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Docket Entry 325 - Filed Pretrial Brief of the U.S.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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

PRETRIAL BRIEF OF THE UNITED STATES

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COMES NOW the United States, through Assistant United States Attorney Stuart F. Pierson, and pursuant to the Pretrial Schedule ordered in this case herewith submits its pretrial brief.

I

INTRODUCTION

A. Reason for this Suit.

This case was begun in September, 1970, upon the complaint of the United States. Various parties have intervened on both sides. It is safe to say that all parties share the expectation that this decision in this case will comprehensively and understandably resolve issues that have been festering in this district for many years. This is, of course, a high expectation, especially in view of the recurrent nature of the Indian fishing rights controversy through numerous other court decisions. We feel, however, that the expectation is justified and will be fulfilled in light of the extent and depth of preparation and presentation of the various parties' positions.

B. Prior Proceedings.

In addition to the normal discovery and intervention activities, several major pretrial proceedings have taken place in this case. In February, 1972, plaintiffs applied for a temporary restraining order and preliminary injunction against the Game defendants regarding enforcement of their regulations outside reservation boundaries on the Quillayute River. A full hearing was had, after which the application was denied.

In January, 1973, the Game defendants moved for summary judgment and plaintiffs reiterated their motion to strike affirmative defenses. A full hearing was had; the defendants' motion was denied and plaintiffs' motion was taken under advisement. In June and July, upon special order, the Game defendants moved to dismiss or to delay judgment. Responses have been filed and the motion is now pending.

Through these prior proceedings, the legal positions and arguments of the plaintiffs and the Game defendants have become fairly clear. The legal position of the Fisheries defendant, while not yet extensively briefed, has been recently described by Thor C. Tollefson, Director of the Department of Fisheries:

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

A. Yes.

Q. Please describe that policy, including when and under what circumstances it originated.

Q. Following our interpretation of several court cases involving Indian treaty fishing rights, including the Puyallup cases in the U.S. Supreme Court and Washington State Supreme Court, and the Sohappy case in the U.S. District Court for Oregon, we have taken the view that Indians have a special right not enjoyed by others to fish at their usual and accustomed fishing places off their reservations. We also take the view under those same court decisions that the Department of Fisheries may regulate such off-reservation fishing and that our

regulations must be reasonable and necessary for conservation and meet appropriate standards. With that as a policy, we have provided off-reservation fishing time and opportunity to Indian tribes.

Q. Are you familiar with the term "fair share" or "fair and equitable share" as they relate to Indian treaty fishing?

A. Yes.

Q. What is your understanding of those terms?

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

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

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

Q. What difficulties does the department face in attempting to provide the Indians with a fair and equitable share of the harvest for salmon?

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

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

A. Yes. These terms sound fine in principle but in practice they they are too vague to give us any standard by which we can determine how to manage the fishery in such a way that the Indian fishermen have an opportunity to catch their fair share of the harvest. All of our regulations which restrict the amount of time and impose gear limitations, such as net size, are reasonable and necessary for conservation. When you have two or more groups of fishermen fishing on the same runs of salmon at different times, any regulation of one group is interrelated with the regulation of the other group. Regulation of one group is as much a conservation necessity as regulation of the other group. If we had an objective standard by which we could measure the Indian share, the tests of "reasonable and necessary for conservation" and "fair share" would be more meaningful.

Written direct testimony of Thor C. Tollefson, pp. 2-5.

It would be unnecessary and unduly time consuming to attempt in this pretrial brief to set forth extensively the legal arguments which the United States presents in this case. A comprehensive post-trial brief will fulfill this function best in light of an established factual record. This brief will be directed, therefore, toward a description of the basic elements of proof which the United States anticipates presenting at trial, a summary of the legal basis for the presentation of such proof and a summary of the relief we seek.

C. Outline of the Position of the United States.

The United States has brought this action on its own behalf as a party to the treaties involved and as a trust guardian of Indian tribes, and on behalf of selected Indian tribes 1/ in western Washington for whom it has a trust responsibility. The United States asserts that each of those tribes holds a reserved right to fish outside reservation boundaries. These rights were secured in treaties with those tribes or their predecessors and are linked to the marine and freshwater locations where they fished during treaty times.

Since each tribe's right is a special, reserved right, it is unlike the privilege of non-Indians to fish under State law. It is federally protected under the supreme law of the land; and it must, therefore, be given treatment by the State independent of State regulation of fishing by non-Indians.

These treaty fishing rights may not be qualified by any State action; for they do not derive from, or depend upon, State authority or power. The State's authority to regulate these rights is limited to an appropriate exercise of its police power. That is, it may impose and enforce such regulations only if, in doing so, (a) it does not discriminate against the tribes' special rights, (b) its regulations meet appropriate standards, and (c) it has shown those regulations to be reasonable and necessary for conservation of the resource. Before imposing any restriction on the tribes' exercise of these treaty fishing rights, the State defendants must: deal with the matter of those rights as a subject separate and

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1/ The selection of the seven tribes named in the United States complaint (Puyallup, Muckleshoot, Nisqually, Skokomish, Makah, Quileute and Hoh) is not meant to indicate a determination that only those tribes hold the rights asserted. There are other western Washington tribes which also hold such treaty fishing rights.

distinct from that of fishing by others; so regulate the taking of fish that the tribes and their members will be accorded an opportunity to take, at their usual and accustomed places by reasonable means feasible to them, a fair and equitable share of all fish which the defendants permit to be taken from any given run; and establish that their regulations are the least restrictive which can be imposed consistent with assuring the necessary escapement of fish to conserve the run involved.

The United States contends that the Game defendants have unlawfully qualified the tribes' treaty rights by wholly refusing to recognize those rights. By this fact and facts of individual conduct, they have discriminated against the tribes' rights. By their refusal to recognize those rights and by other conduct, the Game defendants have ignored and violated appropriate standards; and, by their refusal to recognize those rights and their attempt to set steelhead apart as a species not subject to the tribes' harvest, they have failed to show their regulations reasonable and necessary for conservation.

The United States contends that, while the Fisheries defendant has recognized that some of the plaintiff tribes hold special treaty rights to fish outside reservation boundaries, its regulations unlawfully qualify the tribes' rights, in that (a) they fail to recognize that the right is in the nature of a reservation which may be understood only by referenece to the present and future needs of the tribes; (b) they fail to recognize that the tribes' usual and accustomed fishing places are far more extensive than those currently in use; and (c) they fail to recognize that a scheme of equitable

apportionment of the harvestable resource would not accord the tribes' the full respect and protection due their treaty fishing rights.

The United States contends that the State defendant has unlawfully qualified the tribes' treaty fishing rights in the enactment of leglislation which authorizes or directs the Departments of Game and Fisheries, or other State agencies, to act unlawfully in dealing with either the tribes' rights or the resource from which they are entitled to take.

II

OUTLINE OF EXPECTED PROOF

The Supreme Court has on numerous occasions noted that while the courts cannot vary the plain language of an Indian treaty, such treaties are to be construed:

> as 'that unlettered people' understood it, and, 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules,' Choctaw Nation v. United States, 119 U.S. 1, 7 Sup.Ct. 75, 30 L.Ed. 306; Jones v. Meehan, 175 U.S. 1, 20 Sup.Ct. 1, 44 L.Ed. 49.' United States v. Winans, supra. [198 U.S. 371, 49 L.Ed. 1089, 25 Sup.Ct.Rep. 662]
> Northern Pacific Railway Co. v. United States, 227 U.S. 355, 366, 33 S.Ct. 368, 57 L.Ed. 544 (1913)
>
> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.
> Tulee v. Washington, 315 U.S. 681, 684, 62 S.Ct. 862, 86 L.Ed. 1115 (1942).

Sohappy v. Smith, 302 F.Supp. 899, 905 (D. Ore. 1969).

The United States proof in this case will be in four basic areas. Although it is not necessarily reflected in the order of proof, the logical order of the presentation of the United States' proof in these areas will be:

1. Proof describing the meaning and anticipated affect of the treaty language at issue in this case; such proof will depend primarily upon testimony of anthropological experts.

2. Proof describing the current policies, practices and pattern of State regulations affecting Indians fishing pursuant to their claimed treaty rights; this proof will depend primarily upon agreed biological facts, testimony of State officials and testimony of Indian witnesses.

3. Proof describing alternatives to current State regulations which promise to provide treaty Indians a greater share of the harvestable resource; such proof will be based primarily on the testimony of State officials, agreed biological testimony, testimony of Indian witnesses and testimony of a biological expert of the Bureau of Sport Fisheries and Wildlife.

4. The United States and counsel for the various plaintiff tribes will present Indian witnesses who will describe, among other things, their current fishing practices and the effects of State regulations thereon.

A. Admitted Facts.

Many of the facts in this case have been admitted, either through stipulations in the pretrial order or by answers to requests for admissions. The Final Pretrial Order and the responses the requests for admissions set forth those facts at length. In addition to the stipulated facts stated in the pretrial order, the plaintiffs will offer specific factual admissions taken from the responses to their requests for admissions. We do not propose to repeat those admitted facts or our other proof in detail here. It should be sufficient here simply to outline the nature of our anticipated proof.

B. Indian Life Around Treaty Times.

Through admitted facts and anthropological testimony, we will show that the Indian groups, whose treaty rights are held by the plaintiff tribes, fished extensively for anadromous fish (salmon and what is now classified steelhead trout), before, during and after treaty times. These Indians depended primarily on such fishing and were concerned to retain their fishing rights as non-Indians began settling in western Washington.

The treaty Indians specific places of fishing varied, by run, by season, by year, by water condition and by choice. The various bands were used to and accustomed to fishing broad areas of marine and freshwater. Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, it is impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations. Such an inventory is possible only by designating entire water systems. There are four principal reasons why any list of usual and accustomed fishing places for treaty Indians is necessarily incomplete:

1. Fishing stations which were also the sites of weirs and permanent villages are more easily documented through archaeological evidence, historical records, and ethnographic studies than are riffles where fish were speared. The nature of gear used has tended to influence the recording of sites.

2. Indian fishermen, like all fishermen, shifted to those locales which seemed most productive at any given time. The productivity of local sites varied with (1) volume of water in a stream at a particular season of year, (2) amount of mud or silt present at a given time, and (3) alteration in the water course due to flooding, log jams, and other natural causes. The use of particular sites varied over time. There were traditional fishing locations which were used for as long as people could remember, but these were not fixed and unchanging because the water courses themselves were not immutable or unalterable.

3. A number of important fishing sites recorded in treaty times are no longer extant because of post-treaty manmade alterations in the watershed. Diversion of water for power purposes has lowered the carrying power of some streams and

dried up others; engineering for flood control has altered the course of rivers; canal-cutting has lowered lake levels; and land fill operations have obliterated still other fishing stations. When sites are demolished, their existence is eventually forgotten.

4. Other fishing sites are still extant, but are no longer used by Indian fishermen because the appropriate Indian gear for those particular sites has been outlawed or because competing users, not necessarily fishermen, have made utilization of these sites by Indian fishermen infeasible. In still other instances extant usual and accustomed sites are no longer fished because the species taken in treaty times have been destroyed by post-treaty events. Alteration of water temperature and water level, industrial pollution, and the fencing of spawning creeks by priate land owners are some of the causes. When use of these sites are discontinued, their former importance is gradually forgotten.

Furthermore, documentation as to which Indians used specific fishing sites is incomplete. Many fisheries can be documented in the historical record for which user groups are unspecified. Conversely, mention of user groups, where it occurs, is not necessarily complete or exclusive. George Gibbs, a central figure in the drafting, signing and implementation of the treaties, was drawing on information gathered during treaty times, when he said in 1877:

> As regards the fisheries, they are held in common, and no tribe pretends to claim from another or from individuals, seigniorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season.

The fishing areas used by treaty Indians whose rights are held by the plaintiff tribes were basically of five kinds: (1) freshwater lakes; (2) freshwater streams and creeks draining into the various inlets; (3) shallow bays and estuaries; (4) the inlets and the Sound; and (5) the straits and ocean.

Customary use rights varied according to the type of locale and the gear being used. Winter villages were located along the fishing streams, at the heads of inlets near the mouths of such streams, and on protected coves and bays. The major requirements in the location of winter villages were shelter from the elements and from surprise attack, suitable beach or bank for launching canoes and for storing them above high water mark, and access to firewood, freshwater, and fishing stations.

The larger and more important villages were usually located at particularly lucrative fishing places: at the forks of a river where weirs could be set up; at the outlet of a river into a lake; and at the heads of inlets near the mouths of the salmon streams. Other large villages were located on the saltwater in protected coves and bays.

During the winter season, if people went out for fresh food stores, they used the fishing areas in closest proximity to their villages. During the spring, summer, and fall, people moved about to fish at more distant fishing grounds.

In general, the freshwater fisheries were controlled by the locally resident population. During the winter season, the local residents were the exclusive users. At other seasons use rights at these locations and others within the territory of a particular group would be extended to visitors from other localities.

Visitors from beyond the immediate locality would arrive to take advantage of particular runs not available in their streams or not running at that particular time in their locality. Certain of these visitors would have use rights because they were related to local residents. Others might request permission to fish and such permission was normally extended if amicable relations existed between the local people and the visitors.

The situation with regard to saltwater fisheries appears to have been slightly more complicated. Shallow bays where salmon, flounder, and other fish were speared were often gathering places for people from a wider area. This was especially true if shellfish beds were present. In the deeper waters of the bays, huge flotillas of canoes would gather to troll for the fish as they gathered in the bays just prior to their entry into the rivers.

Meeker (1905:64) offers a firsthand account of fishing activities at the end of May or early June in 1853:

> As we drew off on the tide from the mouth of the Puyallup River, numerous parties of Indians were in sight, some trolling for salmon, with a lone Indian in the bow of his canoe, others with a pole with barbs on two sides fishing for smelt, and used in place of a paddle, while again, others with nets, all leisurely pursuing their calling, . . .

People living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish. At some of the major fishing locations people from other drainage systems would also congregate to join in the fishing.

The deeper saltwater areas, the Sound, the straits, and the open sea, served as public thoroughfares, and as such, were used as fishing areas by anyone travelling through such waters.

Private property rights to saltwater fisheries were recognized reefnet locations in the straits. With the Lummi reefnet locations, individuals owned specific locations on the reef which they received by heirship. Owners of locations then hired relatives and friends to work with them in preparing the gear and fishing the site.

The nature of "rights" varied from individual inheritance of privately owned sites to shared access to specific trolling areas. Such rights were respected by Indians who did not share them. The latter might ask permission to use specific locations and/or gear and this would usually be granted. Trespass was rare and usually led to friction.

Indian control of fishing was by accepted, customary modes of conduct rather than by formal regulations involving enforcement and sanctions. With regard to anadromous fish, it was necessary that the first fish from the run be treated ritually.

Controls over fishing were necessary in cooperative efforts which required coordination by someone who organized and directed the group effort. The construction of a weir was usually a cooperative effort, a number of men working under the direction of a leader. The entire community usually had access to the weir, the leader regulating the order of use and the times at which the weir was opened to allow upstream escapement for spawning and/or supply of upriver fishermen.

Techniques such as spearing or trolling in saltwater which involved individual effort were not regulated or controlled by anyone else.

Generally, individual Indians had primary use rights to locations in the territory which they resided and secondary use rights in the natal territory (if this was different) or in

territory where they had consanguineal kin. Subject to such individual claims most groups claimed exclusive fall fishing rights in the waters near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups.

C. Negotiating and Signing the Treaties.

During the negotiations of the treaties the Indian leaders expressed concern over their right to continue to resort to their fishing places. They were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and game there. The records of the treaty negotiations reflect this concern and also the assurances given to the Indians on this point as inducement for their acceptance of the treaties. The Indians had also received assurances from other non-Indians that they would be compensated for lands which were being settled on and for loss or destruction of native property incident to non-Indian settlement. The Indians were concerned that these things be done by mutual agreement.

The United States was concerned to extinguish Indian title to the land in Washington Territory legally, in order to forestall friction between Indians and settlers and between settlers and the government. The Act creating Oregon Territory provided that Indian land title should be extinguished by treaties. Before Indian title had been extinguished, the Donation Act threw open land to settlement and induced non-Indians to migrate and take up land claims. Until treaties were concluded and reservations were established, it was impossible to enforce the federal trade and intercourse laws regulating traffic in liquor and commercial relations in Indian country.

There is no mention of restrictions as to purpose, time, or method of taking either in the treaties themselves or in the official records relating to treaty proceedings. No such restrictions were indicated by the commissioners or contemplated by the Indians. The treaty commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture but also as a significant element of trade with the settlers. Both parties wanted these aspects to continue -- the Indians in order to sustain their prosperity and the government in order to promote the prosperity of the Territory. Both parties intended the Indians to continue full use of their fishing places, even though most lands adjacent to fishing waters were ceded.

Generally, the Indian signatories to the treaties were individuals who had some sort of friendly contact with non-Indians. A few spoke Chinook jargon and probably most were men of importance in their communities, although they were not necessarily the most important men. The "head chiefs" and "leading men" were selected by Simmons and Stevens, sometimes with the aid of the "head chiefs". The grounds for choice were friendliness to Americans, real or apparent status in their communities, and ability to communicate in Chinook jargon. The "sub-chiefs" and "leading men" were intended by the United States to represent the bands to which they were thought to belong. Various "bands" and "fragments of tribes" were aribitrarily assigned a subordinate status to other "tribes", each of which had been assigned a "head chief". The latter were taken to represent not only the group to which they belonged,

but all other groups which had been declared subordinate to it. The signatories, in the United States' view, had the capacity to alienate land belonging to such groups. On the Indian side, there was no precedent for signing legal documents, nor was there any culturally sanctioned method of formally alienating land.

It is hazardous to judge the extent of communication of either specific terms or of underlying purposes and effect without a transcript of the actual Chinook jargon used to interpret the treaties. We have no knowledge that any Indian present at any of the treaties understood English. It is a matter of record that many, if not most of those present, did not even understand Chinook jargon. The official interpreter, Shaw, spoke no Indian language and had to use Chinook jargon to interpret the treaties, which were then re-interpreted into the various Indian languages by Indians who understood the jargon. This double translation resulted in the Indians receiving the information at third hand and increased the potential for confusion.

Chinook jargon was a trade medium of limited vocabulary and simple grammar. Both Indians and non-Indian witnesses to the treaty negotiations have commented upon its adequacy to express precisely the legal concepts embodied in the treaties.

D. State Law Affecting Indian Fishing.

The Game defendants and state statutes absolutely prohibit taking steelhead by any other method than restricted angling, and in doing so have set that species of fish apart for the exclusive use and benefit of sport fishermen. In enforcing

those statutes; and its regulations, the Game defendants have subjected members of the plaintiff tribes to arrest, prosecution, trial, imprisonment, fine and confiscation, and to threats of the same, despite the fact that those members were fishing pursuant to their treaty right and despite the discriminatory nature of the steelhead regulations which have not been shown either necessary or reasonable to conserve the resource.

The Fisheries defendant, while attempting to reach an accommodation through special regulations for Indian Fishing, has consistently promulgated and enforced its regulations of salmon harvesting upon an assertion of plenary power to regulate treaty Indian harvest in the same manner as it regulates non-Indian harvest. The result has been: Criminal prosecution and the treat of prosecution, use by tribal members of many fewer than all of their usual and accustomed fishing places, and a share of the harvestable resource available to the plaintiff tribes which is both inequitable and incommensurate with full respect for their fishing rights reserved by treaty.

The State defendant has continued to follow a legislative policy at odds with the plaintiff tribes' claimed treaty rights and the supreme federal law which protects them. By permitting the Game Department to take one position (denying the existence of any distinct Indian treaty fishing rights) while the Fisheries Department takes a clearly conflicting position (recognizing special rights held by the tribes under treaty), the State has contributed to tribal members' fear and confusion and to the dismay which publicly exists.

E. Conservation Alternatives.

There are available to the Game defendants and to the Fisheries defendant feasible alternative methods for regulating harvest by non-Indians which promise to provide a greater share of the harvestable fish to the plaintiff tribes. While (as with current regulations) these alternatives are not absolutely precise in their result, they would provide a sufficient volume of the resource to fulfill the present and future needs of the tribes.

F. Issues of Admissibility.

The United States anticipates interposing objections to admissibility of portions of the written direct testimony of the defendants' officers and witnesses, as noted on the face of the exhibits in which that testimony is contained. As a general matter, the following contentions have guided our interposition of those objections:

1. It is irrelevant to determining the nature and extent of the plaintiff tribes' treaty fishing rights, or the range of permissible State regulation thereof, (a) that some fish are bred in hatcheries which are financed (in whole or part) by sports or commercial fishermen, or (b) that sports or commercial fishermen have spent certain amounts of money in pursuit of their fishing effort, or (c) that sports or commercial fishermen will spend less, or earn less, money if the State were fully to respect the tribes' treaty rights, or (d) that agents of the State distribute surplus hatchery fish to some of the plaintiff tribes, or (3) that any portion of the total volume of a run is taken outside the jurisdiction of the State of Washington.

2. Defendants' witnesses are not competent to describe how, when or why members of the plaintiff tribes fish, absent specifically cited foundation.

3. Defendants' witnesses are not competent to interpret court decisions for the guidance of the Court.

4. Events and matters of significance must be confined and supported in terms of time, place, circumstances and persons involved.

5. Witnesses must be confined to their knowledge or expertise.

6. Statements of significance should be offered by the declarant.

III

SUMMARY OF APPLICABLE LAW

A. The Treaty Terms.

The language of Article III of the Treaty of Medicine Creek has been agreed upon as typical of the treaty provisions at issue in this case. That provision has six essential parts:

1. "The right . . .
2. "of taking fish, . . .
3. "at all usual and accustomed grounds and stations, . . .
4. "is further secured . . .
5. "to said Indians, . . .
6. "in common with all citizens of the Territory, ..."

First, the treaty expressly provides that the Indians were given a "right", notwithstanding the Game defendants' reliance on non-analogous dicta in *Ward v. Race Horse*, 163 U.S. 504, 514 (1896). See *United States v. Winans*, 198 U.S. 371, 382-838 (1905).

Second, the right is one "of taking fish". There is nothing in this provision to suggest that the right was to be confined to a specific method of taking fish. While the treaty does not guarantee the Indians a particular mode of fishing, it does guarantee that, before the State can prohibit any type or manner of taking, the prohibition must be justified on the standards set forth in *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968).

Third, the Indians' right of taking fish is geographically limited only by the extent of those places which were their usual and accustomed fishing grounds and stations.

Fourth, the Indians' right was "secured", a term which Webster's Third New International Dictionary defines as "to relieve from exposure to danger . . . to shield."

Fifth, the right of taking fish was secured to the Indians alone. There is no express or implied attempt to secure rights to non-Indians. Indeed, such a provision would be absurd in a treaty between the United States and Indians, where the Indians ceded all of their land and assets and the United States reserved to them certain lands and rights to fish. The treaty was an exchange of assets for solemn guarantees between the two treating parties.

Sixth, the Indians' right was to be exercised in common with the non-Indians of the area. That this part of the article was meant merely as a description of how the Indians could expect to exercise their reserved right has been emphasized by the Supreme Court:

* * *

> In *United States v. Winans,* 198 U.S. 371, this Court held that, despite the phrase "in common with citizens of the territory," Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area; and in *Seufert Bros. Co. v. United States,* 249 U.S. 194, a similar conclusion was reached even with respect to places outside the ceded area.

Tulee v. State of Washington, 315 U.S. 681, 684-685 (1942). This holding was reaffirmed in *The Puyallup Tribe v. Department of Game,* 391 U.S. 392, 397 (1968). In determining how the Supreme Court's guidelines should be administered, the Washington Supreme Court has held:

> (1) If a defendant proves that he is a member of [a treaty] 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 Departments promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery.

Department of Game v. The Puyallup Tribe, 70 Wn.2d 245, 262 (1967), *aff'd,* 391 U.S. 392 (1968), *quoted at* 80 Wn.2d, at 561, 565 (1972). That court further held that the burden of proof to show that regulations are reasonable and necessary (when challenged by a treaty Indian fishing at a usual and accustomed place) rests with the State. The courts have advised that the limitations on the application of state police powers in regulation of treaty Indian fishing are more restrictive than those concerning the scope of the other police powers of the state. *Puyallup Tribe v. Department of Game,* 391 U.S. 392, 402, Note 14; *Holcomb v. Confederated Tribes of the Umatilla Reservation,* 382 F.2d 1013 (9th Cir. 1967); *Makah v. Schoettler,* 192 F.2d 224 (9th Cir. 1951); *Sohappy v. Smith,* 302 F.Supp. 899 (D.Ore. 1969).

B. Leading Cases.

In *Tulee v. State of Washington, supra,* the Supreme Court has advised:

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

315 U.S., at 684-685. Since *Tulee,* numerous courts have expressly recognized the historical dependence of the Indian parties to the Northwest treaties upon fishing for their subsistence and livelihood. The United States District Court in Oregon has found:

> From the earliest known times, up to and beyond the time of the treaties, the Indians comprising each of the intervenor tribes were primarily a fishing, hunting and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture. They were heavily dependent upon such fish for their subsistence and for trade with other tribes and later with the settlers. They cured and dried large quantities for year around use. With the advent of canning technology in the latter half of the 19th Century the commercial exploitation of the salmonid resources by non-Indians increased tremendously. Indians, fishing under their treaty-secured rights, also participated in this expanded commercial fishery and sold many fish to non-Indian packers and dealers.

Sohappy v. Smith, 302 F.Supp. 899, 906 (D. Ore. 1969). That court then went on to hold that the State must apply the purposes of the treaties to its current regulatory scheme as it affects the exercise of the Indians' rights:

> In determining what is an 'appropriate' regulation one must consider the interests to be protected or objective to be served. In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy coequal with the conservation of fish runs for other users.

302 F.Supp., at 911.

The Idaho Supreme Court has recently registered its agreement with the need to recognize and to respect the purpose underlying the reservation of the Indians' fishing rights:

> The gathering of food from open lands and streams constituted both the means of economic subsistence and the foundation of a native culture. Reservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaty. Settlement of the west and the rise of industrial America have significantly circumscribed the opportunities of contemporary Indians to hunt and fish for subsistence and to maintain tribal traditions. But the mere passage of time has not eroded the rights guaranteed by a solemn treaty that both sides pledged on their honor to uphold. As part of its conservation program, the State must extend full recognition to these rights, and the purposes which underlie them.

State v. Tinno, 94 Id. 759, 497 P.2d 1386, 1393 (1972). See also *People v. Joindreau*, 384 Mich. 539, 185 N.W.2d 375 (1971); *State v. Gurnoe*, 39 Wis.2d 390, 192 N.W.2d 892 (1972).

In analyzing the purpose of the treaty provisions securing the rights of salmon and shellfish harvesting, the Ninth Circuit has observed:

> [The Indian parties to the Treaty of Point No Point] were concerned with possible loss of their sources of food -- 'berries, deer and salmon'. The first to speak said in part: 'I wish to speak my mind as to selling the land. Great Chief' What shall we eat if we do so? Our only food is berries, deer and salmon -- where then shall we find these? I don't want to sign away all my land, take half of it, and let us keep the rest. I am afraid that I shall become destitute and perish for want of food.'
>
> After the Indians had been assured that the reservation would only be a place at which they must make their homes, the Indians discussed the proposal among themselves and on the following day assented to the treaty. At that time one of the tribe said: 'My heart is good. I am happy since I have heard the paper read and since I have understood Gov. Stevens, particularly since I have been told that I could look for food where I pleased and not in one place only.

* * *

> We are willing to go up the Canal since we know we can fish elsewhere. We shall only leave there to get salmon, and when done fishing will return to our houses.'
>
> It is clear that the reservation 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 (9th Cir. 1963).

The plaintiff tribes' treaty fishing rights are reserved rights:

> 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.
>
> * * *
>
> . . . the treaty was not a grant of rights to the Indians, but a grant of rights from them, -- a reservation of those not granted.
>
> * * *
>
> Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, 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.'

United States v. Winans, 198 U.S. 371, 381 (1905). The full measure of those treaty rights must be sufficient for the tribes' present and future needs. *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 596-601 (1963); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988; 330 F.2d 897 (9th Cir. 1956); 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924.

IV

SUMMARY OF RELIEF REQUESTED

A. Declaration of the Tribes' Rights.

As the first pillar of appropriate relief in this case, the United States seeks a declaration that each of the plaintiff tribes holds a distinct, special right to take fish, reserved to it under the applicable treaty. That right entitles the Tribes' members to take from the anadromous fish resource in the State of Washington a share which is equitable by comparison to the share taken by non-Indians and which is responsive to the tribe's present and future needs.

B. Injunction.

As the second pillar of relief, the United States seeks an affirmative and prohibitory, permanent injunction requiring the State, its agents and those acting in concert with them immediately to terminate their regulation of fishing by the plaintiff tribes outside reservation boundaries, until, by valid and appropriate procedures, they adopt regulations or enact statutes designed fully and fairly to respect and protect the tribes' treaty rights and to carry out the purposes of the treaties. At the least such actions must:

1. Provide the tribes an opportunity to take, by means feasible to them, a share of the resource which is both fair by comparison with the share available to other user groups and adequate to the tribes' needs;

2. Consider perpetuation and improvement of the size and reliability of the fish runs as the sole controlling objectives of regulation of Indian fishing;

3. Adopt regulations on an annual or seasonal basis only upon specific supporting and current facts and data;

4. Enforce their regulations with due regard for the person and property of Indian fishermen;

5. Consider as fundamental to their regulatory choice the cultural and economic value of fish harvesting to Indians;

6. Accept as prima facie proof of the tribes' needs, the tribes' estimates thereof;

7. Adopt, as their own, tribal proposals for regulation of the Indian fishery unless it can be shown that such tribal proposals are wasteful or are inadequate for necessary conservation of the specific run involved;

8. Protect off-reservation Indian fishing from interference by non-Indians in those instances when the State's regulation has limited the area of Indian fishing to less than the full extent of the tribes' usual and accustomed fishing places; and

9. Leave to the tribes in the first instance the authorization and regulation of the off-reservation fishing of their members. The first of such regulations shall be held ineffective until reviewed and approved by this Court.

Finally, the United States seeks an order continuing the Court's jurisdiction for such other and further relief as may be just and proper.

V

CONCLUSION

The pleadings indicate that the Game defendants and the Fisheries defendant will present contradictory positions. The Game position is clearly wrong as a matter of law where its actions and the true meaning of its "fair share" interpretation are viewed in a factual context.

After many years of prosecution and harassment of treaty Indian fishermen, the record in this case should clearly expose the invalidity of State regulation of off-reservation fishing. A comprehensive and detailed decision will serve the dual goals of finally protecting the Indians rights and resolving a troublesome public dispute.

DATED this 14th day of August, 1973.

STAN PITKIN
United States Attorney

STUART F. PIERSON, Special Assistant
to the United States Attorney

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS
SFP:csg/ld
9213

United States Department of Justice

UNITED STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

August 13, 1973

Clerk of Court
United States District Court
Western District of Washington
Post Office Box 1935
Tacoma, Washington 98401

Re: United States of America, et al. v. State of Washington, et al., Civil No. 9213, U.S.D.C. W.D. Wash.

Dear Sir:

Please file the enclosed Pretrial Brief of the United States in the above-captioned case. Please indicate the date of filing on the copy of this letter to be returned to this office in the enclosed self-addressed envelope.

Sincerely,

8-15-73

STAN PITKIN
United States Attorney

Stuart F. Pierson

STUART F. PIERSON
Special Assistant to
the United States Attorney

Enclosures