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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al, Plaintiffs, -vs- STATE OF WASHINGTON, et al, Defendants.	CIVIL NO. 9213 YAKIMA NATIONS OPENING TRIAL BRIEF

The purpose of this intentionally short brief is to indicate to the court the basic overall legal problem, the position of the Yakima Nation and what the evidence will show are methods to correct the basic problem. In some particulars the position of the Yakima Nation is different than that of the United States and some other plaintiffs. Therefore, after receipt of the briefs of plaintiffs and defendants and during trial other briefs will be delivered to the court.

A. BASIC OVERALL LEGAL PROBLEM

This court by its statements has indicated that it takes judicial knowledge and all parties would certainly agree that the Supreme Court's decision in Puyallup Tribe v. Department of Game, 391 U.S. 398 (1968) requires either a reversal of the holding authorizing state regulation or the creation of standards to guide the States in the exercise of their power to regulate Indian treaty Fishing. A neighboring Federal District Court[1] in United States v.

[1] Judge Belloni, District of Oregon

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Oregon (Sohappy v. Smith), 302 Fed. Supp. 899 has attempted to handle this basic problem by specifying standards. Judge Belloni held -- in rejection of most of the arguments presented by at least one defendant here -- that the only state objective that can be used as a basis for regulating this treaty right is that concerned with "conservation" i.e. "the continued existence of the fish resource." Judge Belloni held that in such regulation that Oregon could not longer "discriminate against Indians as it had been doing" and that the State's management scheme must allow the "Indians a fair share of the fish produced by the Columbia River system." This would not affect conservation, Judge Belloni said but "the only effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago."

While the basic premise of this decision together with rules outlining methods of promulgation of laws and regulations has been helpful to the fish management agencies and treaty Indians a natural conflict exists as to what is a "fair share." Defendant Fisheries has at least in the statement of its policies adopted this "fair share" premise, but it has been totally rejected by the Defendant's Game and therefore the Defendant State. In spite of the statements of Defendant Fisheries that the "fair share" premise is their policy, no plaintiff believes that the Treaty Indians are in fact being accorded a fair share under their management scheme. Under Defendant Game's premise they are being accorded no share at all.

B. POSITION OF THE YAKIMA NATION

It is the position of the Yakima Nation that the State of Washington and its Fish management agencies have no power to regulate treaty off-reservation fishing where such fishing is under existing tribal supervision. It is hoped that the lack of historical and anthropological evidence in Puyallup, supra, shall not be charged against Plaintiffs in this cause. We are hopeful that the

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type of evidence in this case presented by both plaintiffs and defendants shall be helpful to the court in interpreting the treaty provisions. It is what the treaty provisions mean as read in connection with the doctrine of residual sovereignty that shall control this cause. Under the United States Constitution the states have no power to regulate Indian off-reservation, treaty protected fishing. That document provides that the "Constitution -- of the United States -- and all Treaties -- made, under the authority of the United States shall be the Supreme Law of the Land, and the Judges of every State shall be bound thereby, anything in the Constitution or Laws of any State notwithstanding."[2/] A State has no power to amend the United States Constitution, nor can it amend or abrogate a treaty entered into between this nation and some other nation,[3/] or with an Indian Tribe.[4/]

The failure of the treaty provisions reserving the right to fish to specify the method or manner of fishing in the articles drawn by the United States should not be charged against the Indians. There is no more often repeated principle of Indian Law than that language used in treaties with Indians should never be construed to their prejudice and that they should be interpreted as understood by these unlettered people rather than by their critical meaning.[5/]

The doctrine of residual sovereignty of Indian tribes, and particularly with whom the United States made treaties, has been preserved in decisions to the present Supreme Court term.[6/] The reserved right to fish at ususal and accustomed places is a tribal

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2/ U. S. Constitution, Article VI

3/ Missouri v. Holland, 252 U.S. 416

4/ McClanahan v. State Tax Commission of Arizona, 93 Sup. Ct. 1257.

5/ United States v. Winans, 198 U.S. 371 (1905); Jones v. Meehan, 175 U.S. 1 (1899); Winters v. United States, 207 U.S. 564 (1908); Worcester v. Georgia, 6 Pet. 515 (1832); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

6/ McClanahan v. State Tax Commission of Arizona, supra.

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rather than an individual right.[7] While it may be that Indians who are fishing without or in violation of tribal regulation are subject to state regulation,[8] Indians fishing in conformity with tribal conservation regulation should not be placed in the same category. Any state regulation of a tribally regulated fishery infringes on the right of Indian tribes to make their own laws and to be regulated by them.[9] States may not interfere with this right except where Congress has so provided.[10] Congress has not so provided. The Yakima Nation realizes that if they fail to accept this responsibility the Secretary of Interior may act under existing regulations, Congress may act, or fish runs will be reduced. The Yakima Nation fully intends to accept its responsibility for all of these alternatives would be a limitation of its reserved treaty right and residual sovereignty. These rights are important tribal rights. The Yakima Nation continues to exercise this right to allow for a treaty off-reservation fishery to provide for its members who find themselves -- contrary to promises at treaty times -- among the most deprived group of people in our nation. Just as important is the right and duty of the Yakima Nation to maintain these treaty fisheries for those Yakimas yet unborn. A treaty right in a non-existent fishery is no right at all. The Yakima Nation dedicates itself to the protection of these fisheries in spite of all the non-Indian caused handicaps of non-screened irrigation diversions,

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7/ Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961).

8/ The United States Attorney, Western District of Washington expressed the opinion in 1968 that an Indian fishing in violation of tribal ordinance is not correctly exercising the tribal treaty right and is therefore subject to state prosecution. See brief amicus in Department of Game v. Settler, Superior Court for Skamania County (1968). See also State v. Gowdy, 1 Ore. App. 424, 462 P.2d 461.

9/ Federal Judge Charles Powell, Eastern District of Washington in Settler v. Yakima Tribal Court, unreported, has held that it is within the inherent power of the Yakima Nation to arrest and punish fishing in violation of tribes conservation regulation at off-reservation fisheries. Copy attached.

10/ This court has so held in cases from Worcester v. Georgia, supra to McClanahan v. Arizona Tax Commission, supra. The question of whether Congress can do this without compensation is reserved.

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power dams, pollution, and spawning ground destruction.

Likewise the doctrine of federal pre-emption, pre-empts state regulation of tribal treaty off-reservation fisheries.[11/] Regulation of the Secretary of Interior provide that on his own motion, or upon the request of an Indian tribe or state governor, and upon the finding that there is a need for such regulation to assume the conservation and wise utilization of the resource; that off reservation fisheries may be regulated by the Federal Government.[12/] No state has petitioned for such regulation nor has the Secretary found that such regulation is necessary to satisfy the aims of conservation or wise utilization of the off-reservation fisheries resource.

We do not believe that either the location of these treaty fisheries off-reservation or within the exterior boundaries of a state or the phrase "in common with" to be controlling in this cause. The reservation of these fisheries off-reservation took place many years before Washington was a state. A reservation exists and that is the reservation of the tribal right to fish.[13/] Complementing this reserved right is the existence of residual sovereignty to regulate this right.[14/]

The evidence in this case in recalling the situation that existed in 1854 and 1855, will enforce the construction that Indian fisheries reserved were intended to be to the same extent as then existed. The Supreme Court has made it clear that Indian treaties should be construed to effect the purposes for which they were signed, i.e. to protect and reserve a viable political and economic Indian community.[15/]

11/ Again see McClanahan v. Arizona Tax Commission, supra, for discussion of this doctrine.

12/ 25 CFR Part 256 promulgated in 1967.

13/ United States v. Winans, supra. When the State of Washington was admitted to the Union, it accepted these reservations of rights.

14/ See footnote discussing Settler v. Yakima Tribal Court, supra.

15/ Winters v. United States, 207 U.S. 564; Arizona v. California, 373 U.S. 546.

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The State of Washington should not be able to regulate the fishermen of the Yakima Indian Nation or those tribes similarly situated.

C. METHODS OF PERMISSIBLE REGULATIONS

The defendants may suggest that the adoption of this rule -- though it follows logically from their basic doctrines would create havoc and a destruction of the resource. This is just not so.

The evidence in this cause will show that the State of Washington can protect any legitimate interest they have in any Yakima off-reservation fishery. Among the options open to it are:

1. Work with the tribes involved to insure that the tribal regulations prescribe adequate protection of the fishery.16/

2. Enter into an agreement with the Yakimas to provide for a joint regulatory board to regulate the fishery.17/

3. Petition the Secretary of Interior to regulate the fishery if the conservation and the wise use of the fishery is not preserved.18/

4. Petition Congress for relief.19/

D. CONCLUSION

The opinion in this case should clearly indicate that tribes maintaining a tribal government and a regulated tribal

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16/ We had the help of the State of Oregon agencies in the late sixties in this regard. It was very helpful. The Washington State Department of Fisheries is beginning to do this with tribes in the Puget Sound area.

17/ This form of regulation has existed on the Klickitat River since 1952 with the Department of Fisheries.

18/ Questions to the Department of Game would undoubtedly show that they would probably rather let the fisheries be impaired than to give up what they call their "prerogative."

19/ This was tried in 1964. A reading of the Hearings on SJR 170 and SJR 171, 88th Congress 2nd Session, August 5-6, 1964, will show why Congress was unimpressed. Also note that Public Law 83-280, (67 Stat. 588) reserves jurisdiction over treaty rights in the Federal Government and the tribes. Congress repeated its position in 1968. (Public Law 90-284).

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fishery should not be subject to state regulation.

Dated this 14th day of August, 1973.

Respectfully Submitted,

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Extra

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

ALVIN SETTLER, Petitioner	)	CIVIL NO. 2378
vs	)	MEMO DECISION
YAKIMA TRIBAL COURT, Respondent	)	

The principal question in this case is whether the Yakima Tribal Council may pass valid regulations governing the off-reservation fishing of the members of the Yakima Indian Tribe and if so whether the respondent may enforce such regulations.[1/] This case is here on remand from the Court

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1/ The original petition for writ of habeas corpus alleged two additional grounds, (1) double jeopardy, and (2) denial of counsel in violation of Fifth and Sixth Amendment rights. These grounds are not now urged as the Indian Civil Rights Act of 1968, 25 U.S.C.A. 1301 et seq., directed to Tribal Courts, provides in part:

"§1302. Constitutional rights.

No Indian tribe in exercising powers of self-government shall—

* * *

(3) subject any person for the same offense to be twice put in jeopardy;

* * *

(6) deny to any person in a criminal proceeding * * *, and at his own expense to have the assistance of counsel for his own defense; * * *."

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of Appeals of the Ninth Circuit.[2]

Petitioner Alvin Settler seeks a Writ of Habeas Corpus here to set aside the judgments and sentences of the Yakima Tribal Court. Petitioner is an American Citizen and a member of the Confederated Tribes and Bands of the Yakima Indian Nation. He was convicted on September 29, 1967 by the Yakima Tribal Court of twice violating off-reservation Indian Tribal Fishing Regulations (causes #11316 and 11358) and once disobeying the lawful orders of the Tribal Court relating to off-reservation fishing regulations (cause #11336). He was sentenced as follows: (#11316) a fine of $80.00 plus $2.50 court costs or a thirty day suspension from any fishing activities; (#11336) a fine of $50.00 and $2.50 court costs or thirty days in jail; (#11358) a fine of $120.00 and $2.50 costs or ninety days suspension.[3]

The primary issue is whether the Yakima Tribal Council has authority to regulate the exercise of tribal Treaty fishing rights by individual members of the tribe outside the boundaries of the Yakima Indian Reservation. This

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2/ Settler v. Yakima Tribal Court, 419 F.2d 486 (9 Cir. 1969).

3/ Petitioner's conviction was for fishing in violation of Tribal Regulations. The certificate of proceedings made by the Tribal Judge William Yallup shows as follows: #11316. Settler was found tending his fishing gear in the Columbia River near Memoloose Island and Lyle, Washington at 4:00 p.m. on July 14, 1967. The weekly closure under T-100-67 and T-90-66 started at 12:00 noon. #11336. On July 14, 1967 when he was found tending his fishing gear Settler was read the citation and direction to appear as he refused to accept it. Settler did not appear as directed. #11358. On August 8, 1967 Settler was observed checking his gill nets in the Columbia River at 1:00 p.m. and during the season closed by tribal regulations T-90-66 and T-100-67.

question has been briefed by the petitioner and respondent and by the United States and the State of Washington as amici curiae. The state argues that it has the exclusive right to manage the fish and game resources outside Indian reservation boundaries and that the regulations in question here are an attempt to supersede valid state fishery conservation laws. The interest of the United States arises out of its special and continuing relationship with the Yakima Indian Tribe.

Under the terms of the Treaty of June 9, 1855 (12 Stat. 951) the Yakima Indian Tribe reserved certain rights with regard to fishing. Article III of the Treaty provides:

> "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, ..." (12 Stat. 951, 953).

This Treaty acknowledged the sovereign status of the Yakima Indian Nation. As was recognized in Littell v. Nakai, 344 F.2d 486 (9 Cir. 1965), cert. denied, 382 U.S. 986, Indian Tribes occupy a unique status. In that case the Court of Appeals stated, at 488:

> "Historically, the Indian Tribes were regarded as distinct political communities. [Worcester v. Georgia, 31 U. S. 515 at 560, 6 Pet. 515, 8 L.Ed 483 (1832); Ex Parte Crow Dog, 109 U.S. 556 at 568, 3 S.Ct. 396, 27 L.Ed. 1030 (1883)]. Thus, in United States v. Kagama, 118 U.S. 375 at 381-382, 6 S.Ct. 1109, 1112-1113, 30 L.Ed. 228 (1886) the Court, after noting the 'anomalous' and 'complex character' of the

> relationship between the general government and the Indian Tribes, declared that the Tribes' * * * were and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided."

This unique status of the Indian Tribes has been characterized as a "limited dependent sovereignty", see United States Department of the Interior, Federal Indian Law, (rev. ed., 1958) p. 395.

One of the last remnants of sovereignty retained by the Yakima Indian Tribe is the power to regulate their internal and social relations. This principle of tribal sovereignty was recognized and reaffirmed in Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251, (1959) where the Court stated, with reference to the Treaty with the Navajo Tribe, at p. 221:

> "Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."

INTERNAL AFFAIRS

The question before the Court now is whether the treaty-secured right to fish, both on the reservation and in the usual and accustomed places off the reservation, is an internal affair of the Yakima Indian Tribe subject to tribal control and regulation. First, it should be noted that the

fishing rights secured to the Yakima Indians by the Treaty of June 9, 1855 were secured by the Tribe, to be held in communal ownership. Individual members of the Tribe have no separate interest in these reserved fishing rights. In Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), cert. denied, 369 U.S. 818, this Treaty with the Indian Tribe was interpreted. There the Court said, at 663:

> "While property is vested in a tribe, it is the individual member who enjoys the use of the property. Federal Indian Law, supra, 757. As to fishing, this is true. But, like the lands, the interests in the fisheries are communal, subject to tribal regulation.
>
> We hold that the use of accustomed fishing places, whether on or off the reservation, is a tribal right for adjustment by the tribe and that the fact that certain Indians have been allowed to have sole use of a particular spot gives that individual no property right against the Tribe and does not limit the Tribe's right to collect damages for obliteration of fishing spots by the dam."

This interpretation of communal holding of property is in accord with normal Indian custom. United States Department of the Interior, Federal Indian Law, (rev. ed, 1958), pp 750. 4/

The crux of this case is the validity of Yakima Tribal Resolution T-90-66 which establishes a comprehensive scheme for the regulation of tribal members in their exercise of the Treaty right to fish in the usual and accustomed

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4/ The right of the Yakima Indian Tribe to control and regulate fishing by individual members of the Tribe, within the boundaries of the reservation appears to be clearly established. See Whitefoot, supra, at 663; Pioneer Packing

places outside the Yakima Indian Reservation. 5/ The question of the regulation of off-reservation fishing by Indians, acting under their Treaty rights has often been before the courts and has usually arisen in controversies between the Indian Tribes and one or more of the states. The states have argued, generally with success, that under the doctrine of ferae naturae the state holds title to fish and game for the benefit of all citizens and has the police power to regulate fishing and hunting in order to protect these natural resources. See Geer v. Connecticut, 161 U.S. 519, 527, 528, 16 S.Ct. 600, 40 L.Ed. 793 (1896); Ward v. Racehorse, 163 U.S. 504, 514, 16 S.Ct. 1076, 41 L.Ed. 244 (1896); New York ex rel Kennedy v. Becker, 241 U.S. 556, 563, 564, 36 S.Ct.

4/ Cont'd.
Co. v. Winslow, 159 Wash. 655, 294 Pac. 557 (1930). See also 25 C.F.R. §11.57:

"§11.57 Game violations.
Any Indian who shall violate any law, rule or regulation adopted by the tribal council for the protection or conservation of the fish or game of the reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days; and he shall forfeit to the court for the use of any Indian institution such game as may be found in his possession."

5/ T-90-66 provides generally that it is enacted by the Yakima Tribal Council and is deemed necessary to promote the conservation of fishery resources reserved to the use of the Tribe or its members by the Treaty of June 9, 1855. Gill net fishing in the Columbia is permitted to members of the Tribe under the Treaty in accord with the regulations made by the Council. The regulation further fixes seasons and provides for their annual change, for the prohibition of fishing in certain areas, the identity of Tribal members, the allocation of fishing sites and provides types and specifications for boats and gear. It provides other methods that may be used to take fish, recording of catches and provides methods of enforcement and penalties.

705, 60 L.Ed. 1166 (1916).

The police power of the state is not without limit, however. The phrase in Article III of the Treaty reserving to the Indians:

> ". . . the right of taking fish at all usual and accustomed places in common with the citizens of the Territory. . . ." (12 Stat. 951, 953),

has been liberally interpreted in favor of the Indian Tribes. In United States v. Winans, 193 U.S. 371, 381, 384, 25 S.Ct. 662, 49 L.Ed. 1089 (1904), the Supreme Court held that this right of taking fish at "all usual and accustomed places" imposed a servitude on the land in favor of the Indians which allowed them to go on the land and exercise the Treaty right to fish. In Seufert Bros. Co. v. United States, 249 U.S. 194, 198, 199, 39 S.Ct. 203, 63 L.Ed. 555 (1919), the court rejected a technical and restrictive interpretation of the Treaty and held that the phrase "all usual and accustomed places" meant traditional Yakima Indian fishing areas on both sides of the Columbia River. In Tulee v. State of Washington, 315 U.S. 681, 684, 62 S.Ct. 862, 86 L.Ed. 1115 (1941), the court held that the state could not impose a license fee on the Indians' right to fish under the terms of the Treaty. From those cases a concept of the special status of Indian Treaty fishing rights has evolved. While the state has certain power to regulate off-reservation fishing by Indians under their Treaty rights, New York ex rel Kennedy v. Becker, supra, Tulee, supra, it is also well established that such

regulation must be necessary for the conservation of the fishery resource. Puyallup Tribe v. Department of Game, 391 U.S. 392, 399, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968); Holcomb v. Confederated Tribes of Umatilla Indian Res., 382 F.2d 1013 (9 Cir. 1967); Maison v. Confederated Tribes of Umatilla Indian Res., 314 F.2d 169, 172 (9 Cir. 1963), cert. denied 375 U.S. 829; Makah Indian Tribe v. Schoettler, 192 F.2d 224, 226 (9 Cir. 1951); Sohappy v. Smith, 302 F.Supp. 899, 908 (D. of Ore. 1969).

Any exercise of authority by the Yakima Indian Tribe to regulate off-reservation fishing must coincide with the valid exercise of the police power of the state. However, once the limits of state authority have been reached there remain significant areas of fishing activities which are not necessarily subject to state regulation. Among the fishing activities particularly susceptible to regulation by the Tribe are: (1) the use of accustomed fishing places; (2) the allocation of fishing time among individual members of the Tribe; (3) the type of gear; (4) the time of taking fish; (5) the determination of preference among fishing purposes, i.e. subsistence, commercial, or ceremonial. These and other similar questions are most properly determined by the Yakima Tribal Council by means of the enactment of tribal fishing regulations such as T-90-66. The resolution of such questions

is an "internal affair" of the Yakima Indian Tribe. 6/

EXTRA TERRITORIAL JURISDICTION

In this case Alvin Settler was charged with fishing off the reservation in violation of the tribal fishing regulations. The argument is made by petitioner that the jurisdiction of the Yakima Tribal Court exists only within the boundaries of the Yakima Indian Reservation and that the Tribal Court has no authority to try and convict him for acts which occurred outside of the reservation. An analysis of the facts in this case and the applicable law has resulted in a contrary conclusion.

Alvin Settler as a member of the Yakima Indian Tribe has a right, in the nature of a right of user, to fish in the usual and accustomed places under the terms of the Treaty. This right is derived from the legal or equitable property right of the Yakima Indian Tribe in the fisheries. United States Department of Interior, Federal Indian Law (1958), pp. 750.

Here, the Indian Tribe itself has acquired the rights under the Treaty. The Tribe has through its Council provided for the regulation of individual tribal members in their treaty fishing activities in the usual and accustomed fishing areas off of the Yakima Indian Reservation. The

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6/ See, Settler v. Yakima Tribal Court, 419 F.2d 486 (1959) at 488:

"We concede that as a general rule the regulation of Indian fishing is an internal affair of the Yakima Nation under the authority of the Treaty of 1859."

See also, Williams v. Lee, supra; Littell v. Nakai, supra; and State of Arizona ex rel Merrill v. Turtle, 413 F.2d 683 (9 Cir. 1969), cert. denied 396 U.S. 1003, for the development of the "internal affairs" test as the measure of Indian tribal sovereignty.

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authority of a sovereign government to enact such regulation and such laws to protect its legitimate interests against abuse by its own citizens is recognized by the Supreme Court. See: United States v. Bowman, 260 U.S. 94, 98, 43 S.Ct. 39, 67 L.Ed.149 (1922); Skiriotes v. Florida, 313 U.S. 69, 73, 61 S.Ct. 924, 85 L.Ed. 1193 (1941). In the latter case it is held that the State of Florida may pass a law making an act committed by one of its citizens outside of the territorial area of the State of Florida a crime against the laws of that State. The court discusses the question of extra territorial jurisdiction, Skiriotes, supra, at 73-77?

> ". . . [A]side from the question of the extent of control which the United States may exert in the interest of self-protection over waters near its borders, although beyond its territorial limits, (fn. omitted) the United States is not deterred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, (fn. omitted) but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government. . . . [citations omitted]. Thus, a criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect. United States v. Bowman, supra."

> ". . . If a statute similar to the one in question had been enacted by the Congress for the protection of the sponge fishery off the coasts of the United States there would appear to be no ground upon which appellant could challenge its validity."

"The question then is whether such an enactment, as applied to those who are subject to the jurisdiction of Florida, is beyond the competency of that State. We have not been referred to any legislation of Congress with which the state statute conflicts. . . . It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State."

"Appellant's attack thus centers in the contention that the State has transcended its power simply because the statute has been applied to his operations inimical to its interests outside the territorial waters of Florida."

". . . Even if it were assumed that the locus of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place. . . . No right of a citizen of any other State is here asserted. The question is solely between Appellant and his own State."

"If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. Save for the powers committed by the Constitution to the Union, the state of Florida has retained the status of a sovereign. . . ."

See also, Rocha v. United States, 288 F.2d 545, 547 (9 Cir. 1961), cert. denied 366 U.S. 948; Stegeman v. United States, 425 F.2d 984, 986 (9 Cir. 1970).

The violations committed by Alvin Sattler occurred in one of the usual and accustomed places of fishing for members of the Yakima Tribe. The acts violated fishing regulations duly enacted by the Yakima Tribal Council for the

purpose of protecting the legitimate interest of the Tribe in the preservation of the fishery resource. Under these circumstances, the locus of the acts should not be determinative of the right of the Yakima Tribe to punish the offender in the Tribal Courts. 7/

For the reasons stated it is the holding of this Court that the regulation of the right to fish in the usual and accustomed places off of the reservation granted by the Treaty is an internal affair of the Yakima Indian Tribe. The Tribe has the sovereign authority to enact fishing regulations applicable only to the individual members of the Tribe in order to protect the legitimate interests of the Tribe concerning the manner in which the Treaty fishing rights are exercised. Such tribal fishing regulations are binding upon tribal members and are enforceable in the Yakima Indian Tribal Court. Any right the state may have to impose restrictions on off-reservation fishing activities does not preclude the Yakima Indian Tribe from placing restrictions on its own members to control their fishing activities under circumstances where state regulations are inapplicable, unenforceable, or nonexistent.

The remand of this case requires this Court to

7/ See Littell v. Nakai, 344 F.2d at 490, holding that the locus of acts is not determinative of tribal jurisdiction under the "internal affairs" test.

determine the proper "person" to be named as respondent.[8] We find that Wilson Lameer, Chief of Police and William Yallup, Chief Judge of the Tribal Court, or their successors, are the persons to be named as respondents. Respondent is asked to prepare a motion and order adding them as respondents.

The petition of Alvin Settler for a writ of habeas corpus to vacate the sentence of the Yakima Tribal Court will be DENIED.[9] Respondent is requested to submit judgment of dismissal.

DONE BY THE COURT this 4th day of May, 1971.

Charles L. Powell

United States District Judge

8/ "Appellee's third point is that the Yakima Tribal Court is not a 'person' to whom an application for a writ of habeas corpus can be directed. The appropriate section of the United States Code provides that "the writ * * * shall be directed to the person having custody of the person detained." 28 U.S.C. §2243 (1964). Appellee argues that the Tribal Court is not appellant's custodian. We think it appropriate in this case, however, since there was and is no actual physical custodian (as was true in Jones v. Cunningham, supra), that appellant has named as a respondent the court which imposed the fine and to which the bond was paid pending appeal. It is that court (or the person heading or acting for that group) as much or more than any other possible party, that is responsible for the alleged unconstitutional deprivation of appellant's liberty. In view of our disposition of this appeal, we leave to the district court the naming of the precise individual who heads, or otherwise is in a position to act for, the Tribal Court, or if that person cannot be ascertained, the naming of all the individual members of that court." Settler v. Yakima Tribal Court, 419 F.2d 486 at 490.

9/ In the application of Mary Settler for a writ of habeas corpus the additional question is raised of the authority of the Indian police to make an off-reservation arrest. We do not pass on that question here but leave it for disposition later.