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Docket Entry 198 - Filed U.S. Statement of Ultimate issues and General issues of Law and Fact

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CERTIFICATE OF SERVICE

CERTIFICATE OF MAILING

I certify that in accordance with Local Rule 5,
a copy of the foregoing document was delivered
to Judge George H. Boldt
on April 30, 1973.

UNITED STATES ATTORNEY

By Charrigus

I certify that I mailed a copy of the foregoing
document to which this certificate is attached, to
the attorneys of record or plaintiff, defendant,
on the 30th day of April, 1973.

UNITED STATES ATTORNEY

By Charrigus

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,)
)
Plaintiffs,)
)
v.)
)
STATE OF WASHINGTON, et al.,)
)
Defendants.)

CIVIL NO. 13

UNITED STATES' STATEMENT OF
ULTIMATE ISSUES AND GENERAL
ISSUES OF LAW AND FACT

FILED
MAY 1 7 58 AM '73
EDWARD J. COFFIELD, CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY W.D. OPERATING ROOM
DEPUTY CLERK

COME NOW the United States, through Special Assistant
United States Attorney Stuart F. Pierson, and herewith submits
its statement of ultimate issues and general issues of law and
fact, pursuant to paragraph 1 of the pretrial order of April 24,
1973. [In order to aid the reader's understanding of these
statements, there are included in brackets brief statements of
the United States' position. These statements of position are
not intended as a comprehensive explication of the United States'
arguments, contentions, or conclusions.]

I

ULTIMATE ISSUES

A. EXISTENCE OF A RIGHT.

Do the plaintiff tribes hold a federal treaty right to fish
at usual and accustomed places outside reservation boundaries,

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1 which right may not be qualified by the state but may be regulated
2 by an appropriate exercise of state police power?

3 [United States Position: Yes. *Puyallup Tribe v.*
4 *Department of Game*, 391 U.S. 392, 398-399 (1968).]

5
6 B. EXISTENCE OF A VIOLATION.

7 Is the state's regulation of fishing by members of the
8 plaintiff tribes, at locations which were usual and accustomed
9 fishing places to their predecessor tribal members during treaty
10 times, an inappropriate exercise of state police power and
11 therefore a violation of the tribes' federal rights?

12 [United States Position: Yes; the proof will so show
13 under applicable legal standards.]

14
15 II

16 GENERAL ISSUES OF LAW

17 A. GENERAL STANDARDS OF APPROPRIATIONS.

18 Whether applicable law requires that, in order to be an
19 appropriate exercise of police power, the state's regulation of
20 treaty Indian off-reservation fishing must:

- 21 1. Not discriminate against the Indians' right;
- 22 2. Meet appropriate standards;
- 23 3. Be shown reasonable and necessary for conservation
24 of the fish resource.

25 [United States Position: Yes. *Puyallup Tribe v.*
26 *Department of Game*, *supra*, at 398. From the express
27 limitation of the treaty right that the Indians' taking
28 shall be "in common with" non-Indians and that there-
29 fore such taking shall be nonexclusive, there arises
30 the state's power to act appropriately, in regulating
31 treaty Indian fishing; but the state may so regulate
only to prevent the Indians' destruction of the
resource. In order to be nondiscriminatory, the
state's regulation must respect the treaty Indians as
a distinct and coequal user group; and the regulatory
authority must be first concerned to permit the

1 Indians a reasonable opportunity to take a fair
2 volume of fish by whatever means are feasible to them.
3 *Sohappy v. Smith*, 302 F.Supp. 899, 910-911 (D. Ore. 1969).
4 To meet appropriate standards, the regulation must
5 conform to the requirements of the Washington Administra-
6 tive Procedure Act and the Due Process Clause. *Department*
7 *of Game v. Puyallup Tribe*, 80 Wash.2d 561, 574, 576-577
8 (1972). In order to be shown reasonable and necessary
9 for conservation, the regulation must be based upon facts
10 showing that, among available alternative methods for
11 regulating the time, place and manner of Indian fishing,
12 the regulation is the least restrictive necessary to
13 preservation and improvement of the resource. *Sohappy v.*
14 *Smith, supra*, at 907-908.]

15 B. PARTICULAR REQUIREMENTS FOR REGULATION OF INDIAN FISHING.

16 Whether applicable legal standards require that, when
17 regulating off-reservation treaty Indian fishing, the state
18 regulatory authority must:

19 1. Provide the treaty Indians an opportunity to take by
20 methods feasible to them, a share of the resource which is fair
21 by comparison with the share available to other user groups;

22 2. Consider perpetuation and improvement of the size and
23 reliability of the fish runs as the sole controlling objectives
24 of conservation regulation;

25 3. Issue and enforce its regulations so as to carry out
26 the purposes of the treaties;

27 4. Adopt its regulations on an annual basis upon specific
28 supporting and current facts and data;

29 5. Enforce its regulations with due regard for the person
30 and property of Indian fishermen;

31 6. Consider as fundamental to its regulatory choice the
32 cultural and economic value of fish harvesting to Indians;

33 7. Adopt, as its own tribal proposals for regulation of
the Indian fishery, except to the extent that it can show that

1 the tribal proposals are not reasonable and necessary for
2 conservation of the specific run involved; and

3 8. Protect off-reservation Indian fishing from interference
4 by non-Indians, if the state's regulation has limited the area
5 of treaty Indian fishing to less than the full extent of the
6 tribe's usual and accustomed places.

7 [United States Position: Yes. *Winters v. United States*,
8 207 U.S. 564 (1908); *State v. Arthur*, 74 Idaho 252 (1953),
9 cert. denied, 347 U.S. 937 (1954); *Miles v. Veatch*, 199 Ore.
10 533 (1960); *Puyallup Tribe v. Department of Game, supra*,;
11 *Department of Game v. Puyallup Tribe, supra*; *Sohappy v.*
12 *Smith, supra*.]

13 C. Which of the plaintiff tribes is standing to maintain its
14 claim for alleged violation of treaty fishing rights in the
15 waters to which this case applies?

16 [United States Position: All.]

17 III

18 GENERAL ISSUES OF FACT

19 A. ANTHROPOLOGICAL ISSUES.

20 1. What types of fish harvesting techniques were used by
21 the Indians during treaty times?

22 2. What types of fish were taken by Indians in treaty
23 times?

24 3. Of what religious or cultural importance in Indian life
25 was fishing during treaty times?

26 4. Were there commercial aspects to Indian fishing during
27 treaty times?

28 5. How was Indian fishing regulated during treaty times?

29 6. Did the predecessors of each plaintiff tribe have
30 usual and accustomed fishing places at treaty time?

31
32 Page 4 - ULTIMATE ISSUES & GENERAL ISSUES OF LAW & FACT

1 7. What did the treating parties mean by "the right of
2 taking fish, at all usual and accustomed grounds and stations is
3 further secured to said Indians, in common with all citizens of
4 the Tribery?"

5 8. To what extent did the treating parties intend that
6 fishing would contribute to the Indians' welfare?
7

8 B. BIOLOGICAL AND MANAGEMENT ISSUES.

9 1. Is the anadromous fish resource in western Washington
10 so limited in volume as to require restrictions on the amount of
11 fish which should be harvested prior to spawning?

12 2. To what extent have other persons or agencies under-
13 taken to perpetuate and to improve the fish resource?

14 3. To what extent have other persons or agencies under-
15 taken to perpetuate and to improve the fish resource?

16 4. Upon what policies, facts or opinions have the state
17 regulatory agencies based their management and regulation of
18 the fish resource?

19 5. Have the state regulatory agencies ever dealt with
20 off-reservation treaty Indian fishermen as a distinct, federally
21 protected harvesting group?

22 6. Are there alternative regulatory or fishery management
23 schemes to those now enforced which would provide the Indians a
24 reasonable opportunity to take a fair share of the fish resource
25 by means feasible to them while at the same time promises to
26 perpetuate and to improve the resource?

27 7. Is there any fishing technique feasible to the treaty
28 Indians which is:

- 29 a. Inherently harmful or destructive as a method
30 of harvest, or
31

- 1 b. Impossible to reasonably control, or
2 c. Necessarily preemptive of other fishing
3 techniques in the same water area?
4

5 C. ECONOMIC ISSUES.

6 1. If the state regulatory scheme were altered to permit
7 treaty Indians to take a fair share of the resource, would the
8 welfare of those Indians be improved?
9

10 D. CURRENT FISHING PRACTICES.

11 1. How do treaty Indian fishermen control their time,
12 place and manner of fishing?

13 2. What fishing techniques are feasible to members of
14 the plaintiff tribes?

15 3. How has fishing by treaty Indians outside reservation
16 boundaries been influenced by state regulation?

17 4. Where, when and how did treaty Indians fish outside
18 reservation boundaries?

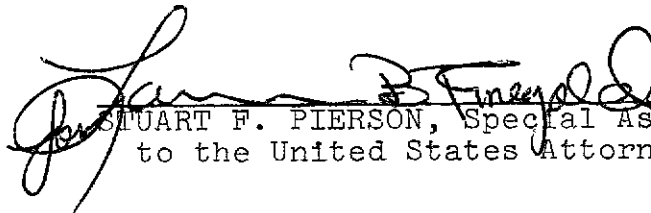
19 5. Are there commercial aspects to fishing by members
20 of the plaintiff tribes?

21 6. Is fishing culturally or religiously important to the
22 plaintiff tribes?

23 DATED this 30th day of April, 1973.

24 Respectfully submitted,

25 STAN PITKIN
26 United States Attorney

27 
28 STUART F. PIERSON, Special Assistant
29 to the United States Attorney
30
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