

7-9-1973

## **Docket Entry 281 - Filed Defendant Department of Fisheries Designation of Plaintiffs Interrogatories Answers**

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FILED

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EDGAR SPOFIELD, 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., )  
Plaintiffs, )  
-vs- )  
STATE OF WASHINGTON, et al., )  
Defendants. )

CIVIL NO. 9 2 1 3

DEFENDANT DEPARTMENT OF  
FISHERIES DESIGNATION OF  
PLAINTIFF INTERROGATORY  
ANSWERS

\* \* \*

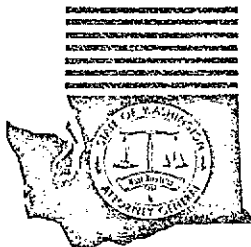
Defendant Department of Fisheries designates all answers  
submitted by plaintiff to interrogatories propounded by the defendants.

In addition, the informal discovery questions submitted by  
defendant Department of Fisheries to plaintiff United States in the  
attached letter dated March 2, 1972, from Mr. William Gingery to  
Mr. George Dysart, and the response to those questions by the Bureau  
of Indian Affairs submitted in a Memorandum dated October 12, 1972,  
from the Bureau of Indian Affairs to the Office of the Regional Soli-  
citor are designated.

DATED this 9th day of July, 1973.

SLADE GORTON  
Attorney General

*Earl R. McGimpsey*  
EARL R. McGIMPSEY  
Assistant Attorney General  
Attorneys for Defendant  
Department of Fisheries



*Yellow*  
OFFICE OF THE ATTORNEY GENERAL

SLADE GORTON ATTORNEY GENERAL  
TEMPLE OF JUSTICE OLYMPIA, WASHINGTON 98501

March 2, 1972

George D. Dysart, Esq.  
Assistant Regional Solicitor  
U. S. Department of Interior  
P. O. Box 3621  
Portland, Oregon 97208

Re: Discovery in U.S. v. Wash., No. 9213

Dear George:

The following request for data is submitted under the Stipulation re Discovery, and because more than one agency is, or may be, involved I am, in accordance with that agreement, including five copies, to include the Department of Interior, Bureau of Sport Fisheries and Wild Life, and Bureau of Indian Affairs.

This data is being sought with regard to salmon only, and for your convenience I am willing to accept a single copy of the reply, or replies, and to reproduce it myself for defendant's liaison counsel. Finally, the time span for such data need not go back beyond 1960.

A. Regulation Data.

1. Is federal agency approval of tribally enacted fishing regulations, regarding on-reservation and/or off-reservation fishing, required by any agency of the federal government?
2. If so, by which agency or agencies and under what statutory authority?
3. Within each such agency, to whom are such regulations initially sent when approval is sought, to which individuals are such regulations sent for review or comments and who, in each case, possesses final authority to approve or disapprove?
4. What criteria are employed in determining whether such regulations shall be approved or disapproved?
5. Do such criteria include the question of whether individual tribal members shall be entitled to a fair share of any fish taken, or a fair opportunity to fish upon such runs as the tribe shall have an opportunity to fish upon?

FISHERIES INFORMAL INTERROGATORIES

OFFICE OF ATTORNEY GENERAL

George D. Dysart, Esq.  
March 2, 1972  
Page -2-

6. Please provide copies of all such tribal regulations submitted for such approval within the past two years, together with evidence of the final agency disposition.

B. Biological Data.

1. Has the federal government systematically gathered any biological data from either the Indian fisheries, on and/or off reservation, or from the natural spawning populations in any Puget Sound or coastal watersheds in the state of Washington?
2. If so, in what watersheds and particular Indian fisheries have these data been gathered?
3. Do these data include length and weight measurements, age analysis, and sex determinations?
4. If so, how were the data gathered and what populations does it represent?
5. What species of salmon is this data available for?
6. How many years do you have records for?
7. Please supply or identify such data.

C. Escapement Data.

1. Has the federal government conducted any spawning ground counts in Puget Sound or coastal watersheds in the state of Washington?
2. If so, in what watersheds and particular streams within these watersheds have escapement counts been made?
3. Has the federal government made spawning ground counts on streams in Western Washington in which the absolute escapement of salmon has been determined? If so, on which streams and with regard to what species?
4. What methodology was used to determine absolute number of fish?
5. How many years do you have records for?
6. Please supply or identify such data.

George D. Dysart, Esq.  
March 2, 1972  
Page -3-

D. Fishery Data.

1. Has the federal government conducted any surveys to determine the amount of Indian fishing gear being used in watersheds of the state of Washington, either on or off reservation?
2. If so, in what specific area of each watershed have these counts been made and at what time of the year?
3. What type of gear was counted, how was it constructed and with what type of material, how was it being fished, and if webbing was used, what was the mesh size?
4. Has data been gathered regarding the percentage or number of individuals in each tribe actually engaged in fishing for salmon?
5. For which have you obtained these data and from what watershed?
6. Please supply or identify such data.

E. Catch Data.

1. Has the federal government conducted any surveys to determine the annual total harvest by particular Indian tribes of a specific salmon species from any Puget Sound or coastal watershed of the state of Washington?
2. If so, by what Indian tribe from what particular watershed?
3. What specific salmon species have these data been gathered for?
4. What percentage and absolute number of this total harvest are for home use, sport, sold commercially, or used for ceremonial purposes?
5. What portion of the commercial harvest is canned, smoked, cured, or otherwise processed and sold by Indians or tribes to which they belong?

OFFICE OF ATTORNEY GENERAL

George D. Dysart, Esq.  
March 2, 1972  
Page -4-

6. How many years do you have records for?
7. Please supply or identify such data.

Very truly yours,

FOR THE ATTORNEY GENERAL

*William M. Gingery*  
William M. Gingery  
Assistant Attorney General

WMG:bmc

UNITED STATES GOVERNMENT

# Memorandum

TO :Office of the Regional Solicitor

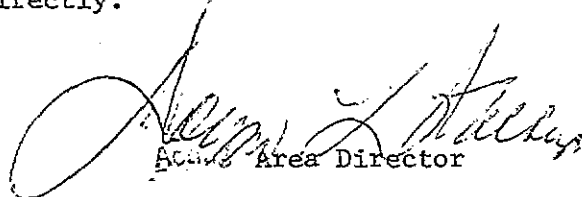
DATE: OCT 12 1972

FROM :Bureau of Indian Affairs

SUBJECT:Discovery Questions: U.S. v Washington

Attached hereto are answers to certain discovery questions submitted by Washington Assistant Attorney General William M. Gingery on March 2, 1972, in connection with U.S. v Washington, Civil No. 9213, Western District of Washington. The attached answers are the answers of the Bureau of Indian Affairs only and do not cover any activities of other federal agencies. We understand you have requested the Bureau of Sport Fisheries and the National Marine Fisheries Service to provide answers with respect to their respective agencies.

To the best of our knowledge the answers to questions under Part A would apply to all agencies of the government since no federal agency approval other than that specified in the attached answers is required for tribal regulations. Also to the best of our knowledge, the only agencies that would be likely to have undertaken any of the activities listed in questions B through E are the above-mentioned fishery agencies. We are not aware that they have undertaken these activities, but we understand they will be answering the questions directly.

  
Acting Area Director

Enclosure



BIA 2010-108 ANSWERS

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

October 11, 1972

Answers to Discovery questions submitted by William M. Gingery,  
Assistant Attorney General, Washington Department of Fisheries,  
March 2, 1972.

A. Regulation Data.

1. Question: "Is federal agency approval of tribally enacted fishing regulations, regarding on-reservation and/or off-reservation fishing, required by any agency of the Federal Government?"

Answer: This depends upon the applicable governing documents for the particular tribe involved and the answer varies from tribe to tribe and even, in some instances, within a single tribe depending upon the type of regulation involved. Such federal agency approval is required only in those instances in which the tribal governing document requires it. Sometimes the governing documents speak in terms of "approval" and other times in terms of "review." The procedures for these two types of responsibility vary. The review procedures are spelled out in the tribal governing document. Copies of the documents for the eleven tribes having a BIA-recognized government that are involved in this case were furnished to you on March 1, 1972 (Plaintiff's I-1 to I-11). In answering the series of questions you have propounded here we will assume that you are using the term "approval" in the broader sense as including "review."

2. Question: "If so, by which agency or agencies and under what statutory authority?"

Answer: In some instances the approval which is required by the tribal governing document is that of the Secretary of the Interior. In other instances it is the Commissioner of Indian Affairs. In both cases this authority has usually been delegated to specified subordinates by published delegations and redelegations of authority, principally



Secretary's Order No. 2508, as amended. These redelegations have changed from time to time. The authority for federal agency approval or review is the tribal governing document, but the statutory basis for assigning this function to the Secretary or to BIA is 25 U.S.C. § 2 as amended by Reorganization Plan No. 3 of 1950, 64 Stat. 1262, and also, in the case of tribes organized under the Wheeler-Howard Act (Indian Reorganization Act of 1934, 48 Stat. 984), the authority conferred by that act. Departmental delegations of authority have been issued which generally delegate to the Commissioner of Indian Affairs and, in turn, on down to the Area Director in some instances, and the superintendent in others, the authority to give final approval of an ordinance, but leave to the Secretary, Under Secretary or Assistant Secretary (for Public Land Management) the authority to disapprove or rescind a tribal ordinance on behalf of the Secretary.

3. Question: "Within each such agency, to whom are such regulations initially sent when approval is sought, to which individuals are such regulations sent for review or comments and who, in each case, possesses final authority to approve or disapprove?"

Answer: The regulations are initially sent to the superintendent (i.e., the Superintendent, Western Washington Agency, for all tribes involved in U. S. v. Washington except the Yakima Tribe; Superintendent, Yakima Agency, for that tribe). They are reviewed in the agency office generally by the Tribal Operations Officer and/or the Branch of Judicial Prevention and Enforcement Services, depending upon the nature of the ordinance. That officer may or may not consult initially with the

Area Office (Land Operations Officer, usually), Regional Solicitor's office, or Fisheries Biologists of the Bureau of Sport Fisheries and Wildlife. If action above the agency level is required, the Superintendent submits the ordinance to the Area Director with his recommendations. It is generally addressed to the attention of the Area Tribal Operations Officer. Under current delegations of authority the only times in which the ordinance must be forwarded above the BIA Area Director is where the latter determines that his approval should be withheld. In such cases it is submitted to the Commissioner's office. The Commissioner may approve it, but if he believes it should not be approved, he must submit it to the Assistant Secretary for Public Land Management who has authority to approve or disapprove on behalf of the Secretary. See Secretary's Order 2508 § 18(4) and 10 BIA Manual § 2.1(4).

4. Question: "What criteria are employed in determining whether such regulations shall be approved or disapproved?"

Answer: The basic and overriding criteria is that the regulation is a tribal, not a federal, regulation and that, except where expressly provided otherwise, the tribe is an independent representative of its members and not a federal agency. Consequently its regulations are expressions of tribal, not federal, legislative desires. Federal review, therefore, focuses on three general objectives, all of which are performed as an aspect of the Secretary's trusteeship duties to the Indian people. These are: (1) whether the tribal governing body has exceeded the authority that the tribe's members have conferred upon it, (2) whether a tribe has exceeded any authority which it may have over nonmembers or

non-Indian property, and (3) exercise a trustee's judgmental supervision over the propriety or reasonableness of the tribal body's decisions where the tribal governing document confers that responsibility on him.

a. Legality. The regulation is reviewed to determine that it complies with the provisions of the tribe's governing document. It also is reviewed to determine that it was properly adopted at properly scheduled meeting at which a quorum was present and at which the proper enactment procedures as required by the governing document were followed. It is further checked to assure that it was timely submitted to the Superintendent for his review. It is reviewed also to ensure that the application of the regulation on its members is consistent with applicable federal law, tribal governing documents, and with rules and regulations of the Department of the Interior.

b. Technical. Such things as dates of fishing, time of day, open and closed periods, gear and mesh size restrictions, and the area in which the regulation applies are also reviewed. This review is intended to help the tribe enact a workable regulation. Often technical details are reviewed by representatives of the Bureau of Sport Fisheries and Wildlife. This review often takes place prior to actual enactment by the tribal governing body. In any event, the review policy stated elsewhere herein<sup>in the</sup> answers to these questions is applied to such review.

c. Approval policy. The BIA's policy in reviewing and approving or disapproving tribal ordinances is to recognize that the tribes are

to have maximum freedom to manage their own internal affairs and govern themselves and that federal control over these actions should be limited to that specifically required by the tribal governing documents. Thus, for example, if the tribal governing document requires Secretarial approval of any provision of an ordinance fixing penalties on individuals or providing for seizure or disposition of personal property, the review may be limited to those phases of the ordinance and no judgment either of approval or disapproval expressed with respect to other aspects of the ordinance. An example of this is the case of Yakima Tribal Ordinance T-90-66, the basic tribal ordinance covering the off-reservation fishing in the Columbia River area. There BIA review and approval was limited to section 11 of that ordinance which fixed penalties and conferred jurisdiction on the tribal court to try offenders. The other provisions of that ordinance which fixed the dates of fishing, mesh restrictions, site registration requirements and other matters were deemed to be matters for tribal determination which under the tribe's governing document did not require review and consequently the Bureau took no action of either approving or disapproving the tribe's decisions on these matters. Where it is deemed necessary to object to a provision, efforts are made (whenever permitted by the time limits that may be prescribed for federal disapproval) to discuss the objections with the tribe and persuade them to modify the regulation.

5. Question: "Do such criteria include the question of whether individual tribal members shall be entitled to a fair share of any fish taken, or a fair opportunity to fish upon such runs as the tribe shall have an opportunity to fish upon?"

Answer: Generally the answer is "no." But this needs to be qualified in view of the 1968 enactment of the Indian Constitutional Rights Act, 25 U.S.C. § 1302, which provides that no Indian tribe, in exercising powers of self-government, "shall \* \* \* deny to any person within its jurisdiction the equal protection of its laws \* \* \* ." Even here, however, unless the regulation contained an obvious and unquestionable violation of this provision, federal administrative review of the tribal ordinance would probably be limited to making suggestions to the tribe that its provision may not be in compliance with that requirement. The point that should be kept in mind with respect to all of the questions which are discussed above is that federal review is limited to the authority of the tribal governing body to enact the regulation which it did, and not to the wisdom of the particular regulation except as noted in Answer 4 above. BIA may counsel with the tribe on the latter point, may suggest provisions to include in the ordinance in the interests of sound policy, but final decision on those matters is usually left to the tribe.

6. Question: "Please provide copies of all such tribal regulations submitted for such approval within the past two years, together with evidence of the final agency disposition."

Answer: See attached copies of Makah Tribal Resolution No. 1-71 approved July 9, 1970, and Amendment of Tulalip Ordinance No. 27 adopted July 8, 1972, approved by Superintendent July 27, 1972, and favorably reviewed by BIA Area Office August 24, 1972 .

B. Biological Data.

1. Question: "Has the federal government systematically gathered any biological data from either the Indian fisheries, on and/or off reservation, or from the natural spawning populations in any Puget Sound or coastal watersheds in the state of Washington?"

Answer: The Bureau of Indian Affairs has not.

2. through 7.: Not applicable.

C. Escapement Data.

1. Question: "Has the federal government conducted any spawning ground counts in Puget Sound or coastal watersheds in the state of Washington?"

Answer: The Bureau of Indian Affairs has not.

2. through 6.: Not applicable.

D. Fishery Data.

1. Question: "Has the federal government conducted any surveys to determine the amount of Indian fishing gear being used in watersheds of the state of Washington, either on or off reservation?"

Answer: The Bureau of Indian Affairs has not.

2. through 6.: Not applicable.

E. Catch Data.

1. Question: "Has the federal government conducted any surveys to determine the annual total harvest by particular Indian tribes of a specific salmon species from any Puget Sound or coastal watershed of the state of Washington?"

Answer: The Bureau of Indian Affairs has not.

2. through 7.: Not applicable.

  
Area Director