7-13-1973

Docket Entry 287 - Filed Plaintiffs response to game Defendants Motion to dismiss or to delay and request to determine motions to strike affirmative defenses

CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing document to which this certificate is attached, to the attorneys of record of plaintiff, defendant, on the 11th day of July, 1973.

UNITED STATES ATTORNEY

By C S Harrigus

CERTIFICATE OF SERVICE

I certify that in accordance with Local Rule 5, a copy of the foregoing document was delivered to Judge GEORGE H. BOLDT on July 11, 1973.

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For All Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JUL 13 1973

EDGAR SCOFIELD, CLERK

By _____ Deputy

UNITED STATES OF AMERICA,

Plaintiff,

QUINAULT TRIBE OF INDIANS on its own behalf and on behalf of the QUEETS BAND OF INDIANS; MAKAH INDIAN TRIBE; LUMMI INDIAN TRIBE; HOH TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE; SQUAXIN ISLAND TRIBE OF INDIANS; SAUK-SUIATTLE INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION; UPPER SKAGIT RIVER TRIBE; STILLAGUAMISH TRIBE OF INDIANS; and QUILEUTE INDIAN TRIBE;

Intervenor-Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant,

THOR C. TOLLEFSON, Director, Washington State Department of Fisheries; CARL CROUSE, Director, Washington Department of Game; and WASHINGTON STATE GAME COMMISSION; and WASHINGTON REEF NET OWNERS ASSOCIATION,

Intervenor-Defendants.

CIVIL NO. 9213

PLAINTIFFS' RESPONSE TO GAME DEFENDANTS' MOTION TO DISMISS OR TO DELAY, AND REQUEST TO DETERMINE MOTIONS TO STRIKE AFFIRMATIVE DEFENSES

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COME NOW the plaintiffs in this case, through Special Assistant United States Attorney Stuart F. Pierson, and herewith jointly present (a) their response to the Game defendants' motion to dismiss and to delay, and (b) their request that the Court determine their pending motions to strike. As grounds therefor, plaintiffs state:

A. The motion to dismiss is without merit and should be denied.

1. The plaintiff tribes reserved a special right to fish at their usual and accustomed places, which right may not be limited by State regulation except upon a showing of necessity for conservation.

2. *Mescalero v. Jones* fails to support a 12(b)(6) motion to dismiss because:

a. There is supreme federal law in this case which specially limits the State's regulatory power;

b. Plaintiffs have alleged discriminatory regulation by the State defendants;

c. Plaintiffs have alleged impairment of a federally reserved right; and

d. Defendants have ignored their duty to carry out the purposes of the treaties.

3. The Game defendants' equal footing argument is totally without merit.

4. Recognition of the plaintiff tribes' special fishing right raises no problems of equal protection.

B. The Game defendants' petition for certiorari in *Puyallup II* cannot be bootstrapped into an excuse for further delay in this case.

1. *Puyallup II* does not involve the fundamental issues presented in this case.

2. A decision in *Puyallup II* will not decide this case.

C. The Court should now determine the pending motions to strike in the interest of expeditious conduct of the trial.

WHEREFORE, plaintiffs respectfully request the Court to:

(1) deny the Game defendants' motion to dismiss;

(2) deny the Game defendants's motion to delay judgment;

(3) grant the plaintiffs' motions to strike affirmative defenses; and

(4) issue an opinion stating that the Game defendants' arguments on those motions are all without merit in this case.

DATED this 11th day of July, 1973.

Respectfully submitted,

Stuart F. Pierson

STUART F. PIERSON
On behalf of all plaintiffs,
following consultation with
counsel.

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EXHIBIT A

Nos. 72-481 and 72-746

In the Supreme Court of the United States

OCTOBER TERM, 1972

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, PETITIONER

v.

THE PUYALLUP TRIBE

THE PUYALLUP TRIBE, PETITIONER

v.

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PUYALLUP TRIBE

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9213
#287

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Treaty, statutes, and regulation—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-481

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, PETITIONER

v.

THE PUYALLUP TRIBE

No. 72-746

THE PUYALLUP TRIBE, PETITIONER

v.

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PUYALLUP TRIBE

OPINIONS BELOW

This Court's previous opinion in this case is reported at 391 U.S. 392. The original opinion of the Supreme Court of the State of Washington is reported at 70 Wash. 2d 245, 422 P. 2d 754; that court's opinion after remand (Pet. App. No. 72-481) is reported at 80 Wash. 2d 561, 497 P.2d 171. The findings

and conclusions of the Superior Court for Pierce County, Washington on remand (App. 21–25) and the opinion of that court (App. 12–21) are unreported.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on May 4, 1972. Timely petitions for rehearing were denied by that court on June 23, 1972. The petition for a writ of certiorari in No. 72–481 was filed on September 21, 1972. On September 20, 1972, Mr. Justice Douglas extended the Tribe's time for filing a petition for a writ of certiorari to November 20, 1972, and the petition in No. 72–746 was filed on that date. Both petitions were granted on March 19, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the State of Washington's laws and regulations absolutely prohibiting the Puyallup Indians from net fishing for steelhead trout at their usual and accustomed fishing places, rather than limiting sports fishing so as to preserve at least some measure of the Indians' net fishery, are necessary for the conservation of fish and do not discriminate against the Indians.

STATUTES AND TREATY PROVISIONS INVOLVED

The Treaty of Medicine Creek, 10 Stat. 1132, Article III, provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, * * *.

Revised Code of Washington 77.16.060 provides in relevant part:

> It shall be unlawful for any person to lay, set, use, or prepare any * * * net * * * of any kind, in any of the waters of this state with intent thereby to catch, take or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: *Provided*: That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of nongame fish.

Revised Code of Washington 77.08.020, provides in relevant part:

> As used in this title or in any rule or regulation of the [game] commission, "game fish" include * * * Salmo gairdnerii commonly known as steelhead * * *.

STATEMENT

The Puyallup Tribe is a federally recognized Indian Tribe with a Constitution and by-laws approved by the United States under the Indian Reorganization Act of 1934, 48 Stat. 984. It is one of the tribes which was a party to the Treaty of Medicine Creek signed on December 26, 1854, and ratified by the Senate on March 3, 1855, 10 Stat. 1132–1137. See *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 394–395. The treaty, in return for the Tribe's relinquishment of large areas of land (Article I), reserved an area of land for the Tribe's exclusive use (Article II), and also reserved to the Tribe the right "of taking fish, at all usual and accustomed grounds and stations * * *

in common with all citizens of the Territory" (Article III). For many years the Tribe conducted an active net fishery, for subsistence and commercial purposes, in and near the Puyallup River. See *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 396. See also App. 130–132.

In 1963, the Departments of Game and Fisheries of the State of Washington initiated this action against the Puyallup Tribe and some of its members, to determine if the Tribe and its members are subject to the State's laws prohibiting net fishing at their usual and accustomed places or whether they are exempted from those laws by rights granted them in the Treaty of Medicine Creek. The suit also sought to enjoin them from violating state fishing regulations. The trial court held that the Puyallup Indians have no treaty rights under the Treaty of Medicine Creek, and entered a permanent injunction restraining the Puyallup Indians from fishing in any manner contrary to the laws of the State of Washington (Pet. App. No. 72–481, pp. 563–564).

The Supreme Court of the State of Washington reversed. *Department of Game* v. *Puyallup Tribe*, 70 Wash. 2d 245, 422 P. 2d 754. That court confirmed the Tribe's treaty-protected fishing rights and remanded the case to the trial court with directions that the decree should reflect that "(1) If a defendant proves that he is a member of the Puyallup Tribe; and (2) He is fishing at one of the usual and accustomed fishing places of that tribe; (3) He cannot be restrained or enjoined from doing so, unless he is violating a statute, or regulation of the [State] Departments

[of Fisheries and of Game] promulgated thereunder, *which has been established to be reasonable and necessary for the conservation of the fishery.*" 70 Wash. 2d at 262, 422 P. 2d at 764 (emphasis added).

On review, this Court affirmed. *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392. It held that the Tribe and its individual members hold reserved fishing rights under the Treaty of Medicine Creek that are independent of their reservation[1] of land.[2] In measuring those rights in light of the words "in common with" the Court rejected the argument that the Tribe had no right beyond that of other citizens and quoted from *United States* v. *Winans*, 198 U.S. 371, 380, that "[t]o construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' * * * would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more'." 391 U.S. at 397.

The Court held that Indian off-reservation fishing rights are subject to state conservation laws only if those laws give adequate recognition to the treaty rights, are " 'necessary for the conservation of fish' " (*id.* at 399, 401–402, n. 14) and do "not discriminate against the Indians" (*id.* at 398). The Court remanded the case for a determination of "[w]hether the prohibition of the use of set nets in those fresh waters was a 'reasonable and necessary' * * * conservation meas-

[1] See 391 U.S. at 394, n. 1. The question of the present existence of the reservation of land is pending in the Court of Appeals for the Ninth Circuit. *United States* v. *State of Washington*, No. 73–1793.

ure" (*id.* at 401), admonishing that "any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'" (*id.* at 403).

Different positions have been taken on remand by two Departments of the State of Washington—The Department of Fisheries with respect to salmon, and the Department of Game with respect to steelhead trout. Prior to the trial on remand and after public hearings and consultation with tribal leaders (App. 112), the Department of Fisheries changed its regulations to permit regulated Indian net fishing for salmon in the Puyallup River, though it maintained its prohibition of such fishing in Commencement Bay, where the fish mill before going upstream, and in the upper portions of the river where the fish spawn (App. 16, 22–23, 104–106; P. Exhibit 6).[2] The Department of Fisheries also curtailed certain commercial fishing near the Puyallup River to increase the runs available in the river (App. 113; P. Exhibit 5).

The Department of Game (which regulates steelhead trout fishing), in contrast to the Department of Fisheries, maintained the position that it had taken before this Court's decision, namely, that so long as Indians and non-Indians are treated alike it has no duty to recognize any special Indian fishing rights. The Department of Game continued its total prohibition of net fishing for steelhead trout (App. 16, Tr.

[2] This Exhibit, which is the text of the regulation, is lodged with the Clerk.

25;[3] see also the Brief of the Department of Game in this Court, pp. 16–17).

After a trial on remand consisting primarily of the testimony of three biologists (App. 31–175), the Superior Court entered findings of fact and conclusions of law (App. 21–26) as well as a written opinion (App. 12–21). The court found that the regulations imposed by the Department of *Fisheries* were necessary for the conservation of fish and were "not unreasonable as far as the Indians are concerned" (App. 23). But the court held that the Department of *Game's* "regulations are not shown to be reasonable and necessary" for the conservation of fish (App. 24), particularly in light of the court's finding that while Indian net fishing is totally prohibited, sports fishermen are allowed an annual take of 12,000 to 18,000 steelhead trout per year (App. 23–24). The court also held that there was no showing by either Department justifying an injunction against the Indians (App. 24–25).

Both sides appealed to the Supreme Court of the State of Washington. That court essentially affirmed the decision of the trial court insofar as it held the regulations of the Department of Fisheries valid. It reversed the trial court's decision as to the Department of Game, however, and upheld the Department's regulations totally prohibiting fishing by net for steelhead trout for the year 1970. It ruled that new fishing regulations for the Puyallup Tribe must be made each year, supported by "facts and data that show the reg-

[3] "Tr." refers to the transcript of the trial on remand, which is lodged with the Clerk.

ulation is necessary for the conservation" of the species of fish in question (Pet. App. No. 72-481, p. 576). The court further ordered that the injunction against the Tribe should be reinstated subject to modifications consistent with the opinion of the court (*id.* at 577). In upholding the 1970 prohibition of net fishing for steelhead trout, the court held that "the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river" (*id.* at 573).

Both the Department of Game of the State of Washington and the Puyallup Tribe petitioned this Court for review of the judgment of the Supreme Court of Washington insofar as it concerned the validity of the laws and regulations of the State of Washington prohibiting net fishing for steelhead trout. None of the parties sought further review of the decision concerning the regulations of the Department of Fisheries (concerning salmon fishing).[4] On March 19, 1973, the Court granted the petitions for certiorari and consolidated the cases.[5]

[4] The Tribe continues to take exception to the extent of fishing permitted it by the Department of Fisheries but has sought review only of the Department of Game's total failure to recognize its fishing rights. It is the Tribe's view that the willingness of the Department of Fisheries to recognize Indian treaty rights will make possible a resolution of practical differences with that Department. Litigation to quantify the fishing rights of a number of Tribes including the Puyallup has been brought by the United States. *United States* v. *Washington*, Civil Action No. 9213, U.S.D.C., W.D. Wash.

[5] A conditional cross-petition by a tribal member, Ramona C. Bennett, No. 72-5437, remains pending.

SUMMARY OF ARGUMENT

1. The question left by this Court to be decided on remand after its prior decision in this case was whether the State of Washington's total prohibition of Indian net fishing in the Puyallup River was necessary for the conservation of fish and, as applied to their treaty protected rights, did not discriminate against the Indians. In the trial on remand the evidence showed that after this Court's decision the Department of Fisheries of the State of Washington changed its position and permitted a regulated net fishery for salmon in the Puyallup River. The trial showed, however, that the Department of Game, by contrast, had continued to prohibit Indian net fishing for steelhead trout and that this prohibition was based on the State's allocation of the entire take of steelhead trout to sports fishermen rather than upon any requirement for conservation of fish. The evidence also showed that as many as 18,000 steelhead trout are taken annually in the Puyallup River by sports fishermen while all Indian net fishing for steelhead trout remains prohibited. The trial court thus correctly found that the State of Washington had failed to show that its prohibition of Indian net fishing for steelhead trout was necessary for the conservation of fish and did not discriminate against the Indians.

2. In reversing the decision of the trial court as to steelhead trout, the Supreme Court of the State of Washington applied an incorrect legal standard that is not in accord with this Court's prior decision in this case. The Supreme Court of Washington held that an Indian net fishery for steelhead trout could not be

permitted because the catch of the "sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead trout for escapement necessary for the conservation of the steelhead fishery in that river" (Pet. App. No. 72-481, p. 573). This holding subordinates the Tribe's rights to those of sports fishermen, permitting an Indian net fishery only if there are sufficient excess fish after sports fishermen have been satisfied. This total subordination of the Indians' treaty rights is contrary to this Court's prior decision in this case and the precedents on which it was based, which recognize that the treaty provision involved here, and provisions similar to it, confer on the Indians a special right to continue to fish for trade and sustenance in accordance with their traditional way of life and present needs.

The Department of Game continues to argue as it did when this case was previously before this Court that the treaty gives members of the Tribe no fishing rights not held by all other citizens of the State. This argument was fully considered and properly rejected by this Court in its previous decision in this case, and is also foreclosed by the previous judgment of the State Supreme Court in this case which this Court affirmed.

3. If this Court agrees with our contention that the State of Washington has failed to show that its absolute prohibition of net fishing for steelhead trout is necessary for the conservation of fish and does not discriminate against the Indians, then, in light of the long history of this litigation, it should order that the Indians be afforded their treaty rights forthwith and

that future regulations of Indian net fishing for steelhead trout fully recognize and safeguard those rights.

ARGUMENT

I

THE TRIAL COURT CORRECTLY FOUND THAT THE STATE OF WASHINGTON FAILED TO SHOW THAT ITS TOTAL PROHIBITION OF INDIAN NET FISHING FOR STEELHEAD TROUT WAS NECESSARY FOR THE CONSERVATION OF FISH AND DID NOT DISCRIMINATE AGAINST THE INDIANS

The question left by this Court to be decided on remand was whether the State's total prohibition of net fishing in the Puyallup River was necessary for the conservation of fish and, as applied to their treaty-protected rights, did not discriminate against the Indians. Unless the State could show this, this Court decided, its prohibition of net fishing by Puyallup Indians was invalid, as contrary to their treaty rights. In order to decide these issues, a new trial was held on remand. It consisted principally of testimony by three witnesses, all biologists and experts in fisheries of the northwest coast. Two of the experts, Mr. Millenbach and Mr. Lasater, were employes of the State of Washington (App. 32, 74). The third, Mr. Heckman, was an employee of the Federal Bureau of Sports Fisheries and Wildlife (App. 143).

1. Mr. Lasater, of the State Department of Fisheries, testified that the Department of Fisheries, which regulates salmon fishing, had changed its views since this Court's previous decision in this case, and no longer opposed a regulated gill-net Indian fishery in the Puyallup River. He explained: "When the decision was made, and we read it, then it, in part, said that we

were wrong, and that there was a special Indian treaty right, and to us, gave us an obligation to recognize their right, and we also have our increased ability, fishery science has advanced * * *. We are more confident of our ability to handle the fish runs in an area like this, a special Indian Fishery, than we were at the time" (App. 102). Accordingly, he testified, the Department had adopted regulations permitting a limited Indian net fishery for salmon in the Puyallup River (see P. Exhibit 6; App. 111–114). He stated that the regulations prohibit fishing in Commencement Bay where the fish mill and in their spawning grounds, but that the Department has determined that in between those two areas a net fishery can properly be allowed (App. 104–105, 111–115, 125).

Mr. Lasater also described a series of studies and of meetings with the public and with leaders of the Tribe in which regulations as to a fishing season, numbers of days of the week in which fishing would be allowed, and net types were developed (App. 111–114). He testified that a portion of the regulation limiting the length of nets to one-third of the river's width was taken from the Puyallup's own regulations.[6] He described successful Indian self-regulation of salmon fishing on other reservations in the State which had resulted in increased hatchery runs, permitting increased Indian net fisheries (App. 103).

In sum, therefore, Mr. Lasater's testimony showed that while prohibiting all net fishing in the Puyallup River might be an easy way of conserving fish, it is

[6] Tr. 217. We have lodged a copy of the Tribe's present regulations with the Clerk.

by no means the only way or a necessary way, and thus that protection of the treaty rights of the Indians—including the right to a regulated net fishery—and proper conservation of fish are not mutually exclusive.

2. The testimony of Mr. Millenbach of the State's Department of Game reflected the difference between the legal position urged by his Department and that of the Department of Fisheries. His testimony was concerned less with conservation requirements than with the economic considerations underlying the State's policy of reserving steelhead trout for sports fishing. He emphasized that the number of steelhead available to sportsmen had been greatly increased by stocking the Puyallup River with fish produced at fish hatcheries financed by hunting and fishing license fees (App. 33), but he admitted that the hatcheries are also supported by the federal government (App. 35) and apparently by reparations paid by power companies (App. 37). Mr. Millenbach testified that in recent years sportsmen had been catching an average of more than 12,000 steelhead annually in the Puyallup River (App. 37).[7] By including the value of transportation, food and drink consumed, sporting equipment sold and the like, he estimated that the economic value of a fish taken for sport is $60, which he claimed to be far greater than that of a fish taken for subsistence or commerce (App. 37, 53–54).

Mr. Millenbach's testimony indicated that the De-

[7] He testified on cross-examination that in one recent year the known sports catch on the Puyallup River was 18,000 steelhead trout (App. 52).

partment of Game, in contrast to the Department of Fisheries, had not considered any compromise position that would allow Indian net fishing with limitations as to location, seasons, days of the week, sizes of nets, total take or the like. Although he testified in general terms that it would be "contrary to conservation" to allow net fishing for steelhead in the Puyallup River (App. 43), his testimony on cross-examination made clear that the State's prohibition of net fishing is the result of its allocation of the entire take of steelhead trout to sports fishing and would not otherwise be required to preserve the fishery (App. 62–63):

> Q. Let me ask you this: you said a net fishery would be absolutely impossible in terms of your definition of conservation. What if we cut down the number of fish a sportsman is allowed to catch, or the number of days, whatever, and we allowed a highly regulated, self-regulating Indian net fishery. Would that be possible to still reach the same number of fish being caught now?
>
> A. It would be possible, yes.
>
> Q. Why don't you do that?
>
> A. We do not have the authority to do it.
>
> Q. What do you mean, you don't have the authority to do it? You make the regulations.
>
> A. By the laws of the State of Washington, steelhead may not be taken with a net.
>
> Q. If you could, would you do it?
>
> Mr. CONIFF: I object, Your Honor. I think the witness has answered the question.
>
> The COURT: I think he has made himself clear.

> Mr. SENNHAUSER: One moment, Your Honor.
>
> Q. Mr. Millenbach, does it make any difference to conservation, whether 2,000 or 3,000, whatever, fish are caught by sportsmen or whether they are caught by Indians?
>
> A. Conservation alone, no.
>
> Q. It makes no difference?
>
> A. It would be possible to rebalance the numbers caught and still maintain conservation. There is a surplus of fish or harvestable part that can be cropped in a system of conservation.
>
> Mr. SENNHAUSER: No further questions.

This testimony, by the Department of Game's own witness, we submit, not only fails to establish that the State's prohibition of the taking of steelhead by net in the Puyallup River is necessary for the conservation of fish, but affirmatively shows that this total prohibition is not necessary for that purpose.

3. Any remaining doubt as to whether an absolute prohibition of net fishing for steelhead in the Puyallup River is necessary for the conservation of fish was dispelled, we submit, by the testimony of the remaining witness, Mr. Heckman, a federal biologist. He testified specifically that a properly regulated net-fishery for steelhead trout on the Puyallup River would be "commensurate with" conservation (App. 152). He based this view partly on his experience with the successful Quinault fishery for steelhead trout in the Quinault and Queets Rivers in Washington where the Indians carry on a commercial gill-net fishery for steelhead and a successful sports fishery within the

reservation (App. 148, 152, 167, 174–175). He was also familiar with the gill-net fishery for steelhead in the Columbia River (App. 152). He was asked specifically whether a net fishery on the Puyallup River "would adversely affect the spawning escapement for steelhead" on that river and responded that "if properly regulated * * * an optimum spawning escapement" could be achieved (App. 152).[8]

In sum, the State of Washington has totally prohibited the Indian net fishery for steelhead trout on the Puyallup River while permitting sports catches averaging more (perhaps substantially more) than 12,000 fish annually, and the State has failed to show that this prohibition does not discriminate against the Tribe's treaty rights or that it is a "'reasonable and necessary'" conservation measure. *Puyallup Tribe* v. *Department of Game, supra,* 391 U.S. at 401–403. Accordingly, the trial court on remand was correct, in our view, in holding (App. 20):

> * * * In view of the large number of steelhead caught in the Puyallup River, it would seem that the Game Department is not in a position to say that the Indians can be entirely excluded from the exercise of any special rights. It is within the province of the Department to adopt a regulation setting forth such details as the time in which steelhead may be taken and by what means. It should compute how much escapement should be allowed so that a comprehensive regulation may be formulated protecting the special rights of the Indians while still adequately conserving this natural resource.

[8] An optimum escapement requires a certain number of fish to be harvested so that fish do not die from overpopulation of the river. See App. 114 (testimony of Mr. Lasater).

II

THE HOLDING OF THE SUPREME COURT OF WASHINGTON, THAT INDIAN NET FISHING CAN BE ALLOWED ONLY IF THERE IS A SURPLUS AFTER SPORTS FISHING AND NECESSARY ESCAPEMENT, RELEGATES INDIAN FISHING TO A SUBORDINATE ROLE IN VIOLATION OF THE INDIANS' TREATY RIGHTS AS INTERPRETED IN THIS COURT'S PRIOR OPINION IN THIS CASE.

This Court held, in *Puyallup Tribe* v. *Department of Game, supra,* 391 U.S. at 398:

> The [treaty] right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U.S.C. § 1401(a)(2). But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

In upholding, as applied to the Puyallup Tribe in 1970, the State's classification of the steelhead as a game fish, R.C.W. 77.08.020 (p. 3, *supra*), and its absolute prohibition of taking game fish by nets, R.C.W. 77.16.060 (p. 3, *supra*), the court below reasoned (Pet. App. 72–481, p. 573):

> [T]he catch of the steelhead sports fishery alone in the Puyallup River leaves no more

> than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river.

On its face, therefore, the decision discriminates against the Tribe's treaty rights. It subordinates the Tribe's rights to those of sports fishermen and gives the Tribe only what might be left after sports fishermen of unlimited number have had their take. Moreover, the opinion below does not discuss the trial court's finding that the Department of Game had not shown the prohibition to be necessary for the conservation of fish, and it ignores the substantial evidence supporting that finding (see point I, *supra*). While it directs the Department of Game to review annually the possibility of a netting season for the Tribe, the opinion below clearly permits the State to reserve steelhead trout exclusively for sports fishing. As a practical matter, therefore, in light of the State's past deference to game fishermen, the opinion offers little prospect that any substantial Indian net fishing would ever be allowed. Indeed, in the one "hearing" that has been held on the subject by the State Game Commission since the judgment below, the large sports take was permitted to continue without abatement and the Indian fishery was again totally prohibited.[9]

The treaty, however, does not state that the Indian fishing rights it guarantees are to be subordinate to the fishing rights of others; nor was the treaty intended to provide the Indians merely with a right to

[9] Information supplied by the Department of the Interior and documented in depositions filed in *United States* v. *Washington*, Civil Action No. 9213, U.S.D.C., W.D. Wash. See note 4, *supra*.

recreational fishing. As this Court recognized with respect to the fishing rights treaty of another Northwest coastal tribe in *Tulee* v. *Washington*, 315 U.S. 681, 684 (a decision strongly relied upon by the Court in its *Puyallup* opinion):

> * * * [W]e are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their Tribes.

Fishing was and, to the extent permitted, has remained the way of life of the Northwest coastal tribes.[10] Indeed, it was the vital importance of fishing to their way of life which led to the inclusion of language in the treaties with virtually all of the Northwest Coastal tribes, such as the Puyallup, reserving a right to fish at the Indians' usual and accustomed places.[11] As this Court explained in *United States* v. *Winans*, 198 U.S. 371, 381 (also relied upon in *Puyallup*), in construing treaty language essentially similar to that involved here:

[10] The historical dependence of Northwest Indians upon fishing for their subsistence and livelihood as well as its continuing economic and cultural importance are recounted in *Sohappy* v. *Smith* (*United States* v. *Oregon*), 302 F. Supp. 899, 907 (D. Ore.).

[11] Some ten treaties with the tribes of the Northwest were negotiated on behalf of the United States and executed in 1854 and 1855 by Governor Isaac Stevens. Each of the treaties included a phrase respecting fishing virtually identical to that found in Article III of the Medicine Creek Treaty (see *supra*, p. 2). 2 Kappler, *Indian Affairs—Laws and Treaties*, pp. 495–497, 501–506, 510–512, 521–531, 536–545 (1903). See generally Friends' Service Committee, *Uncommon Controversy, Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians*, pp. 18–40 (1970).

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. * * * [T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. * * * They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." * * *

Winans thus recognized that the Indians made reservations in the treaties not only of tracts of land upon which to live, but also of rights to fish both within and outside those lands.[12] It is, of course, axiomatic that such reserved rights should be interpreted so as to fulfill the purposes for which they were reserved.[13] The reserved fishing right of the Puyallup

[12] "It is clear that the reservation [land] was intended only as a residence, and the Indians were to remain free to roam and fish at their usual places." *Skokomish Indian Tribe* v. *France*, 320 F. 2d 205, 210 (C.A. 9).

[13] The interpretation of reserved rights has had its fullest development in cases involving water rights. See, *e.g.*, *Winters* v. *United States*, 207 U.S. 564; *Arizona* v. *California*, 373 U.S. 546, 595–601. Justice McKenna, who wrote the Court's opinion in *Winters*, had written the Court's opinion in *Winans* three years earlier, and relied on that decision in *Winters*, 207 U.S. at 577. The rationale of the two cases is the same. *Arizona* v. *California* recognized the reserved right of Indians along the Colorado River to satisfy their present and future needs for irrigation from that river's already heavily appropriated flow because only such a measure of water rights would fulfill the purposes for which the United States reserved the water for the Indians. 373 U.S. at 600–601.

Indians, therefore, should be interpreted to permit the members of the Tribe to meet their continuing needs for subsistence and trade, fully recognizing that the right is not exclusive (*Puyallup, supra,* 391 U.S. at 398), and that it is necessarily limited by the depletable nature of the resources and thus may be regulated to prevent their destruction (391 U.S. at 399, 401–403). But to diminish the treaty right to one of mere sports fishing in common with other citizens would give "the Indians 'no right but such as they would have without the treaty'" (391 U.S. at 397) and thus would effectively abrogate the treaty right. Such a result is foreclosed by this Court's prior *Puyallup* decision (391 U.S. at 397–398) and, as we have shown in point I, *supra* (and as the trial court found) it is in any event not necessary for the conservation of fish.

Moreover, Congress has recently reaffirmed the continuing vitality of treaty provisions guaranteeing Indian fishing rights. Public Law 280, both as originally enacted and as amended,[14] explicitly excepts from the extensions of state civil and criminal jurisdiction authorized thereunder all rights "afforded under Fed-

[14] Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360; Act of April 11, 1968, Title IV, 82 Stat. 78, 25 U.S.C. 1321.

eral treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." And, after extensive hearings in 1964, the Senate let die in committee two proposals to terminate Indian fishing rights on the West Coast. Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, on S.J. Res. 170 and S.J. Res. 171, 88th Cong., 2d Sess. These hearings documented the continuing need of the Tribes to exercise their fishing rights for their sustenance and livelihood and refuted claims that the abolition of Indian fishing rights was required for the conservation of fisheries. If, indeed, Indian treaty rights are in effect to be abolished, Congress, rather than States, must act, and should give full consideration to compensating the Tribes for any rights taken away.

In its brief in this Court the Department of Game of the State of Washington argues that any special treaty right the Indians may have had was abolished by the admission of the State into the Union on an equal footing with other states, and that the treaty phrase "in common with all citizens of the Territory" means the Indians are bound by state fishing regulations whether or not those regulations are shown to be necessary for the conservation of fish (Br. 8–17). The Department relies primarily on this Court's decisions in *Ward* v. *Race Horse*, 163 U.S. 504, and *Kake* v. *Egan*, 369 U.S. 60.

These are the same authorities and the same arguments that the Department of Game relied on when the case was last here (Resp. Br. in No. 247, October

Term, 1967, pp. 22–36). After full consideration, those arguments were rejected in this Court's previous opinion in this case, 391 U.S. at 397–400.[15] And, as the court below held (Pet. App. No. 72-481, p. 571), these contentions of the Department are also foreclosed by the State Supreme Court's previous judgment in this case, which this Court affirmed.[16]

In sum, the question presented on the remand from this Court in *Puyallup* was not whether the Indians have a special fishing right or whether that right exempts them from state regulation except as shown to be necessary for the conservation of fish. Those principles had previously been established by this Court's

[15] See also *id.* at 401, n. 14, final two paragraphs. The only decision which ever embraced the "equal footing" doctrine as a limitation on the exercise of Indian treaty rights after statehood was *Ward* v. *Race Horse*, 163 U.S. 504. At the time it was rendered, *Race Horse* was out of harmony with a prior Supreme Court ruling on the effect of statehood acts on preexisting Indian rights. *Blue Jacket* v. *Board of Commissioners of Johnson County (The Kansas Indians)*, 5 Wall. 737, 755–756. Any doubts about the inapplicability of the doctrine to Indian treaties were laid to rest with the tacit overruling of the "equal footing" holding of *Race Horse* less than a decade later in *United States* v. *Winans*, *supra*, 198 U.S. at 382–384. See also *McClanahan* v. *Arizona State Tax Commission*, No. 71–834, decided March 27, 1973. And see the Memorandum for the United States as *Amicus Curiae* in Nos. 246, 247, and 319, October Term, 1967, in which the same arguments now made by the Department of Game were answered.

[16] Nothing in *Mescalero Apache Tribe* v. *Jones*, No. 71–738, decided March 27, 1973, suggests that a treaty provision expressly providing an off-reservation right can be ignored or abrogated by a State. Nor is there any conflict between that decision and the Court's previous decision in this case. The treaty is the "express federal law to the contrary" referred to in the passage from *Mescalero* (slip op., p. 4) quoted by the Department of Game (Br. 15).

decisions and were reaffirmed in *Puyallup*. The question on remand was whether the State's regulations of that right were reasonable and necessary for the conservation of fish and did not discriminate against the Indians. As we have shown, the State's prohibition of all Indian net fishing for steelhead trout in the Puyallup River is not necessary for the conservation of fish and gives no recognition to the special Indian fishing right guaranteed by the treaty, and thus, under this Court's prior decision, was correctly found by the trial court to be an invalid diminution by the State of a federal treaty right. Cf. *Kolovrat* v. *Oregon*, 366 U.S. 187; *Hauenstein* v. *Lynham*, 100 U.S. 483.

III

IN LIGHT OF THE HISTORY OF THIS LITIGATION, AN APPROPRIATE REMEDY SHOULD ASSURE THAT THE INDIANS ARE AFFORDED THEIR FISHING RIGHTS FORTHWITH

If the Court agrees with our contention that the State has failed to show that its total prohibition of Indian net fishing for steelhead trout in the Puyallup River is necessary for the conservation of fish and does not discriminate against the Indians, then the question of fashioning an adequate remedy arises. This case has been in litigation since 1963. During most of that time the Tribe has been deprived of all of its treaty fishing rights, and it still remains deprived of those rights with respect to steelhead trout. State administrative determinations and judicial decisions have failed during this period to provide adequate protection for the rights secured to the Puyallup Tribe under the Treaty of Medicine Creek.

This Court, of course, cannot itself fashion fishing regulations for the Puyallup River. But it can and should hold that, as applied to treaty-protected Indians, the State's total prohibition of net fishing for steelhead trout violates the Treaty of Medicine Creek, and that such fishing must be permitted forthwith. This Court should also hold that in adopting new regulations the Department of Game must act in a manner that is both procedurally and substantively fair to the Tribe. Substantively, it must sufficiently curtail sports fishing to assure the Tribe an adequate subsistence and commercial fishery. Procedurally, the State should be required to provide an opportunity for the Tribe's views to be heard before it adopts regulations affecting the Tribe. As a guide, we suggest the criteria that have been accepted by both the State of Oregon and the various tribes there in handling the same problem in that State. As stated in *Sohappy* v. *Smith* (*United States* v. *Oregon*), 302 F. Supp. 899, 912 (D. Ore.):

> The State must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the tribal entities are interested parties to any regulation affecting the treaty fishing right. They, as well as their members to whom the regulations will be directly applicable, are entitled to be heard on the subject and, consistent with the need for dealing with emergency or changing situations on short notice, to be given appropriate notice and opportunity to participate meaningfully in the rule-making process.

In the interim, until valid regulations are adopted by the State after appropriate proceedings, the Puyallup Tribe should be allowed to enforce its own regulations of steelhead fishing by members of the Tribe and to adopt and enforce further regulations designed to assure a sufficient escapement for spawning.[17] As the record in this case shows, Indian tribes have without state supervision successfully regulated fishing by their members within reservations although that regulation necessarily affects fishing elsewhere in the stream system (see pp. 12, 15–16, *supra.*). Tribes have also regulated off-reservation fishing by their members. See *Settler* v. *Yakima Tribal Court,* 419 F. 2d 486 (C.A. 9), certiorari denied, 398 U.S. 903, decision on remand, Civil No. 2378, E.D. Wash., May 5, 1971;[18] *Off-Reservation Fishing Rights of Indians in Washington and Oregon,* 69 I.D. 68. Here, the Tribe's interest in maintaining the fishery on the Puyallup River is as great as that of the State, and should be relied upon unless and until the State adopts a regulatory program for

[17] Such Tribal regulations are, of course, valid and enforceable against tribal members regardless of the coexistence of valid state regulation of the same activities. See authorities cited *infra.* Department of the Interior regulations also authorize assistance by the United States, where needed, in regulating off-reservation fishing. See 25 C.F.R. Part 256. These Department of the Interior regulations were not intended to pre-empt state law and thus, in our view, an Indian fishing off-reservation in violation of valid tribal regulations would have no federal defense to enforcement against him by the State of its fishing laws. See *State* v. *Gowdy,* 1 Ore. App. 424, 462 P.2d 461.

[18] We have lodged a copy of the opinion with the Clerk.

steelhead trout fishing that gives adequate recognition to the Tribe's treaty rights.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed on the Tribe's petition and affirmed on the questions raised by the petition of the Department of Game.

Respectfully submitted.

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