or two of them, you said there has been no attempt  
17 made to obtain the information?

18 A Well, this report refers specifically to at least six  
19 tribes.

20 Q Well, I asked you one by one the tribes, and I think with  
21 the exception of a very few of them, maybe two or three,  
22 you said you hadn't attempted to get that information.

23 Does that report contradict that testimony?

24 A I don't know, you lost me somewhere. But I thought --

25 THE COURT: I think that you said that you

1 personally had only made contact in one or two instances,  
2 as I recall.

3 THE WITNESS: That's correct, your Honor.

4 THE COURT: But that you also said that it  
5 was your understanding that someone else in your  
6 organization had contacted others, is that the  
7 substance of it?

8 THE WITNESS: Yes.

9 THE COURT: And I think you further said that  
10 the extent of that would be indicated in this report  
11 by this other person?

12 THE WITNESS: Yes.

13 THE COURT: There we are, down to that period.  
14 Go ahead.

15 Q (By Mr. Getches) Looking at that report, it only  
16 mentioned by name, I believe, four tribes that are parties  
17 to this case, and it indicates that contact was had with  
18 and information gathered from two of those four. Now,  
19 those I am referring to are the Lummi and the Nisqually,  
20 is that correct?

21 A Well, it starts out, "Meetings were held with the Lummi,  
22 Nooksack and Swinomish Tribes, while meetings originally  
23 scheduled with the Muckleshoot and Puyallup were cancelled  
24 at their option. The general reaction of the Tulalip  
25 Tribe was negative, and no contact was ever established

1 with the Nisqually Tribe, although numerous attempts were  
2 made."

3 So we actually had six of them.

4 Q It appears that with three tribes that are parties to  
5 this case, you have attempted to make contact, and two  
6 of them for some reason the meeting was cancelled, is  
7 that correct?

8 A Yes.

9 Q All right. Now, to your knowledge, have contacts been  
10 made or information sought by you or anyone in your  
11 Department from any of the other tribes that are party  
12 to this case?

13 A At the time of this report or since that time?

14 Q Well --

15 A Yes, the Nielson report specifically relates to the  
16 Quileute Tribe, and I have personally referenced the  
17 Quinault Tribe, and from memory I don't know if there  
18 are others or not.

19 Q All right. Well, you did mention the Quileute. Now,  
20 what was the source of that information, was it the  
21 tribe? That's what I'm asking here, what contact was  
22 made with tribal representatives?

23 A I think it was an Indian fish buyer, whether he  
24 represented the tribe, I don't know.

1 Q I will just quote here from the first page of  
2 USA-14, the Neilson Report, "With the exception  
3 of two Indian fish buyers, Mr. N.V. James of  
4 Marietta, Washington, a Mr. Harry Dillon, Senior,  
5 of Tacoma, no information was obtained from Indians."

6 Is that correct?

7 A I assume so. I don't recall the detail of that  
8 report.

9 Q Several references have been made to a report,  
10 which has been labeled G-13, a report by Mr.  
11 Lloyd Royal on the anadromous fisheries program  
12 of the Department of Game. Now, for purposes of  
13 identifying Mr. Royal, is it accurate to say he  
14 is a rather imminent person within the field of  
15 anadromous fish biology?

16 A Yes.

17 Q And he has held posts with the Department of Game  
18 & Fisheries of this State?

19 A Yes.

20 Q And for some 21 years he was the director  
21 for the International Pacific Fisheries Commission?

22 A Yes.

23 Q Would it be fair to say that you have respect for  
24 his views and opinions?

25 A Yes.

1 Q For how long was he retained most recently by  
2 the Department of Game?

3 A Approximately a two year period.

4 Q What was his title in that position?

5 A Research coordinator, if I remember correctly.

6 Q And as a research coordinator, among his duties  
7 he prepared this rather lengthy report that is  
8 labeled G-13?

9 A Yes.

10 Q This report is based, is it not, on a rather inti-  
11 mate knowledge of the Department of Game and its  
12 practices, policies and operations?

13 A Yes.

14 Q And you are aware this report makes several criti-  
15 cisms and recommendations concerning those matters?

16 A Yes.

17 Q Now, one matter that is taken up in the report at  
18 page 29 concerns catch statistics of wild and  
19 hatchery stocks, and quoting from page 29, Mr,  
20 Royal says, "An adequate method for measuring wild  
21 and hatchery production of adult steelhead in key  
22 river systems must be inaugurated on a continuous  
23 basis if future management of the total resource is  
24 to be maintained on a sound biological basis."

25 It goes on to explain something about scale

1           sampling, and then on page 30 concludes, "The  
2           collection of the above data will provide a better  
3           means of measuring the effects of planting policies  
4           and survival rates involved in a fish quality  
5           study which is now carried out in a somewhat hap-  
6           azard manner."

7           Has any action been taken to that recommendation  
8           by the Department?

9           A.    Yes.

10          Q.    What is that action?

11          A.    Our field people have engaged in widespread collec-  
12               tion of scale samples, and these are in storage now,  
13               some have been looked at to attempt to determine  
14               the life history characteristics as depicted by  
15               the scales.

16               We are in communication with and contact with  
17               the University of Washington for this work. We  
18               started out utilizing an individual employed by the  
19               Department of Fisheries to read these scales and  
20               unfortunately, that was a rather short term employ-  
21               ment, so that the continuing benefit from those  
22               efforts are now basically at the University of  
23               Washington School of Fisheries for information from  
24               the scale collections, and we are looking for an  
25               individual that could be employed to carry on this

1 work.

2 In addition to that, we are supporting a graduate  
3 study through the cooperative fishery unit at the  
4 University of Washington which the Department of  
5 Game financially supports in the research project  
6 involving protein blood analysis as stock identifi-  
7 cation methods. This is producing now and will be  
8 pursued for the next year or two, and if it becomes  
9 -- shows it is a practical means of identifying  
10 stock of fish and different races of fish, I am  
11 certain that we will incorporate that into our  
12 normal management program.

13 Q. All right. Mr. Royal makes many, many recommendations  
14 in this report, and in the interests of time I  
15 don't care, and I'm sure you don't care, to go through  
16 all of them, but I would like to ask you about just  
17 a few of them.

18 I should say at this point that through some  
19 inadvertance, the recommendations to the report  
20 were left off of Exhibit G-13, and we have duplicated  
21 those recommendations. I spoke with Mr. Coniff  
22 earlier today about it, and he has indicated there  
23 won't be any problems inserting them as a part  
24 of G-13.

25 MR. CONIFF: They were not left off by

1       inadvertance, Mr. Getches, this came in as a  
2       separate document. However, I have no objection  
3       to it, and I would suggest to the Court that it  
4       be marked as a part of G-13, perhaps G-13A.

5               THE COURT: Something like that.

6       Q     (By Mr. Getches) What I would like to do is just  
7       rundown a few of the recommendations contained in  
8       this addendum to G-13 and ask you first of all  
9       whether action has been taken, yes or no, and if  
10      the answer is yes, then I will ask you what  
11      action has been taken.

12             These pages are not numbered, but the fourth  
13      page, Mr. Royal says, "Major improvements should be  
14      made in record keeping by the Division, which is  
15      now inadequate for practical use, and the respon-  
16      sibility for keeping the required records should  
17      be clearly delineated. In association with improved  
18      record keeping is a need for a complete reorganiza-  
19      tion of the filing system. Currently a general  
20      belief exists that the best way to lose something  
21      is to send it to the Division office."

22             Has action been taken on that?

23      A     I think quite obviously yes.

24             THE COURT: That is not unique in  
25      governmental agencies.



1 A. As a word of explanation, our system of record  
2 keeping of hatchery -- fish hatchery production  
3 and fish plants evolved from an interest in the  
4 knowledge of the number of fish planted in each  
5 county, also there is a need to separate out lakes.  
6 You have a lot of clear lakes in the State, for  
7 example, and you need to have some further way  
8 of separating them.

9 The records have always been by county, and  
10 of course, our river systems don't respect county  
11 boundaries, and this was one of the most vexing  
12 problems that Dr. Lloyd Royal ran into in attempting  
13 to review the steelhead planting record because  
14 sometimes a planting of smolts in a single stream  
15 would encompass two or even three different counties.  
16 Unless he were aware of that, he would not be able  
17 to find a complete record. We have changed this  
18 reporting procedure on our steelhead and now record  
19 them by river systems so that we can go immediately  
20 to the records and have a complete record of the  
21 plants for any given time.

22 Q. All right. Another recommendation appearing on page  
23 5 is that, "The Department should consider the  
24 desirability of establishing permanent facilities  
25 on a control stream suitable as a base for

1 survival studies related to hatchery practices,  
2 inter-specific competition between stream rearing  
3 salmonides, and the effect of fish cultural operations  
4 on the maintenance of natural reproduction."

5 Has action been taken on that recommendation?

6 A. We have made some preliminary efforts at getting  
7 at this recommendation. Basically it involves the  
8 two departments, fisheries and game. Dr. Lloyd  
9 Royal talks of the steelhead salmon competition  
10 in given river systems, and we must consider this  
11 in that light. And to date we have not picked a  
12 specific study area. We do have available, however,  
13 in our budgetary system a project set up and we  
14 hope to be active in that project in the very  
15 near future.

16 Q. All right. The same page makes a recommendation  
17 that, "In view of the negative results accruing from  
18 the recently increased planting program of anadromous  
19 trout, further expansion of this program should be  
20 discontinued until facts obtained from prototype  
21 experiments carried out by the research unit justifies  
22 such expansion."

23 Has there been a curtailing of the planting  
24 program or its expansion?

25 A. There has been, I would say, a rather slight

1 adjustment in the emphasis in our steelhead program  
2 curtailing the total numbers to a very shallow  
3 degree in the interests of improved size and  
4 quality. We have definitely made some changes  
5 in the total annual allotments on some studied  
6 streams cutting back the planting schedule in half,  
7 and we plan to measure the results on this change  
8 in planting.

9 You mentioned facilities, I should mention  
10 that we are in the process of constructing one new  
11 rearing pond at this time, it has been planned  
12 for many years, and involved a major river system,  
13 the Skykomish River system. We will go ahead and  
14 are proceeding with this new facility. It will  
15 not materially increase our total annual plant of  
16 smolt, but it will be shaped, some of it perhaps,  
17 so that we get to the need of quality and best  
18 production possible.

19 (Continued on next page.)  
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ET18t2

1 Q So you are beginning to do it on an experimental basis?

2 A He recommends on page six:

3 "There is a serious need for establishing  
4 close and continuing administrative liaison with  
5 all other agencies involved in raising stream  
6 rearing salmonids, particularly the Washington  
7 Department of Fisheries, to eliminate those  
8 practices which tend to create either undesirable  
9 interspecific competition or which tend to  
10 reduce or eliminate natural reproduction." Has  
11 that recommendation been carried out?

12 A Yes, we have had discussions with the staff of the  
13 Department of Fisheries. We do have some areas of  
14 agreement that this needs to be done, and we plan to in  
15 the near future, sit down and develop a positive action  
16 program.

17 Q But it hasn't been implemented yet?

18 A No, discussed.

19 Q Page 9,

20 "The number of steelhead smolts planted should be  
21 increased in those streams which have not revealed  
22 a 'density barrier' to the number of adults  
23 produced. The number of fish planted should be  
24 reduced, in those streams indicating a 'density  
25 barrier.'..."

1           You indicated before that density barriers haven't  
2           been ascertained, so I take it this is a prerequisite?  
3   A       We have implemented, along the lines Dr. Royal has  
4           recommended, we have reduced the plants in such areas  
5           and increased the plants in other rivers, to evaluate  
6           this point of density barrier.  
7   Q       Finally, "special effort should be expended in obtaining  
8           steelhead escapement figures, by sex, on a daily basis,  
9           reported weekly, at selected locations." Is that now  
10          being done?  
11   A       Could you refer me to that?  
12   Q       This is on page 9.  
13   A       Number 7?  
14   Q       Yes.  
15   A       I still don't find it. I am sorry.  
16   Q       It is the ninth page, third from the last page:  
17           "Special effort should be expended in obtaining  
18           steelhead escapement figures."  
19           THE COURT: It is the fourth from the last  
20           page, at the bottom of the page.  
21           THE WITNESS: Thank you, your Honor.  
22           THE COURT: First sentence.  
23   A       Yes, I read it. The thing that caught my response was  
24           "by sex." I don't quite get the import of that  
25           reference, but we have not particularly implemented this

1 Q All right now, did Dr. Royal do other reports for the  
2 Department, is that correct?

3 A He made a comment, I think relative to the Indian fishing  
4 problem, as I recall.

5 Q That was on approximately May of --

6 A I don't recall the date.

7 Q That was the report that was made a part of this case  
8 on a motion for temporary restraining order, is it not?

9 MR. CONIFF: That is correct, Mr. Getches,  
10 and it is a part of the records and files in this action.

11 Q All right, are you aware that Dr. Royal expressed the  
12 opinion in the report that the Indian reservation fisheries  
13 will usually harvest fish that are wholly deductible from  
14 the potential hook and line catch, rather than from  
15 escapement?

16 A Yes, I am familiar with the fact that he has made such  
17 a statement.

18 Q Do you agree with that statement?

19 A I think generally that is correct.

20 MR. GETCHES: Thank you.

21 THE COURT: I believe that concludes for today.  
22 Very well, we will be a recess at this time, and reconvene  
23 as usual at 9:00 a.m. sharp.

24 (Court was adjourned at 3:15 o'clock.)

25

(In Chambers.)

1  
2 THE COURT: For the record, Mr. William  
3 Stiles, who has represented the Upper Skagit River  
4 Tribe throughout the development of the pretrial  
5 period and at the trial to this time, has had  
6 some problem in that he is not able to be contin-  
7 uously in attendance at the trial for various  
8 reasons. He was engaged in the case not as a  
9 trial counsel, on the understanding with the tribe  
10 that they would provide some additional lawyer  
11 for that purpose. However, they have either changed  
12 their minds or for one reason or another have not  
13 done that, and Mr. Stiles has appeared and is  
14 representing the tribe during the trial. In order  
15 to do that, he will have to have assistance, and  
16 he has reported this to the tribe representative,  
17 Mr. Lawrence Boome, and Mr. Boome has authorized  
18 Mr. Stiles to engage Alvin Ziontz to be co-counsel  
19 with Mr. Stiles for the Upper Skagit Tribe, and  
20 will at any time when Mr. Stiles is not present act  
21 in that capacity, keeping in mind and attending to  
22 whatever interests the Skagit Tribe might have,  
23 particularly those that might be different than or  
24 in addition to the interests of all the other tribes  
25 in common. Have I stated it correctly, gentlemen?

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MR. ZIONTZ: One further addition, and that is there may be some days when I will be absent and my place will be taken by my partner, Mr. Morisset, who will assume those duties when I am not here.

THE COURT: That is part of the understanding.

(Mr. Stiles nods approval.)

THE COURT: Let the record show this understanding.

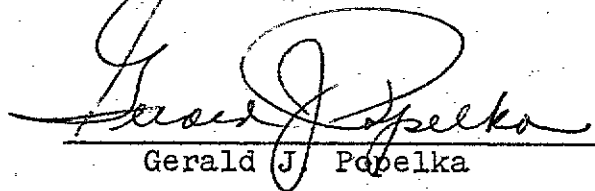


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C E R T I F I C A T E

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 transcript of our shorthand notes of the matters herein reported.

  
ELINOR HOLLOWAY

  
Gerald J. Popelka

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WITNESS Direct Cross Redirect Recross

CARL CROUSE - - - - - 221-P  
273-G  
289-H  
301-Z  
314-T 324-C 335-P

CLIFFORD MILLENBACH - - - 344-G 346-P  
430-G

Legend:  
C - Coniff  
G-- Getches  
H - Hovis  
P-- Pierson  
T - Taylor  
Z - Ziontz

EXHIBIT Admitted  
PL-78 Page 416  
USA 42 Page 262  
G-13A Page 442