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Docket Entry 279 - Filed Direct Testimony of Thor C. Tollefson

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FILED

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EDGAR SCOFFIELD, CLERK
U.S. DISTRICT COURT
W.D. OF WASHINGTON
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,)	
)	CIVIL NO. 9 2 1 3
Plaintiffs,)	
)	
-vs-)	DIRECT TESTIMONY OF
)	
STATE OF WASHINGTON, et al.,)	THOR C. TOLLEFSON
)	
Defendants.)	

* * *

This is the direct testimony of Thor C. Tollefson submitted on behalf of defendant, Department of Fisheries, in this action. This defendant expressly reserves the right to submit further testimony by Mr. Tollefson, either oral or written, to rebut the testimony presented by the plaintiffs in this case.

Q. Please state your full name.

A. Thor C. Tollefson

Q. Mr. Tollefson, are you presently the director of the Washington State Department of Fisheries?

A. Yes.

Q. How long have you held such position?

A. Since May 1, 1965.

Q. Would you briefly summarize your career prior to your appointment as director of the Department of Fisheries.

A. Graduated from University of Washington law school in 1930. Practiced law until spring of 1933 when I was appointed deputy prosecuting attorney for Pierce County. Served until January 1, 1935. Private practice of law during next four years; then

1 elected prosecuting attorney for Pierce County where I served for
2 eight years. Elected to U.S. Congress and served from January,
3 1947 until January, 1965. In Congress I served for eighteen
4 years on the House Merchant Marine and Fisheries Committee. On
5 May 1, 1965 I was appointed to my present position by Governor
6 Dan Evans.

7 Q. Please describe the duties of the director of the Department of
8 Fisheries.

9 A. The duties and authority of the director of Fisheries are out-
10 lined by the State Fisheries Code, chapter 75.08 RCW. The Code
11 states that the director shall have charge and general super-
12 vision of the Department of Fisheries, and shall exercise all
13 the powers and perform all the duties prescribed by law with
14 respect to food fish and shellfish. The Code also provides that
15 it shall be the duty and purpose of the Department of Fisheries
16 to preserve, protect, perpetuate and manage the food fish and
17 shellfish in the waters of the state and the off-shore waters
18 thereof to the end that such food fish and shellfish shall not
19 be taken, possessed, sold or disposed of at such times and in
20 such manner as will impair the supply thereof. The Code spells
21 out in some detail the various duties and authorities of the
22 director. They are quite extensive and broad.

23 Q. Does the Department of Fisheries have a policy for Indian treaty
24 fishing at usual and accustomed stations off reservations?

25 A. Yes.

26 Q. Please describe that policy, including when and under what cir-
27 cumstances it originated.

28 A. Following our interpretation of several court cases involving
29 Indian treaty fishing rights, including the Puyallup cases in
30 the U.S. Supreme Court and Washington State Supreme Court, and
31 the So Happy case in the U.S. District Court for Oregon, we have
32 taken the view that Indians have a special right not enjoyed by
33 others to fish at their usual and accustomed fishing places off

1 their reservations. We also take the view under those same court
2 decisions that the Department of Fisheries may regulate such off-
3 reservation fishing and that our regulations must be reasonable
4 and necessary for conservation and meet appropriate standards.
5 With that as a policy, we have provided off-reservation fishing
6 time and opportunity to Indian tribes.

7 Q. Are you familiar with the term "fair share" or "fair and equit-
8 able share" as they relate to Indian treaty fishing?

9 A. Yes.

10 Q. What is your understanding of those terms?

11 A. Those terms were used in connection with the Judge Belloni de-
12 cision in the So Happy case. The states of Oregon and Washington
13 jointly manage the Columbia River salmon stocks under a federally-
14 approved compact. Both states have had difficulty in determining
15 exactly what the terms mean. Endeavoring to carry out the court's
16 decision to the best of our ability, we have provided the Indians
17 (who fish above Bonneville Dam) equal or greater time and oppor-
18 tunity to fish than we have provided for the non-Indians who fish
19 below the dam. We have also made certain that sufficient fish
20 get over the dam to (1) take care of escapement for spawning
21 requirements, and (2) provide fish for the Indians to meet the
22 fair and equitable share requirements.

23 Q. Under your administration has the Department of Fisheries attempt-
24 ed to provide Indians, fishing under treaty rights, with a fair
25 and equitable share of the harvest of salmon originating in
26 streams upon which there is located an Indian fishery in the area
27 of this case?

28 A. Yes, on the rivers and marine areas listed in Appendix II of the
29 Joint Biological Statement we have set special treaty Indian fish-
30 ing seasons and have attempted to insure that the seasons were
31 set so as to give the Indians an opportunity to fish at times
32 when there are significant numbers of fish in their fishery.

33 Q. What difficulties does the department face in attempting to provide

1 the Indians with a fair and equitable share of the harvest for
2 salmon?

3 A. In the Puget Sound area there are a number of Indian tribes
4 which fish. There are a number of streams, each of which has
5 its own runs of salmon. Also, there are several state hatcher-
6 ies located on different streams which produce a great number of
7 juvenile salmon. Mature salmon return to the streams of their
8 birth or to the hatcheries which produced them. Each species of
9 salmon returns at the same general time. Thus, they are inter-
10 mingled when they enter the Strait of Juan de Fuca or the waters
11 of Puget Sound. While they are intermingled it is impossible to
12 restrict fishing on salmon from one particular stream or one
13 particular hatchery. If in order to protect salmon bound for
14 one stream we place an across the board restriction on fishing
15 on all the salmon while intermingled, we will have over-escape-
16 ment to other streams and large surpluses at hatcheries on
17 rivers where there is no Indian fishery. Such a practice would
18 be wasteful and definitely contrary to the conservation of the
19 resource.

20 Q. In your opinion is there a need for judicial clarification of the
21 terms "reasonable and necessary for conservation" and "meeting
22 appropriate standards" as well as "fair share" or "fair and
23 equitable share?"

24 A. Yes. These terms sound fine in principle but in practice they
25 are too vague to give us any standard by which we can determine
26 how to manage the fishery in such a way that the Indian fisher-
27 men have an opportunity to catch their fair share of the harvest.
28 All of our regulations which restrict the amount of time and
29 impose gear limitations, such as net size, are reasonable and
30 necessary for conservation. When you have two or more groups
31 of fishermen fishing on the same runs of salmon at different
32 times, any regulation of one group is interrelated with the regu-
33 lation of the other group. Regulation of one group is as much a

1 conservation necessity as regulation of the other group. If
2 we had an objective standard by which we could measure the
3 Indian share, the tests of "reasonable and necessary for conser-
4 vation" and "fair share" would be more meaningful.

5 Q. Mr. Director, you are not a biologist, are you?

6 A. No.

7 Q. In the past eight years as director of the Department of Fish-
8 eries, have you become familiar with the biological aspects of
9 managing the salmon fishery in Puget Sound?

10 A. Yes.

11 Q. Upon whom do you chiefly rely for the biological information
12 upon which you base your decisions as an administrator?

13 A. Upon my two chief assistants, Mr. Lasater and Mr. Robison, who
14 are long-time biologists, and upon the biologists in our Manage-
15 ment and Research division. All regulation decisions are made
16 at staff meetings with these people. Of course, we are in
17 constant touch with Indian and non-Indian fishermen and utilize
18 the information which they supply to us.

19 Q. Have you and your staff developed a management model for admin-
20 istering a fair and equitable share of the harvest for Indian
21 treaty fisheries?

22 A. Yes we have.

23 Q. Was this management model prepared in connection with the case of
24 the United States, et al., v. The State of Washington, et al.?

25 A. Yes, we are hopeful that the court will give us a fixed standard
26 by which we can measure the Indians' share. On the other hand,
27 we are concerned that the court's decision not leave us with an
28 unworkable management scheme. We think the model we are propos-
29 ing is fair to the Indians, provides an objective standard by
30 which our performance can be measured and at the same time leaves
31 us with a management plan which is flexible enough to allow us
32 to manage in the best interests of the conservation of the
33 resource.

1 Q. Why was the model prepared?

2 A. To suggest to the court a method which might solve the problems
3 of managing fisheries in such a way as to provide a fair and
4 equitable share of fish to Indians who have treaty fishing rights.

5 Q. Would you briefly describe the model?

6 A. The treaty Indian fair share would be established as a percentage
7 of the salmon produced by streams which were fished by treaty
8 tribes at usual and accustomed places and which are harvested in
9 waters under the jurisdiction of the State of Washington. The
10 Department of Fisheries would then regulate all fisheries under
11 its jurisdiction to ensure that sufficient salmon of all species
12 would reach treaty Indians to provide the fair share catch.

13 Indian fisheries would be treated separately from the sport
14 and all-citizen commercial fisheries and would receive informa-
15 tion and cooperation from the Department of Fisheries as well as
16 full protection under the Washington Administrative Procedures
17 Act.

18 Q. In what ways would managing under the model you have proposed
19 differ from past management practices of the department?

20 A. The Indian fishery would be managed as a separate fishery and
21 not as part of the commercial net fishery. The fair share would
22 be known and our experts could devise management plans to meet
23 that goal rather than bring me tentative alternatives based upon
24 what the Indians might do regarding either fishing or legal
25 action. Conservation goals could be realized so that production
26 could be increased for Indian and non-Indian alike. The state
27 and the Indians would be drawn into closer cooperation in an area
28 of great mutual interest and to the benefit of both. Man-years
29 and funds spent on litigation could be directed to salmon manage-
30 ment and enhancement.

31 Q. Do you believe your department has the capability to manage the
32 Puget Sound salmon fishery under the model that you have proposed?

33 A. Yes.

1 Q. Are there any precedents for the model you have proposed?
2 A. Yes. The International Pacific Salmon Fisheries Commission has
3 a similar program.
4 Q. Are you familiar with the operation of the International Pacific
5 Salmon Fisheries Commission?
6 A. The Commission was created pursuant to a treaty between the
7 United States and Canada. It manages the Fraser River stocks of
8 sockeye and pink salmon. It is composed of three Canadian and
9 three United States citizens. I am one of the latter, having
10 served for eight years, and am currently the Chairman of the
11 Commission.
12 Q. Would you describe briefly the management functions of the Inter-
13 national Pacific Salmon Fisheries Commission.
14 A. The treaty and protocol provide that the Commission must manage
15 the stocks of salmon I referred to above in such a manner as to
16 (1) provide adequate escapement for spawning purposes, and (2)
17 divide the catch as equally as possible between the two countries.
18 Over the years the catches of each country have come close to
19 matching the catches of the other. A more complete statement can
20 be found in the Joint Biological Statement at pp. 101-103.
21 Q. In your opinion, has the Commission been able to successfully
22 manage the Fraser River pink and sockeye runs on the basis of a
23 percentage share of the harvest divided between the United States
24 and Canada?
25 A. Yes. The annual reports of the Commission over the years have
26 indicated that this has been the case.
27 Q. On the basis of your experience with the Commission do you
28 believe that salmon fisheries in the case area can be managed
29 on a similar percentage share basis?
30 A. Yes.
31 Q. In your opinion, is the uniform management of the International
32 Pacific Salmon Fisheries Commission necessary to properly manage
33 the salmon runs for which they have responsibility?

1 A. That is my view, and it is shared by the other commissioners.
2 Q. Is it essential that there be a uniform management of the salmon
3 runs in Puget Sound and on the coastal rivers involved in this
4 lawsuit?
5 A. It seems to me that it is essential. An important ingredient in
6 management, aside from adequate data and trained staff, is the
7 ability to plan the salmon harvest in advance and that requires
8 unified management if conservation is to be achieved.
9 Q. Could your department perform its statutory duties if the manage-
10 ment of the salmon resources in Puget Sound and on the coastal
11 rivers involved in this lawsuit were fragmented between the
12 department and the Indian tribes?
13 A. Jurisdiction to manage fisheries, or any resource, must reside
14 in one agency to be successful. Divided jurisdiction means no
15 jurisdiction, really. I don't remember what court in effect
16 made that statement, but experience suggests that this is clearly
17 true. If Indian tribes attempt to regulate the same off-reser-
18 vation areas that the court has said we have jurisdiction to
19 regulate there will be continued conflict between the tribes and
20 the department and the resource will suffer.
21 Q. If the court were to adopt the management model proposed by the
22 Department of Fisheries, what assurance would the court and the
23 Indians have that the Indians' interest would be fairly repre-
24 sented by the department?
25 A. The department has always abided by court decisions, and will
26 continue to do so. The department operates under our State
27 Administrative Procedures Act which gives the tribes opportunity
28 to participate in the regulation-making process. But we would
29 not restrict our cooperation to just formal avenues. We will
30 actively encourage informal exchanges of information and assist-
31 ance. Our goal is to enhance the Indian fishery and we would
32 hope to win their confidence and trust. If our suggested model
33 is approved by the court, we would naturally want to make it

1 work. The first year of operation under it might not be as good
2 as it would be in the second or fifth or tenth year of operation.
3 We would constantly seek to improve our operations for the bene-
4 fit of the Indians as well as the entire fishery.

5 Thor C. Tollefson
6

7
8 SUBSCRIBED AND SWORN TO Before me this 9th day of July, 1973.

9
10 Barack B. Bunn
11 Notary Public in and for the
12 State of Washington, residing
13 at Olympia.
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