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Docket Entry 416H - Filed Transcript of Proceedings Volume VIII

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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 2 1974

) EDGAR SCOFIELD, CLERK

) By Deputy

) CIVIL NO. 9213

TRANSCRIPT OF PROCEEDINGS

September 5, 1973
Tacoma, Washington

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

4162

Vol. VIII

Exhibit

P R O C E E D I N G S

September 5, 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?

MR. CONIFF: Yes.

THE COURT: Proceed, please.

DAVID PAUL WESTON, resumed the stand and
testified further as follows:

CROSS-EXAMINATION (Continued)

BY MR. CONIFF:

Q Mr. Weston, I had an opportunity this morning to
briefly review the testimony that you gave yester-
day, and at least in my mind there appears to be
a little bit of ambiguity on the record with
regard to the enrollment records that you keep,
as opposed to enrollment records that the tribe
keeps.

1 I believe that you did testify yesterday,
2 did you not the tribe also in some instances, or
3 perhaps in all instances, does keep enrollment
4 records; is that correct?

5 A. They do.

6 Q. And if I may pose a hypothetical and a very simple
7 one, I believe perhaps we can elucidate the dis-
8 tinctions between these two times of enrollment
9 records.

10 I would ask you to suppose that a money judg-
11 ment is rendered by either a federal or a State
12 tribunal in favor of a tribe, and further that the
13 tribe has an enrollment record, and the Bureau
14 of Indian Affairs, your Bureau, has it as a separate
15 enrollment record. I would ask you to further
16 assume that those enrollment records are different;
17 in other words, the names that appear on one
18 enrollment record may or may not appear on the
19 other.

20 My question is: Which enrollment record would
21 determine eligibility for a share of the judgment
22 proceeds?

23 A. Much of the answer that I might give you in regard
24 to the question would depend on the authorizing
25 legislation that must be passed by Congress, which

1 spells out a determination of who are the beneficial
2 owners of this claims judgment award. In not
3 all instances have they been awarded to, as I
4 mentioned yesterday, successor tribes.

5 Now, if the legislation covering the use of
6 the award provides that the funds will be avail-
7 able for purposes designated by the tribal council
8 and approved by the Secretary of the Interior,
9 and the tribe is a part of its plan for use of
10 these funds specifically determines that it wants
11 to make a percapita distribution, then we work
12 with the tribe in the development of a roll, which
13 must be approved by the Secretary of the Interior,
14 utilizing the files of both the tribe and our
15 records in compiling the roll to whom the payment
16 would be made.

17 Now, if this is in the nature of a descendency
18 award such as we have in connection with Snohomish,
19 Snoqualmie, Upper Skagit and others that we have
20 worked on in this area, then the legislation
21 provides that the United States or the Secretary
22 of the Interior will prepare a roll of persons
23 who are descendents of the tribe as it existed
24 at treaty times.

25 Q. What if Congress has not passed such legislation?

1 A. Then the question of who is the beneficial owner
2 of that award is still not determined.

3 Q. Would your answer be the same if we were discussing
4 the question of who is entitled to exercise
5 claimed fishing rights?

6 A. No.

7 Q. Why?

8 A. Because the treaty fishing rights that are involved
9 here in this case have been determined by a
10 previous court action to be tribal rights.

11 Claims judgment awards do not reach that
12 stage of determination until after legislation
13 has been passed which spells out who are the
14 beneficial owners of that award.

15 Q. Let's hypothesize then that it is not what you
16 refer to as a claims judgment award, I presume,
17 Indian claims commission judgment.

18 A. Basically, yes.

19 Q. Let's assume that a State court awards a tribe
20 as an entity a money judgment, and therefore, there
21 would be no necessity for any congressional action
22 with regard to the distribution of the proceeds.

23 Then my question is: Which membership roll
24 would you refer to to determine who would be
25 entitled to a share of the judgment proceeds,

1 the tribal roll or the records that you keep?

2 A. If this was a State court awarding a money judgment?

3 Q. To a tribe.

4 A. To a tribe, then this would be between the State

5 court and the tribe, and the United States or

6 the Bureau of Indian Affairs would have no respon-

7 sibility.

8 Q. Is your answer you don't know?

9 A. No, my answer is that the United States would

10 not have any interest or any responsibility in

11 that connection.

12 Q. Would your answer be the same with regard to

13 who is or who is not entitled to claim of reserva-

14 tion treaty fishing rights?

15 A. No, it would not.

16 Q. Why?

17 A. Because the treaties that are involved set aside

18 this treaty hunting and fishing right were federal

19 treaties and not State actions.

20 Q. Do you maintain a separate record of persons

21 who have been issued fishing identification cards

22 which you testified about yesterday?

23 A. We do.

24 Q. And is this record separate and apart from the

25 other enrollment records that you talked about

1 yesterday?

2 A. It is.

3 Q. And in every instance that a fishing identification
4 card is issued by your agency, does that name
5 also appear on some written enrollment record
6 similar to the Muckleshoot exhibits that you
7 sponsored that you have at your agency?

8 A. Not necessarily.

9 Q. Why is that?

10 A. Because in the case of several of the tribes there,
11 have been no membership rolls prepared and approved
12 by the United States.

13 Q. When you say "approved" you are talking about
14 the Secretary of the Interior, or --

15 A. His authorized representative.

16 Q. With regard to recognition of a tribe as a recognized
17 tribe by the federal government -- and you explained
18 the criteria yesterday of having had a reservation
19 or a viable continuing governmental entity, who
20 makes that federal recognition? Is that also
21 delegated to the area superintendent?

22 A. No, it is not.

23 Q. Who makes it?

24 A. The decisions that have been made with respect
25 to it have been decisions that have been made over

1 a period of many, many years, since back to
2 treaty times, and by the Department of the Interior.

3 Q My question is, who, if the federal government
4 were today to decide to recognize the tribe as
5 a tribe, who would make that determination?

6 A It would be the Secretary of the Interior or
7 whoever he may have designated to exercise that
8 responsibility. It is not one that has been
9 delegated to the area director or to the super-
10 intendent.

11 Q So as far as you know that decision would be
12 made in Washington, D.C?

13 A Yes, sir.

(Continued on next page.)

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1 Q I believe you stated also yesterday that the State
2 agencies requested these identification cards.

3 Do you know the reason why the Washington
4 Department of Game and the Washington Department of
5 Fisheries made such requests?

6 A I am not what I would call totally familiar with the reasons
7 for the requests, other than as they might have been
8 stated to us.

9 Q Isn't it true that the basis upon which the request was
10 made on behalf of the Washington Department of Game was
11 to identify individuals who were entitled to free hunting
12 or fishing licenses within treaty areas?

13 A I believe that was among the reasons that were earlier
14 stated, yes, sir.

15 Q Is it your testimony that there should be any inference
16 drawn from your testimony that by asking for this
17 information that the Washington Department of Game recognized
18 the existence of an immunity from the operation of state
19 law in off-reservation waters?

20 A I would not consider, sir, that I'm totally competent to
21 answer in this field. I have had a number of discussions
22 with representatives of the Department of Game and others
23 and could do some commenting on it, but I would not
24 consider this as true expert testimony.

25 Q Very well, we will pass on to another subject.

1 Will you turn to your testimony, page 6, line
2 18, The question there asks you:

3 "Does the Bureau of Indian Affairs issue
4 cards to members of the Puyallup Tribe?"

5 "A Yes. We recognized that as a government
6 entity and a reservation based tribe, although I
7 realize that the continued existence of the Puyallup
8 reservation has been challenged, and the matter is now
9 in litigation."

10 My first question is have you in the past issued
11 fishing identification cards to members of the Puyallup
12 Tribe?

13 A When so requested, yes.

14 Q And do you have in your records a membership roll of the
15 Puyallup Tribe, similar to the Muckleshoot membership
16 roll which you have offered into evidence as USA-56, 57?

17 A The latest roll that we have that has been approved by the
18 Bureau of Indian Affairs, I believe, is dated about 1929.

19 Q You have a 1929 approved roll, and no other roll since
20 then has been approved?

21 A Draft rolls have been prepared in working with the tribe,
22 but these rolls have never been completed.

23 Q And upon what basis, then, do you issue a fishing
24 identification card to a person who claims to be a
25 Puyallup Indian?

1 A On the basis that is set forth in their constitution and
2 bylaws, which names the 1929 roll as the base roll to
3 calculate from, and in determining tribal membership.
4 Q Do you perform those calculations, or does the tribe make
5 a representation to you regarding this matter?
6 A In many instances the tribe makes representation to us
7 or individuals come in and request these I.D. cards. Our
8 process is to utilize the records that we have available
9 to determine if, in fact they do meet membership
10 requirements as set forth in the constitution and bylaws,
11 if their name does not appear on the 1929 roll.
12 Q What if the tribe makes a different determination than you do?
13 Do you still issue a card?
14 A No.
15 Q You mentioned in the statement I have just read from your
16 testimony that you as an official of the Bureau of Indian
17 Affairs realized the continued existence of the Puyallup
18 Indian reservation has been challenged.
19 Are you aware that this Court has entered a
20 final decree declaring that that reservation does not
21 exist?
22 A I am.
23 Q Have you altered in any way your practice of issuance of
24 these fishing identification cards to members of the
25 Puyallup Tribe?

1 A Not being specifically involved day to day in the
2 issuance of these cards, I'm unable to answer.

3 Q Have you affirmatively made any effort to revoke any of
4 the fishing identification cards issued to members of the
5 Puyallup Tribe --

6 A I have not.

7 Q -- based on the decision of this Court?

8 A I have not.

9 Q You also state you have always recognized it as a
10 reservation and have always issued cards to members of
11 this tribe on the same basis as other reservation tribes.

12 Do you still today continue to recognize the
13 Puyallup Indian reservation as a reservation? I am asking
14 you now as an official of the Bureau of Indian Affairs.

15 A I don't know that I have been involved in specific dis-
16 cussions relating to this question since the court
17 determination was made that the Puyallup reservation no
18 longer existed. I think that the Bureau of Indian Affairs
19 is in the position that it must continue its recognition
20 of the Puyallup Tribe for the reason that there are trust
21 lands where title has never been severed. Title is in
22 the United States, held in beneficial ownership for the
23 Puyallup Tribe, and we must have some entity to look to
24 with respect to the administration of those lands.

25 Therefore, we must continue our recognition of

1 the Puyallup Tribe, irregardless of the question of
2 whether there might or might not be a reservation.

3 MR. CONIFF: Would you read back the question,
4 please, if I may.

5 THE COURT: Read the question.

6 (Question was read.)

7 Q (By Mr. Coniff) Would you answer that question.

8 A I think that my answer need be that because of the court
9 ruling we are unable to recognize it as a reservation, but
10 we still continue our recognition of the Puyallup Tribe.

11 Q As a viable, continuing governmental entity?

12 A Yes, sir.

13 Q So that your practice with regard to the issuance of
14 fishing identification cards to members of what you
15 consider to be continued, viable, governmental entity will
16 continue, as far as you know?

17 A As I understand it, we would have no choice at this time.

18 Q Further down page 6, the question is asked:

19 "Does the BIA issue cards to members of the
20 Muckleshoot Tribe?

21 "A Yes. We have always considered the
22 Muckleshoot Tribe as being eligible for these cards."

23 Are you familiar with an act of Congress in 1925
24 which authorized certain tribes in Puget Sound to bring
25 actions in the United States Court of Claims to recover

1 compensation for claimed loss of or injustices done
2 pursuant to the treaty, against the United States?

3 A I am.

4 Q Are you aware that in that 1925 Congressional enactment
5 that Congress mentioned certain tribes in Puget Sound
6 and designated certain tribes as tribes with whom the
7 United States had treaties?

8 A I am.

9 Q Are you also aware that this statute also listed certain
10 tribes in Puget Sound and designated them as tribes with
11 whom the United States had not treaties?

12 A I am.

13 Q Are you aware that the Muckleshoot Tribe was listed in that
14 Congressional enactment as a tribe with whom the United
15 States did not have a treaty?

16 A I am.

17 Q Does the fact that Congress passed such a statute and that
18 you are aware of it affect in any way your decision to
19 continue to consider the Muckleshoot Tribe as being
20 eligible for treaty fishing identification cards?

21 A IT does not.

22 Q Is it your testimony that as an official of the Federal
23 Government you can look behind an act of Congress
24 declaring the treaty status of a tribe?

25 A I think it should be pointed out that even though the

1 Muckleshoot Tribe was specifically stated in an act of
2 Congress and in this particular Court of Claims case
3 which you mentioned --

4 Q That is entitled the Duwamish, et al, versus the U. S.,
5 is it not, a 1933 decision that you are familiar with?

6 A Right.

7 It should be pointed out that in this case
8 as well in the case that the tribes filed before the
9 Indian Claims Commission, it was the determination that
10 the Muckleshoot Tribe was not a treaty entity; that it
11 was an entity created, as ruled by the Indian Claims
12 Commission in 1856 with the recommendation being sent
13 forward that the Muckleshoot reservation be established.

14 Under these circumstances, it could not have
15 been a pre-treaty entity, per se, involved in treaty
16 negotiations.

17 Q My question is, aren't you really attempting to look behind
18 Mr. Weston, legislative classification or designation of
19 the Muckleshoot Tribe by Congress as a non-treaty tribe?

20 A I wouldn't say so.

21 Q Are you aware that the Supreme Court of the State of
22 Washington has on occasion considered treaty status of the
23 Muckleshoot Tribe?

24 A I am.

25 Q I believe that was on two occasions, was it not?

1 A I do not specifically recall.

2 Q At least one occasion, a fairly recent opinion.

3 In that opinion, isn't it true that the Supreme
4 Court of the State of Washington, based upon this 1925
5 statute, and the fact that the Muckleshoot Tribe sued
6 the United States again before the Indian Claims
7 Commission as a non-treaty tribe; that based upon this
8 salient fact, the Supreme Court of the State of
9 Washington declared that the Muckleshoot Tribe was non-
10 treaty?

11 MR. DYSART: I don't think the Supreme Court
12 declared any such thing in that opinion.

13 MR. CONIFF: I'm asking the witness his opinion.

14 THE COURT: Frankly, you can interrogate him
15 about his understanding and what he does and so on, but
16 the merits of the question are a legal matter.

17 MR. CONIFF: I will re-frame it.

18 THE COURT: I think you are entitled to show
19 what they are doing, how they are interpreting, however
20 erroneous you may think that is, and however erroneously
21 I may ultimately find it to be. I am not suggesting that
22 I will, but it is a legal question, and I think we waste
23 time. Just bring out whatever the practice is, and then
24 we will have a base for considering what to do about it.

25 MR. CONIFF: Thank you, Judge.

1 Q (By Mr. Coniff) Mr. Weston, you are aware that the
 2 State Supreme Court has held in an opinion that the
 3 Muckleshoots are non-treaty Indians?

4 MR. DYSART: Your Honor --

5 THE COURT: What is your understanding of it?

6 THE WITNESS: I have heard a number of
 7 discussions that relate to the question, your Honor.
 8 I myself have not specifically reviewed the provisions
 9 of that court determination, and, as such, I would be very
 10 reluctant --

11 THE COURT: You are unable to answer the
 12 question?

13 THE WITNESS: Right.

14 Q (By Mr. Coniff) Would a State Supreme Court opinion on
 15 this subject carry any weight with you?

16 A I would have to state that it's my understanding that the
 17 question of the tribal or the Federal Government's
 18 activities and actions with respect to tribes is a federal
 19 question and is determined by federal instrumentalities.

20 Q Would the fact that the Muckleshoot Tribe sued the United
 21 States before the Indian Claims Commission as a non-treaty
 22 tribe carry any weight with you?

23 A It did carry some weight with us during the period 1955
 24 through 1966. In 1955, if you will recall, in the Indian
 25 Claims Commission, where the Muckleshoot Tribe was

1 suing the United States, the determination, in effect,
2 of the Indian Claims Commission was that there was no
3 such thing as a Muckleshoot Tribe in pre-treaty days.
4 Therefore, they were not a treaty tribe.

5 In 1966 on an appeal from rulings of the Indian
6 Claims Commission, the Court of Claims in its consideration
7 vacated that portion of the Indian Claims Commission ruling that
8 said they were not a party to the treaty.

9 Q You are familiar with the Court of Claims' decision that
10 you have referred to?

11 A I have researched them, yes.

12 Q You've researched them carefully?

13 A I think fairly carefully, as well as I as a layman might
14 be able to interpret.

15 Q Have you conferred with any Federal attorneys to improve
16 the quality of your information regarding those decisions?

17 A Not to any great extent.

18 Q Now, as I understand it, the Court of Claims initially
19 issued its opinion reaffirming the prior decisions holding
20 that the Muckleshoot Tribe was non-treaty.

21 Approximately how much time elapsed before an
22 addendum was issued by the Court of Claims striking that
23 portion of its opinion?

24 A Of the Court of Claims' opinion?

25 Q The addendum or the additional opinion.

1 A The thing that I mentioned is not in connection with the
2 original Court of Claims case in 1925.

3 Q I'm referring to the one that you were talking about.

4 A The Indian Claims Commission?

5 Q The appeal from the Indian Claims Commission to the
6 Court of Claims in the '60's.

7 A The original determination made by the Indian Claims
8 Commission, I believe, was in 1955. This was not appealed
9 to the Court of Claims until, oh, I don't recall the
10 exact date, but around 1965 or early '66. The Court of
11 Claims' opinion was rendered in 1966.

12 THE COURT: There was a ten or eleven year
13 period?

14 THE WITNESS: That's correct.

15 Q (By Mr. Coniff) From the time that the Court of Claims
16 issued its original opinion, did not the Court of Claims
17 issue a separate later opinion, striking one portion of
18 its opinion you just mentioned?

19 A Not that I'm aware of.

ET2

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(Continued on the next page.)

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1 Q Isn't it true that the original opinion of the
2 Court of Claims in that case held that they were
3 non-treaty Indians?

4 A Now, which Court of Claims case are you talking
5 about?

6 Q I'm talking about the one in '66 that you are
7 speaking of.

8 A The original determination made in Docket 98
9 before the Indian Claims Commission was made by
10 the Indian Claims Commission and not by the Court
11 of Claims. It was presented to the Court of Claims
12 on review or on appeal by the Indians and it was
13 in consideration --

14 Q Let me try to approach this in another manner,
15 I'm not having much success.

16 Is it not true that the Indian Claims
17 Commission during the '60s, when it considered
18 this appeal from the Indian Claims Commission
19 by the Muckleshoot Tribe issued two opinions?

20 A I'm aware of only one.

21 Q You are not aware that there was a separate opinion
22 issued at a later time striking a portion of the
23 original opinion of the Court of Claims' decision?

24 A No, I'm not.

25 MR. DYSART: Your Honor, I wonder if Mr.

1 Coniff could cite this mythical opinion he is
2 talking about?

3 MR. CONIFF: I'm asking him if he is
4 aware, he says he is not.

5 THE COURT: That is all you need to have
6 from this witness about it.

7 MR. CONIFF: I am through with that.

8 THE COURT: The substance being that he
9 knows about a decision of the Court of Claims, rather
10 the Indian Claims Commission, in 1955 and he knows
11 about a decision of the Court of Claims in 1965 or
12 '66, and that his understanding of it is that the
13 Court of Claims in that '65 or '66 decision struck
14 or found invalid a portion of the Indian claims
15 decision which had found or held the Muckleshoots
16 non-treaty Indians, is that the substance?

17 MR. CONIFF: That's the substance of
18 his testimony.

19 THE COURT: Have I recited it correctly
20 without a lot of detail?

21 THE WITNESS: The specific terminology
22 I believe of the Court of Claims order, sir, was
23 to strike that portion of the Indian Claims Commission
24 decision that said that the group was not party to the
25 treaty of Point Elliott.

1 THE COURT: Yes.

2 Q (By Mr. Coniff) have you ever responded to a
3 State agency request in the negative where they
4 have requested you to supply them with BIA prepared
5 membership rolls for any of the tribes plaintiff
6 in this action?

7 A When there were requests for specific tribes
8 or specific information, to my knowledge, we have
9 always responded.

10 Q Does your answer imply that you do not have
11 BIA prepared membership rolls for all of the
12 plaintiff tribes?

13 A That's correct.

14 Q I'm not sure the questions are covered in the
15 pretrial order or not, and if I may, I would like
16 to ask the witness to identify those tribes for
17 which he has membership rolls which have been
18 prepared within the last five years. I'm not talk-
19 ing about 1934 or '29 type of roll, 1875, would
20 you identify within the case area plaintiff tribes
21 whether which you or your agency did not have
22 current rolls, membership rolls, and by current
23 rolls, I mean rolls prepared within the past five
24 years?

25 A There has been a roll prepared and approved for

1 the Quinaults, for the Hoh, and for the Muckleshoots,
2 and I'm not sure, but I believe the Squaxin Island.

3 Now, I might point out that --

4 Q You say approved, do you mean by approved by the
5 Secretary of the Interior or his designee?

6 A When I say approved, I use this context.

7 Q That is the context of my question?

8 A Yes. It's possible that the Hoh roll may predate
9 five years, but that has been since 1965.

10 Q All right.

11 A The Muckleshoots I mentioned, I am uncertain, but
12 I believe that we have completed and approved
13 the Squaxin Island tribal roll, the Skokomish,
14 the Yakima and Quileute.

15 THE COURT: Let me recap and be sure it is
16 correct, Quinault, Hoh, Muckleshoot, Squaxin,
17 Skokomish, Yakima, Quileute?

18 THE WITNESS: Yes.

19 Q I direct your attention to page 11 of your testi-
20 mony, Mr. Weston, and question commencing at
21 line 9, which reads, "The defendants in this case
22 acknowledge only that some members of the present
23 Muckleshoot Tribe have been shown to be descendents
24 of persons who were part of the tribes and bands which
25 were parties that were present at Point Elliott.

1 They, therefore, contend that not all of the
2 members of the Muckleshoot Tribe are entitled
3 to exercise treaty fishing rights.

4 Does the Bureau of Indian Affairs have any
5 evidence as to what percentage of the present
6 members of of descent," and you will proceed
7 with your answer, which indicates that you do not
8 -- your records do not contain sufficient informa-
9 tion to document thoroughly the ancestral lineage
10 of every member currently on the Muckleshoot tribal
11 roll.

12 My first question to you is: Would it not
13 be preferable to develop such detailed information
14 by means of genealogies? Would that not be
15 preferable to a review of the type of records that
16 you do have regarding quantum of blood?

17 A. We do in fact prepare genealogy records with
18 respect to those individuals where specific
19 questions are raised or where there is information
20 available within our files, and such was done in
21 connection with the Muckleshoot, consistent with
22 their material and records which were available
23 to us in 1965.

24 THE COURT: That doesn't quite answer
25 the question. If you would have answered yes or no

1 to start with and then added this, it would have
2 been a better answer.

3 Now, the question was: Would not geneology
4 data be preferable in determining these rolls?

5 THE WITNESS: My answer would have to be
6 no because we do in fact prepare geneology charts
7 in connection with these determinations.

8 Q Are you suggesting that these geneology charts
9 are being prepared by you and members of your staff
10 who are not geneologists?

11 A That's correct.

12 Q Would it not be preferable to retain services of
13 a trained geneologist to perform this function?

14 A Certainly it would be desirable.

15 Q Preferable regarding the validity of the conclusion
16 that would be reached after the performance of the
17 research?

18 A Mm-hmm.

19 Q Would it not be preferable?

20 A I would have to say yes, if we could do that.

21 Q Now, back to page 11, the question states a contention
22 I do not believe that accurately states the conten-
23 tion, the Game Department's position, I'll state it
24 for you and then ask you if your answer would
25 change at all, "The Game Department's position

1 is that the Muckleshoot Tribe of Indians is
2 non-treaty because Congress has declared them
3 so; and secondly, reliable information regarding
4 the quantum of blood necessary for membership in
5 that tribe can only be provided and detailed
6 geneologys are performed on persons claiming such
7 membership."

8 Now, in light of my statement of Game's
9 contentions, would your answer change?

10 A. No, it would not.

11 Q. In your answer on line 16?

12 A. No, it would not. I might point out that even
13 though there have been substantial questions raised
14 with respect to the origin of many of the people
15 on the Muckleshoot Reservation, the Court of
16 Claims in its considerations and in the order
17 issued in 1934 said in effect that the Indians
18 placed on the Muckleshoot Reservation were parties
19 to one of the treaties -- Stevens treaties.

20 Q. When Congress declared those Indians, which
21 Congress referred to as the Muckleshoot Tribe
22 were non-treaty, didn't that affect your judgment
23 at all?

24 A. It could not affect it, because the Muckleshoot
25 per se was not born until after the treaty,

1 therefore, it could not have been party to the
2 treaty.

3 Q: Therefore, Congress was wrong?

4 A: No, Congress was correct in its interpretation
5 because there was no such thing as a Muckleshoot
6 Tribe in 1855.

7 Q: Well, I think we have debated the point long enough,
8 Mr. Weston.

9 On line 1, page 12, you have indicated both
10 Dr. Lane and Dr. Riley in their testimony have
11 indicated a great deal of intermarriage among
12 the Western Washington groups as well as with
13 tribal groups from east of the Cascade Mountains.
14 Does your statement refer to those portions of the
15 testimony that refer to marriage patterns prior
16 to or contemporaneous with the signing of the
17 treaty?

18 A: I believe that their information pretty well lays
19 this out in connection with the pre-treaty dates.

20 Q: So that we shouldn't draw an inference from this
21 information that there is not intermarriage today
22 between persons of Indian blood and persons of
23 non-Indian blood?

24 A: Certainly not, because the record set forth in these
25 two rolls from the Muckleshoot Tribes clearly

1 indicates there has been substantial intermarriage
2 since early days.

3 Q Does the Bureau of Indian Affairs approve the
4 tribal fishing regulations which are found in
5 appendix 5 to Joint Exhibit 2A?

6 I believe that is JX-2B rather than JX-2A.

7 A At least some of them have been approved by the
8 Bureau of Indian Affairs, but without going through
9 and taking considerable time, I couldn't say
10 specifically which ones have and have not.

11 Q Would this show on the face of the regulation?

12 A It should.

13 Q For those regulations which you have approved,
14 first of all, is it your understanding that the
15 Bureau's position is that these off-reservation
16 fishing regulations promulgated by the tribe require
17 your approval before they can become legally
18 effective?

19 A This depends on the specific provisions of the
20 constitution and bylaws of the particular tribe.

21 Q Now, with regard to the approval, is this a pro forma
22 stamp that is made upon the approval upon the face
23 of the text of the regulations or are they actually
24 given any consideration for content?

25 A They are given some consideration for content.

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Q. By whom?

A. By the various people who may be involved in the different facets of operations that may be required to give it a reasonable technical review.

ET3

(Continued on next page.)

1 Q By whom?

2 A For example, many of the regulations do provide specific
3 remedies against our members, and as such, would be
4 considered an adjunct to their tribal law and order codes,
5 and under these circumstances it would be reviewed by the
6 staff in our judicial prevention and law enforcement
7 division, who would review it with certain specific things
8 in mind, and with particular reference to the Civil Rights
9 Act of 1968.

10 Q Let me, if I may, we will try to zero in a little bit,
11 rather than a general discourse.

12 I am referring to the content of the regulations
13 with reference to accomplishment of conservation goals
14 for fishing rights.

15 A You are concerned specifically with those provisions that
16 relate to fishing seasons, the net size and this sort of
17 thing?

18 Q I believe that that is substantially the content of what
19 is found in Appendix 5, is it not?

20 A I might state first that the Bureau of Indian Affairs per
21 se does not have fish biologists on its staff.

22 At one time we did, but because of the series
23 of happenings, we do not any longer have them, so that
24 we do not have the technical expertise to review these
25 regulations specifically from the biological point of view.

1 Q Does that mean that they are not reviewed then, for their
2 content in terms of conservation goals prior to the time
3 that your stamped approval goes on the regulation?

4 A I think, strictly speaking, technically I could say yes
5 to that. I would point out that in many instances we
6 have asked the staff of the Bureau of Sport Fisheries &
7 Wildlife to work with some of our staff and with the tribes
8 in the review of these regulations prior to the time that
9 they go into effect, so that there might be at least some
10 input from the biological standpoint.

11 Q Now, are you referring to Mr. Heckman's organization?

12 A The Fisheries program, I am.

13 Q Has Mr. Heckman ever submitted to you in writing his
14 written approval of any of these regulations?

15 A I am not aware that he has.

16 Q Has he ever orally approved them, recommended your
17 approval of them for conservation reasons?

18 A I should point out that these particular documents --

19 THE COURT: First you must answer the question
20 Yes or No.

21 THE WITNESS: No, but I might point out that
22 these particular documents are not documents which I as
23 a staff officer have the responsibility to process through
24 the Bureau of Indian Affairs operations.

25 Q But your answer is given to the best of your knowledge of

1 the operation of your Bureau?

2 A That is correct.

3 MR. CONIFF: I believe that concludes my
4 examination.

5 THE COURT: Anything further in the way of cross?
6 Redirect?

7 MR. DYSART: Your Honor, after my direct I
8 turned Mr. Weston over for cross examination before
9 asking plaintiffs' counsel if they had anything. I would
10 like to know first if they had direct examination, and I
11 do have some further questions.

12 THE COURT: Anyone else wish to examine on
13 direct? This will be deemed as though made in direct.

14 MR. GETCHES: It may be either direct or
15 redirect.

16 THE COURT: There are different rules applicable
17 to direct and cross, of course. However, we have had
18 little trouble, if any, with that throughout the trial.

19

20 DIRECT EXAMINATION

21 BY MR. GETCHES:

22 Q Mr. Weston, does your office supervise the distribution
23 of per capita payment of the Indian Claims Commission
24 awards to the Muckleshoot Tribe?

25 A We did.

- 1 Q And was that an award made solely on the basis of
2 inadequate compensation for treaty taking?
- 3 A It is my understanding that it was.
- 4 Q What roll or list of persons eligible for distribution of
5 those funds was used?
- 6 A The 1969 roll of the Muckleshoot Tribe.
- 7 Q The same one?
- 8 A That has been offered in evidence.
- 9 Q In answer to questions by Mr. Coniff yesterday, you
10 indicated that the treaty identification cards issued by
11 the Bureau of Indian Affairs were issued only to tribes
12 with communal lands, is that right?
- 13 A Yes, sir.
- 14 Q Is this also a requirement, the requirement of holding
15 communally owned land or property, a requirement for
16 federal recognition of a tribe as well?
- 17 A It has been, yes. It has been one of the provisions set
18 out to us by the central office.
- 19 Q Now, even if a tribe has no reservation, but is made up
20 of successors of a group of people who were parties and
21 perhaps signatories to a treaty, would the lack of a
22 communally held land base prevent them from being federally
23 recognized?
- 24 A It would.
- 25 Q Is that true even if there is a group of people who can be

1 traced to have gathered as a group and lived as a group
2 ever since treaty times?

3 A It is.

4 Q Is it also true if that group has maintained a tribal
5 rolland selected officers and so forth?

6 A It is.

7 Q Then is this requirement of a reservation or communally
8 held land base totally unrelated to whether or not a
9 tribe was a party to a treaty?

10 A I guess I would have to answer yes.

11 Q Is this requirement of a communally held land base
12 imposed by statute?

13 A I am not aware of a specific statute that sets forth this
14 requirement.

15 Q Is it found in a regulation in the code of Federal
16 regulations?

17 A Not that I am aware of.

18 Q Is it essentially an administrative decision?

19 A I believe so.

20 Q Is it an administrative decision of the SEcretary of
21 the Interior not to recognize tribes that are without a
22 communally held land base?

23 A I would presume so.

24 Q Therefore, this requirement that has nothing to do with
25 whether or not a tribe is a party to a treaty rests solely

1 in the discretion of the SEcretary of the Interior?

2 A Yes, sir.

3 Q Now, turning to a couple of individual tribes that were
4 mentioned during the cross examination, first of all,
5 with respect to the Suak-Suiattle Tribe referred to as
6 "Suak" and also the "Upper Skagit," and "Suak", you
7 indicated that recently an error was discovered where
8 the ownership of some land trust for this tribe,
9 records of that had gotten lost in the shuffle of paper
10 and the moving of some agency offices.

11 I believe that is correct?

12 A I believe that is right.

13 Q So the Suak people do have an interest in some land that
14 is held in trust by the United States?

15 A They do.

16 Q And has that tribe also voted to accept the Indian
17 Reorganization Act?

18 A They did.

19 Q When was this done?

20 A I believe about 1935. I don't recall the specific date.

21 Q Is all that remains for the Bureau of Indian Affairs to
22 recognize them as a federally recognized tribe of Indians,
23 the processing and approval of their governing documents?

24 A It is.

25 Q With respect to the Stillaguamish Tribe, you said that

1 recently they were willed some land, I believe.

2 A That is my understanding.

3 Q Now, if that land is taken by the Secretary of the
4 Interior in trust for the Stillaguamish Tribe, would
5 they then be eligible for Federal recognition?

6 A If the land were taken in trust, that act in itself would
7 be Federal recognition by the Department of the Interior.

8 Q I see. Now, it is often said that the Federal Government
9 has a trust responsibility to Indians; is that right?

10 A Yes.

11 Q Now, that trust responsibility extends to safeguarding
12 Indian rights and property, generally?

13 A It has been determined that, yes.

14 Q Does it also extend to protection of treaty fishing rights?

15 A In my opinion, yes.

16 Q Would you say that this lawsuit might be an example of that?

17 MR. CONIFF: Objection, your Honor. This is
18 improper.

19 THE COURT: Yes.

20 Q Was this lawsuit undertaken pursuant to the treaty
21 responsibilities, the trust responsibilities?

22 THE COURT: I wouldn't ask this witness.

23 MR. CONIFF: Objection. The Complaint --

24 THE COURT: I think we shouldn't ask this
25 witness that. He is not a lawyer. All he knows about it

1 is reading the title. I think it would add nothing to it.
2 to have his opinion about it on this subject.

3 Q All right, do persons such as yourself and the Bureau of
4 Indian Affairs consider themselves analogous to a trust
5 officer in a bank, occasionally, in their relationship
6 to Indian people?

7 A In some senses. I am personally involved in the trust
8 responsibilities of the United States as it relates to
9 tribal funds and judgment awards, as it relates to land.
10 I am not a specialist in that category.

11 Q That is not your area?

12 A That is not in my area of operations.

13 Q Do you know if there has been a distinct administrative
14 decision not to carry out whatever trust obligation the
15 United States might have to Indians with respect to those
16 tribes that are not federally recognized?

17 A I think you kind of lost me there.

18 THE COURT: Read it again.

19 (Pending question read by Reporter.)

20 THE COURT: You want to re-state the question?

21 Q All right, has there been, to your knowledge, an affirmative
22 administrative decision within the Department of Interior
23 not to carry out whatever trust responsibilities there
24 might be toward Indians with respect to protection of
25 treaty fishing rights as they might be held by tribes which

1 are not federally recognized?

2 A I believe if I understand the question correctly that my
3 answer would be yes, I think it should be, or would be
4 well to point out that the Bureau of Indian Affairs has
5 dealt with the matter of treaty rights on the basis of
6 successor tribes, as opposed to the groups originally named
7 in the treaty, so that in a situation like the Stillaguamish,
8 it has been the position of the Bureau and the Department
9 that the rights of the Stillaguamish Tribe per se existing
10 from treaty days was absorbed through a successor group
11 like Tulalips and Swinomish.

12 Q If that tribe were to obtain federal recognition by
13 obtaining a land base, for instance, then the Federal
14 Government would assume its trust responsibility with
15 respect to protecting Indian treaty fishing rights?

16 A Certainly, there would have to be a reevaluation of the
17 position of the Department.

18 MR. GETCHES: I have no further questions.

19 THE COURT: Any other direct examination?

20 Yes, Mr. Hovis.

21 MR. HOVIS: This is not direct. It is on
22 redirect.
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1 REDIRECT EXAMINATION

2 BY MR. HOVIS:

3 Q Mr. Weston, the Yakima Nation has received a request
4 of assistance from both the Bureau of Indian Affairs
5 and the Federal Fish & Wildlife Service in the
6 promulgation of their regulations, have they not?

7 A They have.

8 Q And we have received that almost every year up until the
9 time of our promulgation of our final regulations, is
10 that not true?

11 A I believe that is correct.

12 Q As a matter of fact, we had considerable byplay back and
13 forth in regard to Section 11, to give us off reservation
14 arrest powers, is that not true?

15 A That is correct.

16 Q We had disapprovals twice, three times, as I recall?

17 A I do not recall specifically the number of times. I know
18 that at one stage it was disapproved.

19
20 (Continued on the next page.)

1 Q The Bureau of Indian Affairs actually reviewed
2 and Fish and Wildlife Service has given assistance
3 to the Yakima Indian Nation in the promulgation
4 of their fishing, their conservation regulations
5 with regards to off-reservation fishing?

6 A That's my understanding.

7 THE COURT: Anything further now from
8 the plaintiffs? Yes, Mr. Ziontz.

9
10 DIRECT EXAMINATION

11 BY MR. ZIONTZ:

12 Q Mr. Weston, has it fallen under your official
13 responsibility to examine the history of the
14 federal fulfillment of its trust responsibilities
15 to the Northwest Indians with respect to their
16 treaty fishing rights?

17 MR. CONIFF: Objection, Your Honor.
18 I think the question was framed in the form of
19 a legal conclusion.

20 THE COURT: Read the question, please.

21 (The question was read.)

22 THE COURT: I think he may answer as
23 far as he knows.

24 THE WITNESS: Yes, I have been involved
25 in a great deal of discussion with respect to this

1 by virtue of my normal contact with Indian tribes.

2 Q As a matter of fact, did not a Mr. Dwyer, formerly
3 with the office of the Bureau of Indian Affairs,
4 conduct a historical survey to trace the pattern
5 of federal support or protection of Indian treaty
6 rights here in the Northwest?

7 A I'm not totally aware of just what all Mr. Dwyer
8 did, but I'm aware that he did work in this area
9 to some extent.

10 Q Would you say that there was a period when the
11 federal government took no active role in supporting
12 Indians of the Northwest in asserting their
13 treaty fishing rights?

14 A I would.

15 Q And would you say that that role changed at a
16 particular point in history?

17 A I would.

18 Q Will you tell us when that role changed to an
19 affirmative action position.

20 A I'm not sure that I could state the specific
21 date. There has been a gradual change in the
22 attitude and operations of the Bureau of Indian
23 Affairs and the Department of Interior that perhaps
24 began sometime around 1962.

25 Q Prior to that time, Mr. Weston, can you tell us

1 for how long the federal government was not actively
2 asserting or protecting the federal treaty rights
3 for Northwest fishing Indians?

4 A. I don't believe that I could give specific dates
5 that would relate to that. It was for some consider-
6 able period of time, however.

7 Q. Would you say, for example, during the entire
8 period between the first World War and the Second
9 World War that there was no active federal support
10 of Indian treaty rights in the Northwest?

11 A. I'm not sure that I could testify to that.

12 Q. How about between the end of World War II and
13 1962?

14 A. There does not appear to have been a great deal
15 of effort on the part of the Bureau or the
16 Department of Interior in this regard.

17 MR. ZIONTZ: I have nothing further.

18 THE COURT: Now, this would be redirect?

19 MR. DYSART: Yes, Your Honor.

20

21 REDIRECT EXAMINATION

22 BY MR. DYSART:

23 Q. Mr. Weston, Mr. Coniff has raised certain questions
24 about the qualifications of your staff as far
25 as preparing tribal rolls.

1 Are the rolls which your office prepared used
2 for distribution of percapita payments from tribal
3 funds, including claims adjustment awards?

4 A. They are.

5 Q. And do you have any estimate as to how much money
6 was involved in the payments to Indians under
7 the jurisdiction of the Portland area office
8 on the basis of these rolls, for example, during
9 fiscal year 1973?

10 A. During fiscal year 1973 it was probably a little
11 larger than normal. If my memory is correct,
12 it would be somewhere between forty and fifty million
13 dollars.

14 Q. How much larger than normal would you say that
15 is? Do you have any estimate?

16 A. Probably, oh, fifteen to twenty million dollars
17 above normal.

18 Q. This covers a three-State area of Washington,
19 Oregon and Idaho; is that correct?

20 A. That's correct.

21 Q. Now, there was also some mention about whether
22 the Bureau would have the authority to acquire
23 lands in the State of Washington today and convert
24 those into trusts or Indian lands.

25 How much is currently available to the

1 Bureau of Indian Affairs for purchase of lands
2 in the State of Washington at the present time
3 in the way of dollar appropriation?

4 A. No specific appropriations have been given to the
5 Bureau for several years for land purchase. So,
6 our authority at this time with respect to tribal
7 lands would be none.

8 Q. Now, when you say that no specific appropriation
9 are there any appropriations that would be available
10 for that purpose?

11 A. No.

12 Q. Now, Mr. Coniff also asked you to go down from
13 memory with respect to which of these tribes have
14 federally approved rolls.

15 I believe at one point in his question he used
16 a time frame of five years.

17 THE COURT: That is correct. I noticed that.
18 This list that I gave to him was only since
19 1955, I believe, because that was the question that
20 Mr. Coniff asked.

21 MR. CONIFF: 1965, I believe.

22 THE COURT: Whatever the year was. There
23 was a time limit on it and I thought at the time
24 that he was at least trying to answer the specific
25 question at that time, yes.

1 Q Do you know whether there is a federally approved
2 rollfor the Nisqually tribe?

3 A There is.

4 Q And when was that? Do you know when that roll
5 was approved?

6 A If I remember, it was about 1964 . . I don't recall
7 the exact date.

8 MR. DYSART: I believe the agreed pretrial
9 order, Your Honor, recites 1965 as the date of that
10 approval.

11 MR. CONIFF: Then, Your Honor, I object
12 to the line of questioning. If this evidence
13 is in the pretrial --

14 THE COURT: If you want just quickly to
15 mention it --

16 MR. DYSART: That is the only one where
17 his answer seemed to be possibly at variance with
18 the pretrial order, and I just wanted to clarify
19 that.

20 THE COURT: Very well.

21 Q Now, Mr. Weston, the question was raised as to
22 whether you felt governed by congressional determin-
23 ations as to the status of the Muckleshoot Tribe.
24 Mr. Getches, I believe, asked you if a judgment
25 to the Muckleshoot Tribe was paid out to

1 the Muckleshoot Tribe pursuant to a particular
2 roll, and you said yes, the 1969 roll.

3 Was the payment of that Indian Claims
4 Commission judgment to the Muckleshoot Tribe
5 authorized pursuant to an act of Congress?

6 A. It was.

7 Q. And what did Congress direct?

8 A. Congress authorized the use of the judgment
9 awarded to the Muckleshoot Tribe for purposes
10 designated by the tribal council and approved
11 by the Secretary of Interior with the provision
12 that if any of the funds were paid out on a per-
13 capita basis that they would not be subject to
14 federal or State income tax.

15 It was under those provisions that a \$50 percapita
16 distribution was made to the members of the Muckle-
17 shoot Tribe in 1969.

18 Q. When the Bureau of Indian Affairs reviews tribal
19 regulations, such as the ones contained in JX-2B
20 is it reviewing those regulations as a federal
21 regulation or as a tribal --

22 A. As a tribal regulation.

23 Q. Do you attempt to impose federal standards on what
24 a tribe may adopt?

25 A. We do not.

1 Q Now, reference has been made in connection with
2 USA-56 to the fact that Muckleshoot is shown
3 as a derrivation of many of therpersons on that
4 roll.

5 Let's suppose for a moment that the reservation
6 which was established immediately adjacent to the
7 City of Tacoma had originally been called the
8 Tacoma Reservation instead of the Puyallup Reser-
9 vation by the United States and that the very
10 same people were put on that reservation as who
11 were, in fact, put on, and the United States then
12 and since in its enumeration thereafter referred to
13 those as Tacoma Indians.

14 Would that be a comparable situation as to
15 what has beendone in the case of the Muckleshoot?

16 A It would

17 MR. DYSART: I have no further questions.

18 THE COURT: Further cross?

19 MR. CONIFF: Unfortunately, Your Honor,
20 I have two or three additional questions which have
21 occurred as a result of the examination.

22 THE COURT: Fine.

23

24 RECROSS-EXAMINATION

25 BY MR. CONIFF:

1 Q You have stated that the money available that
2 you administered to the Indians under your juris-
3 diction has increased to approximately forty or
4 fifty million dollars; is that correct?

5 A It was that for fiscal year 1973.

6 Q That was your testimony, was it not?

7 A Yes, sir.

8 Q And do you know if any part of that money was
9 claims commission judgment money or monetary awards
10 made to any of the tribes within the case area?

11 A Within the case area? Only with respect to Yakima.

12 Q I'm speaking perhaps a little more generally.

13 Isn't it a fact that many, if not all of the
14 tribes within the case area have filed claims
15 or suits before the Indian Claims Commission
16 seeking money judgments?

17 A Yes.

18 MR. DYSART: Your Honor, if the question
19 pertains to plaintiffs' rights, I think it's rele-
20 vant. If it pertains to tribes who are not plain-
21 tiffs, I fail to see the relevance. He said
22 tribes within the case area, but not plaintiff tribes.

23 THE COURT: There would be a distinction
24 there.

25 MR. CONIFF: I believe the answer was yes.

1 THE COURT: How did you understand the
2 question when you answered it? As pertaining
3 to all tribes within the case area or as being
4 the plaintiff tribes?

5 THE WITNESS: I was interpreting it as
6 being the plaintiff tribes.

7 Q Now, what is your understanding of the basis for
8 the awards that were made by the Indian Claims
9 Commission in favor of the plaintiff Indian tribes?

10 A The primary basis for those that had been adjudicated
11 and the awards had been granted has been on the
12 basis of inadequate compensation for taking,
13 basically pursuant to treaty.

14 Q Taking of the lands ceded or otherwise aboriginally
15 occupied by any of the plaintiff bands; is that
16 correct?

17 A Right.

18 Q And do you have any understanding with regard to
19 whether the Indian Claims Commission when it com-
20 pensates or is in the process of compensating any
21 of the plaintiff tribes for values of their lands
22 which they either aboriginally occupied or ceded
23 by virtue of a treaty with regard to the question
24 of whether or not the value of their communal
25 hunting, fishing or gathering rights were included

1 in determining that value?

2 A. I'm not aware of any claims case where those
3 items were considered in making an evaluation.

4 Q. Are you familiar with the case entitled Otoe
5 and Missouriia, a tribe of Indians versus the
6 United States in the Court of Claims?

7 A. No, I'm not.

8 MR. DYSART: That tribe is certainly
9 not in the case area.

10 THE COURT: I am aware of that.

11 Q. You stated in response to questioning by Mr.
12 Dysart that you presently have no money available
13 to go out on the real estate market and purchase
14 lands for the purpose of creating an Indian
15 reservation. However, if I understood your testimony
16 correctly yesterday, you do believe that you have
17 the authority to do so should the money become
18 available?

19 A. That's correct.

20 Q. And could you explain for the record upon what
21 basis you believe that you have the legal authority
22 to do this. Is this by congressional act, adminis-
23 trative regulation, or policy?

24 A. By congressional act. It would be the only
25 authority that we would have.

1 Q Is there a name to that statute that you refer
2 to, or do you know when it was passed?

3 A One specific statute would be Indian Reorganization
4 Act of June 18, 1934.

5 Q Is it your contention that by the Indian Reorganiza-
6 tion Act you possess this authority?

7 A Yes.

8 Q To acquire land outside the boundaries of the present
9 Indian Reservation and convert it into a reservation?

10 A I don't believe you qualified the basic question
11 with respect to outside the reservation area.

12 Q My question to you, I believe, yesterday posed
13 could you go anywhere within the case area, go on
14 the real estate market, and purchase land and
15 convert it into an Indian reservation? And I
16 understood your answer to be yes.

17 A There are other statutes that are applicable.
18 I was not considering this question in the same
19 framework as that one of yesterday. But there are
20 other provisions.

21 Now, I pointed out yesterday that is not
22 my normal area of expertise. I have some knowledge
23 of it, but not a total and intimate knowledge,
24 and I am not aware of all of the statutes, but
25 I am aware that we have from time to time purchased

1 land on behalf of individuals in locations off
2 the reservation. The exact specifics I am not
3 aware, as I mentioned yesterday.

4 Q And it is your position that the authority for
5 doing this is the Indian Reorganization Act of
6 1936, also known as the Wheeler-Howard Act?

7 A Yes.

8 THE COURT: That is only one of the
9 provisions that were applicable to it.

10 Q My final question has to do with your responses
11 to Mr. Dysart's questioning concerning the approvals
12 of off-reservation Indian fishing regulations.

13 What legal authority do you believe exists
14 which requires such federal approval of the Indian
15 off-reservation fishing regulations? Is it a
16 congressional act, a regulation or a policy?

17 A The actions of the Bureau in reviewing and approving
18 these regulations, as I mentioned in my earlier
19 testimony, is pursuant to the provisions of the
20 specific content of the organic documents of the
21 tribe. Then, in addition to that, I believe also
22 we are involved here with part 256 of 25CFR.

23 Q Is it your testimony that you derive your authority
24 to approve off-reservation fishing regulations
25 from, (a) the tribal governing document itself?

1 A. Right.

2 Q. And 25CFR part 256?

3 A. There is one basic authority relating to Indian
4 affairs I think would be applicable and that is
5 25 USC 2.

6 Q. And that is the general guardian ward statutes?

7 A. This is the general act of appointing the position
8 of Commissioner of Indian Affairs to handle all
9 Indian matters.

10 MR. CONIFF: Thank you.

11 THE COURT: Anything further of this
12 gentleman? If not, Mr. Weston, you are excused
13 and you are free to leave whenever you wish as
14 far as the Court is concerned. Counsel may have
15 some arrangement for you to stand by.

16 (Witness excused.)

17 (Continued on next page.)

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THE COURT: Next witness, please.

MR. PIERSON: Mr. Coffin, would you come forward and be sworn.

MR. CONIFF: Mr. Coffin is being put on out of order at my request. I appreciate the United States attorney's courtesy in this regard.

THE COURT: You have been very courteous to each other at all times during the development of this case and up to now, and if at some time or other, you fail to be courteous, I wouldn't even look at it.

ARTHUR S. COFFIN,
called as an adverse witness, being first duly sworn, was examined and testified as follows:

THE CLERK: Would you please state your name and spell your last name.

THE WITNESS: Arthur S. Coffin, C-o-f-f-i-n.

MR. PIERSON: The record should show Mr. Coffin is being called as an adverse witness by the plaintiffs.

CROSS EXAMINATION

BY MR. PIERSON:

Q Mr. Coffin, are you a member of the Game Commission of the

1 State of Washington?

2 A I am.

3 Q How long have you been in that position?

4 A Seventeen years.

5 Q And you hold an official position on the Commission now?

6 A Yes.

7 Q What is that position?

8 A Chairman of the Commission.

9 Q How long have you been in that position?

10 A At different intervals, five years.

11 Q So it will be five years?

12 A Going on five years, four and a half.

13 Q Mr. Coffin, is it true to say as well that you are a
14 member of the Yakima Valley Sportsmen's Association, the
15 Washington State Sports Council, the Kittitas County Field
16 & Stream, and Washington State Bird Association, all of
17 which are nongovernmental, non-Indian sport and hunting
18 and fishing organizations?

19 MR. CONIFF: Objection, your Honor, on the
20 grounds of relevancy.

21 THE COURT: Overruled.

22 Q (By Mr. Pierson) Are you a member of those?

23 A Yes.

24 Q Is it accurate to say that prior to October 2, 1972, that
25 the Game Commission had never considered as a separate

1 matter of contention the claimed treaty rights of the
2 plaintiff tribes in this case?

3 A As I recall, it was brought to our attention and reported
4 at our October meeting in '72.

5 Q Was that the first time, Mr. Coffin?

6 A As I recall, yes.

7 Q Now, is it accurate to say that it is the responsibility
8 and duty of the Game Commission to determine, pass,
9 modify or repeal the regulations governing game birds
10 and fish in this state?

11 A I believe so, yes.

12 Q Directing your attention to the October 2, 1972 meeting,
13 is it accurate to say that the Game Commission and you as
14 Commissioner considered the facts and data presented by
15 Mr. Millenbach as informative only?

16 A Our position in the matter of off-reservation fishing of
17 steelhead, the decision we are aware of is that state
18 law prohibits that fishery, net fishing off the reservation.

19 We are also aware of the requirement that we
20 review legal -- we review annually the matter of whether
21 there should be a fishery of this kind or not, and that
22 was reviewed at this meeting.

23 Q Let me ask you a little more directly, Mr. Coffin, when
24 you and the Game Commission considered on October 2, 1972
25 the motion regarding Indian fishing rights, was it your

1 impression as a Commissioner that you had any discretion
2 to permit net fisheries for steelhead outside reservation
3 boundaries?

4 A No.

5 Q Your answer is you had no discretion?

6 A Yes, we had discretion relative to the fishery.

7 Q Directing your attention to page 25 of the document in
8 front of you, which is your deposition given on March 27,
9 1973, I will ask you if you recall these questions --

10 THE COURT: Page and line.

11 Q (By Mr. Pierson) Page 25, Mr. Coffin.

12 A I have it, sir.

13 Q And we are starting at line 12, and I will ask you if
14 these questions weren't asked of you and you made the
15 following answers:

16 "Mr. Coffin, as a member of the Game Commission
17 when you considered on October 2nd the motion that
18 we have been talking about, was it your impression
19 as Commissioner that you had a discretion to permit
20 Indian net fisheries for steelhead outside reservation
21 boundaries?

22 "A Under the law we have no discretion.

23 "Q As I understand your answer, you are
24 saying that when you decided that motion, you could
25 not under any circumstances, as the state law now

1 stands, have allowed an Indian net fishery for
2 steelhead outside reservation boundaries?

3 "A Right."

4 Do you recall that testimony?

5 A I do now, yes.

6 Q All right. Now, if I asked you those same questions
7 today regarding the October 2nd meetings, would your
8 answers be the same?

9 A They would.

10 Q Now, Mr. Coffin, directing your attention to October 2nd
11 and the testimony given by Mr. Millenbach, for what
12 purpose in your mind as a Commissioner was Mr. Millenbach
13 presenting to you the facts and data concerning Indian
14 net fisheries for steelhead?

15 A That in my mind is part of the responsibility and the
16 requirement as set forth by law.

17 Q Maybe I can get more directly to the question by reading
18 the next set of questions and answers, beginning at line
19 24 of your deposition, page 25, and ask if you don't
20 recall the following questions and answers:

21 "Q Let me see if I can ask a more particular
22 question in that same line, for what purpose in your
23 mind as a Commissioner was Mr. Millenbach presenting
24 to you facts and data concerning Indian net fisheries
25 for steelhead?

1 "A Informative.

2 "Q By that do you mean there was no way
3 that you could authorize an Indian net fishery
4 outside of Indian reservation boundaries?

5 "A Not legally.

6 "Q By legally do you mean under state law?

7 "A Under state law."

8 Do you recall that testimony?

9 A Yes, I do.

10 Q And if I asked you the same questions today, would your
11 answers be the same with respect to the October 2nd
12 meeting?

13 A I think they would be.

14 Q Directing your attention to August 20, 1973, if I asked
15 you those two same sets of questions we have talked about
16 regarding the August 20 meeting, and your decision
17 regarding Indian net fishery outside the reservation
18 boundaries at that meeting, would your answers be the same?

19 A I feel that during the interim, that we have gained more
20 interpretation of the requirement of the law, and as far
21 as the basis that the Commission considered, the net
22 fishery of steelhead off the reservation is predicated
23 on a conservation of that resource, and the information
24 as it is furnished to us by staff, and I'm referring to
25 Mr. Millenbach.

1 Q Let me ask you a question then about the August 20
2 meeting, if Mr. Millenbach's presentations to you had
3 indicated either in recommendation form or by virtue of
4 the data presented that any kind of Indian net fishery
5 for steelhead outside reservation boundaries could be
6 carried on while the resource was preserved, would you
7 have felt that the state law would prohibit you from
8 authorizing such a fishery?

9 A I answer that question by saying I feel that we would
10 have to be shown first that there was abundant resource
11 before the -- I know I'm not answering directly to your
12 question, but you would have to have a very definite
13 surplus of steelhead before we considered it prudent
14 to grant a fishery of steelhead by nets off the reservation.

15 Q Let's take a hypothetical, Mr. Coffin, a hypothetical
16 example.

17 Suppose you had a river system, which we will
18 call "X" and that the sport fishery average catch over
19 the last ten years has been 10,000 fish; suppose also
20 that Mr. Millenbach presented you facts and data indicating
21 that that sport fishery could be cut in half, and that
22 the 5000 fish left could be taken and no more by a
23 regulated Indian net fishery outside reservation boundaries.
24 Would you have felt that you could authorize such a net
25 fishery?

1 A I think it is understood that I speak only for myself
2 and not other members of the Commission, and the
3 question has been directed to me as a Commissioner,
4 that to me is more of a question of biology than it is --
5 I don't think I could answer that.

6 THE COURT: I think you may not quite have
7 gotten the thrust of the question. I think what the
8 question was intended to ask you was, would you have
9 thought that the Commission had authority in those assumed
10 circumstances to authorize an Indian off reservation
11 fishery?

12 THE WITNESS: I think the Commission, yes,
13 would have that authority.

14 Q (By Mr. Pierson) That would be true for August 20?

15 A August 20.

16 Q What then intervened between October 2, 1972 and August
17 20, 1973 which changed your position with respect to
18 whether state law would prohibit you from authorizing
19 such a fishery?

20 A I can't answer that question.

21 Q Have you as Chairman of the Commission ever directed a
22 study of the location of the usual and accustomed fishing
23 places of the plaintiff tribes in this case?

24 A That has been a matter of management and biology and I
25 can't recall that specific direction.

- 1 Q Is it accurate to say, Mr. Coffin, that the Game
2 Commission has a policy directive with respect to the
3 actions of the Game Department under regulations and
4 preservation of the game birds and fish in the state?
- 5 A That is one yes.
- 6 Q All right. And that policy position, do you know of any
7 time when any member of the Game Commission, including
8 yourself, has ever asked or directed the Game Department
9 to determine, or attempt to determine the location of the
10 usual and accustomed fishing places of the plaintiff
11 tribes in this case?
- 12 A I don't recall that.
- 13 Q Do you know of any time when any member of the Game
14 Commission has directed the Game Department or requested
15 the Game Department to determine as to any of the plaintiff
16 tribes in this case their anticipated fishing effort in
17 terms of fishermen, gear, place and time, should they be
18 authorized an off-reservation Indian net fishery?
- 19 A I can only say that, and this is an assumption, that they
20 have taken action along that line.
- 21 Q I'm asking whether any member of the Commission has
22 directed them to do so.
- 23 A I do not recall, sir, of anyone.
- 24 Q According to your recollection, has any member of the Game
25 Commission ever directed the Game Department or requested

1 the Game Department to inquire into the treaty status
2 of any of the plaintiff tribes in this case?

3 A I am sure they have.

4 Q Could you tell me your recollection of when that has
5 occurred and what tribe you are talking about?

6 A No, I cannot.

7 THE COURT: I take it that that question assumes
8 prior to the filing of this case?

9 MR. PIERSON: The question was "ever." I can
10 bifurcate it, if you like.

11 THE COURT: It is obvious that at least in the
12 development of the Pretrial Order, a very great deal of
13 consideration has been given to the matter.

14 MR. PIERSON: My question was really directed to
15 whether the Game Commission asked for such a study to be
16 done.

17 THE COURT: Yes, I understand that, and apparently,
18 Mr. Coffin doesn't know about it.

19 MR. CONIFF: I will advise the Court and Mr.
20 Pierson that oftentimes a determination of the legal
21 question is referred to counsel for research.

22 THE COURT: Of course, I understand that
23 thoroughly.

24 Q (By Mr. Pierson) Mr. Coffin, directing your attention to
25 the October 2, 1972 meeting and your recollection of that

1 meeting, do you recall any evidence being presented to
2 you, either before the meeting or during the meeting or
3 by any person advising you of the anticipated fishing
4 effort, meaning the number of fishermen, the amount and
5 type of gear, the place of fishing and the time of
6 fishing as to any of the plaintiff tribes in this case?

7 A No, I do not.

8 Q I would ask you the same question as to the August 20,
9 1973 meeting.

10 A The same answer.

11 Q Are you aware, Mr. Coffin, that the position of the
12 Department of Fisheries as to the existence of special
13 treaty rights of Indians off reservation is different from
14 the Department of Game and the Game Commission?

15 MR. CONIFF: Objection, I don't see how that
16 has any bearing on any issue.

17 THE COURT: Overruled.

18 Q (By Mr. Pierson) Did you understand the question?

19 A Yes, and I'm not knowledgeable of such a difference.

20 Q You don't know whether there is a difference?

21 A No.

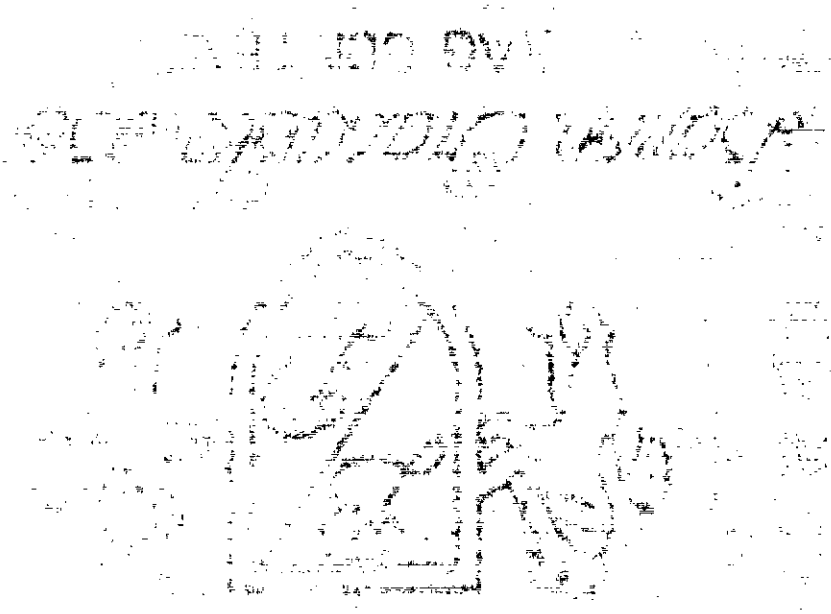
22 Q With respect to the Game Commission decision on October
23 2, 1972, regarding off reservation Indian net fishing,
24 in your understanding of the regulatory framework of the
25 Game Commission and Game Department, would you describe the

1 decision of the Game Commission as a closure or a closing
2 of all off-reservation fishing areas to Indian net fishing?
3 A The decision of the Commission in this respect is
4 predicated upon, first, a conservation of the steelhead
5 resource.

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7 (Continued on the next page.)
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THE COURT: I think, Mr. Coffin, you should really answer the question first and then explain. The question was: Do you consider that a closure.

Q My question was asking him whether he would consider it a closure.

A Yes.

THE COURT: Now, go ahead, now explain.

Q Would you like to explain further, Mr. Coffin?

A The position of the Game Department in defining a zone is predicated on the conservation of the steelhead resource together with the staff report furnished by Mr. Millenbach to the Commission, and our answer was no.

Q With respect to October 2, 1972, you are not changing your testimony you spoke of already?

A Well, frankly, I don't know what I have changed and what I haven't changed. I am just trying to state my remembrance of the situation as it appears to me.

Q I would like to ask you the same question with respect to whether you considered it a closure, the decision made by the Game Commission with respect to Indian off-reservation fishing on August 20, 1973.

1 A. The same, the same principles yes, applied in
2 our consideration of no off-reservation Indian
3 fishery of steelhead.

4 Q. And you would designate your decision as a
5 closure?

6 A. As a closure.

7 MR. PIERSON: That is all, Your Honor.

8 THE COURT: Off the record.

9 (Discussion off the record.)

10 THE COURT: Further interrogation?

11

12

CROSS-EXAMINATION

13

BY MR. SENNHAUSER:

14

Q. Mr. Coffin, would you say that it is the primary
15 policy or purpose of the Game Commission or the
16 Game Department to allow the sportsmen to catch
17 as many steelhead as conservation will allow?

18

A. The sports fishermen of course are limited in the
19 number of fish that they can catch a day and
20 a season, so that limits the number of steelhead
21 you can catch.

22

Q. I am not talking about the individual take. I
23 am talking about permitting the sportsmen to catch
24 as many fish as a group as conservation, taking
25 into account the needs of escapement will allow;

DEPARTMENT

1 so in setting number of days or places they may
2 fish you try to let the sportsman in view of the
3 escapement needs catch as many fish as they can.

4 A. I would say that as far as the sportsmen are
5 concerned the number of fish that they catch during
6 a season is related to the season that is set
7 by the Commission, and that season as it is set
8 by the Commission is prompted by the recommendations
9 of the Department by individuals who attend the
10 meeting for the purpose of making recommendations
11 relative to the setting of the season.

12 Now, as to the number, I do not have this
13 in mind and I again am just speaking for myself,
14 thinking the Commission don't have before them the
15 actual number that is a prudent catch under a
16 conservation program that the Department is pursuing.

17 Q. But is the purpose to benefit, is the purpose
18 of the Game Commission's regulations to benefit
19 the sportsmen, to allow them to fish as much as
20 possible, taking into account the needs of conser-
21 vation?

22 A. The responsibility of the Commission is to promote
23 the fishery under a conservation program, irrespective
24 of the number of fish. That is secondary, but
25 primarily the Commission establishes the season,

1 predicated on the information that we receive from
2 the biologist, information and recommendations that
3 we receive from the public.

4 They are all open meetings and we -- the
5 season, the bag limit, is all determined because
6 of the information furnished us by the Department.

7 Q Well, let me ask you a hypothetical. If your biolo-
8 gist told you that he felt that in studying the
9 conservation situation, that it would be possible
10 to allow the sportsmen to take three fish per day,
11 that that would not be detrimental to the fishery,
12 would you feel that the Commission would agree
13 to promulgate regulation which would permit such
14 an increase?

15 A. I think they would, yes.

16 Q. Would you think that it is fair to say that the
17 Commission tries to give a fair catch to the
18 sportman?

19 A. Yes.

20 Q. Do you think it is fair to say that the Commission
21 tries to give a fair catch to the sportsman before
22 it allows any Indian net fishery?

23 A. I don't know the comparative figures of sport
24 catches and what would be involved relative
25 to a net Indian commercial fishery.

1 Q Suppose a biologist says that we can harvest
2 5,000 fish, and as a biological matter and I am
3 giving you this as a hypothetical so you have to
4 assume the truth of the facts I give you, that
5 we have a possible harvest of 5,000 fish, that
6 it is possible to to take this harvest without
7 being detrimental to conservation.

8 We can give 5,000 fish to sportsmen or we
9 can give 2,000 to Indians and 3,000 to sportsmen.
10 What would the policy of the Game Commission be
11 on this question?

12 A I think they would consider every aspect of it.

13 Q Well, I don't think that is an answer.

14 A I can't speak for the Commission.

15 THE COURT: What more, if anything, would
16 the Commission require in your judgment other
17 than that which is stated in the assumptions
18 Mr. Sennhauser is giving you. Would you like
19 to have it repeated?

20 THE WITNESS: Yes.

21 (Question read by the
22 reporter.)

23 THE COURT: Now, my question is: What
24 if any further information do you need, does the
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Commission need other than that which is stated in that question in order to make a decision of how to divide the fish?

THE WITNESS: The only thing I can see is the Commission would be glad to consider the recommendation, not only the Department or any other individuals, as to what should be done relative to the --

Q In your considerations what other factors other than biological statements by your biologist you take into account?

A We take into consideration the public's desires in the matter, recommendations.

Q Would you be more specific? What do you mean "the public's desires"?

A The public recommendations. These Commission meetings are open to the public.

When the fishing seasons are established it is open first to discussion by the public, and there are recommendations, are considered.

Q So -- excuse me.

A We then consider the Department's recommendations.

Q So in other words, the public opinion that appears at your meeting is that sportsmen should

1 be allowed to catch more fish, that that will
2 be a factor in your considerations?

3 A. It would be considered. I don't know if it
4 would change the opinion of the Commission relative
5 to the setting of the season.

6 Q. Okay, now, so we have biological considerations,
7 what the public thinks; are there any other factors
8 in your considerations?

9 A. Always propagation and conservation of the resource.

10 Q. Okay, including that as biological testimony,
11 by biological factors, is one which would include
12 conservation, propagation, second is public
13 feeling. Is there anything else?

14 A. I think of nothing at the moment.

15 Q. All right, let me ask you the question again.

16 If the biological facts are that there is
17 a harvest of 5,000 fish possible, there would be
18 no detriment to propagation of the fish, there
19 would be necessary escapement and that we could
20 divide that harvest either 5,000 to sportsmen
21 or 2,000 to Indians and 3,000 to sportsmen, that
22 there was no public expression at your Commission
23 meeting. You have no indication of the public
24 sentiment at this time.

25 What as a commissioner would you do with

THE COURT:

1 the regulations?

2 A. We would give it ample consideration.

3 Q. Do you feel that the Department gives the
4 priority to sportsmen's interests?

5 A. The Department always considers the license holder
6 as the one they represent, and things have changed.
7 I feel that it is the responsibility of the Commi-
8 sion to consider all aspects of and people involved
9 relative to establishing the seasons.

10 Q. You feel that you do represent the license holders?

11 A. We represent the license holders. It is their
12 money that permits the Department to propagate
13 the resource.

14 Q. You are aware, of course, that there is other
15 money than license money that is involved in the
16 budget of the Game Commission and Department aren't
17 you?

18 A. Yes, Pittman-Robinson (sic) and Dingall-Johnson
19 particularly.

20 MR. SENNHAUSER: That is all the questions
21 I have.

22 THE COURT: Anything else for the
23 plaintiffs, any redirect?

24 MR. PIERSON: I am sorry. The next witness
25 expected a recess before her testimony.

(Recess.)

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THE COURT: Next witness.

MR. PIERSON: Would you swear the witness please, Madam Clerk.

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

THE CLERK: Would you please state your full name and spell your last name.

THE WITNESS: Barbara Lane, L-a-n-e.

DIRECT EXAMINATION

BY MR. PIERSON:

Q Dr. Lane, are you the same Barbara Lane who has submitted written direct testimony marked as USA-52?

A Yes, I am.

MR. PIERSON: Your Honor, at this time the plaintiffs move the admission of her direct testimony.

MR. CONIFF: Does that include the reports?

MR. PIERSON: This moving does not include the reports.

MR. CONIFF: I have no objection.

THE COURT: Admitted.

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(Exhibit Number USA-52 for
identification admitted in evidence.)

Q (By Mr. Pierson) In your direct testimony, Dr. Lane,
you refer to a bound volume which has been marked
USA-20 through 30. It is a green volume that sits next
to you.

Are these the reports which you referred to at
page 2 of your testimony, line 21, where you are asked
about a bound volume entitled "Political and Economic
Aspects of Indian-White Culture Contact in Western
Washington in the mid-19th Century"?

A Yes.

Q Would you describe briefly to the Court how you came
about to compile and present these reports, and who the
reports deal with.

A I will try to answer the last part first-

The reports are concerned with all of the
plaintiff tribes in this case, except for the Upper
Skagit and the Yakima, and I was asked to research and
write the reports by the United States, and by some of
the intervenor plaintiffs.

Q Now, there is included in the bound volume an exhibit
marked USA-20, which is entitled "A Summary."

Would you describe how you reached the
conclusions and statements which you included in that

1 summary briefly, please.

2 A Yes. The summary is based upon the same materials on
3 which the individual tribal reports were based, and, in
4 addition, general reading in anthropology as it relates
5 to the tribes involved here.

6 Q Would it be accurate to say that as to such tribes as
7 the Upper Skagit, the Yakima, the Tulalips, the Swinomish
8 and the Lower Elwah Tribes, that your summary is not
9 based on specific and detailed studies as to those tribes?

10 A That is correct.

11 MR. PIERSON: Your Honor, for the record, at
12 pages 4 and 5 of USA-52, Dr. Lane's written direct
13 testimony, there is set forth a lengthy explanation as
14 to why any list of usual and accustomed fishing places
15 for the treaty tribes is necessarily incomplete.

16 The record does not yet reflect -- and I would
17 like to state for the record -- that in response to Requests
18 for Admission 3.030 and 3.031 that the defendants admitted
19 these statements.

20 Q (By Mr. Pierson) Dr. Lane, in addition to the reports
21 included in the bound volume, USA-20 through 30, have
22 you also presented and compiled a report as to another
23 tribe?

24 A Yes. I was asked to do a report for the Quinault Tribe.

25 MR. PIERSON: For the record, your Honor, that

1 is USA-53.

2 At this time I would like to move the admission
3 of the bound volume and the Quinault report. As I
4 understand it, as to the bound volume, the only objections
5 to the reports are those appearing at pages 25, 26,
6 and 27 of USA-20, which is the summary report.

7 Maybe Mr. Coniff and I can argue about that.

8 THE COURT: Yes.

9 MR. CONIFF: Your Honor, before I respond
10 directly to the objections which we previously noted,
11 I should like to advise the Court of an understanding that
12 I believe Mr. Pierson and I have with regard to what
13 has been marked for identification as USA-53, that being
14 the Quinault report prepared by Dr. Barbara Lane.

15 I was served with a copy of that report last
16 Saturday at my home by Mr. Dysart, and it is my
17 understanding that the reason for the delay in the
18 obtaining of this information not in advance of trial,
19 which was true, of course, for the balance of Dr. Lane's
20 reports, was that there was some question as to whether
21 the Quinault Tribe of Indians was to be a party or not
22 to be a party in this case.

23 Now, recognizing that, therefore, there was
24 no obviously intentional delay involved in getting that
25 report to me -- and I am sure the Court is aware that the

1 expert anthropologist that will be appearing on behalf
2 of the Washington Department of Game and the Washington
3 Department of Fisheries, Dr. Carroll Riley, is from the
4 Midwest and did not arrive until last Saturday -- it
5 is my suggestion to the Court that we defer cross
6 examination of Dr. Barbara Lane on USA-53 and defer any
7 questions regarding admissibility objections to it until
8 such time as Dr. Riley has appeared and been cross
9 examined regarding his testimony covering all of the
10 other tribes, and that we re-call Dr. Lane next week for
11 the limited purpose of noting any specific objections, if
12 any, and for cross examination purposes on USA-53.

13 For that reason, I submit to the Court or I
14 suggest to the Court that the most expeditious manner
15 and the most fair manner in which to handle the problem
16 of the Quinault report is to segregate it from the balance
17 of the materials which are contained in the large green
18 volume for purposes of cross examination today.

19 My reasoning is as I have indicated, and I
20 believe Mr. Pierson and I have at least reached a
21 tentative understanding.

22 MR. PIERSON: I should add for the record two
23 things that the Court should know.

24 One is that that is my understanding of the
25 arrangement, and the attorney for the Quinaults agrees.

1 The other is that Dr. Lane has pressing family
2 commitments which come to her at the close of this trial.
3 I advised counsel of that, such that if after she leaves
4 here that during her stay during the trial counsel wants
5 to contact her, that there is at least a two or three
6 month period when she will be unavailable.

7 MR. CONIFF: That is why I would like in
8 response to Dr. Lane's desires to be able to have Dr.
9 Riley have a reasonable opportunity to perform whatever
10 research he feels necessary. He has advised me this
11 will be two or three days. We will hold him over here
12 from his duties back at the Southern Illinois University
13 in Carbondale, ask him to perform his research, and then
14 have Dr. Lane appear again next week for the limited
15 purpose of cross examination on her report.

16 At that point I would assume that that would
17 take care of any further contact that I would need to have
18 with Dr. Lane and would satisfy her desires.

19 (Discussion off the record.)

20 THE COURT: I will have to ask you to make
21 yourself available for one day next week for this purpose.

22 THE WITNESS: All right.

23 MR. CONIFF: I am now, your Honor, directing
24 your attention to pages 25 through 27 and in their
25 entirety. My objection to this testimony is simply that

1 it goes entirely to the ultimate issue in the lawsuit.

2 Paragraph B, appearing at approximately the
3 middle of page 25, is labeled "Meaning of 'The right of
4 Taking fish at all usual and accustomed grounds and
5 stations is further secured'."

6 Then the author, Dr. Lane, goes on and explains
7 her opinions regarding the actual legal meaning of that
8 language.

9 Then she goes over to page 26, and again at
10 approximately the middle of the page, under paragraph
11 labeled "C" it is captioned "Meaning of 'in common with
12 all citizens of the Territory.'"

13 She goes on through page 27 and expresses
14 her views as an anthropologist on the legal meaning to be
15 placed upon these treaty provisions.

16 I certainly feel, your Honor, that it is clear
17 to all parties and to the Court that the crux of this
18 case involves the legal interpretation to be placed upon
19 this precise phraseology, common to all of the Governor
20 Stevens' treaties which were executed with the various
21 tribes, bands and villages of Indians in residence, or
22 as many of them as you could find, in the Puget Sound
23 or coastal waters of Western Washington that form the
24 subject matter of this lawsuit.

25 I feel it is improper under the law for this

1 type of ultimate opinion testimony to be considered by the
2 Court or to be introduced into this record. For that
3 reason, I respectfully submit that those pages of her
4 summary report be stricken from this record.

5 MR. PIERSON: Your HONor, I differ with Mr.
6 Coniff as to the characterization of this material. It
7 does not attempt or presume to invade the legal province
8 of the Court interpreting the meaning of these phrases.
9 It attempts to give an expert anthropological view,
10 principally as to the fact of what the Indian people at
11 the time of the treaties understood the terms to mean.

12 It also includes some recitation of what the
13 anthropological evidence indicates the United States
14 Commissioners meant.

15 I think the case law is well settled, and it
16 is listed both in the pretrial brief of the United States
17 and of Mr. Getches where the Supreme Court has recognized
18 for a long time that an essential element in the inter-
19 pretation of the treaty phrases is the understanding that
20 they had with the Indians, if that can be determined.

21 As I understand the witnesses presented in this
22 case, the only two witnesses who will be able to enlighten
23 the Court in that regard are Dr. Lane and Dr. Riley.
24 I submit that the evidence presented through her reports
25 and those three pages is very much at the crux of this case.

1 It goes to an issue, if you will, an ultimate issue, but
2 it is a factual issue, and Dr. Lane is eminently
3 competent and well qualified to give these meanings.

4 MR. ZIONTZ: May I be heard additionally,
5 your Honor?

6 THE COURT: Yes, although I am ready to rule.

7 MR. ZIONTZ: I will try to make it very brief.

8 THE COURT: You are not making an objection,
9 I take it? If you are not enlarging on the objection, I
10 take it to be unnecessary.

11 MR. ZIONTZ: Very well.

12 THE COURT: Obviously, to the extent that a
13 determination of the meaning of these words is a question
14 of law, that would have to be reserved exclusively to the
15 Court, and I do not notice, quickly glancing at these
16 pages -- I read them more carefully before we began --
17 that it purports to state any legal interpretation.

18 With the report itself, the language of the
19 report, it appears to relate solely to the type of
20 information that anthropologists are commonly permitted
21 to give in such situations as this. You may be assured
22 that if there is anything suggesting otherwise in this
23 testimony, the Court will ignore it.

24 On the other hand, if there be factual material
25 that when the evidence is taken as a whole and is under

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consideration that bears upon the facts pertaining to interpretation, then, of course, I will give it effect to that extent.

For these reasons, the objection is overruled, and exception allowed.

(Continued on the next page.)

ET8

1 Q. Dr. Lane, in your report on individual tribes,
2 which are included in USA 21 through 30, did
3 you undertake to name some of the water systems
4 on which you could find some evidence that a parti-
5 cular tribe had usual and accustomed fishing
6 places?

7 A. Yes.

8 Q. Could you describe generally your approach to
9 that problem and how you went about it?

10 A. Yes. There was some discussion at the time that
11 I was asked to do this research regarding research-
12 ing usual and accustomed fishing places at treaty
13 times, and I pointed out to the various individuals
14 with whom such discussions took place that I
15 would in no way undertake to compile and research
16 a list which would purport to show all of the
17 fishing places that were used at treaty times
18 because it was impossible to attempt such a
19 task.

20 I said that I would note those usual and
21 accustomed fishing places that I could find in
22 the course of my research on the tribes at
23 treaty times, but this would in no way represent
24 more than a sampling, because in my view, and I
25 have explained it at several places in the bound

1 report, there are a number of reasons why it
2 is impossible to do this even if one spent much
3 more time than the task would warrant.

4 Q With respect to those rivers that you did and
5 water systems that you did note, and directing
6 your attention to the red overlay, which is
7 USA-73, what is the first time that you saw
8 that red overlay?

9 A Was it on Friday when I arrived here? I believe
10 it was Friday.

11 Q Yes. Is that the first day you saw it?

12 A I believe it was Friday.

13 Q And what is the first opportunity you had to
14 examine it in detail by comparison with your
15 reports?

16 A I looked at it on the Sunday.

17 Q Are there any river systems on that red overlay
18 which you have found are not listed in your
19 report?

20 A Yes.

21 Q Can you give them for the record, please?

22 A Yes.

23 In some cases -- let me elaborate, in some
24 cases entire water systems appear in red -- on the
25 red overlay which I did not touch on in my

1 reports, and in other cases I may have touched
2 on the water systems, but portions of them that
3 are on this overlay are not discussed in my reports.
4 I made a note, the Nooksack River system -- I be-
5 lieve the report which I did on the Lummis, I'm
6 not sure which number that is, may refer to the
7 lower reaches of the drainage system as the water
8 in several mouths goes into the bay there.

9 But certainly the Nooksack River, the upper
10 -- the middle and upper reaches are not touched
11 in my report. Similarly the lower and middle por-
12 tions of the Skagit River system are not touched
13 on in my report.

14 In the Suak-Suiattle report, I don't know
15 the number, the upper portion of the Skagit River
16 where it meets the Suak is the only area discussed
17 in my report.

18 I'm not sure, I didn't have time to check
19 everything out, I'm not sure about the north fork
20 of the Stillaguamish, if that was touched on in
21 my report or not. I believe it was, but I'm not
22 precisely certain.

23 The Samish River was not discussed in my
24 reports.

25

1 Certainly not the Snohomish, Skykomish, Snoqualmie
2 system. I don't believe I touched on the Sammamish
3 River, certainly not the Dungeness on the Elwha
4 and other rivers over in Clallam County draining
5 into the Straits.

6 MR. PIERSON: With the Court's indulgence,
7 the plaintiffs would like to request permission
8 to eliminate from the red overlay those portions
9 that have been identified by Dr. Lane as not
10 being included in her report. The reason for
11 asking that is because it is our fault this
12 occurred, and I would like to correct it for the
13 record.

14 MR. CONIFF: No objection, Your Honor.

15 THE COURT: That may be done. It may
16 well be that a complete re-do of it limiting it
17 would be better than trying to mask out what should
18 be deleted. I take it you would have no objection
19 to that?

20 MR. CONIFF: Any methodology they may use
21 would be satisfactory to me.

22 THE COURT: Do as you think best.

23 Q. Dr. Lane, in your reports and your examination of
24 the red overlay, are there rivers or water systems
25 which are mentioned in your report that are not

1 included in the base map as you saw it excluding
2 the drawn in black lines?

3 A. Yes.

4 Q. In your research, do you have an opinion on the
5 probability that there are usual and accustomed
6 fishing places in areas other than those which
7 you have designated in your reports?

8 A. I'm sorry, I'm not sure I understood your question.

9 Q. From your research, do you have an opinion whether
10 there are other water systems that are noted
11 in your report which may be or may have been
12 usual and accustomed fishing places of the plaintiff
13 tribes in this case?

14 A. Of the plaintiff tribes, certainly, yes.

15 Q. And the opinion is that it would be?

16 A. Yes, there would be. I tried to explain this is
17 only a sampling, the sites that are listed
18 in the report, they don't purport to be a complete
19 listing and thereundoubtedly for all of the plaintiff
20 tribes would have been other usual and accustomed
21 fishing grounds which do not appear in my reports.

22 Similarly, if I may add to that, there are
23 other tribes who are not plaintiff tribes in this
24 case who undoubtedly fished on water sources that
25

1 are mentioned in my reports.

2 Q. Thank you. Dr. Lane, in the final pretrial order
3 at page 145 in paragraph 7-135, at line 16 and
4 paragraph 7-135, there is a contention of the
5 defendants in this case as stated, "Information
6 from living informants or historical reconstruction
7 of past events must be used with great care and
8 is less reliable than contemporary documents."

9 Could you for the Court give your expert
10 opinion on the use and relative reliability of
11 those three types of anthropological sources,
12 historical reconstruction, informants and con-
13 temporaneous documents?

14 A. Yes. Ordinarily anthropologists use all three
15 categories of information listed here. I would
16 partially agree with the statement as it appears
17 here and partially disagree.

18 My agreement would be that information from
19 living informants or historical reconstruction
20 of past events must be used with great care, but
21 I would also include the contemporaneous documents
22 which must be used with great care. All sources
23 of information must be treated with considerable
24 caution.
25

1 I do not agree that a contemporaneous
2 document is necessarily more reliable than informant
3 testimony 100 years after the fact.

4 Q. Can you give some indication of what factors might
5 affect the reliability of contemporaneous documents?

6 A. The reliability of any source depends upon the
7 knowledge, expertise, and bias of the source, and
8 that holds whether it was written at the time
9 or spoken early or some years after the fact.

10 Q. In your approach to the reports which you have sub-
11 mitted to the Court in this case, would you briefly
12 describe how you used these three various sources?

13 A. I used them all very cautiously, I hope, and
14 I recognized the fact that there is one way in
15 which a contemporaneous document is more reliable,
16 and only one way, than oral history, and that is
17 that we see what was said at that time and we
18 know it has not been changed between the time
19 it was set down until now unless the document
20 has been tampered with. So, knowing this and
21 knowing that the concern was with matters that
22 related to the treaty times, I have relied almost
23 entirely on documents recorded by non-Indians
24 at treaty times relative to the information given
25 here about Indian history at treaty times.

1 Q. Have you had occasion in the course of your
2 research and in writing these reports to compare
3 the information provided in these contemporaneous
4 documents with the information provided later by
5 informants either through other anthropologists --

6 A. Yes, I have. Much of the ethnographic material,
7 which is contained in the reports, was obtained
8 many years later in the 1920s and onwards recorded
9 by anthropologists but from informants testimony,
10 and I must say that everywhere that I could find
11 contemporaneous records written at treaty times,
12 that touched on matters upon which anthropologists
13 had gotten information from Indians, the information
14 checked out in great detail. And to me this
15 is testimonial to the value that can be derived
16 from oral history if it is taken and if it is
17 checked by people who are trained to do so.

18 Q. Directing your attention, if I could, Dr. Lane,
19 to page 146, which is the following page in the
20 pretrial order, and to paragraphs 7-145 and 7-146,
21 which begin at line 13, again contentions
22 of the defendants and they read, 7-145, "Each
23 Indian village had its own traditional leader."
24 7-146, "Each village was autonomous and
25 there was no tribal structure involving an entire

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watershed.

Each village did not have "sovereignty" over ability to control other villages even in the same watershed."

With respect to these contentions, Dr. Lane, could you give your opinion as to their accuracy and how closely they agree with what you understand to be prevailing anthropological concepts?

(Continued on next page.)

ET9

1 A. Yes, and of course, whether I speak of my own
2 opinion here or the prevailing anthropological
3 concepts/here in the realm of historical reconstruc-
4 we are dealing tion, to a large extent, because my opinion and
5 that of any other anthropologist has to be
6 based on an analysis of information collected
7 in part from documents at treaty times, but in
8 large part from later materials, and on that
9 basis, making clear on what my opinion is based
10 I cannot agree, and I believe that most specialists
11 in the field of C/Salish culture would not agree
12 with the statements as they occur here, except for
13 the last part, "Each village did not have sovereign-
14 ty or other ability to control other villages."

15 I have no quarrel with that. I certainly disagree
16 -- in my opinion the other two are not accurate.

17 Q. What in your view, and relevant to the subject
18 matter contained there, would be a more accurate
19 statement of prevailing anthropological views?

20 A. In each Indian village there were traditional
21 leaders, not one village-one chief -- that might
22 be the case in a small village, but I certainly
23 don't think it can stand as a generalized statement,
24 and each village was not a completely autonomous
25 and politically discrete unit. I think there is

1 abundant evidence -- again, this is partly analysis
2 and reconstruction, but I think on the basis of
3 the materials that we have to work with, experts
4 in the C/Salish field are agreed that political
5 ^{Coast} structures were inter-village structures.

6 Q. On that same page, Dr. Lane, as the contention of
7 the defendants it states, "Fishery resources were
8 not the sole staple..." and I assume that should
9 be "staple" "foods for Indians for in Western
10 Washington at treaty times." With a correction
11 for the spelling that I have given, would you
12 agree with that statement?

13 A. No, I don't agree. I suppose that depends on how
14 you define the word "staple." When I use it I mean
15 that it was the main food source, both in bulk
16 and importance.

17 Q. If I may direct you to your report, in the summary,
18 page 6 -- which is USA-20, in which you cite some
19 contemporaneous documents, and if I may, I would
20 like to read those statements.

21 Second paragraph, "An article in the July
22 15, 1853 issue of The Columbian, a newspaper published
23 in Olympia noted that ...' salmon is the principal
24 article of Indian subsistence...'
25

1 "George Gibbs, the lawyer ethnologist who
2 helped to draft and negotiate the treaties in
3 Western Washington, wrote an ethnological treatise
4 entitled, "The Tribes of Western Washington and
5 Northwestern Oregon," which was published by
6 the Smithsonian Institution.

7 The monograph was based on observation made
8 in 1850-56, although it was not published until
9 1857. In it Gibbs reported that '... salmon form
10 the most important staple of subsistence...'

11 A. If I may correct you, that should have been 1877.

12 Q. Thank you.

13 THE COURT: The publication date, I noted
14 it, too.

15 Q. And at page 14 of your summary on that same exhibit
16 at the top, it begins, "George Gibbs, in a letter
17 to Colonel Ripley under date of July 21, 1857
18 described a tactic use used in the recent hostilities
19 in the Duwamish-Puyallup-Nisqually drainage areas.
20 The following excerpt is from a draft of the
21 letter. I have not seen the one actually sent.
22 The deletions below are in the draft.

23 'The salmon is everywhere the great staple
24 of winter provision.'

25 Do you have any other indications, Dr. Lane,

1 from George Gibbs along the same line?

2 A. Yes, I do. In that same 1877 publication, the
3 same words occur at various places in the monograph.

4 Q. Could you describe for the Court the position,
5 as you understand it, which George Gibbs occupied
6 with regard to the negotiation and execution of
7 the treaties involved in this case?

8 A. The position?

9 Q. And functions.

10 A. He served as Secretary to the treaty commission
11 for all of the treaties in Western Washington except
12 the first treaty at Medicine Creek, and he helped
13 to draft the treaties, and he helped to negotiate
14 them, and he also acted as land surveyor, and
15 surveyed several of the reservations during the
16 course of the treaty commission's movement.

17 Q. Directing your attention, if I could, further on
18 in the contentions of the defendants at page 148,
19 line 14, paragraph 7-168. It is stated, at the
20 time of the treaties at least some Indians under-
21 stood the English language."

22 With respect to that statement, Dr. Lane,
23 do you know of any non-Indians in the area covered
24 by the treaties in this case who spoke other
25 languages than English, either among themselves

1 or to the Indians?

2 A. I am sorry, could you repeat that question?

3 Q. Do you know of any other non-Indians in the
4 area covered by the treaties in this case who
5 spoke other languages than English either among
6 themselves or to the Indians?

7 A. Yes, I think I understand you. Well, some of
8 the non-Indians who were in the area at treaty
9 times were English speakers, and presumably spoke
10 English among themselves. I have not been able
11 to document that any of them spoke English to
12 the Indians.

13 Chinook jargon was the mode of communication
14 that many, if not most of these English speakers
15 used with the Indians with whom they came into
16 contact one way or another. Some of the English
17 speakers, of course, were young children who grew
18 up learning and knowing the local language, the
19 local Indian language, and would use that instead
20 of the jargon as a means of communication, and
21 some of the English speakers who came into the
22 area like Dr. Tolmie, who was in charge
23 of the Hudson Bay Company, Puget Sound Agricultural
24 Company farms at Nisqually, learned the local language
25 and spoke to the natives from the surrounding

1 area in the Nisqually language.

2 There were some missionaries who were in the
3 area early, but they were French and Belgian, and
4 presumably spoke French among themselves and
5 Chinook jargon to the Indians.

6 Q With respect --

7 A There were also, I might add, French-Canadians
8 in the employ of the Hudson Bay Company and Puget
9 Sound Agricultural Company. I presume they spoke
10 French among themselves, and the jargon to the
11 Indians, and there were also, of course, Hawaiian
12 Islanders who were in the employ of the company
13 in the Nisqually River area, and I don't know what
14 they spoke among themselves. I presume Hawaiian,
15 and presumably spoke in the jargon when they were
16 speaking to Indians.

17 THE COURT: Dr. Lane, we are trying to give
18 you full volume on this machine, and your voice
19 is so soft.

20 THE WITNESS: I am sorry.

21 THE COURT: Your voice is so soft that
22 it is very difficult at times even for me to hear
23 with the machine going at full capacity. Would
24 you please speak up more loudly?
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THE WITNESS: Yes.

Q At page 149 of the pretrial order, paragraph 7-179, line 19, the defendants contend, "At the time of the signing of the treaties the Indians did not have any method for enforcing any rules regarding their conduct other than unstructural familial obligations."

I wonder if you could give us your opinions on whether there existed other such controls, and how they might work?

A Yes, There were certainly other social controls. The Indian societies in the case area were well ordered societies, which were not in any state of anarchy at the time the whites came into the area, and they had the kinds of social controls that anthropologists are quite familiar with, but which are sometimes a little difficult to explain to people who are used to court systems and police systems and formalized chieftainships, et cetera.

This was not a society that had any of these attributes, but there were very effective means of social control. Some of them were supernatural and some of them natural, using these arbitrary categories in the way that I think are generally

1 understood by people.

2 Ridicule and ostracism or holding someone
3 up to public approbrium, shame were all very
4 effective, and widely used means of keeping people
5 in line, and this I might add is one of the
6 facets of C'Salish culture which persists today
7 and I have been at public gatherings in which
8 a wrongdoer was held up to public lecture in front
9 of several hundred assembled guests at a long house.

10 I have also been at such meetings where
11 people paid to wipe out the shame of something
12 which had been witnessed publicly.

13 In addition, there were also more effective
14 methods, and I believe that I can document this
15 from non-Indian treaty records. If an individual
16 persisted in anti-social behavior, the word would
17 go out that he could be done away with by anybody
18 who saw fit to perpetuate the act, and there
19 would be no revenge. The family of the wrongdoer
20 would let it be known that there would not be
21 a blood feud resulting from that. This person
22 had simply stepped too far beyond the pale, so
23 there were effective means of controlling individuals.

24 There was also, of course, as I mentioned, the
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ET11

concern with sanctions of a religious nature,
of things going wrong if people didn't behave
properly, and these things may be less formalized
or less easy to point at than prisons and courts
and so on, but they were certainly very effective.

(Continued on next page.)

1 Q At page 150 here of the pretrial order, line 16, paragraph
 2 7-187, the statement is made:

3 "The severe population decline occurring
 4 among Indian populations of Western Washington
 5 prior to the time of the treaty led to a decline and
 6 breakdown of their culture prior to the time of the
 7 signing of the treaties."

8 I believe at other points in their contentions
 9 the defendants refer by comparison to the Tlingit and
 10 Haida Tribes, north of the Olympic Peninsula and Puget
 11 Sound areas.

12 Could you, Doctor, give your opinions to the
 13 Court regarding the relative social structures of those
 14 two distinct groups and how a population decline might
 15 affect their social structure?

16 A Yes. In the first place, I should note that I don't agree
 17 that there was a breakdown of native culture in this area
 18 at the time of the treaties, and would offer as documentary
 19 refutation of that the fact that George Gibbs and James
 20 Swan and a number of other contemporaneous writers were
 21 able to leave us descriptions of native culture as of that
 22 date, as of that period, which they were recording as
 23 witnesses, not as anthropologists recording what had
 24 happened a hundred years before, but simply recording their
 25 own observations. One could add to that a long list of

1 pioneer records, diaries, journals, et cetera.

2 However, passing on from the documentary
3 evidence to the second part of your question, I would
4 point out that however severe loss of numbers a particular
5 society suffers at, let's say, a given moment, will, of
6 course, affect the native culture, will result in some
7 kind of disorganization. But just how badly population
8 loss affects a society depends upon how it's organized.

9 Societies like that of the Tlingit and the
10 Haida, who were highly structured, matrilineal, sib-
11 organized societies that had a very rigid social structure,
12 they had all of the types of very nice, definite parts to
13 their social and political organizations which are lacking
14 in this area, would be badly hit and badly disorganized
15 by a populational loss because key personnel in positions
16 of authority and status in that society would be lost.

17 In a society which was organized on bilateral
18 kinship system, which occurred in the Salish area, and
19 which had an intervillage network of political organization
20 and social ties, the same loss of personnel would result
21 in far less disorganization because of the less rigidly
22 structured society we are dealing with here. It is a
23 different kind of organization.

24 Q Now, in the contentions presently of the Department of
25 Fisheries, it is indicated that there was no substantial

1 commercial affect to the Indian fishing during treaty
2 times and that there was no way that the Indians or
3 the non-Indians could anticipate the vast expansion of
4 commercial fishing in this area.

5 I would like to refer you to what has been
6 marked as Exhibit USA-65, USA-66, and USA-67, and ask
7 you first if you are familiar with these documents and,
8 secondly, if you can tell us how they might bear on those
9 contentions of the defendants.

10 A Yes, I am familiar with these documents.

11 Q Taking first the exhibit marked USA-65, would you
12 describe the source and origin of the comments and material
13 given there, and how it might bear on the question of the
14 commercial aspect of Indian fishing at treaty times?

15 A Yes. The exhibit in question, USA-65 is a business
16 broadside which was published in 1853.

17 I might mention that the replica of it here is
18 from an article in the Pacific Northwest Quarterly
19 magazine, but I have seen the business broadsides published
20 in the local territorial paper as of the time that it
21 occurred. It was easier to duplicate this reprinted
22 version of it.

23 Q In your research, have you noticed the publication of the
24 broadside outside the territory?

25 A I haven't seen this one, I don't believe, published outside,

1 although this was, according to the broadside itself,
2 going to be distributed all over the Pacific to ports
3 in Australia and South America, in east Asia, and I
4 believe also in Europe.

5 I would have to read it to recall. I haven't
6 looked at it.

7 Q Could you tell us how it might bear upon the commercial
8 aspect of Indian fishing.

9 A Yes. This is a business broadside that was published
10 by Captain William Webster, who resided in Port Townsend,
11 and was apparently printed shortly after Washington
12 Territory had been separated from Oregon Territory in
13 1853.

14 He is addressing it to merchants, shipowners,
15 and shipmasters in all parts of the world, and alerting
16 them to the commercial possibilities that exist here
17 in the new territory.

18 I think perhaps specifically of interest here,
19 after describing various kinds of natural resources and
20 attractions to commerce in this area, he says,

21 "Every River and Bay and Inlet abounds in
22 salmon of the best quality, and a great many thousand
23 barrels may be cured yearly; also, codfish, herrings,
24 halibut and different other sorts of fish, in
25 abundance; clams of all sizes in immense quantities

1 and of excellent quality. Oysters plentiful but
2 small."

3 Later on at the end of the broadside, he
4 provides a price list of current prices of various kinds
5 of commodities: spars, timber, coal, sawed timber.
6 Then he mentions salmon from \$6 to \$8 per barrel of 200
7 pounds, and smoked salmon at about 10¢ per pound. Other
8 sorts of fish at about the same rates.

9 I might mention that I would conclude the smoked
10 salmon would be Indian-cured salmon, and the other salmon
11 would be the salted salmon put up in barrels after the
12 fashion of the whites.

13 Q In your research with respect to the ports in this case
14 and your experience generally, do you have an opinion
15 about whether the salmon that is being spoken of here
16 was fished for by Indians?

17 A Yes. At this time it was being fished by Indians and
18 salted and barreled and exported by non-Indians and
19 some Indians, as well. The exporting was largely by
20 non-Indians.

21 Q Again, the exhibit marked USA-66, could you explain what
22 that is, and how it might bear on the commercial aspects
23 of Indian fishing at treaty times?

24 A Well, again I might just note that this copy was taken
25 from a journal reprinting, but I have seen the original

1 published in the territorial newspapers. It was simply
2 easier to copy it in this format, and it is a letter
3 from the Executive Department, Olympia Puget Sound,
4 Washington Territory, January 1854, and it was sent by
5 Isaac I. Stevens, and it was addressed to Grinnell &
6 Company, Whale Fisheries Mercantile firm, and the letter,
7 as I say, was published not only in the local territorial
8 paper, but, I believe, when I saw it there, it had been
9 reprinted from a New England newspaper.

10 The object of the letter again was to advise
11 commercial fisheries people of the opportunities which
12 existed in the new territory for the development of
13 fisheries on a commercial scale. I believe that Governor
14 Stevens was sending this notice out, not as the man in
15 charge of Indian affairs in this instance, but as the
16 governor of this territory, looking toward the economic
17 development of the territory.

18 Q Could you indicate how this bears upon the commercial
19 aspects of Indian fishing.

20 A Yes. I am just looking for the place.

21 After discussing other resources:

22 "The waters too afford their share of wealth.

23 The fisheries in her rivers in the Columbia, which
24 she divides with Oregon & in other streams entering
25 into the Sound and the Pacific are boundless and

1 without, the banks lying off the coast and the
2 inlets stretching in between Vancouver's Island
3 and the main, swum with cod, halibut & other valuable
4 species."

5 Q Finally, Exhibit USA-67, which is entitled "History of
6 Seattle, Volume I, Clarence B. Bagley, Chicago and
7 Seattle, SJ Clarke Publishing Company, date 1916," from
8 page 398.

9 I wonder if you could explain to the Court
10 how that might bear upon the commercial aspects of
11 Indian fishing during treaty times.

12 A Yes. This is a history written by a member of an early
13 pioneer family. The book was not published until 1916,
14 but Clarence Bagley here is speaking reviewing the history
15 of fisheries in the area. He says that:

16 "That the fishing business is one of the
17 important industries of the early settlers of the
18 Puget Sound Country is shown by the following clipping
19 taken from the first issue of the Olympia-Columbian,
20 September 11, 1852, 'Puget Sound's Oil and Salmon
21 Trade. The schooners CYNOSURE, FRANKLIN and
22 DAMARISCOUE are deriving a brisk business in the above
23 trade. They have already taken, and traded from the
24 Indians this season (though early) many barrels of
25 whale oil and salmon - - meeting with prompt cash

1 sales for the same at San Francisco..."

2 "... Dr. D. F. Maynard, originally from

3 Vermont, appeared in Olympia, seeking a location for

4 a fishing camp. He there met Chief Seattle and asked

5 the old Indian to direct him to the best fishing

6 ground on the Sound. This Seattle promised to do

7 and early in 1853 brought the Doctor to the mouth of

8 the Duwamish River. During the summer the camp was

9 a lively place, Dr. Maynard having as high as 100

10 Indians engaged in catching fish for him, and many

11 barrels of oil and salted fish were sent to the market

12 in San Francisco... the fourth locator was brought

13 here because of the fishing advantages offered by the

14 waters of Elliott Bay and the Duwamish River.

15 "During the next twenty-five years, the fishing

16 industry on the sound depended for its revenue upon

17 salted fish and fish oil. Most of the fishing was

18 done by the Indians while the white men did the

19 packing and selling of the product... San Francisco

20 offered a good market for the salted fish, also for

21 the oil which was extracted from the lower grade fish

22 and offal."

ET12 23 Q In addition to these exhibits which have been submitted,

T13 24 Dr. Lane, have you come across other indications of the

25 commercial aspects of Indian fishing at treaty time?

1 A Yes, I have.

2 Q Would you explain to the Court some of those indications?

3 A Yes, these would be shipping -- just about every issue
4 of the territorial newspapers for the period during
5 treaty times in which they list how many barrels of salmon
6 are being exported to China, to San Francisco and to
7 wherever, and narrative accounts in the annual reports
8 of the Bureau of Fisheries and other such sources in
9 which they are discussing who is doing the fishing and how
10 much fishing is being done, which indicates that Indians
11 were an important part of the fishing industry in its
12 infancy.

13 Q Directing your attention to the San Juan Islands, have you
14 come across any evidence of commercial fishing establishments
15 involving white men and Indians in that area?

16 A Yes. Hudson Bay Company had a very important fish station,
17 a place where they salted and barreled salmon on the
18 southeastern coast of the San Juan Island, and this was
19 convenient to the Indian reefnet fishery there and other
20 salmon fishery, and the Hudson Bay Company purchased
21 salmon, particularly sockeye, from the Lummi and other
22 tribes who had usual and accustomed fishing places there,
23 and then exported that salmon to their various posts
24 and overseas, as well as to the whites in other places.

25 Q Now, while your report goes into this somewhat, could you

THE COURT

1 just describe briefly what indications you have had of
2 commercial or trade dealing in fish among the Indians
3 themselves?

4 A Yes. Prior to the time of white entry into the area, there
5 was extensive trade, particularly in fish among the Indian
6 tribes, both on a local basis and a very wide basis as
7 well.

8 For example, tribes here on the Sound traded with
9 people across the mountains in the interior, and the
10 salmon, interestingly enough, went both ways, the salmon
11 went in both directions, and it was a question of getting
12 types of salmon that were not available locally.

13 In addition, there was extensive trade at the
14 time that whites entered the area, which became a three
15 cornered sort of trade in which, for example, the Makah ,
16 which is one of the plaintiff tribes here, went up to the
17 West Coast of Vancouver Island and purchased fish from
18 the Nootkans Indians in villages on the west coast of
19 Vancouver Island, and then the Makah took this fish, which
20 they got, and fish oil, which they got from the Indians
21 on the west coast of Vancouver Island, and traded it to
22 Hudson Bay Company at Victoria on the east coast of the
23 Island. Hudson Bay Company exported it out of the area
24 entirely to other white buyers.

25 Q Switching tracks for a minute, in your experience --

1 THE COURT: When you reach a subject break,
2 we will break. But complete some subject.

3 MR. PIERSON: I think I can probably complete
4 my direct in about ten minutes.

5 THE COURT: Let's go to the end of the direct,
6 then.

7 Q (By Mr. Pierson) In your experience, Dr. Lane, and
8 your training, are you competent to perform genealogical
9 surveys of individual lineage?

10 A Yes, I am.

11 Q Have you had occasion to examine some of the tribal rolls
12 about which Paul Weston testified earlier in this case?

13 A Yes, I have.

14 Q In your examination have you ever come across any mistakes
15 which you could attribute to the fact that those lists
16 were compiled by people who did not have genealogical
17 training?

18 A No.

19 Q Lastly, with respect directly to the intentions of the
20 non-Indians and the Indians regarding the continuation of
21 the Indians fishing subsequent to the treaty, what views
22 have you come to as an anthropologist?

23 A I'm sorry --

24 THE COURT: Read it.

25 (Pending question read.)

1 THE COURT: Do you want it rephrased?

2 THE WITNESS: No, I understand now, but I think
3 I have covered that in my reports, if I can direct you to
4 the page there.

5 MR. PIERSON: I think I might read that, your
6 Honor, and I can conclude my direct by reading it.

7 It's at page 26.

8 THE COURT: You might follow it, Dr. Lane, in
9 case you are asked to amplify in some detail.

10 THE WITNESS: Yes.

11 MR. PIERSON: Page 26, it is stated:

12 "There is no mention of restrictions as to
13 purpose, time or method of taking either in the
14 treaties themselves or in the official records
15 relating to treaty proceedings. It is my opinion
16 that no such restrictions were indicated by the
17 Commissioners or contemplated by the Indians. The
18 Treaty Commissioners knew that fish were important
19 to the Indians, not only from the standpoint of their
20 food supply and culture, but also as a significant
21 element of trade with the settler. Both parties
22 wanted these aspects to continue, the Indians in
23 order to sustain their prosperity and the government
24 in order to promote the prosperity of the Territory."

25 That concludes my direct, your Honor.

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THE COURT: Very well, we will reconvene at
12:35.

(Recess.)

AFTERNOON SESSION

September 5, 1973
12:35 o'clock p.m.

MR. PIERSON: A very short housekeeping
matter, Speaking of these exhibits, USA-65,66 and
67, I neglected to move their admission, and
I do so now.

MR. MCGIMPSEY: No objection, Your Honor.

THE COURT: There being no objection
they are admitted.

(Plaintiffs' Exhibits
Number USA-65, 66 and 67
for identification,
admitted in evidence.)

THE COURT: Further inquiry for the
plaintiffs? Mr. Getches?

DIRECT EXAMINATION

1 BY MR. GETCHES:

2 Q. Dr. Lane, I would like to advert your attention
3 to the map that is on the easel board. It has
4 been marked on the reverse side as USA-58 for
5 identification.

6 For the record, will you please step to the
7 easel and identify that map?

8 A. Yes. Can you hear me?

9 The map is entitled, "Reconnaissance of Part
10 of the Skagit River, July, 1858," and it is
11 signed George Gibbs.

12 Q. What does that map depict?

13 A. This map is a sketch that George Gibbs made showing
14 the part of the Skagit River which he explored,
15 I believe in 1858, although I haven't quite pinned
16 it down in the related text materials, and he
17 shows Indian villages all along the Skagit River.

18 The reason for introducing it here is that
19 it shows the location of one of the plaintiff tribes
20 at the time, just after the treaties in 1858
21 and it shows the location of the Sakhumehu, which
22 is the way the name appears on the treaty, shows
23 their village at the confluence of the Sauk River
24 which is marked "Sauk" on this map, and it is
25 people who are now the Sauk-Suiattle, and who are

1 plaintiff intervenors in this case.

2 Q Is that map referred to in your report on the
3 Sauk-Suiattle?

4 A No, I found this map after I completed the
5 reports, which are in this volume, and as far
6 as I know it is the only map in existence which
7 shows location of those people as of treaty times.

8 While their location has been known from
9 oral testimony traditions and is known to anthro-
10 pologists, this is the first time I was able to
11 document a contemporaneous document from treaty
12 times.

13 Q Is it in any way inconsistent with your report on
14 the Sauk-Suiattle?

15 A In no way.

16 Q Does it corroborate your report in any way?

17 A In that it precisely identifies and reports where
18 these people were, and these people whom Gibbs
19 called the "Sakhumehu" lived at the confluence of
20 the two rivers.

21 MR. GETCHES: We move the admission of
22 USA-58.

23 THE COURT: Admitted.

24 (Plaintiffs Exhibit Number USA-58
25 for identification admitted
in evidence.)

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MR. GETCHES: I have no further questions.

THE COURT: Any further inquiry for plaintiffs? Mr. Ziontz?

DIRECT EXAMINATION

BY MR. ZIONTZ:

MR. ZIONTZ: Would the clerk take out Exhibits 64, 63, 62, 61, 60 and 59, USA-59 through 64?

THE COURT: Go ahead, Mr. Ziontz.

Q. Dr. Lane, in your report on the Lummi, which is contained within your total report, you have orally, verbally set forth the places where you assert that the Lummis had usual and accustomed reef net sites; is that right?

A. That's right, correct.

Q. And subsequent to the preparation of this report did you discover maps and charts which also confirmed those locations?

A. Yes.

Q. Where did you discover those maps and charts?

A. These were in a collection of maps which I had not looked at before, and which dated mostly from the period 1856, I believe, to about 1860, '61 and

1 they are a collection of maps that was left from
2 the Northwest boundary survey, and after George
3 Gibbs had completed his work with Governor Stevens'
4 Treaty Commission, shortly thereafter he joined
5 the Northwest Boundary Survey on the American staff
6 to help map and locate the boundary between the
7 British territory and the American territory,
8 and it occurred to me that there might be some
9 maps that would be useful for this case in that
10 collection, but I had not had an opportunity
11 to examine that collection until a few weeks
12 ago.

13 Q Where did you find that collection?

14 A These are deposited in the national archives in
15 Washington, D.C.

16 Q Is that Exhibit 64 which the Clerk has mounted?

17 A Yes.

18 Q I wonder if you would mind stepping up to the
19 easel and examining USA-64 and telling us what
20 that is?

21 A Yes, this is United States coast survey map dated
22 1853 which was part of the collection on the
23 Northwest Boundary Survey.

24 Q All right, now, would you examine the map and
25 tell us if there are any markings or any indications

1 which have any relevance to the location of Lummi
2 reef net fisheries?

3 A. No, not directly, not this map by itself. What
4 it does show is the location of the Lummi villages
5 on the west coast of the Lummi island at their
6 reef net fishery.

7 Q. What is the significance of the village location?

8 A. This is the same village which is referred to
9 in text materials from Gibbs in connection with
10 the Indian fishery there, and it simply is a matter
11 of triangulation, if you like, that this is a map
12 which documents where the village was, and on
13 other maps the fishery is located there.

14 Q. All right, let's turn to number 63, USA-63.

15 A. That map, by the way, that we just finished with
16 is a printed map, and the earlier Gibbs' map is
17 not a printed map. Perhaps I should mention that
18 for the record.

ET11

19 (Continued on next page.)

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CONFIDENTIAL

1 THE COURT: Go ahead.

2 Q (By Mr. Ziontz) Now, with respect to USA-63, will you
3 examine that, Dr. Lane, and tell us what that exhibits
4 shows.

5 First of all, what is it.

6 A Yes, this is an undated unsigned rough sketch of the San
7 Juan Island area, and the surrounding waters, and mainland.

8 Q Was it contained in the United States Archives, in the
9 same group?

10 A Yes, it's from the same collection.

11 Q And does it have any relevance to establishing the location
12 of Lummi reefnet fishing sites?

13 A Yes, I believe it does. I will have to examine it.

14 Q Would you do so, please.

15 MR. RHEA: What was your last question and
16 answer?

17 MR. ZIONTZ: What relevance does it have to
18 Lummi reefnet fishing sites.

19 Q (By Mr. Ziontz) Dr. Lane, have you examined the exhibit,
20 and -can you now tell us what relevance it has to the
21 location of Lummi reefnet fishing sites?

22 A Yes. This sketch has marked on it a fishery off the
23 northeast corner of Orcas Island, which was a Lummi
24 reefnet fishery. The maps had to be deposited in that
25 collection, I would say, some time prior to 1861, I think.

1 I would have to check notes that I don't have with me.
2 1861, '63 at the very latest.

3 Q Does the map indicated that it was an Indian fishery?

4 A No. It just says "fishery," but there were no whites
5 up there at that time, and it is in the same spot where
6 there is historically an Indian reefnet fishery.

7 Q And does it indicate that that was a marine fishery an
8 offshore fishery?

9 A Yes. It's not located at a stream. It's located off
10 the coast. At least on that map there is no stream.

11 Q Is there any other fishery indicated on that map?

12 A I don't believe so.

13 Q Could we now have USA Exhibit 62. I will ask, Dr. Lane,
14 if you will examine that exhibit and tell us, first what
15 it is, at least what it purports to be.

16 A I must apologize. I did not examine the previous map
17 sufficiently. That is a map which evidently shows the
18 track of, I believe, a U.S. cutter, and there are dates
19 as to when the ship arrived at the particular locations.

20 These are in the year 1859. So, I presume
21 that sketch was done some time in 1859. I can date it more
22 precisely than I have before.

23 Q Now, we are referring presently to USA-62. Have you
24 examined it, and can you tell us what that is?

25 A Yes. This is a printed U. S. Coast survey map over the date

1 of 1853, and on this map, which was not made for the
2 purposes of showing fisheries -- it is a U. S. Coast
3 survey -- there is, however, noted the Hudson Bay fish
4 station which I mentioned earlier, on the southeast
5 coast of San Juan Island and off of the Indian fishery
6 labeled "Indian fishery" next to it.

7 Q Does that --

8 A The precise wording on the map is "Hudson Bay fishing
9 station and Indian fishery," and that is another usual
10 and accustomed reefnet station, as depicted in a map in the
11 report.

12 Q Does that appear to be prepared as a chart for navigational
13 purposes?

14 A It would appear to be, yes.

15 Q Do you have any idea why the United States Coast survey
16 chart would have located the Lummi reefnet fishery on it?

17 A Well, with respect to this one and the previous coast
18 survey maps -- and perhaps the rough sketches are of the
19 same sort -- I presume because when the reefnet fisheries
20 were in operation they were an obstacle to navigation, and
21 there would be a point in noting them.

22 Q Can we turn now to USA Exhibit 61. I will ask you to step
23 up to the chart, Dr. Lane.

24 Can you tell us what that map or drawing is,
25 Dr. Lane?

1 A Yes, this is another undated, unsigned rough sketch, not
2 a printed map, that was contained in the collection, and
3 it does have marked on it the Lummi name with a fishery
4 on the West Coast of Lummi Island near where the village
5 was located on the other map. It does say "fishery" on it.

6 Q What is that Lummi name, Dr. Lane?

7 A For any Lummi present, you must forgive my pronunciation.
8 Something like Sky- ak - sin. S-k-a-y-u-k-s-e-n, I think
9 is the spelling that George Gibbs uses. I may be slightly
10 off.

11 Q Is that the only Lummi reefnet site located on that
12 drawing?

13 A I believe so.

14 Q Can we now turn to USA-59, Dr. Lane. As soon as they have
15 mounted that, would you take a look at that and tell us
16 what that is. What is Exhibit 59, Dr. Lane?

17 A I'm sorry. That's some sort of a white on black
18 reproduction of a map that I presume was identified in the
19 certification, but I can't read it from here. Again,
20 it is the map of the same general area that we have been
21 referring to, and on it is located the Hudson Bay fishery
22 on the southeast coast of San Juan Islands, referred to
23 already.

24 Q Is there also any depiction of an Indian fishery?

25 A No, I don't believe so.

1 Q Can we now have USA Exhibit 60, and will you take a look
2 at that Dr. Lane, and tell us what that is.

3 A This is another undated, unsigned, rough sketch that was
4 found in the same collection with the printed maps of
5 this same 1850's, beginning somewhere in the 1860's
6 collection, and it shows the area around from about
7 Whidbey Island north.

8 It has located on it a Samish reefnet location.
9 That information is not on it. That is the site of a
10 Samish reefnet fishery off the Eildago Island. There are
11 several Lummi fisheries noted, three I believe, on the
12 main mouth of the Lummi-Nooksack drainage, near where
13 several mouths of the river enter into the bay. The
14 Sky-ak-sin fishery off the west coast of Lummi Island is
15 also noted on this map.

16 Q Now, these maps, the series of which are in the group
17 starting at USA Exhibit 59 through USA Exhibit 64, these
18 do not show a number of the reefnet sites which you
19 mentioned in your report.

20 For example, at Point Roberts.

21 A I must have missed it. One of these maps does show the
22 Indian fishery at Point Roberts. I'm sorry. I must
23 have overlooked that.

24 By the way, if I may interrupt you, something
25 else has just occurred to me. The map that had the

1 certification written on it did not come from this
2 collection.

3 Q What is the significance of that?

4 A Simply that I want to make it clear. It may have a year
5 printed on it. It looks like a section of another map.
6 But it wasn't from this collection.

7 THE COURT: But that tag on it contains the
8 identification?

9 THE WITNESS: The identification, the proper
10 identification, yes.

11 Q (By Mr. Ziontz) Now, not all of the reefnet sites are
12 located on the map that you have listed in your written
13 report?

14 A Correct.

15 Q Do you attribute any significance to that?

16 A No, because none of these maps were presumably constructed
17 for the purpose of displaying reefnet locations.

18 Q With respect to the Samish, is that a group which is
19 subsumed under the Lummi treaty?

20 A Yes; subsumed with the Lummi at the present time as a
21 post-treaty artifact of administration.

22 MR. ZIONTZ: We would move the admission of
23 Exhibits USA 59 through 64, your Honor.

24 MR. RHEA: Your Honor, I object until we have
25 greater details on the authentication of this. We can't

1 have random sketches on there. I personally haven't
2 heard anything to indicate the authenticity of the
3 documents.

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5 (Continued on the next page.)

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1 THE COURT: Well, the testimony at this
2 point is that all but one were found in a collec-
3 tion of materials, government materials. I think
4 they are admissible. The weight and significance
5 of them may be something else, but they are
6 admissible in my judgment.

7 (Plaintiffs Exhibit Number
8 USA-59, through and
9 including 64 were marked
for identification were
admitted in evidence.)

10
11 MR. ZIONTZ: I have nothing further.

12 THE COURT: Anything further for the
13 Plaintiffs?

14 MR. HOVIS: Your Honor, I have discussed
15 with counsel the report, it was not prepared
16 basically in regard to the Yakimas, I discussed
17 with counsel, and they agreed, that I reserve my
18 questions until after the defendants have completed
19 their cross-examination.

20 THE COURT: You may do that.

21 Are you ready for cross?

22 MR. CONIFF: Yes, Your Honor.

23
24 CROSS-EXAMINATION

25 BY MR. CONIFF:

1 Q Dr. Lane, I would like to first describe to you
2 my approach in cross-examination so that you
3 may be apprised generally of where we are and
4 where we are going.

5 My first area of cross-examination would in-
6 volve two clarification questions regarding matters
7 to be developed orally today; secondly, I will ask
8 you questions generally relating to the background
9 of your assignment; thirdly, perhaps most importantly
10 with regard to the volume of material which you
11 have submitted as testimony in this record.

12 I propose to develop, if we can, through cross-
13 examination the conceptual basis for the summary which
14 I feel, as you have testified, I believe, forms
15 a general basis, at least conceptually, for the
16 individual tribal reports that are contained in the
17 green bound volume.

18 By the way, am I correct in interpreting your
19 testimony this morning that the summary does reflect
20 the basic concepts which are implicit or form a
21 foundation for the individual tribal reports?

22 A I believe I would put it the other way around,
23 Mr. Coniff, and say the individual tribal reports
24 form the basis for the summary.

25 Q But they are one and the same, the concepts?

1 A. The conclusions arrived at in the summary rest
2 upon the factual determinations made for the
3 individual tribal research.

4 Q. Let me ask you this, do you think it would be
5 fair of me to cross-examine you on the basis that
6 I have indicated because, otherwise, Dr. Lane, I
7 simply want to advise that we are going to be here
8 an awful long time, and I'm trying to figure out a
9 method of developing the basic conceptual ideas
10 that you have with regard to the problems that you
11 have discussed in your testimony and the testimony
12 that you have entered, and I'm trying to figure
13 out a way with you, if we can, to kind of shorten
14 a little bit the length of time that might otherwise
15 be involved in cross-examination.

16 MR. PIERSON: Your Honor, I think the
17 witness has tried to correct Mr. Coniff's approach
18 to how the reports were compiled. If Mr. Coniff
19 can't cross-examine her on that basis, I think it's
20 too bad. But she is in no position to direct his
21 cross-examination or change her testimony or the
22 approach to those reports to accomodate him.

23 THE COURT: I think you should explore
24 further, perhaps by restateing what you propose
25 without the prologue. Just simply state what

1 in simple terms you propose her to testify to.

2 MR. CONIFF: I will make it short, a
3 short recitation of some what I consider to be
4 rather fundamental concepts that I think are
5 common to most, if not all, of the tribes within
6 the case area.

7 One of those concepts would be, with the
8 exception of the Makah linguistic commonality
9 and your interpretations based upon what we have
10 called the Salish dialects which I believe were
11 spoken, a variety of dialects within the case area.
12 I believe the concepts of Indian understanding
13 of ownership are relatively common understandings
14 or at least they appear to be the same throughout
15 the bulk of the report.

16 I think that the Indian conceptions of sovereign-
17 ty are relatively common, again with the possible
18 exception of the Makah throughout your report. I
19 believe that subject to certain variations, depend-
20 ing upon tribal locations, that the nature of the
21 fishing activities which you describe in your summary
22 are common to most of the tribes that are
23 involved in the plaintiff area, again with certain
24 exceptions, with the exception of the Lummi and
25 Makahs.

1 Further, generally the cultural state of
2 what we could term Western Washington or
3 southern north coast Indians, Salish Indians,
4 was relatively the same, the white impact or
5 European impact, if you will, during the relevant
6 period of time was relatively the same, again
7 with some variations.

8 These are the sorts of fundamental concepts
9 that I am referring to, and my suggestion to you
10 Dr. Lane, is that it would be easier for me and
11 perhaps for you if we could approach your cross-
12 examination in that line, and if I were able --
13 if I could do that, then I'm going to tell you what
14 I propose to do to conclude my examination, and
15 that is, I would simply at that point go to the
16 individual reports and ask some clarification
17 points on individual statements that you make in
18 the various tribal reports that you make.

19 Do you understand my position?

20 A. I understand what you have said to me. I don't
21 understand what your problem is. The only objection
22 I was registering to your question initially
23 posed to me was unless I misunderstood you, I
24 thought you were suggesting that the cart came
25

1 before the horse and that the individual reports
2 were written on the basis of prior assumptions or
3 ideas on my part.

4 Q No.

5 A As to the ideas that I developed in the summary,
6 whereas, I wish to make it clear that the comments
7 on the summary were the result of the individual
8 reports.

9 Q I accept that understanding of yours.

10 A As to the rephrasing or what you have just been
11 saying with respect to commonalty and individual
12 differences, I believe that I state to the best
13 of my ability in attempting a summary where I say
14 that there were very important differences among
15 these groups, but one can make some broad general
16 statements always understanding that they need
17 qualification for the plaintiff group for any
18 given area within the larger region.

19 THE COURT: That is a pretty good
20 understanding, isn't it?

21 MR. CONIFF: I think we have an under-
22 standing.

23 THE COURT: All right, go ahead.

24 Q My first really clarification question, Dr. Lane,
25 has to do with your statement that you knew of

1 no Americans or Europeans as of around treaty times
2 who spoke Western Washington Indian languages,
3 could you clarify that statement that I believe
4 you made?

5 A. I'll have to hear that again.

6 Q. I'll state it again. Was it your statement that
7 you knew of no Americans or Europeans as of treaty
8 times who spoke Western Washington Indian languages?

9 A. No, on the contrary. I cited Dr. Tolmie specifically
10 as an individual who spoke the Nisqually language,
11 and I stated, I believe, that there were young people
12 children in pioneer families who had intimate contacts
13 with Indian women who were helping to look after
14 them and other Indian people and learned to speak
15 the language the way the children will, rather
16 quickly, and they also spoke the local language,
17 and I'm sure there were others as well.

18 Q. Are you aware of any adults beyond Mr. Tolmie
19 who were familiar with Western Washington Salish
20 dialects at the time of the treaties that you
21 have any information about?

22 A. I'm sure there must have been. I don't have documen-
23 tation on specific individuals.

24 Q. My second question related --

25 A. I might -- may I add to that.

1 I have, of course, read reports that there
2 are particular individuals who spoke several
3 Indian languages, but I use these documents with
4 great care and require more proof than a simple
5 statement on the part of someone else for the party
6 involved that they did.

7 Q Do you have any information regarding any of the
8 American Treaty Commissioners or their representa-
9 tives that met with various Indian tribes at
10 treaty times, whether or not they had any ability
11 to speak or understand any of the Western Washington
12 Salish dialects or, for that matter, for the
13 Makahs, which I understand is a different dialect
14 or different language group?

15 A Yes, and for the others you have been calling dia-
16 lects, they are languages.

17 Q I will grant you that I am paraphrasing poorly.

18 A To the best of my knowledge, there is nothing in
19 the record to suggest that Governor Stevens had
20 any knowledge of any Western Washington Indian
21 language. There is nothing in the record to suggest
22 that George Gibbs had any such knowledge.

23 I do not ignore the fact, by the way, that
24 he was an ardent student of local Indian languages
25 and compiled a number of vocabularies and has

1 handed down to us the best information we have
2 about local languages at that time. But no where
3 in his writings does George Gibbs suggest that he
4 can speak and communicate effectively in any local
5 Indian language, and I do not suppose on the basis
6 of my knowledge as a professional anthropologist
7 that the collection of vocabularies in any way
8 stands as the same thing as being able to speak
9 a native language or another language.

10 The man who was the official interpreter
11 for all the treaties in Western Washington, Mr.
12 Shaw, is reported not to have spoken any local
13 language. He did, of course, use the Chinook
14 jargon, that's not a language, that's a jargon,
15 a few hundred words, and depending on the area,
16 it varies.

17 Does that answer your question?

18 Q That's fine.

19 A I think I have taken care of the four principal
20 parties of the treaty mentioned.

21 Q Thank you for your clarification. My second
22 question again related to the oral presentation
23 which you made just today before the Court.

24 I believe you read from or described from
25

1 an exhibit, I frankly don't recall the number,
2 it was the Maynard exhibit, that Mr. Maynard in
3 Seattle hired local Indians to work on a fish
4 exporting establishment.

5 A. Yes.

6 Q. Wouldn't this be evidence that the Indians were
7 working for Dr. Maynard and that this would necessar-
8 ily not be an Indian commercial enterprise? I
9 am referring --

10 A. I know what you are referring to.

11 Q. I'm referring to Exhibit USA-67.

12 A. I read several accounts of Dr. Maynard's operation,
13 and I suppose it really turns on whether --
14 you are asking the question were the Indians
15 operating as independent fishermen selling to a
16 processor, Dr. Maynard, who is barreling, salting
17 and exporting, or were the Indians in this particular
18 instance salaried employees of Dr. Maynard in
19 his employ and so on.

20 In this particular instance I don't think
21 we really have enough information to be sure from
22 the way that Clarence Bagley reports it, it would
23 seem to be that the Indians were actually hired
24 and on a salary from Dr. Maynard. But from
25 everything I know about Dr. Maynard's life at that

1 time from his own diaries and so on, I would
2 not suppose it was a formal employee-employer
3 relationship of the sort that would seem to be
4 suggested by that wording, but rather something
5 far more informal.

6 But even if it were, and by the way, I do
7 know that Dr. Maynard did employ Indians to make
8 the barrels for him, and he lost money on the salmon
9 and had to make it up on his lumber,, because the
10 barrels weren't properly made, he didn't have any-
11 body who knew proper coopering and he blamed the
12 loss of the salmon, because they arrived in poor
13 condition, on the fact that he didn't have a cooper
14 to work for him.

15 So you know, your supposition and mine would
16 have to be conjecture, and it may be that these
17 were an instance of Indians being employed. But
18 by far, most of the other instances of that era
19 are quite clearly the opposite , whites purchasing
20 from Indians.

21 Q Let me read you a sentence from what you have
22 sponsored as Exhibit United States of America
23 Exhibit 67, "During the summer, the camp was
24 a lively place. Dr. MAYnard having as high as
25 100 Indians engaged in fish catching, fishing for

1 him, and many barrels of oil and salted fish were
2 sent to the market in San Francisco."

3 Let me ask you this: In light of your
4 testimony, do you agree or disagree with the
5 statement made by Clarence B. Bagley that I have
6 just quoted in Exhibit USA-67?

7 A. I agree that you have read the statement as it
8 stands. I have tried to indicate the care with
9 which I would treat that kind of language. I don't
10 think from everything I know about Dr. Maynard
11 and his finances at that period in his life that
12 he was in a position to retain 100 Indians at any
13 kind of pay on any kind of a scale whatever.
14 So I think this is probably just a matter of speaking
15 loose speaking on the part of Mr. Bagley.

16 Q. So you do not agree with his statement that I
17 read you?

18 A. No, I agree with the statement, I'm just saying
19 one has to interpret this kind of statement, and
20 I'm trying to offer you my interpretation of it.

ET16 21 (Continued on next page.)
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1 Q Well, I believe my question to you, Dr. Lane,
2 was whether you agreed or disagreed with the
3 statement. I don't know that you have answered
4 me.

5 MR. PIERSON: Yes, she did. I thought
6 she answered you very well.

7 THE COURT: I thought so, but I would
8 point her attention to anything she neglected to
9 answer.

10 MR. CONIFF: I will leave that exhibit,
11 Your Honor.

12 THE COURT: Well, I don't mean to impose
13 my idea on you about this.

14 MR. CONIFF: I felt the question was
15 entirely a yes or no answer. I don't recall hearing
16 a yes or no from the witness.

17 THE COURT: It is one of those things
18 you can't say yes or no to. You have to interpret
19 it.

20 MR. CONIFF: She agreed with the facts
21 asserted by the writer. I asked her if she had
22 agreed with that statement and I don't recall ever
23 hearing a yes or no in the record.

24 THE COURT: She said she didn't think
25 he could have hired 100 Indians at one time, and

1 that is in the statement and so on. I think
2 she has answered as well as she can.

3 If you think of anything else to explain
4 about your answer, you may do so.

5 THE WITNESS: Yes, I would like to say
6 that nowhere in the statement does he say, use
7 the word "hired."

8 Q Well, now, turning to some general preliminary
9 questions before we turn to your summary, Dr.
10 Lane, first of all, if I understood your testimony
11 earlier this morning correctly you were retained
12 by the Department of Justice for a research assign-
13 metn. When were you retained?

14 THE COURT: Approximately.

15 A This case it seemed to be forever. I am sure that
16 is not the correct date, but I don't know what
17 it was.

18 Q This case was commenced in September of 1970. Would
19 that refresh your recollection?

20 A Well, it must have been sometime after that, then.
21 I am sorry, I really don't know.

22 MR. PIERSON: I think it should be stated
23 for the record, probably will speed things up greatly
24 to say that the first arrangements with Dr.
25 Lane were not on a very formal expert witness

1 type retainer basis. At least, however, for the
2 last year and a half Dr. Lane has been under
3 a contract as an expert consultant witness with
4 the United States as well as some of the plaintiff
5 tribes.

6 Q. When you were first contacted, who contacted you
7 regarding these assignments?

8 A. When I was first contacted by the United States
9 Justice Department?

10 Q. Yes.

11 A. I believe it was Mr. Dysart.

12 Q. And do you recall generally when that occurred?

13 A. I am sorry, I don't know. It was in the summertime,
14 I believe.

15 Q. Do you recall discussing with him the nature of
16 your assignment?

17 A. Oh, yes.

18 Q. And how was it explained to you at that time?

19 THE COURT: What did he tell you about
20 it?

21 THE WITNESS: I beg your pardon?

22 THE COURT: What did Mr. Dysart tell
23 you about it?

24 THE WITNESS: Mr. Dysart asked me if
25 I would be willing to serve as an expert witness

1 for the United States to do research regarding
2 the tribes which the United States had named
3 in this lawsuit.

4 Q And I gather you responded in the affirmative?

5 A Generally, I did, after some discussion about the
6 nature of the assignment.

7 Q With regard to the discussion of the nature of
8 the assignment, what more precisely was the nature
9 of the assignment that was given you?

10 THE COURT: What were the essentials of
11 it, not all the details?

12 THE WITNESS: I suppose I should say
13 that I was asked to do the sort of things which
14 I did eventually do in the report, of the discussion
15 regarding these specifications of each one of the
16 usual and accustomed fishing sites, and I think
17 I explained this morning that was a concern that
18 I had, and I was not desirous of accepting an assign-
19 ment which I felt couldn't be accomplished.

20 Q As a part of your retainer, or perhaps we can
21 do this with a general question.

22 Dr. Lane, could you relate to the court the
23 amount of money that you expect to receive in
24 total from your assignment in connection with this
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litigation?

A. I cannot.

Q. Why not?

A. Mr. Coniff, I am even more vague about money matters than I am about dates and time.

Q. You don't recall that?

A. I am sure these are matters of fact that can be established by the people who look after the records.

Q. Unfortunately, they are not here to testify.

MR. PIERSON: On the contrary, Your Honor. I can give you a rough estimate of precisely how much money we expect to give Dr. Lane. I can run it down for details, if Mr. Coniff would like, and I will get the record. If he would like me to give a rough estimate of how much it is, I can do that.

MR. CONIFF: That would be fine.

MR. PIERSON: In the last year, in the year prior to July, 1973, Dr. Lane's general estimate of retainer by the United States was approximately \$1000.00 per month. The retainer was based upon actual costs incurred. In each month that she had costs she was to give it, itemize

1 it and eventually turn it over to the Department
2 of Justice for payment.

3 I might add that Dr. Lane has been concerned
4 much more about getting her reports than in getting
5 in her vouchers, so sometimes it comes in lumps.
6 I would guess that over the year and a half she
7 has been retained, an accurate estimate would be
8 in the realm of \$1000.00 per month, which would
9 make it somewhere between eighteen and twenty
10 thousand dollars.

11 THE COURT: You say "costs." Are you speak-
12 ing of the total of her professional fees plus
13 expenses of travel and the like, or does this
14 include everything?

15 MR. PIERSON: Well, the arrangement has
16 been somewhat amorphous, as Dr. Lane and I would
17 be ready to admit.

18 The principal items of cost have been her
19 expenses, personal expenses both for trips, motel
20 stays, secretarial expenses, supplies, time spent
21 just in hourly terms as an expert, and has been,
22 I would guess, minimal. We have, however, estimated
23 on a per diem basis the dates where we demand
24 or ask that she be somewhere for us -- for example,
25

1 prior to this trial she has consulted with us
2 on a number of occasions, prior to this trial.
3 She has been to the National Archives prior to
4 this trial. She's visited some of the Indian
5 tribes, and we have agreed that a per diem basis
6 is the governments normal \$25.00 a day that would
7 apply.

8 I should also add that Dr. Lane has not claimed
9 expenses for all those days, and I could only give
10 you a quotation from the record that we do have,
11 and I don't have those specific records in front
12 of me.

13 Q Does the statement of counsel sound reasonably
14 correct to you, Dr. Lane?

15 A Yes.

16 Q At the time that you received your assignment to
17 commence your research activities on the tribes
18 which are plaintiffs in this case, was the position
19 of the United States that the United State was
20 taking in this lawsuit explained to you?

21 A I'm not sure to what you refer.

22 Q I am referring to the position that the United
23 States and the plaintiff tribes have taken with
24 regard to their claims of off-reservation treaty
25 fishing rights which are the subject matter, of

1 course, of this lawsuit.

2 A. Well, in a general way I understood that the
3 United States entered the case, or suit or whatever
4 the proper term is, in order to get some kind of
5 a Court decision about treaty fishing rights, which
6 the United States had the obligation to be concerned
7 about, a federal treaty. I understood it was a
8 matter of federal law. I frankly do not concern
9 myself too deeply with the intricacies of legal
10 positions, because I find them rather bewildering.

11 I understood what my assignment was, and that
12 was to find out whatever I could about particular
13 matters at treaty times and that I tried to do.

14 Q So it would be a fair statement, would it not,
15 that your research therefore was not really conducted
16 with the purposes of this lawsuit in mind?

17 A. No. I understood certain types of material were
18 necessary for this lawsuit, and I looked through
19 the historical records to find materials pertaining
20 to the subject matter that was referred to me as
21 being relevant.

22 Q At the time that you received or during the course
23 of the performance of your assignment, were you
24 aware of the purpose for which the United States
25

1 government has brought this lawsuit?

2 A. In a general way, yes.

3 Q. What do you understand that purpose to be?

4 A. I believe I just said my understanding was to protect
5 Indian treaty fishing rights.

6 Q. Outside reservation boundaries?

7 A. Wherever they may be.

8 Q. At the time that you received your assignment, or
9 at any time during the course of the performance
10 of your research assignment, were you made aware
11 of the position of the United States government
12 before the Indian Claims Commission regarding the
13 claims of Puget Sound Indian tribes?

14 A. With respect to the land?

15 Q. With respect to the position that the United
16 States government took before the Indian Claims
17 Commission?

18 A. I'm not sure what you refer to.

19 MR. PIERSON: I don't object to this line
20 of questioning, particularly but I think he assumes
21 that the United States' position on Indian Claims
22 has been some kind of consistent whole, and I'm
23 not certain that that is true. I think there is
24 another witness who can establish that.

25

1 A. Mr. Coniff, I really want to answer your question,
2 but I am not quite certain what it is. Perhaps
3 I can tell you that in the course of pursuing my
4 my research for this case the opinions of the
5 Indian claims Commissions for the various plaintiff
6 tribes in this case were made available. Does
7 that help in some way?

8 Q. Based upon your review of these materials?

9 A. Yes.

10 Q. And the research that you have conducted? And
11 any contacts you have had with the representatives
12 of the federal government, my question is: Were
13 you aware of the position that the United States
14 government took with regard to the Indian claims
15 before the Indian Claims Commission?

16 A. I am sorry, I really have difficulty understanding
17 what it is you are asking.

18 THE COURT: Just simply this. Were you
19 told what position the United States was taking
20 with respect to those claims, the substance of
21 which you said were provided to you?

22 THE WITNESS: I suppose I would have to
23 say no, because I am not certain what it is.

24 THE COURT: Well, do you know now, right
25 now, do you know what their contentions are?

1 THE WITNESS: Well, I would have to say
2 no, specifically on what issue and for which tribe.
3 I gather the positions have been quite different
4 in different cases. Since it is not quite certain
5 I am -- maybe I am talking at cross purposes here,
6 because I don't know what you are referring.

7 THE COURT: That would in itself seem
8 to be an adequate answer to the question, I would
9 think.

10 Q If I may ask one, Dr. Lane, would in your opinion
11 a system of compensation for Indians for land
12 purchases or land acquisitions reasonably include
13 the values of hunting, fishing, gathering or
14 agricultural pursuits?

15 MR. PIERSON: I object. There is no way
16 an anthropologist can competently answer the
17 question.

18 THE COURT: Do you have any experience at
19 all in this area of negotiation concerning
20 claims in Indian lands or rights or anything
21 of that kind. Do you have any experience or
22 qualification in that field?

23 THE WITNESS: I was not one of the
24 anthropologists who was involved at the time the
25 Indian Claims Commission was pursuing cases here.

1 However, I should mention that during the
2 progress of this case, one of the lawyers for
3 one of the plaintiff tribes was pursuing something
4 that apparently developed from that era used
5 my expert testimony regarding conditions of treaty
6 times in a case that had to do with, a Claims
7 Commission case.

ET17

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1 Q (By Mr. Coniff) So you do have some knowledge, then, of
2 the purpose of the Indian Claims Commission cases?

3 A I thought you asked me about position. If you're asking
4 me about purpose, I understand, I think the purpose of
5 the Indian Claims cases.

6 Q What do you understand that purpose to be?

7 A I understood that it was an attempt in some way to allow
8 for hearing of claims outstanding against the United
9 States on the part of the Indian Tribes in connection with
10 inadequate compensation received at the time of treaty
11 negotiations or complete lack of compensation if treaties
12 hadn't been made, and that's generally my understanding.

13 Q Was it predicated upon the primary market value of the
14 land at the time of the taking?

15 MR. PIERSON: If she knows.

16 THE WITNESS: What was predicated?

17 Q (By Mr. Coniff) The compensation which the claims were
18 seeking.

19 A I don't really know. It sounds reasonable, but I don't
20 really know myself.

21 Q Did you submit any testimony regarding land values at
22 the time of the signing of the treaty?

23 A No.

24 Q Was your testimony more concerned with tribal identity
25 and location?

1 A Neither. It was concerned with fishing practices at the
2 time of the treaty and with treaty negotiations, promises
3 made about fishing at the time of the treaty.

4 Q Was your testimony, if you know, presented for the
5 purpose of establishing or seeking compensation for
6 the loss of fishing rights or fishing locations?

7 A I don't know.

8 Q Would you mind telling us which plaintiff tribe it was
9 that you presented testimony for?

10 A It was the Makah.

11 Q And along that line, have you received in connection
12 with your research --

13 A Excuse me. What was the last question you asked of me?

14 Q What was the name of the plaintiff tribe --

15 A I'm sorry. Just prior to that. Did you ask me whether
16 compensation was for loss of fishing?

17 Q Whether your testimony was to be used for that purpose.

18 A For that purpose? No. My understanding is that my
19 testimony was to be used in a land claims case having to
20 do with compensation for land.

21 Q Did your testimony have to do with the value of that land?

22 A No.

23 Q We will go back to an earlier question. You have indicated
24 to counsel that you have received certain compensation
25 from the Federal Government for performing your research.

1 Have you received any additional compensation
2 for performing your research from any of the plaintiff
3 tribes?

4 A Not directly from plaintiff tribes.

5 Q From other sources?

6 A Yes.

7 Q Could you in a general way indicate the source and the
8 amount over the period of time that you performed your
9 research period?

10 A Yes, in a general way I can.

11 Q That's fine.

12 A Some of the plaintiff intervenor tribes retained my
13 services through an organization called The Small Tribes
14 Organization of Western Washington. I received some monies
15 through that organization, which I presume was indirectly
16 on behalf of those tribes, but not coming from the tribes
17 themselves.

18 I think there was an amount of something like
19 \$1500, perhaps, involved. This is several years ago.

20 I really don't remember too clearly.

21 Q Do you recall receiving any other monies from any source
22 regarding payment for this particular task of writing this?

23 A Yes. Let me think. I think again there was a small amount
24 of money, perhaps -- I'm not positive, but I have an idea
25 that there was some money from the American Friends Service

1 Committee in one way or another. I'm not positive about
2 that.

3 Q Do you recall in any way the amount of money that they
4 made available to you?

5 A No; because I can't remember whether it happened or not.

6 Q Were there any other sources that you recall?

7 A Yes, yes. Let me think. I think some money came through
8 the -- and I'm not sure of the proper name. Is it Legal
9 Services? Really, I could be helped here.

10 THE COURT: Well, you are not supposed to be
11 helped. You can remember for yourself.

12 THE WITNESS: I think there may have been some
13 money. Again, it would be a small amount. I am sorry,
14 but I don't remember the proper name. I think it's
15 Legal Services.

16 Q (By Mr. Coniff) Was it an organization based in Seattle?

17 A Yes.

18 Q Would it be Legal Services Center?

19 A Is that it?

20 Q You are the witness.

21 A Somehow "Center" doesn't sound right.

22 THE COURT: Just tell us the best you can and
23 go on.

24 THE WITNESS: Legal Services.

25 Q (By Mr. Coniff) Do you recall who it was from Legal Services

1 that arranged for you to be paid from that source of funds?

2 A Yes. I believe it was Mr. Sennhauser.

3 Q Do you recall who it was that made arrangements for you
4 to receive compensation from the American Friends Service
5 Committee?

6 A No; because, as I say, I can't remember now whether that
7 happened or not.

8 Q Do you recall who it was that made arrangements for you
9 to receive, to the best of your recollection, \$1500
10 from the Small Tribes of Western Washington Association?

11 A By the way, that's a guess figure. I'm saying \$1500.

12 Q I understand that.

13 A That's perhaps high. I don't recall.

14 No, I don't know who arranged for that.

15 Q During the course of your studies in the performance of
16 your research in connection with these contractual
17 arrangements, did you ever have occasion to consult with
18 Dr. Carroll Riley, who was --

19 A No, I did not.

20 Q Do you know a Dr. Herbert C. Taylor, who was the expert
21 anthropologist who presented evidence on behalf of the
22 Puget Sound Tribes of Indians before the Indian Claims
23 Commission?

24 A Yes, I know Dr. Taylor.

25 Q Did you, in the course of your studies consult with him

1 concerning the subject matter of your reports?

2 A No, I did not.

3 Q It is still a little unclear, I believe, in my mind, but
4 perhaps it was in your mind also, as to approximately
5 how many years or months, if you will, you have been
6 engaged in conducting the research and writing the
7 materials which are in the green bound volume.

8 A Those materials specifically, if it was 1970 when I was
9 contacted, then, since that time to this.

10 Q Approximately three years. Would that be a fair rough
11 estimate?

12 A Yes. Not full time, of course.

13 Q During the course of the performance of your contract,
14 did you have any other teaching assignments in the field
15 of anthropology during the past three years?

16 A Yes. I taught at Western Washington State College in
17 Bellingham.

18 Q What courses did you teach?

19 A I taught a course on Indian treaties and aboriginal rights,
20 and I taught a course on the ethnic history in Western
21 Washington and British Columbia. I forget the exact title
22 of the course, but it had to do with the history of
23 contacts with various groups of people, ethnic groups,
24 Indian and others, and various kinds of European
25 immigrants to this area.

1 Q In the course of the performance of your teaching
2 assignments at Western Washington, did you basically cover
3 the same materials and views that are expressed in your
4 reports?

5 A No. There was much overlap, of course, but the courses
6 that I taught, this case was not the subject matter of
7 those courses.

8 Q Do you feel during the course of the performance of your
9 assignment that there was any attempt, either by omission
10 or commission, on the part of the plaintiffs or any of
11 their representatives to influence your opinions?

12 A My opinions regarding my work?

13 Q Yes; the opinions you have expressed contained in the
14 green volume.

15 A No.

16 Q Then if I understand you correctly, it is simply a
17 coincidence that the views that you have expressed
18 coincided completely with the views taken by the United
19 States and the plaintiff tribes in this case?

20 MR. PIERSON: Your Honor, I don't think that
21 that has been established. If Mr. Coniff would like to try
22 to establish it, he may go ahead.

23 THE COURT: I think you are assuming something
24 that has as yet not been established.

25 MR. CONIFF: I will withdraw the question.

1 THE WITNESS: Am I allowed to comment?

2 THE COURT: No.

3 MR. CONIFF: Not at this point.

4 THE COURT: The objection was sustained to the
5 question.

6 Q (By Mr. Coniff) During the course of the performance of
7 your contract, including your appearance today, have you
8 consulted with any representatives of the plaintiffs or
9 their counsel to critique the method of attack on the
10 evidence offered by Dr. Carroll Riley in this proceeding?

11 A I'm sorry. I didn't quite hear all of that.

12 THE COURT: I think your voice is a little low.

13 MR. CONIFF: I'm sorry.

14 THE COURT: This machine may not be operating
15 as well as it should, but it is a little bit hard to catch it.
16 A little louder, please.

17 Q (By Mr. Coniff) My next question, Dr. Lane, is during
18 the course of the performance of your contract, including
19 your appearance here today on behalf of the United States
20 and plaintiff tribes, have you consulted with any
21 representatives of the plaintiffs or their counsel, their
22 attorneys to critique on a method of attack upon the
23 evidence which is offered by Dr. Carroll Riley in this case?

24 A To critique? I'm sorry. For me, critique isn't a verb.
25 I'm having a little trouble.

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THE COURT: Re-frame it.

Q (By Mr. Coniff) To develop a method of attack upon the evidence presented by Dr. Carroll Riley.

A No. I read the direct testimony of Dr. Riley and saw areas where he and I are in disagreement and called these to the attention of some of the counsel for the plaintiff tribes, to indicate where I would have to disagree and where I could agree, and if there were some areas of agreement, as well, of course. I made known to them my reactions to the anthropological opinions offered by Dr. Riley.

Q When you commenced with the anthropological studies and research that you did in preparation of the documents, did you do so with a purpose of reaching a specific conclusion that you had already formed in your own mind?

A No.

Q You had no opinion, I take it, then, as to what the nature or extent of claimed Indian treaty fishing rights were within the case area in Western Washington prior to the time that you commenced your research?

MR. PIERSON: As long as that asks for an anthropological opinion, I think it is fine. I think it has a legal connotation which is not proper.

MR. CONIFF: I am asking her as an anthropologist.

THE WITNESS: Mr. Coniff, at this moment, I am

1 not certain what the extent of usual and accustomed
2 fishing areas that may be claimed by plaintiffs in this
3 case might be. As an anthropologist who spent her life
4 time concerning with Indian cultures in this area,
5 of course, at the time I began, I had some prior knowledge
6 of where Indian fishing places were.

7 But until I undertook the detailed research
8 in the course of the last few years before this
9 particular assignment, I didn't have the knowledge that
10 I have today about either Indians or non-Indian fishing
11 during treaty times.

12 Q Did you have any opinion prior to the time that you
13 undertook that assignment regarding Indian immunity from
14 state conservation laws in off-reservation waters?

15 A No.

16 Q I believe that in your qualifications you have indicated,
17 and I believe that you have indicated here today that
18 you wrote your doctoral thesis in 1953 at the University
19 of Washington; is that correct?

20 A That's when it was accepted- That's when I received
21 my degree, yes. It was written prior to that.

22 Q I'm referring to the date given in your bibliography.

23 A That's correct.

24 Q I believe the subject matter was Indian religions of the
25 Salish people.

1 Am I correct in that?

2 A In a general way, yes.

3 Q I gather that you performed some research in connection
4 with the preparation of that thesis?

5 A That is correct.

6 Q And in connection with the research that you performed
7 to write your doctoral thesis, did you not contact Indian
8 peoples within the case area?

9 A Yes, I did.

10 Q And in the course of your contacts with these Indians
11 informants in connection with your research, did you
12 not encounter or were there any views expressed to you
13 concerning this subject, i.e. Indian immunity from state
14 conservation law in off-reservation waters?

15 A No.

16 Q It was never communicated to you during that period of time?

17 A No.

18 Q From 1953 until the date which you received your
19 assignment to perform research which led to your reports,
20 had you had any contact with representatives or members
21 of tribes within the case area?

22 A Yes.

23 Q And during the course of your contacts, have you received
24 from them any views, their opinions, regarding their
25 immunity from the application of state conservation laws?

1 A Yes.

2 Q And what were those views?

3 A As you know, Mr. Coniff, a few years ago I was called
4 upon to testify in another case, fishing case.

5 Q The Muckleshoot case in King County Superior Court, State
6 v. Moses?

7 A State v. Moses, yes. Thank you.

8 At that time in the course of interviewing
9 Muckleshoot fishermen, I did hear expressed to me views
10 such as those that you have been asking about.

11 Q So at the time did you tend to believe or disbelieve those
12 views as they were expressed to you by those individuals
13 of the Muckleshoot Tribe?

14 A I'm not certain what you mean by believe. The people
15 were expressing to me their views.

16 Q Did you believe the truth or validity of the statements
17 or opinions that were given?

18 A I had no reason to check the validity. I wasn't
19 interested in checking out what state laws might be, or
20 anything of this sort. That is out of my area of
21 expertise. I assumed that that is the province of lawyers
22 and courts.

23 Q So then it is your testimony here today that at the time
24 that you undertook this particular research assignment,
25 you had no preconceived notion, not only as to the locations

1 of usual and accustomed stations around fishing grounds
2 and stations, but as to the nature or quantum of the
3 rights secured to Indian tribes by virtue of the
4 Governor Stevens treaties; is that correct?

5 A Perhaps I haven't made myself clear in my previous
6 testimony a moment ago. Of course I had some prior
7 knowledge of where Indian fishing sites were. I could
8 not avoid having some knowledge of that sort in the course
9 of reading ethnographies from this area over a period of
10 years, both as a student and then later as a professional
11 anthropologist. So, I did have some prior conceptions
12 of where fishing sites were.

13 Q I believe I tried to state that. Now, let's put that
14 area aside, if we can.

15 Did you at the time that you undertook this
16 assignment have any opinions, personally held opinions
17 regarding the nature, quantum or extent, if you will --
18 perhaps scope is the right word -- of the claimed off
19 reservation treaty fishing rights of these plaintiff
20 Indian tribes?

21 A That really entails two different things, Mr. Coniff.
22 So, the answer is both yes and no, I am afraid.

23 Q Explain yourself, please.

24 A No, I have no view as to what the legal rights may be
25 since I don't know what they may be. The only kind of view

1 that I can have are those which I have gained from
2 looking at the historical documents of the treaties and
3 the associated documents, and my understanding of Indian
4 culture at that time and my understanding of non-Indian
5 culture at that time in this area, which gives me some
6 notions about what probably was current in those days,
7 what was intended by the parties that were involved.

8 I presume that that is one of the reasons
9 why I am here today, because I have some opinions on that.
10 But they have been developed during the course of this
11 research. I didn't come with them at the beginning of
12 the assignment.

ET18

13 Q I think you have answered my question. What hypothesis
14 then did you have when you commenced the performance of
15 your assigned research?

16 A That there was an area of doubt as to what the intent of
17 the parties to the treaty had been with regard to fishing
18 provisions, and that if somebody, like myself, would
19 examine the relevant materials, some light might be thrown
20 on this vexed question.

21 Q This was the primary purpose then of the research assignment?

22 A It was one of the purposes.

23 Q What were the other purposes?

24 A To help untangle the identity of some of the plaintiff
25 tribes whose identity seemed to be not completely understood

1 relating them as successors in interest to parties
2 to the treaty. That was another aspect.

3 Q Were there any other purposes for the performance of your
4 research?

5 A Those are the two main areas that occur to me at the
6 moment. In general I think the counsel were asking me
7 to provide them with a clear understanding of both
8 Indian and non-Indian culture at the time of the treaties
9 here in Western Washington. At least, that was my under-
10 standing of the assignment. I am not sure they understood
11 initially that they needed to know about non-Indian culture,
12 but I felt this need, and eventually we came to a consensus
13 on that.

14 Q So the scope of your studies was including non-Indian
15 culture at the time of the signing of the treaties?

16 A Yes, here, and that was not something which I had known
17 very much about as an anthropologist before, because I
18 had been interested only in the local Indian culture and
19 not the local non-Indian cultures.

20 Q I believe you touched on this this morning, you have
21 commented that you did not agree with a statement in the
22 Pretrial Order regarding the validity of the contemporaneous
23 documents, documents contemporaneous with the treaties,
24 and I would like to follow that line of inquiry for a
25 moment here.

1 My question is, Doctor, do you feel that
2 oral informants today provide you as reliable information
3 as documents executed in a time frame contemporaneous
4 with the treaty?

5 A I don't think you understood me properly this morning,
6 Mr. Coniff.

7 Q Please explain.

8 A I did not deny the validity or the question of the
9 validity of contemporaneous documents, I said that any
10 source, whether contemporaneous or not, had some kind of
11 a bias, depending upon the perceptions, the knowledge,
12 the background of the observer, the source of the
13 information, whether it was intended bias or unconscious
14 bias, and that any source had to be carefully examined
15 with due regard to placing the source in a proper context
16 and allowing for whatever kind of bias or perspective it
17 might have.

18 I am not saying contemporaneous documents have
19 no validity, I am not saying that they are less valid than
20 oral testimony taken from informants today, I don't believe
21 I said that this morning.

22 Q But isn't it true, Dr. Lane, that the views of living
23 informants might tend to be colored by the fact that there
24 has been more or less continuous litigation over the
25 subject of fishing rights for a good many years in Washington

1 State?

2 A That is entirely true, Mr. Coniff, that may happen. It
3 doesn't necessarily follow.

4 Q Have you made a conscious effort in your own mind when
5 you interviewed informants, Indian informants, in connection
6 with the conduct of the research, to bear that fact in
7 mind, that there has been --

8 A I assure you, the fact never leaves my mind.

9 Q But you do feel that you as a professional anthropologist
10 can evaluate this bias factor, segregate it out and sift
11 out what is true from the bias?

12 A I attempt to do it to the best of my ability, Mr. Coniff.

13 MR. CONIFF: Your HONor, I am going to be
14 starting into a summary at this time, and it is a logical
15 point for a break.

16 THE COURT: All right, fine. We will take the
17 afternoon recess and reconvene at 5 after 2:00 o'clock.

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19 (Continued on the next page.)

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1 MR. CONIFF: Your Honor, I have caused
2 the clerk to be given two copies of the document
3 which had been marked for identification earlier
4 at a pretrial conference as USA Exhibit 65.
5 It was not offered by the United States and is
6 not presently before the Court.

7 For purposes of cross-examination of Dr.
8 Lane I would like to have the exhibit marked,
9 and I have been informed that it would be marked
10 as G-21. Opposing counsel have received copies,
11 and the document consists of parts I and III of
12 a summary report by Dr. Carroll Riley entitled,
13 "Western Washington Indians."

14 I should note that it does not include the
15 Squaxin report. I would like to use the document
16 as a basis to examine Dr. Barbara Lane, to compare
17 her views to that, to those of Dr. Riley. Dr.
18 Riley can identify the document, and can do so
19 at the time he takes the stand. I am wondering
20 if there is any objection to the use of this
21 document for this purpose at this time.

22 MR. PIERSON: None, Your Honor.

23 THE COURT: Proceed.

24 Q Dr. Lane, have you received a copy now of G-21?
25 If not --

1 A. Yes, I have. Thanks.

2 Q What I propose to do is to turn to part III, Roman
3 numeral III -7 and I am going to read to you what is
4 contained in III-7.

5 In pre-white times the base unit of society
6 throughout the area was the village. This was the
7 site of one or more large slab houses, permanent winter
8 quarters for the people who lived in them. Each
9 house was normally shared by several families,
10 often (though not necessarily) related. Kinship
11 ties between separate houses of a village were also
12 common. The focus of the village was primarily
13 territorial. This village association often lasted
14 the lifetime of an individual, though adult residence
15 might be in another village.

16 The village actually functioned as the
17 largest cohesive social grouping. If we apply the
18 commonly accepted definition of tribe, that is,
19 a political land-using unit, to western Washington,
20 then obviously the village was a tribe."

21 I would ask you if you agree or disagree with
22 that statement, and why?

23 A. I disagree with the statement as regards the final
24 paragraph.

25

1 Q Would you please explain.

2 A Last two sentences.

3 Q Will you please explain your reasons?

4 A Yes, those two sentences read, "The village actually
5 functioned as the largest cohesive social grouping."

6 I disagree, for the reasons mentioned earlier
7 in my testimony, that there were cohesive groupings
8 on an inter-village basis, and therefore, I cannot
9 accept this statement as it stands.

10 Q Excuse me. With regard to your reason, you just
11 stated, does that apply in your opinion to all
12 of the Salish, including the Makah? Does your
13 answer apply to all of the plaintiff tribes?

14 A Yes, it does.

15 Q Proceed.

16 A And the final sentence to which I object, with
17 which I disagree, is, "If we apply the commonly
18 accepted definition of tribe, that is a political
19 land-using unit, to western Washington, then obviously
20 the village was a tribe, "

21 And to my mind this is ridiculous statement,
22 because it would mean that on a stretch of the
23 Green River, for example, where you had perhaps
24 eight or ten villages in a several mile stretch
25 of river that you had eight or ten distinct tribes,

1 and I don't think that that is a generally
2 accepted characterization by anyone who works
3 in this area, apart from Dr. Riley and whoever
4 else may agree with him, but certainly among
5 people who have published on the tribes that we
6 are concerned with here, there is no place in the
7 ethnographic literature that I know of where any
8 anthropologist in modern times has said that each
9 village was a separate tribe.

10 Q. Turn now to Roman numeral III-8.

11 THE COURT: May I please have the page
12 again?

13 MR. CONIFF: Roman Numeral III-8. I
14 am reading from the report.

15 THE WITNESS: I may say, perhaps additive
16 to that, that of course the word "tribe" like any
17 label, is one which we can define as we wish and
18 put the content that we like into the description.

19 I simply don't feel that I can share the
20 label the way the description -- definition that
21 Dr. Riley proposes. I don't deny that he may
22 define tribe any way he wishes. I simply can't
23 agree with it, and I don't think most of my colleagues
24 in this area agree with it, either, on the basis
25

1 of the writings.

2 Q. "The class system of Western Washington Indians
3 was very weakly developed in aboriginal times.
4 The leading figures in society were ones who
5 met the cultural requirements of good birth, and
6 more importantly, of wealth. There were three classes
7 in the Western Washington social system; nobles,
8 commoners, and slaves. The latter had a distinct
9 status and were, in a sense, outside the system.
10 The distinction between nobles and commoners
11 was complicated by kinship, which crosscut the
12 rank designation, and by the unformalization of
13 class concepts.

14 Generally speaking, a noble (siam or
15 siab in native terminology) was the head of a
16 family unit. His children might also be noble;
17 at least there was a feeling that they were born
18 to this position, but it was necessary for them
19 to validate their status by some conspicuous success
20 in life.

21 Conversely, a commoner might rise to siam rank
22 by skill or luck. The ideal combination was that
23 of good breeding (that, descent from siam families)
24 and wealth. Riches took the form of tangible goods:

25

1 slaves, canoes, blankets, food, et cetera.
2 Actually, in native theory, the wealth was the
3 spirit power necessary for the success of any
4 enterprise."

5 I would ask if you agree or disagree with
6 that statement and why?

7 A. I have some minor differences. I would not have
8 said things precisely in this way, but I don't
9 care to disagree with the general content.

10 Q. We will proceed. This won't take, I believe, very
11 long.

12 "As has been said, the richest and most influen-
13 tial man in the village functioned as a kind of
14 chief, although his powers were mainly advisory.
15 Another important group of men who had advisory
16 powers in village life were the specialists.
17 Such men usually were considered members of the
18 siam class. Included in this category were the
19 shaman, the professional hunter, and the
20 woodcarver. These skilled individuals seldom
21 functioned as chiefs; in fact, it seems probable
22 that political chieftainship itself represented a
23 particular type of specialization."

24 Do you agree or disagree with that?

25 A. Well, again in general I wouldn't care to disagree,

1 although I would not have put things in quite this
2 way.

3 The main area of disagreement, of course,
4 is the statement that one man, the richest and
5 most influential man in a village functioned as a
6 kind of chief without having spelled out to me
7 precisely in what way he functioned, and what
8 attributes are being designated here.

9 I find it difficult to deal with the statement.
10 The point that I would make in response, I suppose
11 the major point is that these most important men,
12 and usually there was more than one, in any given
13 village, unless it was very small, these advisory
14 -- to go back to Dr. Riley's word here, functions
15 not only relative to people within their own
16 village but relative to people in other villages
17 as well, you crosscut village lines and the influence
18 of an important man in a given village might be
19 greater with some people who are not co-villagers
20 than it was with some of the people who were
21 in the village.

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23 (Continued on next page.)
24
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1 Q Proceeding along on the same page, "Another
2 authoritarian group was that of the war leaders.
3 These were men who had received war powers in the
4 spirit quest. They took active command of their
5 group in time of war, and may have temporarily
6 had considerable influence.

7 ' The settlement period in Washington brought
8 some changes in the native system of authority.
9 Demands by the government officials for responsible
10 persons who could speak for Indians in a particular
11 area led to a greater emphasis on important leaders.
12 The positions of such men as ..."

13 I will not for the benefit of the court reporter
14 attempt to spell or pronounce the names, " such as
15 three indicated Indian leaders were certainly en-
16 hanced in these changing times..

17 ' Indian Bureau officials resorted to
18 "king-making" during the treaty period, assigning
19 chiefs to various groups. Usually men so assigned
20 were chosen from among those who by reasons of
21 prestige were most fitted to fill the office.

22 'In modern times chieftainship has descended
23 to some degree through family lines, through not
24 necessarily from father to son. In fact, patrilineal-
25 ity and affiliation with the father's group were

1 never overriding factors in the Western Washington
2 region."

3 Would you care to agree or disagree with that
4 statement, and why?

5 A. I am happy to be able to agree with Dr. Riley with
6 regard to that statement.

7 Q. Continuing on page 10, "Transformation of old
8 prestige-based leadership into political leadership
9 of the chief was paralleled by the use of the
10 sub-chief concept for lesser dignitaries in each
11 community. In reservation life these sub-chiefs
12 often formed an advisory council, generally of
13 informal nature.

14 'Even today the peoples of this area tend
15 toward family autonomy. Atomistic tendencies,
16 especially among reservation Indians, is very evident.
17 Schisms within the group are common, and one is left
18 with the feeling that the elected or appointed
19 leaders have no real power to enforce decisions.'

20 Do you agree or disagree with those statements,
21 and why?

22 A. Well, again, I would never have said things in
23 quite this way, but I don't have any real disagree-
24 ment.

25 Q. You will now turn to page 11 entitled, "Land Use."

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I will read through page 13 and ask you to comment.
The statement reads, "The land holding unit was
the village with its permanent house or houses."

A. Do you wish me to interrupt you if I disagree?

(Continued on next page.)

ET20t2

1 Q I propose to read the three pages. If you like, I will
2 break it down page by page.

3 Would that be easier for you?

4 THE COURT: Paragraph by paragraph.

5 THE WITNESS: All right.

6 Q (By Mr. Coniff) First paragraph:

7 "The land holding unit was the village, with
8 its permanent house or houses."

9 A I disagree.

10 Q May I complete the paragraph?

11 A I'm sorry.

12 Q Then you can indicate your agreement or disagreement and
13 the reasons.

14 THE COURT: What page are we on now?

15 MR. CONIFF: Roman numeral III, Judge - 11.

16 THE COURT: All right.

17 Q (By Mr. Coniff) Continuing on:

18 "Each of these village settlements utilized
19 an expanse of stream or a section of coastline in
20 the neighborhood of the houses. There was also
21 semi-permanent installations held by villagers or
22 by families in this region. These included fish
23 traps in the smaller streams, spearing stations,
24 netting areas, and the like. The use of these latter
25 areas was not exclusive. The fishing regions of the

1 Upper Nooksack and Upper Snoqualmie Rivers, for
2 example, were visited during salmon runs by people
3 from further downstream, and this situation was
4 true for other areas."

5 Now, would you care to express your agreement
6 or disagreement and the reasons?

7 A Yes. I have to disagree with the initial statement in the
8 paragraph that equates the village as the land holding
9 unit without some further discussion, amplification or
10 whatever. I cannot accept the statement as it stands.

11 Q How would you amplify it?

12 A I would prefer that I understood what Dr. Riley meant by
13 the statement.

14 Q How do you understand it?

15 A If by this he means going from the earlier disagreement that
16 I voiced about a village being a tribe, that there was
17 an area of land surrounding a village which was the sole
18 territory of that village over which they exercised
19 exclusive rights, I think this is unsupported by the
20 ethnographic literature.

21 Q Proceed with the paragraph and explain the areas of dis-
22 agreement and agreement.

23 A I have no disagreement with anything else in that
24 paragraph.

25 Q Second paragraph:

1 "However, each village had its own major
2 fishing region and thus concentrated on the economic
3 potentialities of the host ground. Movements to
4 other areas usually took a form of family migrations.
5 The right to use the fishing areas of other
6 villages probably necessitated asking permission,
7 but because families were linked by kinship and
8 friendship ties and because of the culture pattern
9 of economic generosity, this would seldom be refused."

10 A I have no objections.

11 Q Third paragraph:

12 "Hunting and gathering areas were considered
13 in somewhat the same way as fishing grounds. Each
14 village had gathering lands in the general vicinity
15 of the richer settlements. These included berry
16 patches and prairies where various roots grew. Such
17 areas were likely thought of as village property,
18 though outsiders could use them. Some gathering
19 spots were well known. The prairies above
20 Snoqualmie Falls, and on the upper Sammish River, and
21 the berry patches around Case Inlet are excellent
22 examples. Regions like these were used by several
23 village units, but their primary exploitation was by
24 villagers in the immediate area. Well known fishing
25 and clamming grounds on the Sound were also widely

1 utilized, serving, incidentally, as points of social
2 contact for large numbers of people."

3 A Again, in general, this is not objectionable, but in spe-
4 cifics, it is. Precisely, for example, the identification
5 of a village with a particular gathering ground.

6 Q You do not accept that?

7 A I don't accept it on a one to one relationship there,
8 no.

9 Q All right.

10 A However, I believe the rest of Dr. Riley's paragraph is
11 really somewhat in conflict with that notion anyway.

12 Q (Reading:)

13 "The hunting lands were for the most part
14 beyond the region of immediate economic concern.
15 There was hunting in all the river valleys, but the
16 larger and more important animals lived mainly in
17 the mountains. The eastern Sound Indians hunted
18 in the Cascades along the uplands of the rivers.
19 Indians from the Nooksack and Skagit River areas
20 journeyed to the Mt. Baker area for large game.
21 People from the coastal villages north of Shoalwater
22 Bay visited the Olympics. "

23 Do you agree or disagree with that paragraph
24 and why?

25 A Well, it's all right as far as it goes, except that a lot

1 of big game was taken down near the water, too, not just
2 up in the mountains.

3 Q What evidence do you have?

4 A Contemporaneous documents.

5 Q Do you have any specific contemporaneous document in mind?

6 A Yes. Several that are in mind, and I am not certain
7 exactly in which one of them I could pick a statement
8 out of, but the section of the Pacific Railroad Exploring
9 Expeditions Report, which reports on the botany of the
10 routes.

11 Q You are referring to the Suckley reports?

12 A I believe Suckley wrote the botany report, yes.

13 There was also a report on mammals. It may have
14 been in one or the other. Gibbs 1877, I believe, may also
15 have something on that.

16 Q We will proceed.

17 "Hunting was an important occupation of the
18 inland groups only, and the mountain territories were
19 utilized mainly by them. The coast peoples for the
20 most part, traded seafoods, especially dried clams,
21 for game and skins. The coast inland trade contacts
22 were carried out by individuals or families and
23 seldom by villages operating as such. Trade contacts
24 generally followed the river or coastlines for these,
25 particularly rivers where the traffic arteries of the

1 Puget Sound and the coast to the west."

2 A I'm perfectly happy to accept that section, with one
3 qualification, and that is the statement that hunting was
4 an important occupation of the inland groups only. It was
5 not an important occupation of the inland groups, but it
6 was more important among the inland groups than it was
7 among the others.

8 Q Continuing with the quote:

9 "Exclusive use of private resources was
10 unusual. It might be said that such things as
11 spearing platforms and fish traps were 'owned'
12 by single persons, but as the entire village could
13 use them, this had little meaning. Land, as such,
14 excepting house sites, was probably never thought
15 of as an individual property. In fact, to use the
16 word 'property' is to approach the problem from the
17 wrong point of view. Almost certainly these Indians
18 thought mainly in terms of use. The people were land
19 holding to the extent they were land using, and the
20 rights of use were widespread. In actual fact, the
21 area around the village was used for the most part
22 by the people of that village. Indeed, their
23 primacy was indicated by the fact that outsiders
24 had to request permission to use the region."

25 Do you agree or disagree? If you disagree, would

1 you explain your reason.

2 A This will be a bit lengthy.

3 I agree with Dr. Riley's initial statement
4 that exclusive use of private resources was unusual.
5 Agreed.

6 The next sentence/ "It might be said that
7 such things as spearing platforms and fish traps were
8 'owned' by single persons, but as the entire village
9 could use them, this had little meaning."

10 Let me make two remarks concerning that statement.
11 First of all, if I may use an analogy, I as a single person
12 own a posthole digger. Everybody who lives in my
13 neighborhood is free to borrow my posthole digger, and many
14 of them do, and I don't think that reflects at all on my
15 ownership over that posthole digger.

16 The fact that I extend free use rights to
17 friends and neighbors doesn't make it any less, at least
18 from my point of view. I don't know what a lawyer's
19 view of this might be. But from my point of view, I still
20 am the sole owner of that piece of property, no matter
21 how many people I let have free access to it. Sometimes
22 people come and borrow it without even asking me, because
23 it's understood that when I'm not using it, someone else may.

24 That is one comment I wish to make.

25 The second comment is, and I have explained this

1 I think at some length in my bound report, although
2 ownership was often said to reside in a particular
3 individual at a given time, this was in the nature,
4 really of stewardship rights over a resource-producing
5 area or gear.

6 In point of fact, of course, if that individual
7 were taken out of the fishery, some other individual would
8 assume stewardship rights over it, and it was really a
9 caretaking kind of ownership, if you like. Not that it
10 would disappear with a person and was attached only to him
11 as an individual.

12 Have I clarified myself?

13 Q That's fine. If you have concluded your statement we will
14 proceed.

15 A With that sentence.

16 Q We go on to the next sentence.

17 A All right.

18 "Land and such, excepting house sites, was
19 probably never thought of as individual property."

20 I think there are a few places in the report where
21 I indicate what may be exceptions to this statement which
22 generally I would agree with Dr. Riley is probably an
23 adequate representation.

24 But there are exceptions in our area among the
25 plaintiff tribes. We certainly have indications, for example,

1 with the Makah and a few others, and I think Makah would
2 be the only one that's cited in the reports of specific
3 ownership relating to cranberry bogs. This seems to crop
4 up with more or less precision in the description for
5 several areas within the region of concern here.

6 Going on, in fact, to use the word "property"
7 is to approach the problem from the wrong point of view.
8 Again, we are back to a question of labels, whether one
9 wishes to use the term "property" to describe the kinds
10 of rights that Indian people felt they had and operated
11 as if they felt they had in certain kinds of resources
12 or land or water.

13 It seems to me a choice of terms. I don't see
14 why the word "property" isn't appropriate and analogous
15 to the way we use the term in our culture. We don't
16 speak in terms of completely exclusive and unimpeded
17 control over something.

18 I own my house, but all kinds of other
19 institutions and entities have rights in my property. I
20 live in Canada. I think the ultimate title to land is
21 in the crown. Another is the municipality and the police
22 force and the fire department and all kinds of people have
23 rights on my property and do things, and my property can be
24 condemned for one purpose or another. It can be inspected.
25 It can be alienated and so on.

1 We have, I think, a very complex bundle of
2 rights that go into our definition of what ownership of
3 property is in our culture, and I gather that these are
4 not completely and clearly understood since there seems
5 to be a great deal of litigation over ownership of land.
6 I think perhaps what is at issue here is that it is
7 expected that because Indian people are thought to be
8 simpler or more primitive or somehow easier to understand
9 that they should have some clearer-cut very simple
10 notion of property.

11 I think that their notion of property, like
12 ours, consists of a bundle or a complex of different
13 kinds of rights. As Dr. Riley suggested, local people
14 probably had primary rights in certain kinds of areas or
15 in fish traps, and other people might have secondary
16 rights based on kinship or friendship or what-have-you.

17 I don't think we really are in disagreement
18 there. We are in disagreement as to whether it's
19 appropriate to use the word property, and perhaps I have
20 said enough to indicate why I think it is an appropriate
21 term. I think both ownership and property are legitimate
22 words to use in this context.

T22 23 Q In terms of the examples you have used, did you refer to the
24 Makahs as one of the examples to explain the property
25 concept?

1 A Yes, I did.

2 Q And is that the only reference that you made?

3 A No, I believe I also made the same point with reference
4 to the Skokomish and explained it -- may I direct you to
5 the place in my report where I deal with that?

6 Q If you would like to do so in terms of your answer, please
7 do.

8 A I think it might make it quicker.

9 If I may refer you to the Skokomish report,
10 which I see is marked USA-23, on pages 12 and 13.

11 If I may read from that section?

12 A If you choose to do so, please do.

13 A (Reading:)

14 "With respect to these property rights, it
15 should be observed that although the weirs as such
16 were community property, the individual dip net
17 platforms on the weir from which all net fishing was
18 done were privately owned.

19 "The content of these group and individual
20 ownership rights is more precisely described in the
21 following passages from Elmendorf, 1960, page 72.

22 'A number of men in one village community would
23 build and own a weir together. Each man owned one
24 dip net platform on the weir; all net fishing was
25 done from these platforms. What an individual caught

1 and dried was his own. If he made a good catch, it
2 was customary to give a feast and feed his fellow
3 villagers; what was left over was usually smoke
4 dried and belonged to the person who had caught it.

5 "A person might sell or trade fish, but only
6 outside his own village. Offering food in sale or
7 trade to a fellow villager has never been done; the
8 impression was gained that as a hypothetical case,
9 such conduct would have been regarded as
10 scandalously stingy. Sold or traded fish was almost
11 always smoke preserved!"

12 Then he goes on:

13 "Dip net platforms were not sold or rented, but
14 an owner often lent use of his platform to a relative
15 or friend. According to an informant, he would say
16 'do dipnetting with my dipnet.' The borrower got all
17 his catch and was not required to pay for the use of
18 the platform. Public opinion required him to
19 distribute part of his catch to the villagers if the
20 catch was a good one, but he was not expected to give
21 more to the owner of the platform than to anyone else.
22 Platform borrowers apparently included, in practice,
23 any fellow villager of the owner."

24 That is the end of the descriptive material
25 from the ethnographer of the Skokomish, and I went on to say

1 then:

2 "The fact that use rights to individually owned
3 dipnet platforms were freely extended to fellow
4 villagers in no way diminishes the ownership rights
5 in either the platform or the dipnet itself.

6 "Concepts of ownership were highly developed and
7 rather precisely formulated, not only in Twana culture,
8 but in most, if not all, cultures of the Northwest
9 Coast. While use rights were freely extended, it
10 was necessary for the borrower to request permission
11 to use the privately owned site, gear or privilege
12 and for the owner to accede to the request. Alternatively
13 the owner could initiate the extension of use rights
14 by offering them.

15 "The absence of formal payment or rent for use
16 rights was common throughout the Northwest Coast
17 culture area, especially when the user was either
18 kin or fellow villager of the owner. The lack of
19 payment or requirement for same was an expression of
20 solidarity between the owner and the user.

21 "Formal rent or payment for use of resource
22 areas or gear expressed a more distant status
23 relationship between the contracting parties. The
24 presence or absence of consideration paid for use
25 rights spoke to the relationship of the parties to

1 the transaction but said nothing in regard to
2 concepts of ownership."

3 There is more, but I think perhaps that is
4 enough to indicate my position here.

5 Q Do you have any other disagreement with the first paragraph
6 on page 13 that you care to make?

7 A I am sorry, are you referring to the last paragraph on
8 page 13?

9 Q I am referring to the paragraph just read.

10 THE COURT: The balance of the first paragraph.

11 THE WITNESS: I see.

12 Q (By Mr. Coniff) The paragraph beginning:

13 "Exclusive use of --"

14 THE COURT: I take it you mean other than those
15 expressed already generally concerning that subject
16 matter?

17 MR. CONIFF: Yes, your Honor.

18 THE COURT: Is there anything to add with respect
19 to those last sentences?

20 THE WITNESS: Yes. I'm not sure I can agree
21 with the statement where it says the people were land holding
22 to the extent that they were land using. This suggests
23 to me that tenure would cease if use ceased, or that
24 tenure would shrink, the area covered by tenure would
25 shrink if the number of people using were to shrink or the

1 same numbers for some reason used less of the land, and
2 I believe Gibbs 1877 can be cited to the contrary. I
3 believe he says in there something to the effect that
4 title lasted to the last individual.

5 I am not using the correct phrase, I would have
6 to find the page to get his exact words.

7 Q Doesn't Gibbs in fact indicate that in fact lands were
8 communally owned rather than by individuals as a
9 general proposition?

10 A He says that title to lands was a tribal matter, yes, not
11 an individual.

12 Q Communal?

13 A Yes.

14 Q Communal rights, that's an individual.

15 A He used the word "tribes" not "communal".

16 Q Do you interpret the terms "tribe" and "communal" to be
17 synonymous?

18 A Not necessarily.

19 Q Might they be in this context?

20 A They might be, but they wouldn't necessarily be.

21 Q Are they in your opinion?

22 A No.

23 Q Now, if you will now proceed to the next paragraph --
24 had you concluded your comments with regard to that
25 paragraph?

1 A I agree completely with Dr. Riley's final sentence in
2 that paragraph.

3 Q The next paragraph reads:

4 "The Indian attitude toward property was not
5 as is so often stated, 'primitive and amorphous,'
6 Rather, it was a matter of different cultural
7 emphases. With all Western Washington natives,
8 hospitality patterns and reciprocal kinship
9 obligations were extremely important. Wealth was
10 useful, mainly in gaining prestige, and conspicuous
11 giving, rather than conservation of goods, was the
12 way to achieve prestige. Sharing of natural areas
13 with others may have been a generalized expression
14 of this cultural tendency."

15 A I am in complete agreement.

16 Q Turning to Roman III, page 14, entitled "Summary," I
17 will read it in seriatum:

18 "In the sections above, certain points have
19 been made regarding systems of control and concepts
20 of ownership. Presented in tabular form, these
21 include: 1. The largest close-knit unit in
22 Western Washington society was the village."

23 Do you agree or disagree with that statement,
24 and exclude for purposes of your answer the Makahs, we
25 will deal with that separately.

1 A It's a little difficult to give a no, yes answer to that
2 formulation like the "largest close-knit unit" because
3 I'm not sure what that entails. If it is meant to mean
4 a political entity, I disagree.

5 THE COURT: Would you say that it would be --
6 what would you say with respect to the family unit,
7 would it be larger or smaller than the village as a whole?

8 THE WITNESS: Well, this is precisely where
9 the problem lies, because families were not necessarily
10 co-resident in the same village, and this is part of the
11 difficulty I have in dealing with the statement as it
12 stands.

13 Q (By Mr. Coniff) All right. "Number 2. Political
14 authority was on village level and was very weak.

15 The leaders were those who, by reason of birth
16 and wealth, had prestige in the community."

17 A I agree, except for my earlier qualification that I don't
18 tie political entity and the village, so that political
19 authority on the village level in one way is an
20 acceptable statement in that villages were the form of
21 residence in this area.

22 But if we are talking about a one to one
23 relationship, again, I have to disagree on the same
24 basis as before.

25 Q Is your disagreement predicated upon a concept that there

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was a political authority over all of the villages in a given watershed?

A No.

(Continued on the next page.)

E E22-1

1 Q Number 3. "The land-using unit was the village.
2 This group made intensive use of fishing, hunting
3 and gathering lands in the vicinity of the actual
4 settlement. Other territory was used sporadically
5 in hunting and collecting."

6 A I have to disagree with this.

7 Q Why?

8 A Because I do not agree that the land-using unit
9 was the village. The village where it was a
10 group of people living together in the wintertime
11 when subsistence activities were being carried on
12 at a much reduced level than at other seasons of
13 the year and when people from a village dispersed
14 in the spring and summer and early fall for most
15 of the area. But generally speaking when they
16 moved out to harvest oysters, they did not move
17 as village units but families from a co-resident
18 winter village dispersed in different directions
19 to join up with other families from other winter
20 villages to cooperatively use a particular resource
21 area.

22 Q So your objection is based on the sentence, "Land
23 using unit was the village"? Your objection is
24 based on your understanding of the circumstances
25 to be that it would be families or family groupings

1 who would be the land -- who would form the land
2 using unit?

3 A. Well, I didn't say that and I wouldn't agree
4 with that completely either. Families did not
5 resort year after year in the same pattern of
6 dispersal, and I believe I described this in the
7 report, so that if we are talking about some larger
8 grouping that uses a territory, I would have to say
9 that the larger grouping, which communally used
10 the territory, was what we have been talking about
11 here as tribal groupings, not in a derogatory
12 sense, but a village sense, what I refer to as
13 tribes.

14 Q. How do you define a tribe, excluding for purposes
15 of your answer the Makah, within the case area?

16 A. Well, I have to preface my remarks saying I use
17 the word only for purposes of communication here.
18 I'm not too happy with the term "tribe" in the
19 very technical kind of sense. But it is the term
20 that is commonly used here, and the criteria are
21 quite simple, people who share a particular language,
22 a particular culture, a particular territory and
23 regard themselves as a unit.

24 Q. Is it your testimony that all of the people, for
25 example, of the Nisqually watershed would

1 constitute a tribe?

2 A. When?

3 Q. Prior to the time of signing the treaty?

4 A. No.

5 Q. Item number 4, "Access to village territory was
6 available to outsiders. There was a feeling,
7 however, on the part of both host and visitor that
8 such territory belonged to the home group."

9 A. I can agree with that. It depends quite a bit
10 on who the outsiders were.

11 I should qualify my answer, some of the
12 people who were not residents of the village might
13 be outsiders in the sense that they were not
14 residents in the village, but they might have
15 as much primary rights to that territory as people
16 who were resident in it at a given time.

17 Q. I ask you now to move to your green bound volume
18 of reports, I turn to page 1 of your summary, I
19 believe that is Exhibit USA-20, my first question,
20 Dr. Lane, relates to the statement, the first
21 two sentences that appear on that page which reads,
22 "Aboriginally and during the time when the treaties
23 were negotiated, Indian settlements were widely
24 dispersed throughout Western Washington. Population
25 density was higher than almost anywhere else in

1 native North America north of Mexico."

2 My question is: Would you care to modify
3 your statement regarding population density as it
4 appears in your testimony?

5 A. No.

6 Q. Turn to page 2, bottom of the page, we find the
7 following sentence, "Extensive trade was carried
8 on among Indian groups in Western Washington in
9 order to acquire food stuffs, raw materials, and
10 manufactured goods not available locally."

11 My first question is, what do you mean when
12 you use the word "extensive"?

13 A. Covering a wide area geographically.

14 Q. Do you have any opinion concerning the percentage
15 of contribution such trade might have made to the
16 Indian economy at that time?

17 A. It was very important.

18 Q. Can you describe the dimensions of that trade?

19 A. Yes.

20 Q. Let me first ask you, are you referring here to
21 aboriginal trade and pre-white contact or at the
22 time of signing the treaties?

23 A. The heading for that section of the summary says,
24 "Indian Life at the Time of the Treaties."

25 Q. Now, can you describe the dimensions of the trade

1 which you set forth and indicate was extensive?

2 A. Very briefly, yes. I was referring to the trade
3 from the interior tribes across the mountains
4 to tribes on the Sound, which I think I mentioned
5 earlier today, and in the opposite direction, trade
6 from the west coast of Vancouver Island through
7 the intermediary of the Makah middlemen all the
8 way down to the Columbia River to trading posts
9 like Astoria, and I'm speaking now, of course, of
10 the latter half of the 19th century.

11 Q. Latter half of the 19th century?

12 A. I'm speaking of the late 1800s.

13 Q. All right. Approximately what time?

14 A. From about 1811 or whatever it was onwards.

15 Q. Have you completed your answer?

16 A. Speaking about trade from the Olympia Peninsula
17 over to the Lummi and Bellingham Bay area.

18 Q. Can you give us any idea of the quantities that
19 were involved in terms of numbers of fish, barrels
20 of fish or pounds of fish?

21 A. No.

22 Q. Can you give us any comparative level to the modern
23 day commercial levels of trade in these commodities
24 comparing in terms of the volume, any rough percen-
25 tage of comparison? How many fish are we talking

1 about percentagewise the Indians traded then in
2 the manner you have described compared to whatever
3 information you might have concerning the levels
4 of commercial trade in fish today?

5 A. Perhaps I can clarify that by citing the kind of
6 evidence on which I based the statement about
7 trade being important to treaty times.

8 Q. Well, I'm asking you if you can, and if you need
9 to refer to these materials, please do so.

10 A. Well, let me make -- I can't answer your question
11 because I don't know how many pounds of salmon
12 are traded today, and therefore, I can't make
13 a comparison with how many pounds may have been
14 traded or what proportion at that time.

15 Q. If you will assume that the approximate level
16 of trade in salmon today is approximately 7.7
17 million fish, can you give us any idea of comparison
18 between that level of trade and the level of trade
19 which you are describing in your testimony?

20 MR. PIERSON: For clarification, Counsel,
21 her report says of salmon and steelhead, and I
22 think there is a commercial trade in steelhead
23 which you should include in your question to have
24 the two terms synonymous.

25 MR. CONIFF: Your Honor, I believe I

1 am entitled to frame my own question.

2 THE COURT: Oh, yes, you are. Go ahead.

3 Q (By Mr. Coniff) Can you answer it?

4 A I'm sorry, can you repeat the question?

5 Q If you will assume that the present level of trade
6 in salmon is approximately 7.7 million fish per year,
7 can you compare, based on the available evidence
8 that you have been able to discover in your research,
9 the level of Indian commercial trade at treaty
10 times that you are describing here in this portion
11 of your testimony?

12 A Oh, I'm sorry, I think perhaps I lost my frame
13 of reference. The question you are asking me
14 now has to do with Indian commercial trade in
15 salmon today?

16 THE COURT: He asked, are you able to
17 make any quantitative comparison between the
18 extent of trade at or about treaty time as compared
19 with what the Indian trade in fish or whatever it
20 was as of the present time.

21 THE WITNESS: I see. So for both time
22 periods you are talking about Indian trade in fish --
23 in salmon?

24 Q (By Mr. Coniff) No, I'm attempting to compare the
25 level of trade by Indians and non-Indians at treaty

1 times.

2 A. I'm sorry, I didn't understand that that was encom-
3 passed. Then you see, the statement in my report
4 to which you initially directed me refers only
5 to trade among Indian groups, and I thought you were
6 confining the discussion to that. At the same time,
7 Indians, of course, were trading fish, selling fish,
8 commercial dealing in fish with non-Indians at
9 treaty times. But this particular statement was
10 a description of Indian trade among Indians.

11 Q. Intra-tribal trade was what you were attempting
12 to portray?

13 A. Yes, in this particular instance.

14 Q. Let me ask you the question on what you just pointed
15 out to me and that is, can you compare the level
16 of intra-tribal trade which you describe here in
17 your testimony, with the level of -- total commercial
18 level of activity in salmon today assuming for
19 purposes of my question that that level is approxi-
20 mately 7.7 million salmon commercially traded each
21 year.

22 A. You are asking me to compare?

23 Q. Compare the level of intra-tribal trade.

24 A. Trade in salmon in 1855 or thereabouts with the
25 level of trade pursued by non-Indians today in this area?

1 Q All people. I'm referring to all people, Indian
2 or non-Indian. Assume a level of trade today of
3 7.7 million salmon.

4 A And you are not concerned with the actual numbers
5 of fish. You are concerned with the place this
6 has in the economy or you are concerned with the
7 actual numbers of fish? If so, I don't know.

8 Q I am concerned --

9 THE COURT: Did you hear her last answer?
10 If it concerns the number of fish, she doesn't
11 know.

12 Q (By Mr. Coniff) You are unable to give us even
13 a rough percentage approximation if it is based
14 on numbers; is that correct?

15 A That's correct.

16 Q I will ask you the same question, now, except I
17 will reframe it to include Indian commercial
18 dealings in salmon or steelhead at treaty times.
19 I will ask you to compare that with the 7.7 million
20 salmon landing figure that I have just given you.

21 A I can't answer it.

22 Q It's not possible for you to quantify in any rough
23 percentage terms, either?

24 A No; because I have never seen any figures which
25 would allow me to make that comparison.

1 Q Then what is the basis for the expression, "exten-
2 sive" that appears in the sentence at the bottom
3 of page 2?

4 A Contemporaneous documents.

5 Q "Extensive trade"?

6 A Yes.

7 Q You did not mean to imply size or high volume?

8 A Yes; both wide geographic distribution and high
9 volume, meaning importance in the economy.

10 Q But you were unable to compare that --

11 A I have seen the figures, yes.

12 Q -- with today's volume?

13 A Yes, that's correct.

14 MR. CONIFF: That will conclude that
15 area.

16 THE COURT: Very well. We will recess,
17 then, and reconvene at 9:00 a.m.

18 (At 3:00 o'clock p.m. proceedings
19 in the above matter were
20 recessed until Thursday, Septem-
ber 6, 1973, at 9:00 a.m.)

ET22

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C E R T I F I C A T E

We, the undersigned official court reporters in and for the United States District Court for the Western District of Washington, do hereby certify and affirm that the foregoing transcript of proceedings is a true and accurate transcription of our shorthand notes of the matters herein reported.

[Signature]
ELINOR HOLLOWAY

[Signature]
GERALD J. POPELKA

[Signature]
DONNA M. DAVIS

I N D E X

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WITNESS	Direct	Cross	Redirect	Recross
David P. WESTON -----		1581-C		
	1611-G		1618-H	
	1619-Z		1621-D	1626-C
ARTHUR S. COFFIN -----		1633-P		
		1646-S		
BARBARA D. LANE -----	1653-P			
	1693-G			
	1696-Z	1706-C		

EXHIBITS	Admitted
USA-65 -----	1693
66 -----	1693
67 -----	1693
58 -----	1695
52 -----	1654
59 -----	1706
60 -----	"
61 -----	"
62 -----	"
63 -----	"
64 -----	"

- Legend
- C - Coniff
 - D - Dysart
 - H - Hovis
 - G - Getches
 - P - Person
 - S - Sennhauser
 - Z - Ziontz