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Docket Entry 347 - Filed Pretrial Brief of Intervenor-defendant Washington Reef Net Owners Association

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants.	CIVIL NO. 9 2 1 3 PRETRIAL BRIEF OF INTERVENOR-DEFENDANT WASHINGTON REEF NET OWNERS ASSOCIATION

I. INTRODUCTION

As has been pointed out in the pretrial discovery procedures and in the final pretrial order submitted to the Court, the Washington Reef Net Owners Association is an unincorporated group which has been in existence since the early 1950s. Prior to its inception, there were other organizations of the individuals who fished by this method. A "reef net" is well defined in the Department of Fisheries portion of the Washington Administrative Code, at WAC 220-16-080,

> "REEF NET. 'Reef net' shall be defined as a non self-fishing open bunt square or rectangular section of mesh netting suspended between two anchored boats fashioned in such a manner that to impound salmon passing over the net, the net be raised to the surface. The lead or leads of any 'reef net' must be floating at all times, except under stress of tidal conditions, and shall not be fixed to any piling whatsoever, nor shall the lead or leads be constructed of any kind of mesh webbing. In the construction of any 'reef net' no principle of a fyke net or fish trap may be employed."

They have long been regulated and controlled by the State of Washington, the current statutes relating to them being RCW 75.12.140, creating "reef net fishing areas"; RCW 75.12.150, authorizing the Director of Fisheries by appropriate regulations to specify the distances to be maintained between rows; RCW 75.12.160 which makes commercial salmon fishing with reef nets unlawful elsewhere; and RCW 75.28.220 which fixes the amount to be charged by the Director for the annual license.

Additionally, the Fisheries section of the Washington Administrative Code recognizes and regulates them extensively, in addition to the definition already quoted above. WAC 220-47-050 fixes the seasons for the various areas, WAC 220-47-303 explicitely imposes restrictions on the size and type of mesh which can be used as well as the number and length of the "leads" which may be used, and WAC 220-47-401 fixes the seasons.

Their legitimacy was expressly recognized by the Supreme Court of this state in a challenge that they were a fixed fishing device and hence a forbidden "trap" in the case of State ex rel Pirak v. Schoettler, (1954) 45 Wn.2d 367.

In short, it may well be said, then, the police power of the state has been abundantly exercised in the defining, locating and regulation of them.

II. ISSUE

The issue as to this Association has, by the terms of the Final Pretrial Order and the Pretrial Brief of the intervenor-plaintiff Lummi Indian Tribe becomes squarely one of whether they may continue thus to operate or whether they should be banned or limited on the theory that they are operating at or in "usual and accustomed grounds and stations" of the Lummis contrary to the provisions of the Treaty of Point Elliott. Counsel for the Lummis

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has also at various times pressed the argument that they have been systematically excluded or prohibited by a concerted and illegal action of the non-Indians who hold reef net licenses and have operated such gear for many years.

III. DISCUSSION AND LEGAL AUTHORITIES

A. Deliberate Exclusion:

Whether or not there has been such an exclusion is basically solely and only a factual question. By the pretrial depositions of reef net owners, John R. Brown, Jerry M. Anderson and Glenn H. Schuler, as well as Lummis, John B. Finkbonner, Herman Olsen and Forrest L. Kinley, incorporation of which in the Final Pretrial Order herein has been requested by the Association, they clearly appear to have in no wise been excluded--they have in fact been encouraged to join the crews operating such locations, but have indicated no sustained interest in so doing. It is also abundantly apparent in the depositions that nothing prohibited the Lummis from seeking a location and fishing in a manner in keeping with the methods and practices of the industry. The fact that the user of a location has the right to return to it the following year and usually leaves his anchors there to indicate his intent so to do does not in any fashion imply an exclusion. The Lummis could acquire gear and locations precisely the same as the present members of the Association do and have done. Locations are at times abandoned and they would be equally entitled to reactivate such a location and operate in the usual manner at such point. Their rights to return to such a location in subsequent years would be equally respected. It will be shown by further evidence at trial that there would be but an "Oklahoma land rush" type of

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chaos if some orderliness were not maintained and followed by the reef net fishermen being entitled to resume operations each year at the location they had used the previous year if they desired so to do. (In this connection, it should also be noted that the theory of true "ownership" by Lummis in pre-treaty days is wholly untenable, requiring as it does, and as Dr. Riley points out, concepts of property not known to loose social structures of such Indian tribes and bands. Also, pre-treaty practices as to the use of locations were precisely the same, i.e., no other Indian would take a location if it were in use by a prior occupant.)

B. Interpretation of Treaties.

Once again, as in so many prior cases, both state and federal, it is the meaning of the words "at all usual and accustomed grounds and stations" and "in common with citizens of the Territory" that becomes the major issue in the case, the answer to which, plus the question of the amount and extent of a state's police power over its fishery resources, solves the dispute.

At the outset, as has been pointed out by the Association at appropriate points in the Final Pretrial Order, it will be contended that the boundaries of the rights conferred upon the Lummis by the Treaty of Point Elliott will be only to the line of mean low tide and shall not be deemed to extend to the open waters of Puget Sound--an arm and part of the "high seas"; in other words, such sea areas cannot be considered "grounds" or "stations" as those words are used in the Treaty.

Next comes, however, the problem of the overall interpretation to be given to the words of the Treaty and much authority has already been cited by the various plaintiffs indicating that treaties with Indians should be interpreted

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liberally and all doubts resolved in favor of the tribes.

Common sense, and prior sound legal authority, indicates there are clear and necessary limitations upon this rule, however.

As was so well stated by Justice Hale of our own state Supreme Court, in his dissent in the second decision in Department of Game v. Puyallup Tribe, 80 Wn.2d 561, at p. 577,

> "There is, I perceive, a curious aura of romantic whimsy suffusing the law of Indian treaties. Indian treaty cases seem never quite fully to depart that peculiar genre of elemental melodrama compounded more of fantasy than fact, more of folklore than truth--all subject to the inevitable distortion of time and history--in order to reach a devoutly wished judicial consummation. Although this may make for good reading, it probably produces bad law. Inexorably inhering in these decisions on Indian treaties, I think, is the judicial conscience which aspires somehow to right what the courts think to be historical wrongs--even if the treaty is somehow twisted out of shape to achieve it. Thus, in Indian treaty law, the Indian occupies a traditionally exalted position; the pioneers and the government which encouraged them to settle and develop this Western frontier a correspondingly low one; and the treaties undergo an inevitable distortion in the process. The time must eventually come, however, when the courts will have to construe the Indian treaties as the parties intended and as common sense dictates. Whatever pangs of conscience the judiciary may have developed through the present century concerning treatment of the Indians more than a century ago at the hands of the citizenry, misconstruing the treaties is a poor means of expiation. Two wrongs do not make a right and the courts cannot and ought not remedy such wrongs whether real or imagined by revising the treaties and inventing special rights in order to come up with a result which comports with the judiciary's ideas ex post facto of what the treaty should have said. If the treaties with the Indians did not afford treaty Indians exclusive rights or preferential privilege in the state's lakes, rivers, streams and bays, the courts ought not accord such preferential rights and privileges to their descendants.
>
> Courts must accept the treaties as written and cannot alter or amend them. Kansas or Kaw Tribe of Indians v. United States, 80 Ct. Cl. 264 (1934), cert. denied, 296 U.S. 577, 80 L. Ed. 408, 56 S. Ct. 88 (1935); Osage Tribe of Indians v. United States, 66 Ct. Cl. 64 (1928), appeal dismissed and cert. denied, Osage Indians v. United States, 279 U.S. 811, 73 L.Ed. 971, 49 S. Ct. 251 (1929). If a

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treaty did not give the Indians special times and places in which to fish, the court is without power to write a new treaty giving their descendants such special privileges. Whatever rights Indians may once have possessed to treat with the United States as a contracting entity ended with the act of March 3, 1871, Rev. Stat. § 2079, 25 U.S.C. § 71, which abrogated the treaty-making power with the Indian nations and tribes.

Lacking the constitutional power to make treaties of any kind, the courts are equally without power to rewrite them from time to time or at all--even to achieve what the courts believe to be a good result. The judicial function is limited, I think, to enforcing and upholding the treaties according to their content and spirit. Accordingly, judicial process is not the medium nor is the courthouse the place to rectify the wrong, real or illusory, done to the Indians by the pioneers and the United States government more than a century ago. Any wrongs done the Indians, if genuine and shown to persist down through the generations, should be righted by the Congress."

Other and higher authority also supports this view. In Northwestern Shoshone Indians v. United States, (1944) 324 U.S. 335, at p. 353, Justice Reed, writing the majority opinion, states,

> "We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress."

Justice Jackson, concurring for himself and Justice Black, states, in the same case at p. 356, while addressing himself to the question of the liberal interpretation of Indian treaties,

> "Even if both parties to these agreements were of our own stock, [i.e., non-Indian], we being a record-keeping people, a court would still have the gravest difficulty determining what their motives and intentions and meanings were. Statutes of limitation cut off most such inquiries, not because a claim becomes less just the longer it is denied, but because another policy intervenes --the policy to leave in repose matters which can no longer be the subject of intelligent adjudication." (Emphasis supplied.)

In Choctaw Nation of Indians v. United States, (1942) 318 U.S. 423, at p. 431, Justice Murphy stated,

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"Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Factor v. Laubenheimer, 290 U.S. 276, 294, 295, 78 L. Ed. 315, 324, 325, 54 S. Ct. 191; Cook v. United States, 288 U.S. 102, 112, 77 L. Ed. 641, 646, 53 S. Ct. 305. 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, 315 U.S. 681, 684, 685, 86 L. Ed. 1115, 1119, 1120, 62 S. Ct. 862. See also United States v. Shoshone Tribe, 304 U.S. 111, 116, 82 L. Ed. 1213, 1218, 58 S. Ct. 794; Choctaw Nation v. United States, 119 U.S. 1, 28, 30 L. Ed 306, 315, 7 S. Ct. 75. But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. United States v. Choctaw Nations, 179 U.S. 494, 531, 533, 45 L. Ed. 291, 305, 306, 21 S. Ct. 149; United States v. Mille Lac Band, 229 U.S. 498, 500, 57 L. Ed. 1299, 1302, 33 S. Ct. 811." (Emphasis supplied.)

We must then abide by the plain, clear meaning of the key words already quoted above--"at all usual and accustomed grounds and stations" and "in common with all other citizens of the Territory". Involuted or artificial reasoning will be of no avail--it has already compounded the problem as has a sophistry of "reserved rights".

C. "Usual and Accustomed Grounds and Stations."

As has been pointed out elsewhere, no courts, state or federal, have attempted fully to analyze or define the foregoing term. That leaves no alternative, therefore, but to refer to the basic and customary meanings attributed to the words which together create the phrase.

Black's Law Dictionary, Fourth Edition, (1951), defines "usual" as,

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"USUAL. Habitual; ordinary; customary; according to usage or custom; commonly established, observed, or practiced. Such as is in common use or occurs in ordinary practice or course of events. See Chicago & A.R.Co. v. Hause, 71 Ill.App. 147; Kellogg v. Curtis, 69 Me. 214, 31 Am.Rep. 273; Oilmen's Reciprocal Ass'n v. Gilleland, Tex.Com. App., 291 S.W. 197, 199; Roberts Coal Co. v. Corder Coal Co., 143 Va. 133, 129 S.E. 341, 344; Webb v. New Mexico Pub. Co., 47 N.M. 279, 141 P.2d 333, 335."

"Accustomed" is defined in the same work as,

"habitual; often used; synonymous with usual; Farwell v. Smith, 16 N.J.Law, 133."

(It is to be noted, then, that the words have nearly identical and interchangeable meanings and they reflect the redundancy so dear to the hearts of Victorian legal draftsmen.)

"GROUND(S). Soil; earth; the earth's surface appropriated to private use and under cultivation or susceptible of cultivation.

Though this term is sometimes used as equivalent to 'land', it is properly of a more limited signification, because it applies strictly only to the surface, and always means dry land. See Wood v. Carter, 70 Ill.App. 218; State v. Jersey City, 25 N.J.L. 529; Com. V. Roxbury, 9 Gray, Mass., 491." (Emphasis supplied.)

"Station(s). This word, unfortunately, is not defined in Black's Law Dictionary. Recourse to Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, (1964), defines it as,

"The place where a person or thing stands or is located, especially an assigned post, position or location; . . ."

"In common". The definition of this term, in Black, is,

"Shared and respected title, use, or enjoyment, without apportionment or division into individual parts; held by several for the equal advantage, use or enjoyment of all. Hewit v. Jewell, 59 Iowa 37, 12 N.W. 738." (Emphasis supplied.)

Putting the foregoing definitions together, we cannot come up with any other possible meaning for them than that the

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treaty Indians were given the right to continue to fish at their usual places, on land, but their enjoyment thereof was to be equal to, in all respects, but not superior to, the rights of the other citizens of the Territory, i.e., the present citizens of the State of Washington. No "super" rights or special privileges can be inferred.

Nor can the plain intendment of the foregoing words be escaped by a claim the terms would have been incomprehensible to the tribal representatives. The concepts embodied in each "usual and accustomed grounds and stations" or "in common with all other citizens of the Territory" are ones capable of being grasped by any individual, literate or illiterate, schooled or unschooled. The rule then that the words of a treaty if they have a clear and well defined meaning should not be disregarded, or altered, to obtain a desired social objective or to correct a fancied wrong which is solely within the scope of Congress, should be applied and attempts to alter their meaning by lengthy anthropological exigeses or legend should not be allowed.

D. Police Power of States.

The inherent power of a State as a sovereign to regulate and conserve the fish and game resources within its boundaries --equally often referred to as the "police power" of the State-- has been recognized undeviatingly in a long series of cases, both from the State of Washington and from the U. S. Supreme Court.

The earliest Washington cases to assert this principle, without reservation or hesitation, are State v. Towessnute, 89 Wash. 478, and State v. Alexis, 89 Wash. 492. The first case involved a member of the Yakima Tribe and the second, interestingly enough, a Lummi. In the latter case, in the per curiam

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decision denying the petition for a rehearing, it is stated,

> "Under the federal decisions, as we understand them, Congress, in making provision for Indians, could not do it at the expense of the police power of the future state." (Emphasis supplied.)

In what is, of course, the most recent decision for the guidance of all in the instant case, Puyallup Tribe v. Department of Game, 391 U.S. 392, Justice Douglas, at p. 399, quotes the rule from the previous case of Tulee v. Washington, 315 U.S. 681, that the treaty left the state,

> "with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish."

Later, on the same page, he states,

> "The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved."

Later, on pp. 399 and 400, he quotes from Kennedy v. Becker, 241 U.S. 556, as follows,

> "We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all of those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. 241 U.S. at 563-564, 60 L.Ed. at 1172."

IV. CONCLUSION

The case, despite the multitude of parties and the volume

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of exhibits and the wide ranging scope of pretrial discovery proceedings, is basically still a simple one. Are the words, "the right of taking fish, at all usual and accustomed grounds and stations; . . . in common with all citizens of the Territory," ambiguous? They are not. Does the state have, as an inherent power of sovereignty, a police power to regulate the fish and game within its boundaries? It has--by both state and federal decisions of long standing.

As to the Reefnetters, the sub-questions are: Has the state or the reefnet operators discriminated against the Lummis? They have not--either by law, regulation or concerted activity by the license holders. Are the reefnetters, as presently licensed and limited by the state, fishing at "usual and accustomed grounds and stations" of the Lummis? It is highly doubtful that they are; methods were so different in pre-treaty days; "ownership" of sites was never in any wise of a type or nature such that the heirs of Lummis who 125 years ago may have fished in some of these areas could now by any stretch of the imagination be entitled to an "inheritance" of them; (also, how would such "heirs" be determined?); the areas in question are beyond the geographical limits of the grants, by the Treaty of Point Elliott, to the Lummis and they are sufficiently a portion of the "open seas" that they cannot be considered "grounds" or "stations". The most that could be said of any rights possessed by the Lummis would be to say that they have the right, as does every other citizen, to reefnet wherever it is feasible, but only in conformity with such laws and regulations as the state may adopt to meet the needs of conservation of a resource which could otherwise be permanently depleted--to the detriment of all.

The Lummis, off their reservation, have rights--many rights--

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but they are only such, by the Fourteenth Amendment, and by any fair interpretation of the Treaty of Point Elliott, as are similar to those enjoyed by the non-Indians.

Respectfully submitted,

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