8-16-1973

Docket Entry 327 - Filed Pretrial Brief of Plaintiffs Muckleshoot, Squaxin, Sauk-Suiattle, Skokomish and Stillaguamish tribes

DAVID H. GETCHES
DOUGLAS R. NASH
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone (303) 447-8760

JOHN SENNHAUSER
LEGAL SERVICES CENTER
5308 Ballard Avenue, N.W.
Seattle, Washington 98107
Telephone (206) 789-2450

Attorneys for Plaintiffs Muckleshoot, Squaxin, Sauk-Suiattle, Skokomish, and Stillaguamish Tribes.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al, Plaintiffs, vs. STATE OF WASHINGTON, et al, Defendants.	CIV. NO. 9213 PRETRIAL BRIEF

I. INTRODUCTION

This pretrial brief is filed on behalf of the Muckleshoot Indian Tribe, Squaxin Island Tribe of Indians, Sauk-Suiattle Indian Tribe, Skokomish Indian Tribe and Stillaguamish Tribe of Indians. Each of these tribes and their members have endured years of uncertainty while the full nature and extent of their off-reservation fishing rights secured by treaties with the federal government have gone unrecognized. This has been due in large part to the fact that no court has had before it factual and legal contentions that have enabled it to determine and articulate such matters fully. The legal system has failed to resolve these matters of critical importance to the parties in

this case and, indeed, to the citizenry generally. Presumably the failure has been one not inherent in the system but in the circumstances that neither the facts of cases which have been litigated nor the records made in the numerous cases involving Indian fishing rights have lent themselves to the kind of determination that hopefully this case will produce.

The tribes now repose their confidence and trust in this United States District Court believing that the vast body of evidence which has been prepared and the factual and legal arguments that will be made on their behalf will be heard and considered objectively and a fair decision rendered consistent with the law.

These plaintiff tribes are substantially in agreement with the several points made in the Pretrial Brief of the United States. This separate pretrial brief is filed by them primarily to emphasize to the court the vital importance to them of this case which will turn upon an interpretation of a treaty made between them and their co-plaintiff, the United States of America. Furthermore, the tribes wish to emphasize to the Court their contentions, which differ slightly from those of the United States, and certain legal principles which deserve further emphasis at this time in order to assist the Court by providing background for this complicated case.

II. OUTLINE OF THE POSITION OF PLAINTIFF TRIBES

Necessary to a full understanding of this case is extensive evidence concerning the life habits of salmon. It is also important to understand the nature of the regulatory schemes of the Washington State Departments of Fisheries and Game and the fishing practices of the Indians. Of paramount importance, however, is evidence concerning negotiation and signing of the treaties. This is so because the case is,

above all, not a fisheries management case, not a case which seeks accommodation between state, federal, and tribal governing power, not a civil rights case, but a case of treaty construction, application, and enforcement.

Once the meaning and effect of the treaties have been established the task is one of applying the law. If one principle is clear in this case it is that the law of the State of Washington must yield if it is in any way in conflict with a treaty of the United States of America. Article VI of the United States Constitution says in pertinent part "that all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution and Laws of any State to the Contrary notwithstanding." The supremacy clause is equally applicable to international treaties and Indian treaties. United States v. Forty-three Gallons of Whiskey, 93 U.S. (3 Otto) 188 (1876); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Thus, it is the first task of this Court to determine the meaning of the treaty language in this case and then to determine to what extent the law (statutes, regulations, policies and practices) of the State of Washington may conflict or interfere with those treaties. It is hoped that at that point the court will be able to fashion relief to provide full safeguards for the treaty rights which are found to exist while providing for the proper exercise of the state's power over activities of persons beyond the scope of the treaties' coverage.

Following is a brief discussion of some of the most important aspects of the law which is vital to the court's consideration of this case. First is a discussion of the rules of construction and interpretation applicable to Indian treaties, and second is a brief discussion of the principle of reserved rights which is regularly applied in situations where Indians

are found to have ceded certain rights or property and retained others. Finally, there is a short discussion of the position of these tribes concerning the application of the Supreme Court's requirement of a showing of necessity for conservation before a state can regulate Indian treaty fishing.

A. Canons Of Indian Treaty Construction And Interpretation

Although the fundamental rules of Indian treaty construction have been variously stated, there are essentially three well defined and well established rules.

The first fundamental rule is that "treaties with Indians must be interpreted as they would have understood them." Choctaw Nation v. Oklahoma, 397 U.S. 620, 630 (1970). The United States Supreme Court has stated the rationale of this principle as follows:

> In construing any treaty between the United States and an Indian tribe, it must always ... be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; and that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have not written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Jones v. Meehan, 175 U.S. 1, 10-11 (1899).

And in another Indian treaty case the court stated that:

> [I]n treaties made with them the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as

> sometimes may be writings expressed in words or act employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.

United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938). Accord, Worcester v. Georgia, 31 U.S. 515 (1832); Stan v. Long Jim, 227 U.S. 613 (1913); Choctaw Nation of Indians v. United States, 318 U.S. 418, 431-432 (1943); State v. Tinno, 94 Ida. 759, 497 P.2d 1386, 1391 (1972); People v. Jondreau, 304 Mich. 539, 185 N.W.2d 375, 377-78 (1571). Cf., State v. Gurnoe, 53 Wis.2d 390, 192 N.W.2d 892, 898 (1972).

In the context of Indian fishing rights, the Supreme Court long ago rejected contentions of the State of Washington that the very treaty language which is here the subject of controversy gave Indians no more rights than other citizens. The Court said of the contentions that Indians "acquired no rights but such as they would have without the treaty":

> This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more. And we have said we will construe a treaty with the Indians 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. ...How the treaty in question was understood may be gathered from the circumstances.

United States v. Winans, 198 U.S. 370, 380-81. In accordance with the principles enunciated in the portion of the Winans opinion quoted here, the Court turned to an examination of the importance to Indians of fishing at the time of the treaties and expansively interpreted the nature and extent of the off-reservation fishing right reserved in the treaties.

In holding that the State of Washington could not exact a fishing license fee from Indians fishing outside their reservation because of the special off-reservation fishing rights secured to them by the same treaty language which this Court is called

650

upon to construe, the Supreme Court followed the same approach. It stated:

> From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we 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 tribe. It is our responsibility tosee 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, 684-85.

A second rule of Indian treaty construction is that doubtful expressions are to be resolved in favor of the Indian parties to the treaty. McClanahan v. State Tax Comm'n of Arizona, ___ U.S. ___, 36 L.Ed.2d 129, 137 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930).

The rule of treaty interpretation that requires unclear phrases in treaties with Indians to be resolved in their favor was well stated in an important Indian water rights case.

> [B]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purposesof the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the "double sense" which might sometime be urged against them.

Winters v. United States, 207 U.S. 564, 576-77 (1908). See also, Standing Rock Sioux Tribe v. United States, 182 Ct. Cl. 813 (1968).

A third important canon of Indian treaty construction is that Indian treaties are to be constructed in favor of the Indians.

This principle was stated by the United States Supreme Court in Choctaw Nation of Indians v. United States, supra, at 431-432:

> [O]f course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the the written words to the history of the treaty, and negotiations, and the practical construction adopted by the parties.... Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

Tulee v. Washington, supra; United States v. Shoshone Tribe, supra.

As the evidence in this case unfolds, it will be incumbent upon the court to determine just how the Indian parties to the treaties in question must have understood the provision with respect to the fishing rights they reserved. It is this meaning -- what the Indians must have intended -- that must be accorded to the treaty language. Any ambiguities which then remain must be resolved in favor of the Indians. And, throughout the process of treaty interpretation, the overall axiom that the treaties must be construed liberally in favor of Indians must be kept in mind. This has been the consistent approach of courts dealing with Indian treaty cases; the United States Supreme Court has insisted upon no less. It is entirely understandable that the Court should dictate such an approach when treaty making with Indians is placed in its proper context.

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's - length transaction. Rather, treaties were imposed upon them and they had no choice but to consent.

Choctaw Nation v. Oklahoma, supra, 397 U.S. at 630-31.

B. The Reserved Right Doctrine

When the treaties were made with the Indians, the government made certain promises and obligated itself to the Indians in return for cession of vast tracts of land and other rights. To

the extent rights were not expressly given up by the Indians, they were retained by them -- even if they were not expressly mentioned in the treaty. See, Menominee Tribe v. United States, 391 U.S. 404 (1968). As the Pretrial Brief of the United States points out, the plaintiff tribes' treaty rights to fish are reserved rights.

The reserved right principle was first enunciated in the Supreme Court's decision in United States v. Winans, supra. The Court there said:

> [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..... There was a right outside of those boundaries [of the retained lands] reserved "in common with citizens of the territory".

198 U.S. at 381.

The United States Supreme Court has dealt with the extent of reserved rights. In Winters v. United States, supra, the leading case in the field, the Court held that Indian reserved water rights existed to the extent necessary to fulfill the purposes of the reservation. The Winters decision, which was authored by Justice McKenna, who wrote the Winans decision three years earlier, has been followed consistently for 65 years. It is especially instructive to look to the Indian reserved water rights cases in determining the extent to which the state may, if at all, regulate the exercise of the off-reservation fishing right. The purposes of reserving the right must be fulfilled, and state regulations cannot be allowed to interfere with its full exercise.[1]

---

[1] As will be discussed below, the courts have imposed a limitation on the fishing right in cases where its unbridled exercise would destroy the depletable fish resource. Thus, state regulatory authority has been recognized where its exercise is "necessary for conservation". Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

In determining the measure of water rights impliedly, reserved to the Indians along the Colorado River, the United States Supreme Court held that there is a right to sufficient waters to meet all of the present future needs of the Indians' lands, notwithstanding the serious needs of the non-Indian users of the states on either side of river. No less would fulfill the purpose of the reservations, which was found to be to enable agricultural development by the Indians. Arizona v. California, 373 U.S. 546, 599-600 (1963). If this result leaves little or even no water for the white settlers, it is, nevertheless, the inevitable consequence of the treaty. See, United States v. Ahtanum Irrigation District, 236 F.2d 321, 327 (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.

In Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), the Supreme Court found that:

> The purpose of creating a reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining, and advance to the ways of civilized life.

248 U.S. at 89. Consistent with this purpose, the Indians were held to have rights not only to the lands specifically reserved to them, but to the adjacent fishing grounds. In so holding, the Court looked to the circumstances in which the reservation was created including "the power of Congress in the premises, the location and character of lands, the situation and needs of the Indians, and the object to be obtained." 248 U.S. at 87. Pursuing a similar analysis, the Ninth Circuit Court of Appeals upheld a decision of this Court, stating with regard to the same treaty language that is the subject of this case, "it is clear that the reservation was intended only as a residence, and the Indians were to remain free to roam and fish the usual places." Skokomish Indian Tribe v. France, 321 F.2d 205, 210 (9th Cir.

1963). Indeed, some tribes were left with no land base at all.

Numerous courts have concluded, based on historical evidence, that the Indians intended to reserve their right to fish as they had at the time of the treaties. The Supreme Court has stated "we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial custom of their Tribes." Tulee v. Washington, supra at 684. See also, Sohappy v. Smith, 302 F.Supp. 899, 907 (D. Ore. 1969); State v. Tinno, supra, 94 Idaho at 766, 497 P.2d at 1393. As outlined in the Pretrial Brief of the United States, extensive evidence in this case will be offered concerning the importance of fishing to the Indians at the time of the treaties and the circumstances surrounding the treaty negotiations. The tribes submit that this evidence will lead to the inescapable conclusion that they reserved the right to take sufficient fish to meet their subsistence and livelihood needs at their usual and accustomed places, outside their reservations.

Because the fishing right of the plaintiff tribes is a reserved right and because the reserved right extends so far as is necessary to fulfill the purposes of the reservation, it is the contention of the plaintiff tribes that the Department of Fisheries' arguments that the Indians' entitlement is to a "fair and equitable share" of the fishery must be rejected. Looking to the purposes of creating Indian reservations along the Colorado River, the United States Supreme Court rejected soundly the application of the doctrine of equitable apportionment for allocation of water between the Indians and other people in Arizona. Arizona v. California, supra, 373 U.S. at 597.

Fairness and equity may govern where the issue concerns adjustment of rights between individuals whose position before the court is an equal one to begin with. In this case, however, the Indians have a reserved right protected by federal treaty,

while non-treaty fishermen in the State of Washington have merely a privilege which may be regulated by the state in the exercise of its sovereign power. See, Geer v. Connecticut, 161 U.S. 519, 532 (1896). This distinction has been recognized recently by the Supreme Court in a fishing rights case in which it held that any state regulation of Indians exercising a treaty right to fish at their off-reservation usual and accustomed places must be not only reasonable (the standard applicable to state regulation of other citizens) but "necessary for conservation." Puyallup Tribe v. Department of Game, supra at 399 and 401. Thus, "the measure of the legal propriety of those kinds of conservation measures is distinct from the federal constitutional standard concerning the scope of the police power a State." 391 U.S. at 401, n.14. More severe regulation, even prohibition, of non-treaty fishing may be proper. Tulee v. Washington, supra at 685; Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169, 174 (9th Cir. 1963); Sohappy v. Smith, supra at 908 and 911. In acknowledgement of this principle, the United States District Court for the District of Oregon in Sohappy held at p. 908:

> The state may regulate fishing by non-Indians to achieve a wide variety of management or "conservation" objectives. Its selection of regulations to achieve these objectives is limited only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment. But when it is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource.

That the treaty secured right to fish is a reserved right is a matter of law. It will be the task of this Court to find, based upon the evidence in this case, the purpose of the Indians in making that reservation judged by the circumstances

at the time of the treaty and according to the canons of treaty construction discussed above. After the Court has made that finding, it will be in a position to determine whether or not the regulatory schemes of the State of Washington allow the exercise of such rights to the extent necessary to fulfill the treaty purpose.

C. Standards For State Regulation

As discussed above, and as explicated in the Pretrial Brief of the United States, the Supreme Court has recognized a strict limitation of state regulatory power over Indian off-reservation fishing pursuant to treaty; only such regulation as conforms to the requirements set forth by the Court is permissible.

1. Necessity for Conservation

It has been noted that the touchstone requirement for state regulation is a finding that it is "necessary for conservation." These plaintiff tribes contend that until the effect of other applicable regulatory schemes - tribal or federal - which may operate upon the fishery is considered, a determination of necessity cannot be made intelligently. This proposition is rooted not only in common sense, but in established legal principles in the case of Indian fishing.

Regulation of Indian fishing is reposed in tribal and federal authority and the exercise of state power in the area must be seen as supplementary. Tribal enforcement, with prosecutions handled by tribal courts, is the appropriate way to handle most regulation of the exercise of treaty fishing rights.[2] No entities

---

[2]A defendant prosecuted in tribal court has recourse to the federal district courts by means of habeas corpus proceedings. 25 U.S.C. §1303. See also, Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969).

have a greater interest in the proper regulation of such rights than do the tribes themselves. Fishing in violation of tribal regulations is considered to be outside the scope of the treaty right and thus subjects an Indian to prosecution for a state regulation he might be also violating. State v. Gowdy, 1 Ore.App. 424, 462 P.2d 461 (1970); 60 I.D.68, 70 (1962).

More than half a century ago, the Supreme Court in Missouri v. Holland, 252 U.S. 416 (1920), held that the power of a state to manage game within its boundaries is not infringed by a federal treaty and regulations under it which regulate game within the state. The holding was based upon the basic principle under the supremacy clause that the sovereign power of a state must yield to paramount federal power. The same principle is applicable in this case.

Besides being a prerequisite for determining whether state regulation of Indian treaty fishing is proper, recognition of the effect tribal regulations is required to avoid an interference with the tribes' ability to govern themselves. An impairment of the tribes' right to govern their members is the result of confining to the state all regulatory power over the exercise of rights reserved by the tribes in their treaties with the United States.

It is well settled that a state may not establish its jurisdiction over Indians such that it "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." Williams v. Lee, 358 U.S. 217, 223 (1959); see also, Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965); McClanahan v. Arizona State Tax Commission, supra. The Supreme Court has recently indicated in McClanahan that treaties must be read "with this tradition of sovereignty in mind." Consistent with that principle, the general rule that Indians are subject to the operation of state law outside reservation boundaries is inapplicable

where "such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." Mescalero Apache Tribe v. Jones, ___ U.S. ___, 36 L.Ed.2d 114, 119 (1973). The failure of the state to afford the tribe the opportunity to make regulations applicable to Indians exercising treaty rights to fish and to consider the impact of those regulations before determining conservation necessity for imposing state regulation upon the exercise of those rights poses a threat to tribal sovereignty in that it would "infringe on the right of the Indians to govern themselves."

2. Regulation of Treaty Fishing Must Be A Last Resort

A further requirement which the plaintiff tribes urge must be met before necessity for conservation can be found is that the state exhaust other avenues designed to achieve its conservation objectives. Thus, as the Court in Sohappy v. Smith, supra, found, state regulations applicable to Indians exercising treaty secured fishing rights must be the least restrictive which can be imposed consistent with assuring necessary escapement of fish for conservation purposes. Therefore, it is relevant for the Court to inquire in this case as to whether the state has imposed adequate restrictions and prohibitions on non-Indian fishermen before resorting to restriction and prohibition of Indian treaty fishing rights. Likewise, the Court must inquire into the extent to which the state has pursued remedies for rectifying or preventing destruction or damage to the fishery resource from causes such as pollution, stream bed alterations, water diversion, and damming Until such possibilities are explored, the necessity of the state's regulation of Indians exercising treaty rights to fish at their usual and accustomed places as reserved by their tribes in treaties with the United States, for conservation cannot be determined.

3. Procedural Requirements For State Regulations

As the United States points out in its Pretrial Brief, any state authority to regulate Indian treaty fishing rights is limited to such regulations as (a) do not discriminate against the tribes' special rights, (b) meet appropriate standards, and (c) are shown by the state to be reasonable and necessary for conservation of the resource. If anything is clear from the requirements imposed upon the states by the treaties, as interpreted by the United States Supreme Court in Puyallup Tribe v. Department of Game, supra, it is that regulation of Indian treaty fishing may not be undertaken as a routine matter. Not only has the state attempted to impose its regulations upon Indians as a matter of course, but it has failed to show that its regulations measure up to the standards which the Supreme Court requires before imposition of state regulation. It is, therefore, submitted that a prior determination that a proposed state regulation of Indian treaty fishermen meets appropriate standards, is reasonable and necessary for conservation and does not discriminate against the Indians' treaty right to fish should be required.

As the Court is fully aware, and as the record will reflect, the enforcement of state laws upon Indians during protracted litigation creates a presumption that regulation of the treaty right to fish meets the standards which, if found inadequate by a court decision after a full hearing, comes too late to give relief to the Indian litigants. Typically, the fishing season is over sometimes several years past - and a favorable declaration of rights provides only academic satisfaction. This is true not only in criminal cases, but when injunctions are sought by the state such as in Puyallup Tribe v. Department of Game, which began ten years ago and is now before the United States Supreme Court for the second time. To avoid this effective denial of rights, plaintiffs urge that this Court continue its jurisdiction in a manner

that will provide access to it for a prior review of any future fishing regulations proposed to be applicable to Indian fishermen before their attempted enforcement by the state.

II. OUTLINE OF EXPECTED PROOF

The United States and the plaintiff tribes are cooperating in the preparation and presentation of their cases. The proof to be offered by these tribes will be essentially that outlined by the United States in its Pretrial Brief and, therefore, the United States' outline of expected proof is incorporated here.

III. OBJECTIONS TO ADMISABILITY OF DEFENDANTS' EVIDENCE

The plaintiff tribes anticipate interposing objections to admisability of portions of the written direct testimony submitted by defendants as noted on the face of the exhibits in which the testimony is contained. These objections have been formulated in conjunction with counsel for the United States and the contentions regarding them as summarized in the United States' Pretrial Brief are incorporated here.

IV. SUMMARY OF RELIEF REQUESTED

A. Declaration of Rights

These plaintiff tribes seek an appropriate declaratory judgement that:

1. They hold a right distinct from other citizens of the state to take fish at their usual and accustomed places as reserved by them in treaties with the United States, which right entitles persons deriving rights from the tribes to take sufficient fish to fulfill the purposes of the treaty and, thus, to meet their subsistence and trading needs now and in the future;

2. The state may not qualify the right to fish reserved by the tribes in treaties with the United States in any way, and its exercise may be regulated only when such regulation is shown, prior to its enforcement, to be necessary for pre-

servation of the resource after a consideration of any and all applicable tribal and federal regulations, and exhaustion of other methods available to the state for achieving such conservation objective; and

3. All state statutes, regulations, policies, and practices inconsistent with the rights of the tribes as declared by the Court are unlawful as applied to, or as they affect, individual Indians deriving rights from the plaintiff tribes.

B. Injunction

These plaintiff tribes seek injunctions:

1. Requiring the state provide full recognition for Indian treaty fishing rights at the tribes' usual and accustomed places outside their reservations as declared by this Court; and

2. Restraining the state from enforcing or otherwise applying its statutes, regulations, practices, and policies in such a manner as to prevent the exercise of Indian off-reservation treaty fishing rights as they are declared to exist by this Court.

C. Appointment of Master

These plaintiff tribes seek the appointment of a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure, who is acceptable to all parties. The special master shall:

1. Hold such hearings and make such orders as may be necessary to enforce the judgement of this Court;

2. Meet with, assist, and coordinate the efforts of the tribal, federal, and state governments, (a) to assure that Indians with treaty secured fishing rights have an opportunity to take sufficient fish at their usual and accustomed places to meet their subsistence and trading needs and otherwise to fulfill the purposes of the treaties; and (b) to prevent destruction of or serious damage to the anadromous fish resource in the geographic area encompassed by this case in a manner consistent with the Court's declaration of rights; and

3. Report annually to the Court on his activities.

D. Continuing Jurisdiction and Other Relief

The plaintiff tribes also ask that:

1. The Court retain continuing jurisdiction to assure full implementation of its orders, to review determinations and reports of the special master, and to resolve other related and correllary issues, the necessary resolution of which becomes apparent during trial; and

2. They be awarded their costs of suit, attorney fees and expenses, and such other relief the Court may find to be proper.

V. CONCLUSION

When the established law of Indian treaty construction is applied to the facts surrounding negotiation of the treaties involved in this case, these plaintiff tribes believe that the nature and extent of their rights will be perceived clearly. Those rights, as reserved rights, should be determined to be of sufficient scope to provide a means for perpetual maintenance of Indian subsistence and livelihood. The state's attempts to qualify or regulate such rights must fail as in conflict with the supremacy clause as well as an infringement of the tribes' rights. Past attempts of the State of Washington to regulate Indians claiming a fishing right at their off-reservation usual and accustomed fishing places will be shown to be unlawful as inconsistent with the United States Supreme Court mandate that they must be shown to be necessary for conservation.

Determining, at last, the tribe's full measure of treaty fishing rights and the invalidity of the state management and regulatory schemes in the face of those rights, the Court should then turn to the future and provide guidance to the state in recognizing and accommodating the tribe's rights.

DATED: August 14, 1973

Respectfully submitted,

Douglas R. Nash
David H. Getches
Native American Rights Fund

By David H. Getches
David H. Getches

John Sennhauser
Legal Services Center

By John Sennhauser DHG
John Sennhauser

Attorneys for Plaintiffs

664