

8-24-1973

## Docket Entry 353 - File and Entered Final pretrial order

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12 UNITED STATES DISTRICT COURT  
13 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

FILED IN THE  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 QUINAULT TRIBE OF INDIANS on its own behalf  
17 and on behalf of the QUEETS BAND OF INDIANS;  
18 MAKAH INDIAN TRIBE; LUMMI INDIAN TRIBE; HOH  
19 TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE;  
20 SQUAXIN ISLAND TRIBE OF INDIANS; SAUK-  
21 SUYATTLE INDIAN TRIBE; SKOKOMISH INDIAN  
22 TRIBE; CONFEDERATED TRIBES AND BANDS OF THE  
23 YAKIMA INDIAN NATION; UPPER SKAGIT RIVER  
24 TRIBE; STILLAGUAMISH TRIBE OF INDIANS; and  
25 QUILEUTE INDIAN TRIBE;

Intervenor-Plaintiffs,

v.

26 STATE OF WASHINGTON,

27 Defendant,

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

Intervenor-Defendants.

AUG 24 1973

EDGAR SCOFIELD, CLERK

By *(Signature)* Deputy

CIVIL NO. 9213

FINAL PRETRIAL  
ORDER

*(Signature)*  
759

LUMMI INDIAN TRIBE,

Intervenor-Plaintiff-Appellee

v.

WASHINGTON REEF NET OWNERS ASSOCIATION,

Intervenor-Defendant-Appellant

UNITED STATES OF AMERICA,

Plaintiff-Appellee

QUINULT TRIBE OF INDIANS on its own  
and on behalf of the QUEETS BAND OF INDIANS;  
MAKAH INDIAN TRIBE; LUMMI INDIAN TRIBE;  
HOH TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE;  
SQUAXIN ISLAND INDIAN TRIBE; CONFEDERATED TRIBES  
AND BANDS OF THE YAKIMA INDIAN NATION;  
UPPER SKAGIT RIVER TRIBE; STILLAGUAMISH TRIBE OF  
INDIANS; QUILEUTE INDIAN TRIBE; PUYALLUP TRIBE;  
and NISQUALLY INDIAN COMMUNITY of the  
NISQUALLY RESERVATION

Intervenor-Plaintiff-Appellees

v.

NORTHWEST STEELHEADERS COUNCIL OF TROUT  
UNLIMITED and GARY ELLIS

Additional Intervenor-Defendant-Appellants

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1           Upon consultation with the Court and counsel for the parties  
2 (each of whom has signed below with designations of whom he  
3 represents), this pretrial order is hereby entered. Upon its  
4 entry, all pleadings pass out of the case; and this order shall  
5 not be amended except by order of the Court pursuant to agreement  
6 of the parties or to prevent manifest injustice. Counsel of  
7 Record for the parties and amici are named on the attached list.

8  
9                                 PART ONE

10                                 JURISDICTION AND VENUE

11           1. Jurisdiction is vested in this Court\* by virtue of:

12           a. 28 U.S.C. §1345, in that the United States brings this  
13 action on its own behalf and on behalf of the following Indian  
14 tribal political entities recognized as such by the United States  
15 in connection with its administration of Indian Affairs:

16                         The Hoh Tribe or Band of Indians;

17                         The Makah Indian Tribe of the Makah Indian Reservation;

18                         The Muckleshoot Indian Tribe of the Muckleshoot  
19 Reservation;

20                         The Nisqually Indian Community of the Nisqually  
21 Reservation;

22                         The Puyallup Tribe of the Puyallup Reservation;

23                         The Quileute Tribe of the Quileute Reservation; and

24                         The Skokomish Indian Tribe of the Skokomish Reservation.

25           b. 28 U.S.C. §1331, in that the matter in controversy  
26 involves the fishing rights of each of the following Indian tribes  
27 or bands (herein collectively referred to as "plaintiff tribes")

28  
29           \_\_\_\_\_

30           \*This agreed statement as to jurisdiction is subject to the  
31 contention of the defendants that the exclusive jurisdiction to  
32 hear and determine this action is before the Indian Claims  
Commission pursuant to 25 U.S.C. §§70-70v. See Part Six *infra*,  
Issues of Law, Paragraph 6-52.

1 and individually by the shorter name set out after each such  
2 tribe) which in each case have a value in excess of \$10,000,  
3 exclusive of interest and costs, and are claimed to exist and to  
4 be secured under the Constitution, laws and treaties of the  
5 United States listed next to the respective tribe:

6	Hoh Tribe of Indians ("Hoh Tribe")	Treaty with the Quinaeilt, et al., July 1, 1855; 12 Stat. 971
7		
8	Lummi Indian Tribe ("Lummi Tribe")	Treaty of Point Elliott, January 22, 1855; 12 Stat. 927
9		
10	Makah Indian Tribe ("Makah Tribe")	Treaty with the Makah, January 31, 1855; 12 Stat. 939
11	Muckleshoot Indian Tribe ("Muckleshoot Tribe")	Treaty of Medicine Creek, December 26, 1854; 10 Stat. 1132; and Treaty of Point Elliott, January 22, 1855; 12 Stat. 927
12		
13		
14	Nisqually Indian Community of the Nisqually Reservation ("Nisqually Tribe")	Treaty of Medicine Creek, December 26, 1854; 10 Stat. 1132
15		
16	Puyallup Tribe of the Puyallup Reservation ("Puyallup Tribe")	Treaty of Medicine Creek, December 26, 1854; 10 Stat. 1132
17		
18		
19	Quileute Indian Tribe ("Quileute Tribe")	Treaty with the Quinaeilt, et al., July 1, 1855; 12 Stat. 971
20		
21	Quinault Tribe of Indians ("Quinault Tribe")	Treaty with the Quinaeilt, et al., July 1, 1855; 12 Stat. 971
22		
23	Sauk-Suiattle Indian Tribe ("Sauk-Suiattle Tribe")	Treaty of Point Elliott, January 22, 1855; 12 Stat. 927
24		
25	Skokomish Indian Tribe ("Skokomish Tribe")	Treaty of Point No Point January 26, 1855; 12 Stat. 933
26		
27	Squaxin Island Tribe of Indians ("Squaxin Island Tribe")	Treaty of Medicine Creek December 26, 1854; 10 Stat. 1132
28		
29	Stillaguamish Tribe	Treaty of Point Elliott January 22, 1855; 12 Stat. 927
30		
31		



1 Upper Skagit River Tribe Treaty of Point Elliott,  
2 ("Upper Skagit Tribe") January 22, 1855; 12 Stat. 927  
3 Confederated Tribes & Treaty with the Yakimas,  
4 Bands of the Yakima June 9, 1855; 12 Stat. 951  
Indian Reservation  
("Yakima Nation")

5 c. 28 U.S.C. §1343(3) and (4), in that the plaintiff  
6 tribes allege that defendants State of Washington, and its  
7 Departments of Fisheries and Game have, under color of State law,  
8 regulation, custom and usage, deprived them of rights secured to  
9 them in the treaties cited in paragraph 1.b. above and under the  
10 Constitution of the United States, and those tribes seek equitable  
11 relief for that deprivation.

12 d. 28 U.S.C. §1362, as to the following Indian tribes each  
13 having a governing body duly recognized by the Secretary of the  
14 Interior in that this action is brought by each on its own behalf  
15 alleging violations of its rights under the Constitution, laws  
16 and treaties of the United States:

17 Hoh Tribe,  
18 Lummi Tribe,  
19 Makah Tribe,  
20 Muckleshoot Tribe,  
21 Quileute Tribe,  
22 Quinault Tribe,  
23 Skokomish Tribe,  
24 Squaxin Island Tribe,  
25 Yakima Tribe.

26 2. Jurisdiction over the Washington Reef Net Owners Associa-  
27 tion exists by virtue of the prior order upon the first pretrial  
28 conference heretofore entered herein wherein the motion of Washing-  
29 ton Reef Net Owners Association to intervene, filed December 30, 1971,  
30 was granted, the grounds of the motion having been that specifically  
31 by the terms of the complaint in intervention of the Lummi Indian  
32 Tribe the property interests of the members of the Association were  
affected.

1 3. An actual controversy exists between each of the plaintiffs  
2 on the one hand and each of the defendants on the other, as to the  
3 nature and extent of the claimed treaty fishing rights of the plain-  
4 tiff tribes and the attempted regulation thereof by the State defen-  
5 dants, except that the controversy between the defendant Reefnetters'  
6 Association and the plaintiffs is limited as stated in paragraph 8  
7 below.

8 4. Declaratory judgments are properly sought pursuant to  
9 28 U.S.C. §§ 2201 and 2202 and this Court may grant such relief.

10 5. This case is limited to the claimed treaty-secured fishing  
11 rights of the plaintiff tribes, as they apply to areas within the  
12 Western District of Washington, within the watersheds of Puget Sound  
13 and the Olympic Peninsula north of Gray's Harbor, and in the adjacent  
14 offshore waters which are within the jurisdiction of the State of  
15 Washington. The subject-matter of this case is limited to the appli-  
16 cation of those rights to the anadromous fish which are in the waters  
17 described, including such fish which are native to other areas.

18 6. Venue is properly laid in this Court under 28 U.S.C. §§ 1391(b),  
19 in that all defendants reside within the Western District of Washington.  
20

21 PART TWO

22 PARTIES & PARTICIPANTS

23  
24 7. The parties plaintiff in this case are as follows:

- 25 a. The United States of America;  
26 b. The following Indian tribes or bands:  
27  
28  
29  
30  
31  
32

- 1 i. Hoh Tribe,
- 2 ii. Lummi Tribe,
- 3 iii. Makah Tribe,
- 4 iv. Muckleshoot Tribe,
- 5 v. Quilleute Tribe,
- 6 vi. Quinault Tribe,
- 7 vii. Sauk-Suiattle Tribe,
- 8 viii. Skokomish Tribe,
- 9 ix. Squaxin Island Tribe,
- 10 x. Stillaguamish Tribe,
- 11 xi. Upper Skagit Tribe,
- 12 xii. Yakima Tribe.

13 Except as expressly stated to the contrary below in  
14 PART FOUR, the parties admit that each of the above thirteen  
15 plaintiffs has standing to maintain its claim of violation of  
16 rights secured by treaty.

17 8. The parties defendant\* in this case are as follows:

18 a. The State of Washington (herein sometimes referred  
19 to as the "State");

20 b. Thor C. Tollefson (herein sometimes referred to as  
21 the "Department of Fisheries" or "Fisheries defendant");

22 c. Carl Crouse and the Washington State Game  
23 Commission (herein sometimes referred to as the "Game Department"  
24 or the "Game defendants"); and

25 d. Washington Reef Net Owners Association (herein  
26 referred to as the "Reefnetters Association"), which participates  
27

---

28  
29 \*When used herein the plural term "state defendants" refers  
30 to the defendants named in subparagraphs a. b. and c. of paragraph  
31 8.

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1 only with respect to issues affecting its members' claimed rights  
2 and practices with request to their reefnet fishing operations  
3 and to the meaning and application of the treaty language  
4 involved.

5  
6 9. The following entities participate in this case as  
7 *amici curiae* only and are limited to filing written briefs:

- 8 a. Washington State Sportsmen's Council, Inc.;
- 9 b. The Association of Northwest Steelheaders, Inc.;
- 10 c. State of Idaho Fish and Game Department; and
- 11 d. Purse Seine Vessel Owners Association.

1 PART THREE

2 ADMITTED FACTS

3 Any objection to the admission of an admitted fact is noted  
4 immediately following the statement of that fact in brackets.  
5 The following facts are admitted by all parties as true and are  
6 hereby admitted into evidence, subject only to such objections,  
7 limitations or qualifications as are stated herein immediately  
8 following the fact. Each party reserves the right to introduce  
9 oral or documentary evidence in explanation of and in addition  
10 to, but not in conflict with, any of the admitted facts, provided  
11 that such evidence shall be subject to objection by any party  
12 on appropriate grounds.

13  
14 I. TREATY STATUS AND STANDING

15 3-1. The United States has entered into treaties with  
16 certain Indian tribes. The treaties involved in this case are:

17 The Treaty of Medicine Creek of December 26, 1854,  
18 with the Puyallup, Nisqually, Squawskin and other tribes,  
19 ratified March 3, 1855 and proclaimed April 10, 1855,  
20 10 Stat. 1132.

21 The Treaty of Point Elliott of January 22, 1855,  
22 with various tribes and bands including the Sakhumehu,  
23 Lummi, Stoluckwamish and certain other tribes or bands  
24 of Indians identified therein, ratified March 8, 1859,  
25 and proclaimed April 11, 1859, 12 Stat. 927.

26 The Treaty of Point No Point of January 26, 1855,  
27 with the Skokomish and other tribes, ratified March 8,  
28 1859, and proclaimed April 29, 1859, 12 Stat. 933.

29 The Treaty with the Makahs (Treaty of Neah Bay)  
30 of January 31, 1855, ratified March 8, 1859, and  
31 proclaimed April 18, 1859, 12 Stat. 939.

1           The Treaty of Olympia of July 1, 1855, and January 25,  
2           1856, with the different tribes and bands of the Qui-  
3           naielt and Quillehute Indians, including the Hoh Tribe  
4           or Band of Indians, ratified March 8, 1859, and  
5           proclaimed April 11, 1859, 12 Stat. 971.

6           The Treaty with the Yakimas of June 9, 1855,  
7           ratified March 8, 1859, and proclaimed April 18, 1859,  
8           12 Stat. 951.

9           Each of said treaties contains a provision securing to the  
10          Indians certain off-reservation fishing rights. The following  
11          provision from the Treaty of Medicine Creek is typical of these  
12          treaty provisions:

13           The right of taking fish, at all usual and  
14           accustomed grounds and stations, is further  
15           secured to said Indians, in common with all  
16           citizens of the Territory, and of erecting  
            temporary houses for the purpose of curing,  
            together with the privilege of hunting . . .

17                           II. STATE AGENCY POSITION ON TREATY RIGHT

18          3-2. In dealing with the claimed treaty fishing rights of  
19          the plaintiff tribes, the Game defendants have taken the position  
20          that the treaties cited in paragraph 3-1 do not grant to any  
21          Indian citizen or tribe any privileges or immunities greater  
22          than those which those defendants recognize as being held by  
23          non-Indian citizens.

24          3-3. In dealing with the claimed treaty fishing rights of  
25          the plaintiff tribes, the Game defendants have taken the position  
26          that they are bound, under the Constitution and laws of the  
27          United States and the constitution and laws of the State of  
28          Washington, to regulate Indian fishing activities outside  
29          federal and Indian Reservation boundaries to the same extent  
30          and in the same manner as they regulate fishing activity by all  
31          other classes of citizens.

32          Page 9 - FINAL PRETRIAL ORDER

1 3-4. In dealing with the claimed treaty fishing rights of  
2 the plaintiff tribes, the Game defendants have refused to attempt  
3 to regulate fishing in waters subject to their jurisdiction so  
4 as to accord any of the members of the plaintiff tribes, at their  
5 claimed usual and accustomed fishing places, any opportunities  
6 to take, by means other than angling, a fair and equitable  
7 portion of the anadromous fish runs that are subject to the  
8 regulatory jurisdiction of those defendants, consistent with  
9 adequate escapement for spawning and reproduction.

10 3-5. In dealing with fishing by members of the plaintiff  
11 tribes under claim of treaty right, the Game defendants and  
12 their agents have seized nets and other property of those members  
13 and have released, confiscated and attempted to prevent the sale  
14 and transportation of anadromous fish which are under their  
15 regulatory jurisdiction and which have been caught by those  
16 members.

17 3-6. The Fisheries defendant has promulgated certain  
18 regulations governing fishing by members of some of the plaintiff  
19 tribes under their claim of treaty right, taking the position  
20 that those tribes hold a distinct treaty right to fish at usual  
21 and accustomed places outside their reservations, the quantum of  
22 which has never been adequately defined.

23 3-7. In dealing with fishing by members of the plaintiff  
24 tribes in a manner different from that expressly provided in  
25 its regulations, the Fisheries defendant and its agents have  
26 seized nets and other property of those members and have  
27 released, confiscated and attempted to prevent the sale and  
28 transportation of anadromous fish which are under their  
29 regulatory jurisdiction and which have been caught by those  
30 members.

1 3-8. The State defendants have taken the position that the  
2 plaintiffs Muckleshoot, Stillaguamish, Sauk-Suiattle and Upper  
3 Skagit Tribes do not hold fishing rights under any of the  
4 treaties involved in this case.

5 3-9. The map marked JX-1 depicts the waters and drainages  
6 in the case area.

7 3-10. The Joint Biological Statement in two volumes (marked JX  
8 2a and 2b) is a true and accurate copy of the document to which  
9 the parties have stipulated as a joint evidentiary exhibit.

10  
11 III. IDENTIFICATION OF PARTIES

12 3-11. The Hoh Tribe is the present-day tribal entity which,  
13 with respect to the matters that are the subject of this  
14 litigation, is a political successor in interest to some of  
15 the Indian tribes or bands which were parties to the Treaty of  
16 Olympia. It is recognized by the United States as a currently  
17 functioning Indian tribe maintaining a tribal government. This  
18 tribe is organized pursuant to section 16 of the Indian  
19 Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. §476.  
20 Its membership is determined in accordance with its Constitution  
21 and Bylaws approved by the Assistant Secretary of the Interior  
22 on February 28, 1969. Its present membership role was approved  
23 by a representative of the Secretary of the Interior on  
24 December 15, 1972. The tribe presently has approximately 62  
25 members.

26 3-12. The Lummi Tribe is the present-day tribal entity which,  
27 with respect to the matters that are the subject of this litiga-  
28 tion, is a political successor in interest to some of the  
29 Indian tribes or bands which were parties to the Point Elliott  
30 Treaty. This tribe is recognized by the United States as a  
31 currently functioning Indian tribe maintaining a tribal

32 Page 11 - FINAL PRETRIAL ORDER



1 government. Its membership is determined in accordance with  
2 its Constitution and Bylaws approved by the Assistant Commissioner  
3 of Indian Affairs April 2, 1948, as amended April 10, 1970.

4 It does not have a current federally approved membership roll  
5 but it presently has approximately 1,500 members.

6 3-13. The Makah Tribe is a party to the Treaty  
7 with the Makah. It is recognized by the United States as a  
8 currently functioning Indian tribe maintaining a tribal government.  
9 This tribe is organized pursuant to section 16 of the said  
10 Indian Reorganization Act of June 18, 1934, and is also  
11 incorporated under section 17 of that act. Its membership is  
12 determined in accordance with its Constitution and Bylaws  
13 approved by the Secretary of the Interior on May 16, 1936. It  
14 does not have a current federally approved membership roll but  
15 it presently has approximately 800 members.

16 3-14. The Muckleshoot Tribe is organized pursuant to  
17 section 16 of said Indian Reorganization Act of June 18, 1934,  
18 and is incorporated under section 17 of that act. The Tribe  
19 is recognized by the United States as a currently functioning  
20 Indian tribe maintaining a tribal government. At least some  
21 of the members of the Muckleshoot Tribe are descendants of  
22 persons who were part of the tribes and bands who were parties  
23 to the Treaty of Point Elliott. Its present membership roll was  
24 approved by a representative of the Secretary of the Interior on  
25 December 15, 1969, and a supplemental roll was so approved on  
26 November 27, 1970. The tribe presently has approximately 386  
27 members. Its membership is determined in accordance with its  
28 Constitution and Bylaws which were approved by the Secretary of  
29 the Interior on May 13, 1936, and as amended on June 14, 1961,  
30

1 and March 26, 1969. The Muckleshoot Indian Reservation was  
2 established by Executive Order of the President of January 20,  
3 1857 (I Kappler (1904) 918-920) pursuant to authority under  
4 Article 6 of the Treaty of Medicine Creek, which was the only  
5 pertinent treaty then in effect. The reservation drew its name  
6 from its location on Muckleshoot Prairie and not from the name  
7 of any Indian group that was placed thereon. Pursuant to  
8 authority of the Treaty of Medicine Creek and the Treaty of  
9 Point Elliott, Indians from the Green and White River areas,  
10 who constituted bands which were parties to the Treaty of  
11 Point Elliott, and some Indians from the upriver portions of  
12 the Puyallup River who were party to the Treaty of Medicine  
13 Creek, were removed to and consolidated on the Muckleshoot  
14 Reservation. The defendants do not concede that all Indians  
15 placed on the reservation were parties to any treaty and deny  
16 that the present-day Indians of the Muckleshoot Reservation  
17 have any treaty rights. No aboriginal band or tribe known  
18 collectively by the name "Muckleshoot" (however spelled) existed  
19 at treaty time. Those Indians who were removed to and consolidated  
20 on the Muckleshoot Reservation thereafter became known as the  
21 "Muckleshoot Indians" or "Muckleshoot Tribe." On March 30,  
22 1935, the Indians of the Muckleshoot Indian Reservation voted,  
23 pursuant to the provisions of the Indian Reorganization Act  
24 (48 Stat. 988, 25 U.S.C. §§476 and 479). , not to exclude  
25 themselves from application from that Act. That Act authorizes  
26 "the Indians residing on one reservation" to organize as a  
27 tribal entity under the Act. The Act of June 13, 1935, 49  
28 Stat. 378, 25 U.S.C. §478b, provides that nothing in the Indian  
29 Reorganization Act "shall be construed to abrogate or impair  
30 any rights guaranteed under any existing treaty with any Indian  
31 tribes, where such tribe voted not to exclude itself from  
32 the application of that Act.

1 3-15. The Nisqually Tribe is the present-day tribal entity  
2 which, with respect to the matters that are the subject of this  
3 litigation, is a political successor in interest to some of the  
4 Indian tribes or bands which were parties to the Medicine Creek  
5 Treaty. It is recognized by the United States as a currently  
6 functioning Indian tribe maintaining a tribal government.  
7 This tribe is organized pursuant to section 16 of the said  
8 Indian Reorganization Act of June 18, 1934. Its membership  
9 is presently determined in accordance with its Constitution  
10 and Bylaws approved by the Assistant Secretary of the Interior  
11 on September 9, 1946. It has a membership roll approved by  
12 a representative of the Secretary of the Interior on November 3,  
13 1965. A new constitution was adopted by the tribe on June 9,  
14 1973, to become effective upon approval by the Secretary of  
15 the Interior. The matter is currently pending before the Secretary.  
16 The Tribe presently has approximately 61 members.

17 3-16. The Puyallup Tribe is the present-day tribal entity  
18 which, with respect to the matters that are the subject of this  
19 litigation, is a political successor in interest to some of  
20 the Indian tribes or bands which were parties to the Medicine  
21 Creek Treaty. It is recognized by the United States as a  
22 currently functioning Indian tribe maintaining a tribal govern-  
23 ment. This tribe is organized pursuant to section 16 of the  
24 Indian Reorganization Act of June 18, 1934 (48 Stat. 987,  
25 25 U.S.C. §476). Its membership is determined in accordance  
26 with its Constitution and Bylaws approved by the Secretary of  
27 the Interior March 11, 1936, as amended June 1, 1970. It does  
28 not have a current federally approved membership roll but it  
29 presently has approximately 600 members. This Court in  
30 *United States v. Washington*, No. 39-71C3, determined that the  
31 Puyallup Tribe has no reservation. This decision is now on  
32 appeal to the Ninth Circuit Court of Appeals.

1 3-17. The Quileute Tribe is the present-day tribal entity  
2 which, with respect to the matters that are the subject of this  
3 litigation, is a political successor in interest to some of  
4 the Indian tribes or bands which were parties to the Treaty of  
5 Olympia. It is recognized by the United States as a currently  
6 functioning Indian tribe maintaining a tribal government. This  
7 tribe is organized pursuant to section 16 of the said Indian  
8 Reorganization Act of June 18, 1934. Its membership is determined  
9 in accordance with its Constitution and Bylaws approved by the  
10 Secretary of the Interior November 11, 1936, as amended March 11,  
11 1949. Its present membership roll was approved by a representa-  
12 tive of the Secretary of the Interior on December 26, 1972. The  
13 tribe presently has approximately 450 members.

14 3-18. The Quinault Tribe is the present-day tribal entity  
15 which, with respect to the matters that are the subject of this  
16 litigation, is a political successor in interest of some of the  
17 Indian tribes or bands which were parties to the Treaty of  
18 Olympia. This tribe is recognized by the United States as a  
19 currently functioning Indian tribe maintaining a tribal govern-  
20 ment and is composed of Quinault and Queets Band of Indians, and  
21 other fish eating Indians of the Olympic Peninsula who were  
22 allotted on the Quinault Reservation. Its membership is deter-  
23 mined in accordance with its Bylaws adopted by its tribal  
24 council on May 22, 1965, and recognized by the Bureau of Indian  
25 Affairs. It has a membership roll of 986 approved by a representa-  
26 tive of the Secretary of the Interior on March 31, 1973. Additional  
27 applications for membership are pending.

28 3-19. No separate reservation was established for a Sauk-  
29 Suiattle tribe in their area. They were permitted to move to  
30 reservations established in the general vicinity; and the majority  
31 who moved to a reservation moved to the Swinomish Reservation, but

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1 most remained in their aboriginal area. The Sauk-Suiattle Tribe  
2 is organized and incorporated under the State of Washington Non-  
3 profit Corporation Act (R.C.W. 24.03) and is not organized  
4 pursuant to any federal law.

5 3-20. The Skokomish Tribe is, with respect to the matters that  
6 are the subject of this litigation, a political successor in  
7 interest of some of the Indian tribes or bands which were parties  
8 to the Point No Point Treaty. It also includes descendants from  
9 some Indians to whom the Medicine Creek Treaty was applicable.  
10 It is recognized by the United States as a currently functioning  
11 Indian tribe maintaining a tribal government. This tribe is  
12 organized pursuant to section 16 of said Indian Reorganization  
13 Act of June 18, 1934, and is also incorporated under section 17  
14 of that act. Its membership is determined in accordance with the  
15 Constitution and Bylaws approved by the Assistant Secretary of  
16 the Interior on May 3, 1938, as amended January 12, 1966. Its  
17 present membership roll was approved by a representative of the  
18 Secretary of the Interior on May 22, 1973. The Tribe presently  
19 has approximately 416 members.

20 3-21. The Squaxin Tribe is the present-day tribal entity  
21 which, with respect to the matters that are the subject of this  
22 litigation, is a political successor in interest to some of the  
23 Indian tribes or bands which were parties to the Medicine Creek  
24 Treaty. It is recognized by the United States as a currently  
25 functioning Indian tribe maintaining a tribal government. This  
26 tribe is organized pursuant to section 16 of the said Indian  
27 Reorganization Act of June 18, 1934. Its membership is determined  
28 in accordance with its Constitution and Bylaws approved by  
29 the Secretary of the Interior July 8, 1965. It has a membership  
30 roll approved by a representative of the Secretary of the Interior  
31 on April 24, 1971. Its current membership is approximately 175.

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1 3-22. No separate reservation was established for the Stoluck-waha-mish  
2 Indian Tribe. That tribe was permitted to move to reservations established  
3 in the general area near them; and some who moved to a reservation moved to  
4 the Tulalip Reservation, but the majority remained in their aboriginal area  
5 along the Stillaguamish River. The membership of the Stillaguamish Tribe of  
6 Indians is determined in accordance with the Tribal Constitution and Bylaws,  
7 approved by the tribe meeting at the Western Washington Agency Office of the  
8 Bureau of Indian Affairs on January 31, 1953.

9  
10 3-23. The Upper Skagit Tribe has prosecuted a claim against the United  
11 States pursuant to the Indian Claims Commission Act of 1946 (60 Stat. 1049,  
12 25 U.S.C. Section 70-70v-1). The Indian Claims Commission determined, in  
13 The Upper Skagit Tribe of Indians v. United States of America, Docket No. 92  
14 8 Ind.Cls.Comm. 475, 476-477, 491, that said Tribe is the successor in interest  
15 to the rights of an identifiable group of American Indians identified as ten  
16 separate villages on the Upper Skagit and Sauk Rivers in treaty times and  
17 subsequently known as "the Upper Skagit Tribe." No separate reservation was  
18 established for the Upper Skagit Indians in their area. They were permitted  
19 to move to reservations established in the general vicinity. Most of  
20 those who moved to a reservation moved to the Swinomish Reservation, but  
21 the majority remained in their aboriginal area. The membership of the  
22 Upper Skagit Tribe is determined in accordance with Articles of Association  
23 adopted in 1962. The Tribe is not organized pursuant to any federal law.

24  
25 3-24. The Yakima Nation is a party to the Treaty with the Yakimas. It is  
26 recognized by the United States as the currently functioning Indian tribe  
27 composed of the tribes and bands consolidated into the Yakima Nation by that  
28 treaty and maintaining a tribal government on the Yakima Indian Reservation.  
29  
30  
31

1 Its membership is determined in accordance with the provisions  
2 of the Act of August 9, 1946 (60 Stat. 968, 25 U.S.C. §§601-607)  
3 and its roll and all additions thereto are approved by a  
4 representative of the Secretary of the Interior. It presently  
5 has approximately 6,040 enrolled members.

6 3-25. Defendant Thor C. Tollefson is the duly appointed,  
7 qualified and acting Director of the Washington State Department  
8 of Fisheries, an agency of the State of Washington vested with  
9 the authority to carry out the purpose and intent of the laws of  
10 Washington pertaining to commercial and sport fishing for food  
11 fish as defined by State law and to the propagation, distribution,  
12 protection and promotion of food fish. As Director he is vested  
13 with the authority to exercise all of the powers and duties of  
14 that Department, including the authority to adopt and promulgate  
15 regulations pursuant to said laws and to enforce said laws and  
16 regulations. Under the laws of Washington the various species  
17 of salmon are classified as food fish and the Department of  
18 Fisheries has jurisdiction over their management, propagation  
19 and harvest, including sport fishing thereon. The Director is  
20 appointed by and serves at the pleasure of the Governor. The  
21 position is a full time position.

22 3-26. Defendant Washington State Game Commission is an agency  
23 of the State of Washington vested with authority to carry out the  
24 purposes and intent of the laws of Washington, including the  
25 adoption and promulgation of regulations thereunder, pertaining  
26 to the propagation, distribution, protection and promotion and  
27 harvest of game fish as defined by State law and to enforce said  
28 laws and regulations. The Commission is part of the Department  
29 of Game. Under the laws of the State of Washington steelhead  
30 trout are classified as a game fish and the Department of Game  
31

1 has jurisdiction over their management, propagation and harvest.  
2 Defendant Carl Crouse is the duly appointed, qualified and acting  
3 Director of the Department of Game. The Commission consists of  
4 six part time commissioners having the qualifications prescribed  
5 by R.C.W. 77.04.040, appointed for staggered six year terms by the  
6 Governor. Three commissioners must come from west of the Cascade  
7 Mountains Summit and three from east of that Summit. The Director  
8 is appointed by and serves at the pleasure of the Commission.

9 3-27. Defendant Washington Reef Net Owners Association is  
10 an unincorporated association, in existence since on or about  
11 1953, of individuals engaging in such form of commercial  
12 fishing operations at various points in upper Puget Sound and in  
13 the San Juan Islands, doing so under licenses obtained from the  
14 Department of Fisheries and in compliance with regulations of  
15 such department, plus the statutes of the State of Washington.



1 IV. TREATY BACKGROUND

2 3-28. The United States claimed the area now embraced within  
3 the State of Washington by discovery and settlement and by the  
4 treaty extinguishment of conflicting claims of Spain (Treaty of  
5 February 22, 1819, 8 Stat. 252), Russia (Convention of April 17,  
6 1824, 8 Stat. 302), and Great Britain (Treaty of June 15, 1846,  
7 9 Stat. 869). By the Act of August 14, 1848, 9 Stat. 323, the  
8 United States established the Oregon Territory and provided that  
9 nothing contained in said act "shall be construed to impair the  
10 rights of person or property now pertaining to the Indians in  
11 said Territory, so long as such rights shall remain unextinguished  
12 by treaty between the United States and such Indians . . ."  
13 Section 14 of that act extended the Northwest Ordinance of 1797,  
14 1 Stat. 51, Note a, to the Oregon Territory. Article 3 of that  
15 Ordinance provides that "good faith shall always be observed  
16 toward the Indians; their lands and property shall never be taken  
17 from them without their consent." By an Act of June 5, 1850,  
18 9 Stat. 437, Congress authorized the negotiation of treaties with  
19 the Indian tribes in the Territory of Oregon (which then included  
20 the area which now comprises the State of Washington) for the  
21 extinguishing of their claims to lands lying west of the Cascade  
22 Mountains. By the Act of March 2, 1853, 10 Stat. 172, Congress  
23 organized the Territory of Washington out of the north portion  
24 of the Oregon Territory (including all of the present State of  
25 Washington) and provided therein that nothing in said act "shall  
26 be construed to affect the authority of the government of the  
27 United States to make any regulations respecting the Indians  
28 of said Territory, their lands, property, or other rights, by  
29 treaty, law or otherwise, which it would have been competent  
30 for the Government to make if this act had never been passed."

1 Section 12 of that act provided that all laws of Congress  
2 relating to the Oregon Territory not inconsistent with said 1853  
3 act were continued in force in the newly created Washington  
4 Territory. Section 2 of the act provided for the appointment of  
5 a governor who was also to perform the duties of Superintendent  
6 of Indian Affairs in the Territory. The Appropriation Act of  
7 March 3, 1853, 10 Stat. 189, authorized the President to enter  
8 into negotiations with Indian tribes west of the States of  
9 Missouri and Iowa "for the purpose of securing the assent of said  
10 tribes to the settlement of the citizens of the United States  
11 upon the lands claimed by said Indians, and for the purpose of  
12 extinguishing the title of said Indian tribes in whole or in part  
13 to said lands; . . ." The Appropriation Act of July 31, 1854,  
14 10 Stat. 315, 330, authorized the use of appropriations for making  
15 treaties in several territories, including Washington, prior to  
16 July 1, 1855.

17 3-29. The Act of February 22, 1889, 25 Stat. 676, admitting  
18 Washington to statehood, provided in section 4, as a precondition  
19 to such statehood, that the people of the state forever disclaim  
20 all right and title to all lands owned or held by any Indian or  
21 Indian tribes and until the title thereto shall have been  
22 extinguished by the United States, the same shall be and remain  
23 subject to the disposition of the United States and shall remain  
24 under the absolute jurisdiction and control of Congress.  
25 Washington accepted this requirement and incorporated it into  
26 Article XXVI of the State Constitution. Washington was admitted  
27 into the Union as a state on November 11, 1889. 26 Stat.  
28 Proclamations p. 10.

29 3-30. On December 26, 1853, Isaac Stevens, the first  
30 Governor and ex officio Superintendent of Indian Affairs of the  
31

1 Washington Territory, wrote to the Commissioner of Indian Affairs  
2 suggesting the necessity of making treaties with the Indians west  
3 of the Cascade Mountains in Washington Territory. He pointed out  
4 that these tribes lived on different watercourses or bays and  
5 inlets of Puget Sound, and they should have lands set aside for  
6 their use. On August 30, 1854, the Acting Commissioner of Indian  
7 Affairs notified Governor Stevens of his official appointment to  
8 negotiate treaties with all tribes in the Washington Territory.  
9 Governor Stevens was directed that in making the treaties he  
10 should endeavor to unite the "numerous bands and fragments of  
11 tribes into tribes, . . ." and to furnish the Commissioner of  
12 Indian Affairs a skeleton map of Washington Territory, showing  
13 the location of the different tribes and bands, and the  
14 boundaries of the regions claimed by each. In carrying out his  
15 duties as Superintendent of Indian Affairs, Governor Stevens  
16 had previously, on March 22, 1854, appointed Colonel Michael T.  
17 Simmons as Indian agent for the Puget Sound District and directed  
18 him to visit the various tribes in his district, make a census of  
19 the tribes and bands, ascertaining as nearly as possible the  
20 boundaries of the territory claimed by each, and at the same time  
21 organize the small bands into tribes and appoint chiefs for  
22 each. Governor Stevens was assisted in arranging for the treaties  
23 also by George Gibbs, a lawyer, surveyor and ethnologist, who was  
24 one of the sources of information relative to the identity and  
25 location of Western Washington tribes at the time of the treaties  
26 and who wrote an extensive ethnological report in 1854-55, and by  
27 Colonel B. F. Shaw, an interpreter.

28 3-31. Each of the applicable treaties contains a provision  
29 securing to the Indians who were parties thereto certain fishing  
30 rights. The respective treaty provisions are as follows:  
31

1           Treaty of Medicine Creek (Article 3)

2           The right of taking fish, at all usual and accustomed  
3           grounds and stations, is further secured to said  
4           Indians, in common with all citizens of the Territory,  
5           and of erecting temporary houses for the purpose of  
6           curing, together with the privilege of hunting,  
7           gathering roots and berries, and pasturing their  
8           horses on open and unclaimed lands; Provided, however,  
9           That they shall not take shell-fish from any beds  
10           staked or cultivated by citizens, and that they shall  
11           alter all stallions not intended for breeding-horses,  
12           and shall keep up and confine the latter.

13           Treaty of Point Elliott (Article 5)

14           The right of taking fish at usual and accustomed  
15           grounds and stations is further secured to said  
16           Indians in common with all citizens of the Territory,  
17           and of erecting temporary houses for the purpose of  
18           curing, together with the privilege of hunting and  
19           gathering roots and berries on open and unclaimed  
20           lands. Provided, however, That they shall not take  
21           shell-fish from any beds staked or cultivated by  
22           citizens.

23           Treaty of Point No Point (Article 4)

24           The right of taking fish at usual and accustomed  
25           grounds and stations is further secured to said  
26           Indians, in common with all citizens of the  
27           United States; and of erecting temporary houses  
28           for the purpose of curing; together with the  
29           privilege of hunting and gathering roots and  
30           berries on open and unclaimed lands. Provided  
31           however, That they shall not take shell-fish from  
32           any beds staked or cultivated by citizens.

Treaty of Neah Bay (Article 4)

              The right of taking fish and of whaling or sealing  
              at usual and accustomed grounds and stations is  
              further secured to said Indians in common with all  
              citizens of the United States, and of erecting  
              temporary houses for the purpose of curing, together  
              with the privilege of hunting and gathering roots  
              and berries on open and unclaimed lands; Provided,  
              however, That they shall not take shell-fish from  
              any beds staked or cultivated by citizens.

1 Treaty with the Quinaielt, etc. (Article 3)

2 The right of taking fish at all usual and accustomed  
3 grounds and stations is secured to said Indians in  
4 common with all citizens of the Territory, and of  
5 erecting temporary houses for the purpose of curing  
6 the same; together with the privilege of hunting,  
7 gathering roots and berries, and pasturing their  
8 horses on all open and unclaimed lands. Provided,  
9 however, That they shall not take shell-fish from any  
10 beds staked or cultivated by citizens; and provided,  
11 also, that they shall alter all stallions not intended  
12 for breeding, and keep up and confine the stallions  
13 themselves.

14 Treaty with the Yakimas (Article 3)

15 The exclusive right of taking fish in all the streams,  
16 where running through or bordering said reservation,  
17 is further secured to said confederated tribes and  
18 bands of Indians, as also the right of taking fish at  
19 all usual and accustomed places, in common with the  
20 citizens of the Territory, and of erecting temporary  
21 buildings for curing them; together with the privilege  
22 of hunting, gathering roots and berries, and pasturing  
23 their horses and cattle upon open and unclaimed land.

24 The Yakima Treaty also contains a provision that:

25 . . . if necessary for the public convenience, roads  
26 may be run through the said reservation; and on the  
27 other hand, the right of way, with free access from  
28 the same to the nearest public highway, is secured  
29 to them; as also the right, in common with citizens  
30 of the United States, to travel upon all public  
31 highways.

1 V. INDIAN LIFE AT THE TIME OF THE TREATIES.

2 3-32 General Structure of Indian Life.

3 Aboriginally and during the time when the treaties were  
4 negotiated, Indian settlements were dispersed throughout western  
5 Washington.

6 There was considerable local diversity in the availability  
7 of animal, plant, and mineral resources used for food and artifacts.  
8 It is possible to make some valid generalizations regarding  
9 Indian life west of the Cascades during aboriginal and treaty  
10 times.

11 All groups utilized to varying degrees saltwater and  
12 freshwater resources for food, as well as land plants and  
13 animals.

14 The Indians generally lived next to waterways, traveled  
15 upon them, and depended on the resources of the waters for  
16 an important part of their diet. These resources differed  
17 in the open sea, in bays, rivers and lakes. Availability varied  
18 not only from area to area, but also seasonally. There was also  
19 considerable fluctuation in abundance and availability from year  
20 to year. Some of this was regular and predictable, as in the  
21 case of runs of certain species and races of salmon. Other  
22 causes were erratic, such as flooding and alterations in  
23 watercourses.

24 Successful Indian utilization of the marine and freshwater  
25 food resources required an intimate knowledge of local environments  
26 and the locally available species and specialized taking-  
27 techniques. In the case of fishing, gear and techniques were  
28 specific not only as to species but also to water conditions.  
29  
30  
31

1 Throughout most of the area, salmon was a staple food.  
2 Steelhead were also taken. Salmon and steelhead could only be  
3 taken at particular periods of time. The harvest and utilization  
4 of these resources involved: (a) fishing equipment; (b) food-  
5 preservation techniques and storage facilities; and (c) an  
6 exchange system.

7 The major food acquisition techniques in the area were  
8 fishing, hunting of land animals and sea-mammals. The collection  
9 of shellfish and other intertidal marine life, berries, and the  
10 digging of edible roots, 'shoots and bulbs. Animal husbandry  
11 and agricultural activities such as cultivation of potatoes were  
12 also important.

13 In order to take these foods as they became available at  
14 certain places and seasons, it was necessary for people to be on  
15 hand when the resources were ready for harvest. These seasonal  
16 movements were reflected in native social organization. In the  
17 winter, when weather conditions generally made travel and  
18 fishing difficult, people remained in their winter villages  
19 and lived more or less on stored food. Fresh fish and other  
20 foods were harvested during the winter. That season, however,  
21 was devoted primarily to intra- and intervillage ceremonies  
22 and manufacturing tasks. This was the time when people were  
23 congregated into the largest assemblages, occupying long  
24 multifamily houses made of split cedar planks. Throughout the  
25 rest of the year individual families dispersed in various  
26 directions to join families from other winter villages in fishing,  
27 clam digging, hunting, harvesting camas, berry picking, and  
28 agricultural pursuits. People moved about to resource areas  
29 where they had use patterns based on kinship or marriage.  
30 Families did not necessarily follow the same particular pattern  
31 of seasonal movements every year.

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1 Native society was hierarchical, in which upper-class people,  
2 commoners, and slaves were recognized. Leadership and authority  
3 tended to be task oriented with the appropriate specialist  
4 taking over leadership according to the occasion, e.g., hunting  
5 party, communal fish drive, raiding party, life crisis ceremony.

6  
7 3-33 Function of Fishing in Indian Life.

8 The first-salmon ceremony, which was general through most  
9 of the area, differed in detail and was celebrated over different  
10 species from community to community. This was essentially a  
11 religious rite to ensure the continued return of salmon to the  
12 area. The symbolic acts, attitudes of respect and reverence,  
13 and concern for the salmon reflected a ritualistic conception  
14 of the interdependence and relatedness of all living things which  
15 was a dominant feature of native Indian world view. Religious  
16 attitudes and rites insured that salmon were never wantonly wasted  
17 and that water pollution was not permitted. Refuse was never  
18 deposited in streams during the salmon season and the Twana  
19 (Skokomish) even beached their canoes to bail them.

20 Distribution of surplus foods involved voluntary gift  
21 giving to kin and friends, reciprocal gifting to specified affinal  
22 kin which sometimes became competitive, intercommunity feasting,  
23 potlatching, and trade beyond the local community.

24 As a food staple, fish provided essential proteins, fats,  
25 vitamins, and minerals in the native diet. These fish were  
26 not the sole or exclusive source of these dietary ingredients.

27 Fishing methods varied according to the locale but generally  
28 included trapping, dip-netting, gill-netting, reef-netting,  
29 trolling, long-lining, jigging, set-lining, impounding, gaffing,  
30 spearing, harpooning and raking. The methods then pursued were  
31 different in some respects from the present techniques known by  
32 the same name.



1 Species of fish taken, again varying according to locale,  
2 included salmon and steelhead, halibut, cod, flounder, ling cod,  
3 rockfish, herring, smelt, eulachon, dogfish and trout.

4  
5 3-34 Controls Over Indian Fishing.

6 Indian control over fishing was by accepted, customary codes  
7 of conduct rather than by formal regulation in the Western-  
8 European sense.

9 Generally, individual Indians had primary use rights in  
10 the territory where they resided and permissive use rights in the  
11 natal territory (if this was different) or in territories where  
12 they had consanguineal kin. Subject to such individual claims  
13 most groups claimed fall fishing use rights in the waters near to  
14 their winter villages. Spring and summer fishing areas were often  
15 more distantly located and often were shared with other groups  
16 from other villages.

17 There is no evidence of any attempt by the settlers to impose  
18 regulatory controls over their own or Indian fishing during this  
19 period.

20  
21  
22 Certain areas in the rivers were more productive than other  
23 areas in the rivers and were utilized to a greater extent by the  
24 Indians than other fishing locations.

25 Although there are extensive records and oral history from  
26 which many specific fishing locations can be pinpointed, it  
27 would be impossible to compile a complete inventory of any  
28 tribe's usual and accustomed grounds and stations.

1 VI. NEGOTIATION AND EXECUTION OF THE TREATIES.

2 3.35 Purpose of Treaty as a Whole.

3 The Indians had received constant assurances from white  
4 settlers and from government representatives that they would be  
5 compensated for lands which were being settled on by United  
6 States citizens.

7 The United States was concerned to extinguish Indian claims  
8 to the land in Washington Territory and codify its relations  
9 with the Indians, in order to forestall friction between Indians  
10 and settlers and between settlers and the government. The Act  
11 creating Oregon Territory provided that Indian rights should be  
12 extinguished by treaties. Before such extinguishment, the  
13 Donation Act had thrown open the land to settlement and induced  
14 non-Indians to migrate and take up land claims.

15  
16 3-36 Signing the Treaties.

17 Generally, Indian signatories were individuals who had some  
18 sort of friendly contact with non-Indians. Most were men of  
19 importance in their communities, although they were not necessarily  
20 the most important men. The "head chiefs" were chosen by Simmons  
21 and Stevens. The "sub-chiefs" and "leading men" were selected  
22 by Simmons and Stevens, sometimes with the aid of the "head  
23 chief". The bases for choice were friendliness to Americans,  
24 real or apparent status in their communities, and ability to  
25 communicate in Chinook jargon. The "sub-chiefs" and "leading  
26 men" were intended by the United States to represent the bands  
27 to which they were thought to belong. Various "bands" and  
28 "fragments of tribes" were arbitrarily assigned a subordinate  
29 status to other "tribes", each of which had been assigned a  
30 "head chief". The latter were taken to represent not only the

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

7 3-37. Communication.

8 It is hazardous to judge the extent of communication of  
9 either specific terms or of underlying purposes and effect of  
10 the treaties. Chinook jargon, a trade medium of limited  
11 vocabulary and simple grammar, was inadequate to express  
12 precisely the legal effects of the treaties. Some of those  
13 present, did not understand Chinook jargon. The official  
14 interpreter, Shaw, spoke no Indian language and had to use Chinook  
15 jargon to interpret the treaties, which were then re-interpreted  
16 into the various Indian languages by Indians who understood the  
17 jargon.

18 VII. POST-TREATY FISHING.

19 3-38. For many Indians, fish continue to provide a vital component  
20 in their diet. For other Indians, fish is not a necessary  
21 dietary item although it may remain an important food in a  
22 symbolic sense. (Analogous to Thanksgiving turkey.) Few  
23 habits of human beings are stronger than dietary habits and  
24 their persistence is usually a matter of emotional preference  
25 rather than a nutritional need. For some Indians, fishing is  
26 also important economically. Fishing is also important for  
27 some non-Indians.

28 Since treaty times, Indians and non-Indians have adopted new  
29 fishing techniques and gear. Indians no longer fish from dugouts,  
30 just as non-Indians no longer fish from wooden sailboats. Indians  
31 no longer use bark nets and non-Indians no longer use cotton or  
32 linen nets.

VIII. SPECIFIC TRIBES.

(1) Hoh Tribe.

(See Quileute and Hoh, *infra.*)

(2) Lummi Tribe.

3-39. The Lummi Indian Tribe is composed primarily of descendants of Indians who in 1855 were known as Lummi or Nook-Lummi and who lived in the area of Bellingham Bay and near the mouth of the river emptying into it. The present Lummi Indian Tribe also includes descendants of the Semiahmoo and Samish Indians of 1855. The Lummi Indians, and the Semiahmoo and Samish Indians who were subsumed under the Lummi designation, were party to the Treaty of Point Elliott. Fourteen of the signatories to the Treaty of Point Elliott are identified as Lummi Indians.

3-40. Prior to, during and after treaty times, the Lummi, Semiahmoo and Samish Indians shared two differentiating characteristics: (a) They spoke a common language called Straits Salish which was distinct from the Nooksack language spoken by the Nooksack Indians to the east and unlike the Puget Sound language spoken by the rest of the Point Elliott treaty Indians to the south; and (b) they utilized a specialized fishing technique called "reef netting". Aboriginal Indian "reef netting" differs from present methods and techniques described by the same term.

3-41. Reliable information concerning the pre-treaty activities of the Lummi, Semiahmoo and Samish Indians is given in the reports and writings of George Gibbs and Theodore Winthrop. Reliable information concerning the activities of those

1 Indians during and after treaty times is given in the reports  
2 of George Gibbs (1854), Indian Agent Fitzhugh (1856), C. C.  
3 Finkboner (1865), John McGlinn (1874), B. N. McDonough (1871-  
4 1883), Franz Boas (1889-1890), J. W. Collins (1892), D. J. Stern  
5 (1934) and W. P. Suttles (1951). These sources have varying  
6 degrees of reliability and they are not the only sources on the  
7 subject.

8  
9 3-42. Prior to the Treaty of Point Elliott, the Lummi,  
10 Semiahmoo and Samish Indians had been engaged in trade in salmon,  
11 halibut and shellfish both with other Indians and with non-  
12 Indians. They took spring, silver and humpback salmon by gillnets  
13 and harpoons near the mouth of the Nooksack River, and steelhead  
14 by harpoons and basketry traps on Whatcom Creek. Before the  
15 sockeye run, the Lummi trolled the waters of the San Juan  
16 Islands for various species of salmon.

17  
18 (3) Makah Tribe.

19 3-43. Reliable information concerning the activities of the  
20 Indian parties to the treaty with the Makah is provided in the  
21 works of a shipwrecked Russian crew member who lived with the  
22 Makah in 1809; Samuel Hancock who resided at Neah Bay in 1852;  
23 George H. Gibbs who was one of the treaty negotiators;  
24 Captain William Webster who wrote a letter in 1853; contemporary  
25 newspapers during treaty time; Boit's log from the "Columbia",  
26 September 30, 1792; and Governor Isaac I. Stevens. Reliable  
27 information concerning the shortly post-treaty activities of the  
28 Indian parties to the treaty with the Makah is given in the  
29 reports and writings of George H. Gibbs, one of the treaty

1 negotiators; James G. Swan (1862-1866); T.T. Waterman;  
2 Elizabeth Colson; Jose Mariano Mozino; Phillip Drucker; Frances  
3 Densmore; Michael T. Simmons; Henry A. Webster (1863); the  
4 Superintendent of Indian Affairs for the Washington Territory in  
5 1863; E.M. Gibson (1873); C.A. Huntington (1875); Superintendent  
6 of Indian Affairs for the Washington Territory R.H. Milroy  
7 (1872); Indian Agent Charles Willoughby (1881); John P. McGlinn  
8 (1891); and Samuel Morse (1901). These sources have varying  
9 degrees of reliability and are not the only sources of information  
10 on the subject.

11  
12 3-44. The members of the treaty commission at the Treaty with  
13 the Makah (Stevens, Gibbs, Shaw and Simmons) were aware of the  
14 commercial nature and value of the Makah maritime economy  
15 (covering such saltwater objects as halibut and whale) and they  
16 promised the Makah that the government would assist them in  
17 developing their maritime industry. By his promise of kettles  
18 and fishing apparatus to the Indian parties to the Treaty with  
19 the Makah, Governor Stevens clearly indicates that there was no  
20 intent on the part of the treaty commissioners that the Indians  
21 be restricted to aboriginal equipment or techniques. The  
22 United States Government intent to aid the Makah Indians in their  
23 whaling, sealing and other fisheries continued for at least 40  
24 years following the treaty.

25  
26 3-45. The Makah Indians have continued to assert their use  
27 rights to areas of saltwater and freshwater after the execution  
28 and ratification of the Treaty with the Makah.

1 3-46. At the time of the treaty, the Makah Indians maintained  
2 separate winter and summer villages, such that residents of one  
3 winter village (e.g. Baadah) summered at a specific summer  
4 village (e.g. Kiddecubbut). The treaty commissioners did not  
5 fully understand this network of summer and winter villages.  
6 Prior to, during and after treaty some of the Makah Indians  
7 traveled from their summer village and in the fall moved to  
8 camps which provided access to places for taking fish from the  
9 salmon runs in the streams and rivers draining into the Strait  
10 of Juan de Fuca.

11  
12 3-47. Prior to, during and after treaty times the Makah Indians  
13 were a trading as well as a producing people, who traded with  
14 the Chinook, Kwinaiult and Kwilleute Indians to the south and  
15 other Indians north of Cape Flattery. James G. Swan recorded  
16 that between 1859 and 1866 the Makah Indians imported from  
17 Vancouver Island Nootkan Indians such things as ocean-going  
18 canoes, cedar house planks, wooden chests, and medicine, and  
19 from their Indian neighbors to the south and east, such things  
20 as camas, pipe clay, ochre, sleeping mats and ash baskets. They  
21 also imported from Europeans such things as blankets, guns,  
22 beads, kettles and pans. He also recorded that the Makah  
23 Indians exported to Nootkan Indians on Vancouver Island such  
24 things as dried halibut and whale oil and exported to whites such  
25 things as dried halibut, smoked salmon and furs. Defendants  
26 contend that this activity was in violation of Article XIII of  
27 the Treaty with the Makah.

1 3-48. At treaty times the Makah Indians took at their usual  
2 and accustomed fishing sites, sockeye, chum, and coho salmon,  
3 using fishing techniques which included seining, spearing and  
4 trolling.

5

6 (4) Muckleshoot Tribe.

7 3-49. Reliable information concerning the activities, prior to  
8 and during treaty times, of the Indians who inhabited the areas  
9 from which were drawn those Indian bands who were resettled on  
10 the Muckleshoot Reservatiøn is given in the reports and writings  
11 of the Pioneer and Democrat, G. Suckley, Denny, and George H. Gibbs.  
12 Reliable information concerning the post-treaty activities of  
13 these Indians is given in the reports and writings of Arthur C.  
14 Ballard, T.T. Waterman, Ezra Meeker, Morda C. Slauson, and M.T.  
15 Simmons. These sources have varying degrees of reliability and  
16 are not the only sources of information on the subject.

17

18 3-50. Some of the Indian bands who were resettled on the  
19 Mucklshoot Reservation, and who are the ancestors of the present-  
20 day Muckleshoot Indians, inhabited the upper portions of the  
21 Duwamish River and Puyallup River drainages.

22

23 3-51. Prior to, during and after treaty times the Indian  
24 ancestors of the present-day Muckleshoot Indians caught coho,  
25 kokanee, sockeye, chum and pink salmon and steelhead which they  
26 ate fresh and smoked and cured for winter consumption and for  
27 exchange and trade. They used weirs, funnels, snares, grills,  
28 set nets and spears for this purpose. They operated their weir  
29 sites so as to periodically remove lattice sections of the weir  
30 which had the effect of permitting the salmon to escape upstream  
31 to spawn.



1 3-52. In 1860, when speaking of the Muckleshoot Reservation as  
2 a place for resettlement of Indians inhabiting the Duwamish and  
3 Puyallup drainages, Agent M.T. Simmons stated:

4 Here [at the Reservation], with a fine range for stock  
5 summer and winter, warm bottoms for vegetables, and a  
6 fertile prairie for grain and grass, besides a river  
7 on each side of them teeming with salmon in the  
proper season, they must surely be self-supporting  
in a short time.

8 3-53. Prior to and during treaty times, the Indian ancestors  
9 of the present-day Muckleshoot Indians fished primarily at  
10 locations on the upper Puyallup, the Carbon, Stuck, White, Green,  
11 Cedar and Black Rivers, the tributaries to these rivers (including  
12 Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington,  
13 and secondarily in the saltwater of Puget Sound. Villages and  
14 weir sites were often located together. Defendants do not  
15 concede that all of these waters constituted usual and  
16 accustomed fishing grounds within the meaning of the treaty.

17  
18 3-54. Fishing for anadromous species is a source of income and  
19 food for Muckleshoot Indians today.

20  
21 (5) Nisqually Tribe.

22 3-55. Dr. George Suckley reported information respecting salmon  
23 which he recorded from the Indians while he resided at Puget  
24 Sound between 1853 and 1856. Some of this information is  
25 recorded in the 1854 Reports of Explorations and Surveys, to  
26 Ascertain the Most Practical and Economical Route for a Railroad  
27 from the Mississippi River to the Pacific Ocean, Made Under the  
28 Direction of the Secretary of War, in 1853-4, According to Acts  
29 of Congress of March 3, 1853, and May 31, and August 5, 1854,

1 which was published as Executive Document 91, House of  
2 Representatives for the Second Sess. of the 33d Cong.

3

4 3-56. Dr. George Suckley reported that:

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the salmon known to the Nisquallies as the skwowl, which I consider identical with the Klutchin of the Clallums, . . . arrives in the bays and estuaries of Puget Sound about the middle of autumn, and towards the first of December commences to run up the larger rivers emptying into the sound. Their ascent of these streams continue through December and January. This arrival of the species in fresh water is not as simultaneous neither do they arrive in such great numbers at any one time or in 'schools,' as is the case with the Skourtz and several other species, but the 'run' being somewhat more 'drawn out' affords a steady moderate supply to the Indians during its continuance.

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He further recorded that, after the skwowl entered the rivers, they were taken by the Indians in nets, traps, baskets, etc., and also by spearing.

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3-57. Dr. George Suckley reported on some of the uses which the Indians made of different species of salmon in 1853 and 1854. Quoting George Gibbs, Suckley reported that the dog salmon is preferred by the Indians for drying because there is but little fat upon it. The Indians do not dry them until they have been in the fresh water some time and have lost what little fat they had. They arrive about October first and last until late in the winter. Suckley further noted that the Indians say that the Huddoh, i.e. pink or humpback salmon, is usually quite fat and that they like it as food very much. He said that the skowitz or coho is a very abundant species and affords the principal salmon harvest to the natives who dry vast quantities

1 for winter consumption. He said that the Puget Sound Indians take  
2 a salmon in summer which is known to the Skadgetts as the Yoo-mitch  
3 and to the Nisqually as the satsup which the Indians considered to  
4 be the best of all kinds of salmon. It commences to run up the  
5 freshwater streams about June 15 and continues until about the  
6 middle or end of August.

7  
8 3-58. During treaty times the Nisqually Indians recognized  
9 separately and harvested the following species or races of  
10 anadromous fish:

- 11 a. Tl'hwai (chum or dog salmon),
- 12 b. Skowitz (coho salmon),
- 13 c. Huddo (humpback salmon),
- 14 d. Satsup (Chinook salmon),
- 15 e. To-walt Satsup (king or tyee salmon),
- 16 f. Skowl (steelhead).

17 Their fishing techniques included trolling in saltwater, and nets,  
18 traps, weirs, gaffs, spears and hook and line in freshwater. Such  
19 fish were the Nisqually Indians' most important single food. They  
20 were eaten fresh, were smoked and preserved, and were used for  
21 nonfood purposes such as glue base by the Nisqually Indians. The  
22 Nisqually Indians also identified several constellations by  
23 reference to fish and fisheries.

24  
25 3-59. Prior to and during treaty times the Nisqually Indians  
26 intermarried with the Steilacoom, Puyallup and Duwamish Indians  
27 and with other Indians from various inlets of southwestern Puget  
28 Sound.

1 3-60. At the time of the Medicine Creek Treaty upriver  
2 fisheries in the Nisqually area were normally used by the locally  
3 resident group. Saltwater fisheries and fisheries at the mouth  
4 of the Nisqually River traditionally were used by visitors as  
5 well as the local residents. Visitors might use them because  
6 they held claims to them by virtue of kin ties with the local  
7 people or they might be accorded guest privileges by virtue of  
8 friendship.

9  
10 3-61. The unpublished works of George Gibbs contain at least  
11 three notations of a fish trap or fish dam on the Nisqually  
12 River involving at least two separate locations.

13  
14 3-62. T.T. Waterman, an anthropologist who conducted field  
15 research in 1917 to 1920 on native names for geographic locations  
16 in the Puget Sound area, recorded information concerning an old  
17 Indian village site at the mouth of the Nisqually River which  
18 was called Tu Sqwe le, meaning "late." He recorded  
19 that the run of salmon was said to be later in the Nisqually  
20 than in any other stream and that the people at that village  
21 would be engaged in taking and curing slamon after they were gone  
22 from the other rivers.

23  
24 3-63. It is not possible to document or to pinpoint every  
25 location where Nisqually Indians took fish during treaty times.  
26 Their principal fishing places included at least the saltwater  
27 areas at the mouth of the Nisqually River and the surrounding  
28 bay and the freshwater courses of the Nisqually River and its  
29 tributaries, McAllister (Medicine or Shenahnam) Creek,

1 Sequalitcu Creek, Chambers Creek and the lakes between Steilacoom  
2 and McAllister Creeks. The saltwater fisheries were shared with  
3 other Indians. Defendants deny that all of these waters constituted  
4 usual and accustomed fishing places within the meaning of the  
5 treaty.

6  
7 (6) Puyallup Tribe.

8 3-64. At the time that the Treaty of Medicine Creek was  
9 negotiated, George H. Gibbs, who assisted Governor Stevens in  
10 the treaty preparation and negotiation and who prepared reports  
11 on and made estimates of the populations of Indian groups in  
12 western Washington with whom treaties were sought to be negotiated,  
13 designated the Puyallup peoples by two names only -- Puyallup,  
14 evidentially meant to encompass those on all of the river drainage,  
15 and S'Homamish, referring to those on Vashon Island.

16  
17 3-65. At the time of the Medicine Creek Treaty communication  
18 among upriver Puyallups, people of the Green River - White  
19 River - Stuck River area and the upriver Nisquallies was relatively  
20 easy. In addition, there was considerable intermarriage and  
21 trade contact with Sahapatin-speaking peoples from east of  
22 the Cascades.

23  
24 3-66. Reliable information concerning pre-treaty activities of  
25 the Indians who inhabited the Puyallup River valley and Vashon  
26 Island is given in reports by George H. Gibbs and Ezra Meeker.  
27 Reliable information concerning shortly post-treaty activities  
28 of the Indians who were brought to the Puyallup Reservation is  
29 given in reports by George H. Gibbs, Byron Barlow, Indian Agent

1 Michael T. Simmons. M.W. Smith, G. Suckley, T.T. Waterman and  
2 Richard Lane. These sources have varying degrees of reliability  
3 and are not the only sources of information on this subject.  
4

5 3-67. The reference in the Preamble to the Treaty of  
6 Medicine Creek to the Puyallup and S'Homamish Bands of Indians was  
7 intended to encompass all those groups of Indians living on the  
8 Puyallup River, its tributary creeks, and neighboring Vashon  
9 Island. After the treaty these people, as well as any others  
10 who removed to the Puyallup Reservation, were all subsumed under  
11 the single name "Puyallup".  
12

13 3-68. Accounts by settlers and others prior to and contempora-  
14 neous with the Medicine Creek Treaty attest to the abundance of  
15 fish in the waters utilized by the Indians who were subsumed  
16 under the name of Puyallup and to the variety of techniques  
17 employed by them in taking fish. Those Indians fished for four  
18 species of salmon and steelhead in saltwater and in freshwater  
19 creeks and rivers throughout those areas. In the rivers the  
20 bulk of the salmon and steelhead were taken in nets associated  
21 with weirs, but other important taking techniques included  
22 gaffing, falls traps, river seines, and spearing. These fish  
23 were important to them as an item of diet and subsistence, an  
24 item of trade, a medium of exchange and a base for such manufactured  
25 commodities as glue.  
26

27 3-69. In 1856, in connection with the transmittal to the  
28 Commissioner of Indian Affairs of his recommendation for the  
29 relocation of the Puyallup Reservation from the original location  
30  
31

1 specified in the treaty to the location at the mouth of the  
2 Puyallup River; Governor Stevens forwarded a map  
3 which showed salmon fisheries located on the north and south  
4 sides of Commencement Bay. The land set apart as the Puyallup  
5 Reservation as a result of that recommendation was intended to  
6 encompass usual and accustomed freshwater fishing sites and to  
7 provide access to traditional fisheries in Commencement Bay for  
8 those Indians who were brought to the reservation.

9  
10 3-70. One of the earliest white settlers of the Puyallup  
11 Valley, Ezra Meeker, who first visited the Puyallup River  
12 in June of 1853, later commented on the abundance of salmon in  
13 a tributary creek of that river. He stated that he had seen  
14 salmon "so numerous in the shoal water of the channel as to  
15 literally touch each other. It was utterly impossible to wade  
16 across without touching the fish."

17  
18 3-71. On September 18, 1871, Byron Barlow, farmer in charge  
19 of the Puyallup Indian Reservation, reported to his superiors that  
20 "This being the fishing season for the Indians, there are many  
21 of them temporarily absent securing their winter supply of salmon  
22 \* \* \* There will be a large catch of salmon this year, probably  
23 over 400 barrels."

24  
25 3-72. On January 6, 1861, Richard Lane, in charge of the  
26 Puyallup Reservation, reported to his superiors that a number of  
27 the upper Puyallup Indians came down to the forks of the Puyallup  
28 River "to fish salmon, as has been their custom hitherto at this  
29 season of the year -- \* \* \*. These Indians had been fishing  
30 for about five or six days with success \* \* \*."

31  
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1 3-73. It is no longer possible to document and pinpoint all  
2 of the usual and accustomed fishing places of the Puyallup  
3 Indians. However, such usual and accustomed places were located  
4 on lands ceded by these Indians under the Medicine Creek  
5 Treaty as well as on lands subsequently set aside for their  
6 exclusive use pursuant to the treaty as the Puyallup Indian  
7 Reservation.

8  
9 3-74. Fishing for salmon and steelhead continues to be  
10 important to the Puyallup Tribe.

11  
12 3-75. Although Governor Stevens asserted in his letter of  
13 December 30, 1854, that Indians "catch the salmon with spears in  
14 deep water and not with seines or weirs", there is considerable  
15 evidence from the contemporary observation of others from which  
16 it can be concluded that the Indians in fact did use seines and  
17 weirs as well as other nets for taking salmon and steelhead.

18  
19 3-76. Control and use patterns of fishing gear varied  
20 according to the nature of the gear. Certain types required  
21 cooperative effort in their construction and/or handling.  
22 Weirs were classed as cooperative property but the component  
23 fishing stations on the weir were individually controlled.



1 (7) Quileute and Hoh Tribes.

2 3-77. Linguistically and culturally the Quileute and Hoh  
3 Tribes appear to be one people. Dr. George Gibbs, in a comprehen-  
4 sive report on Washington Indians which he made in 1856 and which  
5 was published in 1877, described the Quileute Indians as follows:

6 \* \* \*

7 There are two bands of this tribe, the Kwilla'-huit,  
8 of Kive-dee-tut and the Huch, of Kwaat-sat.

9 At the time of the treaty (circa 1855) the Quileute (including  
10 the Hoh) relied primarily on salmon and steelhead taken in their  
11 long and extensive river systems. These Indians were able to  
12 take canoes far up into the foothills country by following the  
13 river system, not only to take salmon and steelhead, but also  
14 to hunt land game in the foothills. The existence of a village  
15 at the mouth of the Hoh River as well as settlements on the  
16 upper reaches of the Hoh are documented in the narrative of  
17 a Russian named Tarakanov who visited the area as one of seventeen  
18 survivors of a shipwreck in 1808.

19  
20 3-78. On August 1, 1861, James G. Swan made an exploratory  
21 trip up the Quillayute River in company with Howelatl, head  
22 chief of the Quileutes, and Wackamus, a chief of the Quinaults.  
23 He wrote an account of that trip in which he described the river  
24 and stated that about a mile up from the bend of the river near  
25 its mouth there was a strong weir for taking salmon. About  
26 a mile further up the stream the party encountered another fish  
27 weir. There was an Indian lodge at each weir. In describing  
28 the fish in the river, Swan reported that the same variety of  
29 salmon are taken as run up the Que-nai-ult, spring and fall --  
30 "short, thick and very fat." He stated that the Indians were

31

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1 expecting a run to commence in a couple of weeks. He also  
2 stated that in addition to the salmon there was at the mouth  
3 of the river "the greatest abundance of smelts I have ever seen,  
4 and plenty of tom cod, just like those taken in Boston harbor."  
5 The Indians took the smelt by means of large hand nets.

6  
7 3-79. Quileute Indian names for some months are related to  
8 fish or fishing activities. Translated into English these  
9 names and their approximate period of our calendar include  
10 the following: "Beginning of the spawning of the steelhead  
11 salmon", approximately January (32 days); "regular or strong  
12 spawning time of salmon", about February (32 days); "time for  
13 black (chinook) salmon", September; "time for silver salmon",  
14 October.

15  
16 3-80. An account of Quileute fishing given September 1,  
17 1916, by Arthur Howeattle, a Quileute Indian, stated that the  
18 Quileutes used to fish in rivers, lakes and the ocean and that  
19 the fishing grounds in the river were used by individual families and  
20 those in the lakes and ocean were used in common. He stated  
21 further that fish were caught with drag nets, scoop nets and  
22 fish-traps, fish baskets, dip nets, spears, hooks and lines.

23  
24 3-81. Quileute fishing gear included a stake trap stretching  
25 across a stream with open spaces at intervals in which dip nets  
26 were suspended; triangular fish traps which often could catch  
27 a canoe-load of fish at a time; and sloping dams across a river  
28 along which dip or bag nets were suspended from the downstream  
29 side into which the fish would jump in their attempts to get  
30 over the dam.

31  
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798

1 3-82. The Hoh Indians sometimes constructed artificial falls  
2 in the smaller streams by placing hemlock logs across the  
3 watercourse. During periods of high water they would catch  
4 salmon below the falls with special falls nets.

5  
6 3-83. Before, during and after treaty times, the Quileute  
7 and Hoh Indians fished the Hoh River from the mouth to its  
8 uppermost reaches, its tributary creeks, the Quileute River and  
9 its tributary creeks, Dickey River, Bogachiel River, Calawah  
10 River, Lake Ozette, Lake Dickey, Pleasant Lake and the adjacent  
11 tidewater and saltwater areas. Defendants do not concede that  
12 all of these described waters were usual and accustomed fishing  
13 places within the meaning of the treaty.

14  
15 3-84. In aboriginal times the Quileute Indians utilized  
16 fishing weirs where salmon were caught along the Quillayute  
17 River. Quileute Indians also fished on the Bogachiel, Calawah  
18 and Soleduck Rivers. Along the adjacent Pacific Coast Quileutes  
19 caught smelt, bass, puggy, codfish, rock, red, ling-cod, halibut,  
20 flatfish, bullheads, devilfish shark, herring, sardines, sturgeons,  
21 seal, sea lion, porpoise and whale. The Hoh Indians fished along  
22 the river bearing their name.

23  
24 (8) Sauk-Suiattle Tribe.

25 3-85. The Sauk-Suiattle Tribe is composed primarily  
26 of the descendants of the Sakhumehu and other Indians who lived  
27 on the upper reaches of the Skagit River system in 1855. The  
28 Sakhumehu Indians are named in the preamble to the Treaty of  
29 Point Elliott; and one of the signatories of that treaty is

1 identified as a Sakhumehu. At treaty time the Indians known as  
2 Sock-a-muke, Sakhumehu and Sock a bute, regarded themselves as a  
3 distinct and separate group and were so regarded by other Indians  
4 and by non-Indians. Their separate identity was consistently  
5 recognized in reports referring to them before, during and after  
6 Treaty of Point Elliott. Prior to and during treaty times these  
7 Indians intermarried to a considerable extent with the Upper  
8 Skagit and Stillaguamish Indians. Some of the Indians from the  
9 groups known as Sock-a-muke, Sakhumehu and Sock a bute continued  
10 after treaty times to live along the Sauk and Suiattle Rivers  
11 where their descendants still reside.

12  
13 3-86. Reliable information concerning the pre-treaty activities  
14 of those Indians known as Sock-a-muke, Sakhumehu and Sock a bute  
15 is given in the reports and writings of Edward A. Starling and  
16 George Gibbs. Reliable information concerning the activity of  
17 these Indians during and after treaty times is given in the  
18 reports and writings of R.C. Fay, Dr. Sally Snyder, present  
19 members of the Sauk-Suiattle Tribe and Agent N. D. Hill  
20 These sources have varying degrees of reliability and are not the  
21 only sources of information on the subject.

22  
23 3-87. Prior to, during and after treaty times, the Indians  
24 known as Sock-a-muke, Sakhumehu and Sock a bute contrasted with  
25 Indians living on the coast of Puget Sound in that (a) they spent  
26 the winter in their own territory and appeared to have been much  
27 influenced by their plateau Indian neighbors with whom they  
28 shared a number of specific traits; (b) they did not own slaves;  
29 and (c) they placed a premium on maintaining peaceful relations  
30

1 and a non-aggressive attitude. Defendants state further that  
2 the "Sauk-Suiattle" were influenced by their eastern neighbors  
3 in the same manner and extent as other upper watershed Indian  
4 bands and groups.

5  
6 3-88. During treaty times Indians from the groups known as  
7 Sock-a-muke, Sakhumehu and Sock a bute took fish by means of  
8 spearing, dipnets, traps and weirs. They procured salmon and  
9 steelhead in their upriver region and also traveled to the  
10 saltwater to procure marine life unavailable in their own territory.  
11 They ate salmon and steelhead in both fresh and cured forms.  
12 Curing was then by smoking and drying only.

13  
14 3-89. ~~(S)~~ Skokomish Tribe.

15 The Indians named in the Treaty of Point No Point as  
16 the "Too-an-ooch" and the "Skokomish" were different segments of  
17 the Too-an-ooch or Twana group which shared a common drainage  
18 system, a common language not spoken elsewhere and common customs.

19  
20 3-90. Fishing was the most important food acquisition  
21 technique of the Twana Indians during treaty times, and salmonid  
22 fish (king, silver, humpback and dog salmon and steelhead) was  
23 one of their important sources of food. These fish were eaten  
24 fresh, were dried and were smoked for winter use.

25  
26 3-91. Prior to and during treaty times the Twana Indians  
27 accumulated food surpluses with which they supplied feasts for  
28 invited guests from as far away as Carr Inlet and Vashon Island  
29 to the east and Satsop country to the southwest.

1 3-92. Prior to and during treaty times the Twana Indians  
2 located villages for easy access to fishing stations. They took  
3 salmon and steelhead in saltwater areas by trolling, spearing  
4 and netting, and in freshwater areas by single dam and double  
5 dam weirs and similar types of traps. They maintained three  
6 important weir sites on the Skokomish River during the 1850's.  
7 One of the Indian signatories of the Treaty of Point No Point was  
8 in charge of an important weir on the Skokomish River. The Twana  
9 Indians who operated weir sites during treaty times periodically  
10 removed lattice sections of the weir which had the affect of  
11 permitting fish to escape upstream to spawn.

12  
13 3-93. During treaty times the Twana Indians marked the  
14 arrival of the king salmon by a first salmon ceremony, and  
15 forbade any human waste disposal into the rivers immediately  
16 prior to the run's arrival.

17  
18 3-94. Reliable information regarding the activities of the  
19 Twana Indians before, during and after the Treaty of Point No  
20 Point is provided in the works of Agent M. T. Simmons,  
21 W. W. Elmendorf, Edward S. Curtis, E. G. Swindell, T. T. Waterman,  
22 J. E. Youngblood and W. B. Gosnell. These sources have varying  
23 degrees of reliability and are not the only sources of information  
24 on this subject.

1 (10) Squaxin Island Tribe.

2 3-95. Pursuant to the Treaty of Medicine Creek, members of  
3 the Squawksin, Steh-chass, T'Peeksin, Squi-aitle and Sa-heh-wamish  
4 Indian bands (who had lived respectively in the vicinity of Case,  
5 Budd, Totten, Eld and Hammersley Inlets) were relocated on the  
6 Squaxin Island Reservation and became known collectively as the  
7 "Squaxin" (spelled variously).

8  
9 3-96. Reliable information regarding those Indians who became  
10 known as "Squaxin" following their relocation on the Squaxin  
11 Island Reservation is supplied by the works of George H. Gibbs,  
12 Michael T. Simmons, T. T. Waterman, W. W. Elmendorf, Ezra Meeker,  
13 H. H. Bancroft and H. B. Barnett. These sources have varying  
14 degrees of reliability, and are not the exclusive sources.

15  
16 3-97. The Indian Claims Commission decision in its Docket No.  
17 206 regarding the group there designated as the "Squaxin Tribe of  
18 Indians" was confined to those people who were known prior to  
19 the Treaty of Medicine Creek as "Squawksin" and who were inhabitants  
20 of the area surrounding Case Inlet.

21  
22 3-98. It is impossible to compile a complete inventory of the  
23 specific fishing places of those Indians who became known as the  
24 "Squaxin" following their relocation on the Squaxin Island  
25 Reservation. During treaty times they fished for coho, chum,  
26 chinook, and sockeye salmon in three water areas in southern  
27 Puget Sound: (1) freshwater streams and creeks draining into  
28 the various inlets, (2) shallow bays and estuaries, and  
29  
30  
31

1 (3) inlets and the open Sound. Customary use patterns varied accord-  
2 ing to the types of water areas being used; with freshwater fisheries  
3 being controlled by the residents while the deeper saltwater areas  
4 were open to anyone who traveled thereon. Their fishing techniques  
5 included trolling, stream weirs, spearing and tidal traps. These  
6 Indians continued to fish these areas following their relocation on  
7 the Squaxin Island Reservation and to rely in part on fishing for  
8 subsistence and monetary income. Salmon fishing and the fishing  
9 areas used by their predecessor bands continue to be important to  
10 members of the Squaxin Tribe.

11 (11) Stillaguamish Tribe.

12 3-99. There is reliable information regarding the pretreaty Indians  
13 inhabiting the area embracing the Stillaguamish River and its south  
14 fork in the works of Samuel Hancock, who visited the area in 1850  
15 and 1851, and of George O. Wilson who visited the area in February,  
16 1851. There is reliable information regarding the post-treaty  
17 Indian inhabitants of the area embracing the Stillaguamish River and  
18 its south fork in the works of W.W. DeLacy (information circa 1857),  
19 Indian Agent Nathan D. Hill (information circa 1856), sub-Indian  
20 Agent Father Chirouse (information circa 1871) and Stillaguamish  
21 Indian James Dorsey (Quil-Que-Kadam) (information circa 1855-1926).  
22 These sources have varying degrees of reliability and are not the  
23 only sources of information on the subject.

24 3-100. During treaty times and for many years following the Treaty  
25 of Point Elliott, fishing constituted a means of subsistence for the  
26 Indians inhabiting the area embracing the Stillaguamish River and its  
27 south fork. Salmon and steelhead were eaten in both fresh and  
28 cured form. These Indians had names for four or five species of  
29 salmon, steelhead and other indigenous fish. They took salmon and  
30 steelhead by spearing, harpooning, traps and weirs (with dipnets)  
31 at various places in those watercourses. The Stillaguamish Indians  
32 still consider fishing as a source of food today.



1 (12) Yakima Indian Nation.

2 3-101. The Yakima Indian Nation is a recognized tribe of  
3 American Indians. Said tribe was created by the Treaty with the  
4 Yakimas and occupies a reservation known as the Yakima Indian  
5 Reservation, located in south central Washington. The treaty  
6 merged the confederated tribes or bands named in its preamble  
7 into the newly formed Yakima Nation and that confederated  
8 Yakima Nation became the successor in interest to the formerly  
9 separate tribal entities and all the rights of the formal tribal  
10 entities were merged as of March 8, 1859. The preamble of the  
11 treaty reads as follows:

12 Articles of agreement and convention made and concluded  
13 at the treaty ground, Camp Stevens, Walla Walla Valley,  
14 this ninth day of June, in the year one thousand eight  
15 hundred and fifty five, by and between Isaac I. Stevens,  
16 governor and superintendent of Indian Affairs for the  
17 Territory of Washington, on the part of the United States,  
18 and the undersigned head chief, chiefs, headmen and  
19 delegates of the Yakama, Palouse, Piquouse, Wenatshapam,  
20 Klikatat, Klinquit, Kow-Was-say-ee, Li-ay-was, Skin-pah,  
21 Wishham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat,  
22 confederated tribes and bands of Indians, occupying lands  
23 hereinafter bounded and described and lying in Washington  
24 Territory, who for the purposes of this treaty are to be  
25 considered as one nation, under the name of "Yakama",  
26 with Kamiakun as its head chief, on behalf of and acting  
27 for said tribes and bands, and being duly authorized  
28 thereto by them.

29 The readily identifiable treaty tribes and bands confederated  
30 into the Yakima Indian Nation have the following modern names and  
31 are classified as follows:

32 A. The Salish speaking tribes:

1. Chelan
2. Entiat
3. Wenatchee
4. Columbia

1 B. The Sahaptin speaking tribes:

2 5. Kittitas

3 6. Yakima

4 7. Klickitat

5 8. Wanapam

6 9. Palus (Palouse)

7 10. Skeen

8 C. Chinookan speaking tribe:

9 11. Wishram

10 The number of Indians who were from the tribes and bands merged  
11 into the Yakima Nation by the Yakima Treaty of 1855 was in the  
12 neighborhood of 5,000 Indians.

13

14 3-102. In the main, at the time of the treaty, the Indians  
15 referred to in the preceding paragraph, lived in a food gathering  
16 culture. They existed on game, fish, roots, berries and some  
17 cultivated vegetables. Of these foods fish was a food and they  
18 landed salmon, steelhead, trout, mussels, eel, and other  
19 miscellaneous fish. Salmon, however, both fresh and cured was  
20 a staple in the food supply of these Indians. It was annually  
21 consumed by these Indians in the neighborhood of 500 pounds per  
22 capita. Circumstances necessitated that large quantities of  
23 fish, fish oil, roots and berries be cured in adequate quantities  
24 to insure a sufficient and balanced diet for those periods of the  
25 year when the fresh supply of these commodities was not available.  
26 Quantities of fish in considerable numbers were preserved for  
27 future use through smoking and drying. The choice of the method  
28 depended on the climatic conditions and the availability of  
29 firewood. It was customary for these Indians to manufacture  
30 pemican. This was accomplished by pounding the dried strips of  
31

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1 fish until quite fine and packing the resultant mass in containers  
2 lined with fish skin. In this process oil was used where  
3 available and the oil from male steelhead was used for this  
4 purpose. Because of the monotony of this fish diet, variety in  
5 the kind of salmon and other fish caught was a desired goal.  
6

7 3-103. With the exception of the spear, gaff and like gear  
8 which to a great extent depended on the skill and dexterity of  
9 the individual operator, methods used by these Indians to land  
10 salmon and steelhead were very efficient. These Indians used  
11 traps, weirs, nets gillnets, baskets, seines to land salmon and  
12 steelhead. They were proficient in the manufacture of strong  
13 twine from native materials.  
14

15 3-104. Indians from the Yakima Nation and particularly those  
16 from the Yakima, Klickitat, Wenatchee, Columbia, Chelan, Entiat,  
17 and Kittitas aboriginal groups communicated continually with the  
18 tribes on Puget Sound by the use of the Snoqualmie, Naches and  
19 Stevens Passes as weather permitted. Of the aboriginal tribes  
20 only the the Klickitats exercised dominion and control over land  
21 and area to the west of the Cascade Range. This area was south  
22 of the area with which this lawsuit is concerned and with which  
23 the Yakima Nation's intervention is permitted. This continual  
24 communication created bilingualism, custom interchange, inter-  
25 marriage, and utilization of the natural resources in the Puget  
26 Sound area. In the main this communication and intermarriage  
27 was with the tribes now considered Nisqually, Puyallup, Muckleshoot  
28 and Snoqualmie.  
29  
30  
31

1 3-105. These Indians of the Yakima Nation used fisheries  
2 located in the Puget Sound area for the purpose of obtaining  
3 salmon and steelhead for their use. They took these fish  
4 there by the consent of the tribes in that region. Since there  
5 was more intermarriage and communication with those Indians  
6 now called Nisqually, Puyallup, Muckleshoot, and Snoqualmie,  
7 fisheries in their area of residence were more commonly used by  
8 members of the Yakima Indian Nation. These fisheries in the  
9 area of this case's inquiry included the waters of the Snoqualmie,  
10 Snohomish, Green, Puyallup, Nisqually, Stuck, Duwamish, White,  
11 Carbon, and Black Rivers and their tributaries.  
12

13 3-106. Isaac I. Stevens was appointed governor, and *ex-officio*,  
14 Superintendent of Indian Affairs of the territory of Washington  
15 shortly after it was organized by the Act of March 2, 1853  
16 (10 Stat. 172). He had been in charge of the federal surveys  
17 for a railroad to the Pacific on the Northern route. Stevens  
18 had selected Captain George B. McClellan as commander of the  
19 Western Division of the Northern Pacific Railroad exploration  
20 party. George Gibbs, as secretary for this party, recorded  
21 information about the Indian tribes in this area in preparation  
22 for the execution of treaties with the Indians in the area of the  
23 tribes which later formed the Yakima Nation under the Yakima  
24 Treaty. This report, which is dated March 4, 1854, clearly  
25 indicated that the tribes of the Yakima Treaty ceded area were  
26 friendly to the Indians of the Puget Sound, bilingual, and  
27 intermarried with one another, and communicated regularly to  
28 this Puget Sound area.  
29  
30  
31

1 3-107. Thereafter on August 30, 1854, the Acting Commissioner  
2 of Indian Affairs gave written instructions to Governor Isaac I.  
3 Stevens directing him to negotiate treaties with the Indian  
4 tribes, bands, and groups of Washington Territory for the  
5 extinguishment of their title to land in their territory and  
6 conveying his principal concern that this be done as rapidly  
7 and economically as possible.

8  
9 3-108. Agents of Governor Stevens made preliminary contact  
10 with the Indians that comprised the Yakima Indian Nation on  
11 May 29, 1855. The Yakima Chiefs attended at council and listened  
12 to an explanation of the treaty terms. This discussion continued  
13 from day to day until June 9, 1855 while Governor Stevens  
14 explained to the tribes that the Indians were to cede their  
15 vast land holdings and move to a reservation. Provisions for  
16 this off-reservation treaty food gathering and grazing were  
17 written into the Yakima Treaty in Article III thereof.

18 (See paragraph 3-31, *supra*.)  
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1 IX. BIOLOGY AND FISHERIES MANAGEMENT

2 A. GENERAL

3  
4 3-400. A great many of the biological, fisheries management, and  
5 fisheries harvest facts relevant to the issues in this case are set out  
6 in Exhibit JX 2(a) and (b) which is an extensive Joint Statement Regarding  
7 the Biology, Status, Management, and Harvest of the Salmon and Steel-  
8 head Resources of the Puget Sound and Olympic Peninsular Drainage Areas  
9 of Western Washington dated May 14, 1973, prepared by staff biologists of  
10 the Washington Department of Fisheries, the United States Fish and Wild-  
11 life Service, and the Washington Department of Game. The contents of  
12 said report are hereby incorporated by reference as Admitted Facts in  
13 this case.

14  
15 3-401. On June 16, 1973, the United States exercised its right to  
16 terminate the recognition given to Canadian fishermen to fish in the  
17 contiguous zone (established by 16 U.S.C. §§ 1091-1094) off the coast  
18 of Washington south of Carroll Island located at approximately 48° north  
19 latitude. (Cf. § 2-<sup>12</sup>~~21~~, pp. 100-101, Exhibit JX 2(a))

20  
21 3-402. James L. Heckman is employed as a fisheries biologist by the  
22 U. S. Fish and Wildlife Service and has been for eighteen years. He is  
23 presently the Program Manager of the Northwest Fisheries Program, Division  
24 of Fishery Services. The Portland Regional Office of the Division of  
25 Fishery Services covers six western states and provides technical assist-  
26 ance in fishery management to Indians and managers of federal lands;  
27 and it participates in cooperative programs with various state fisheries  
28 agencies, including Fisheries and Game Departments of Washington. Pro-  
29 gramming the production and distribution of hatchery fish to these co-  
30 operators is an activity of that Division. For example, after a request  
31 from a cooperator (e.g. Washington Game Department) for fish, it determines  
32 whether and how many fish from the national fish hatcheries

1 will be distributed to the requesting cooperator. Mr. Heckman received  
2 his B.A. degree in Zoology from the University of California at Berkeley  
3 in 1952. His first position after graduation was as a biologist for  
4 the United States Bureau of Reclamation in California in 1952. He then  
5 went to work as a biologist for the Oregon Fish Commission in 1954. In  
6 this capacity, he worked in Columbia River investigations of the salmon  
7 and steelhead commercial fishery and participated in population studies  
8 of Columbia River steelhead. He came to the Bureau of Sport Fisheries  
9 and Wildlife in 1955. With the Bureau, his work has been concentrated  
10 on salmon and steelhead from Central California to Alaska. He has spent  
11 considerable time in salmon and steelhead population studies in Northern  
12 California and has worked closely with Indian salmon and steelhead fish-  
13 eries throughout Washington for the past 10 years. He is a member of  
14 the American Fisheries Society and the Pacific Fisheries Biologists. In  
15 addition to routine duties of his present position, he is Chairman of  
16 the White River Fisheries Improvement Committee and a member of the  
17 Portland General Electric Company Fishery Project Review Committee.  
18 Mr. Heckman has observed Indian river gill net fisheries conducted by  
19 members of the Hoh, Makah, Muckleshoot, Nisqually, Puyallup, Quileute,  
20 Quinault, Skokomish, Tulalip and Yakima Tribes. As a general matter,  
21 net fishing for anadromous fish is a very important activity for the  
22 members of these tribes. Generally, the fishing is comprised mostly of  
23 set (gill) netting, rather than drift (gill) netting; drift netting is  
24 often precluded by riverbed and flow conditions.

25  
26 3-403. At least for the past ten years, for those Washington State  
27 river systems where there has been a sport fishery but no on-reservation  
28 Indian net fishery, there has been no record of so great a harvest of  
29 steelhead that subsequent years' runs have been diminished. There are  
30 no records of such fisheries showing a harvest of the maximum amount of  
31 steelhead which may be taken without diminishing the runs in later years  
32 (i.e. total run less the amount necessary for spawning escapement).

1                    B. GAME DEPARTMENT REGULATORY PATTERNS, POLICIES AND PRACTICES

2                    3-425.                    Arthur Coffin of Yakima, Washington, has served on  
3                    the Washington State Game Commission (hereinafter "Game Commission")  
4                    for seventeen years, the last two years as its Chairman. Prior to re-  
5                    tirement he was in the banking business. Any expertise he has in the  
6                    field of fisheries biology has been gained through experience individu-  
7                    ally as a sportsman and as a member of the Game Commission.

8  
9                    3-426.                    Mr. Carl Crouse had been employed with the Game  
10                    Department for 19 years and has been its Director since 1970. He holds  
11                    a B.A. in Zoology and a Master's degree in Wildlife Management from  
12                    Washington State University.

13  
14                    3-427.                    The Game Commission has never held meetings or  
15                    corresponded with the Bureau of Indian Affairs regarding claimed treaty  
16                    fishing rights of Indian tribes in Western Washington.

17  
18                    3-428.                    In formulating policy, establishing regulations and attempting to  
19                    conserve the fish resources under their jurisdiction the Game Department  
20                    and the Game Commission consider, as the ultimate purpose in managing those  
21                    fisheries, a maximum sustained recreational experience for the sport  
22                    fishermen.

23  
24                    3-429.                    The Game Commission defines "conservation" as "wise  
25                    or prudent use." In determining what is wise and prudent use of the  
26                    fish resource, the Game Commission consults experts in the Game Department  
27                    and the general public.

28  
29                    3-430.                    As a matter of policy, it is the Game Department's position that  
30                    its first concern in regulating the harvest of steelhead is the preserva-  
31                    tion of that resource; the second concern is the prevention of commerciali-  
32                    zation of the steelhead.

812



1 3-431. As a matter of policy the Game Commission favors the taking of  
2 game fish by hook and line over taking by net at all places outside In-  
3 dian reservation boundaries. The Game Department and individual sport  
4 fishermen believe that an important aspect of steelhead fishing is the  
5 relatively high ratio of effort to total catch which occurs under current  
6 regulation. There are other aspects to hook and line fishing for steel-  
7 head which they consider important such as the fact that the resource can  
8 be maintained in the face of such a public fishery. The Commission  
9 takes the position that a hook and line fishery is incapable of destroy-  
10 ing a steelhead run and that no user group, whether Indian or non-Indian,  
11 is capable of self-regulation which would achieve sound conservation on  
12 any anadromous fish run. This position is based upon opinions furnished  
13 by the Game Department. The Game Department takes the position that In-  
14 dian regulation of Indian off-reservation net fishing for game fish would  
15 eliminate off-reservation recreational fisheries on the same runs.  
16

17 3-432. The Game Department takes the position that state law prohibits  
18 it from considering recommendations in favor of Indian net fishing at  
19 usual and accustomed places outside reservation boundaries. Game's  
20 position is also predicated upon its view of conservation and of require-  
21 ments of appropriate court decisions. As a matter of policy the Director  
22 takes the position that such fishing is not a wise or prudent use of the  
23 steelhead resource. He believes a net fishery is more efficient than a  
24 hook and line fishery because a net can take more fish than a hook and  
25 line during the same time with less effort. In his opinion if the De-  
26 partment were required to permit net fisheries for steelhead on rivers  
27 outside reservation boundaries, the Department could regulate the net  
28 fisheries to conserve the resource but all other fisheries for steelhead  
29 would be subservient to such regulated net fisheries.  
30  
31  
32

1 3-433. In setting regulations for bag limits and seasons, the Game  
2 Commission considers information relating to the particular streams or  
3 rivers involved. It receives estimates of the relative size of coming  
4 steelhead runs from Game Department personnel. The Game Department con-  
5 siders catch records and escapement data as indications of the size of  
6 runs. Catch records, which have been kept from steelhead punch cards  
7 since 1947 for all rivers having a steelhead run, are the primary source  
8 of information in this regard. Escapement data is estimated from spawa-  
9 ing ground counts, which have been compiled over the last ten to twelve  
10 years for the major river systems, and from counts of fish at racks and  
11 dams. The Game Department attempts to estimate total fish in a run only  
12 from rack or dam counts. Currently, such counting is done at Mud Mountain  
13 Dam on the White River and at a fish rack on the Cowlitz River. The  
14 Department also has information from such counts at the dams on the Co-  
15 lumbia River. The Department has also, during the 1960's, maintained a  
16 counting rack on the Elochoman River. Generally speaking, these dams  
17 and racks measure the numbers of fish in the run at that point in the  
18 river where the facility is located. As its catch statistics and escape-  
19 ment data come to cover longer periods and become more accurate, the Game  
20 Department will become better able reliably to protect the steelhead runs  
21 and to harvest the resource more efficiently. The Department believes  
22 the primary purpose of seasons for taking game fish is to preserve the  
23 resource for later years by retaining sufficient spawning escapement.  
24 The Game Department regulations setting hook and line seasons are designed  
25 to take account of long term trends in game fish runs; so that, if there  
26 has been a consistent overescapement to spawning grounds the Department  
27 will adjust its coming seasons to provide for greater angler harvest;  
28 and, if there has been a consistent underescapement to spawning grounds,  
29 the Department will adjust its coming seasons to provide for a decrease  
30 in angler harvest. In recommending bag limits the Department considers,  
31 among other things, past and present stream flows and the amount and con-  
32 dition of steelhead planted in the brood year.

1 3-434. The Game Commission has not promulgated any administrative and  
2 procedural rules for the conduct of its business other than those pre-  
3 scribed in the Washington Administrative Procedure Act, RCW Ch. 37.12,  
4 and in relevant portions of the Washington Administrative Code. When  
5 passing temporary regulations, the Game Commission and the Game Depart-  
6 ment follow the Washington Administrative Procedure Act, RCW 34.04, ex-  
7 cept when specific exemptions are made by the Code Reviser.

8  
9 3-435. The Game Commission holds four meetings, as required by statute,  
10 in April, June, October and January and also normally holds two or three  
11 special meetings per year. Members of the public who have requested  
12 notice are informed of these meetings and the agenda thereof through the  
13 press and by letters sent by the Game Department. The Game Department  
14 sends out a preliminary agenda followed by a final agenda to those who  
15 have requested notice and to the press. The Department considers recom-  
16 mendations from the public together with its own views and presents its  
17 recommendations to the Game Commission at the meeting. The preliminary  
18 agenda for Game Commission meetings is compiled and distributed entirely  
19 on the initiative of the Game Department. The Game Commission Chairman  
20 feels that it is the role of the Game Commission in regulatory matters to  
21 provide public input into Game Department decisions and to leave to the  
22 Game Department all other responsibilities and obligations attendant to  
23 managing the game fish resource in the State of Washington.

24  
25 3-436. Game Department fishing regulations and propagation operations  
26 are designed both to preserve the resource and to enhance the fish supply  
27 for sportsmen. Indians may also be included within the classification  
28 of sports fishermen off the reservation as they might desire.

29  
30 3-437. The Game Department, pursuant to state law, has never consi-  
31 dered permitting or authorizing any of the Plaintiff tribes to take

32  
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1 part in the management or propagation of any anadromous fisheries under  
2 its regulatory jurisdiction.

3  
4  
5 4-438. The Game Department is aware that the amount of fish taken in  
6 nets may be regulated by regulation of net length, the type of net, the  
7 place of fishing and the periods for taking. Net fisheries and hook and  
8 line fisheries can be regulated, from total prohibition to total per-  
9 mission, with all degrees of restriction in between.

10  
11 3-439. Steelhead punch cards are used by the Game Department to compile  
12 catch data on the time and river in which the fish have been caught. The  
13 Department estimates annual steelhead catch by multiplying the number of  
14 steelhead reported caught on returned punch cards by a factor designed to  
15 compensate for punch cards not returned. The Department requires treaty  
16 Indians fishing with hook and line outside reservation boundaries to have  
17 a free steelhead punch card.

18  
19 3-440. At its October 2, 1972, meeting the Game Commission considered  
20 the policy of whether to recommend a regulation for off-reservation Indian  
21 commercial net fishing pursuant to a State Supreme Court decision. In  
22 addition to legal advice from its attorney, the Commission considered only  
23 the facts and data presented by Mr. Millenbach. Prior to his presentation  
24 to the Commission Mr. Millenbach did not discuss the facts and data or  
25 recommendations he presented with any of the Plaintiff tribes and he had  
26 not consulted with any of those tribes concerning their fishing practices  
27 or techniques. He had not estimated how many Indians would fish, how  
28 many fish would be in the coming run in the Puyallup River, or what speci-  
29 fic level of escapement would be best for that run. He believed that the  
30 Commission was then considering a change in its regulations which abso-  
31 lutely prohibit such fishing. When it recommended at the October 2nd  
32

1 meeting that the Commission not authorize net fishing for steelhead by  
2 Indians pursuant to claimed off-reservation treaty rights, the Game  
3 Department (a) did not consider the ultimate use which such Indians  
4 would make of the fish taken; and (b) did not know how many Indians or  
5 nets would fish if such fishing were allowed, although its Director ex-  
6 pected there would be many Indians fishing on many rivers.

7  
8 3-441. The Game Department did not notify in advance any of the  
9 Plaintiff tribes or the United States that it would consider at its  
10 meeting on October 2, 1972, whether to change its regulations so as to  
11 permit net fishing by Indians outside reservation boundaries at usual  
12 and accustomed places under claim of treaty rights because they did not  
13 request to be placed on the mailing list prior to that date. The De-  
14 partment of Game takes the position that it was not required to file a  
15 notice with the Washington Code Reviser, pursuant to RCW 34.04.025 and  
16 34.04.010, stating that it was going to consider the matters regarding  
17 Indian off-reservation net fishing which were listed on the agenda for,  
18 and were considered at, that meeting. The only record of the Commission's  
19 consideration of that matter is set forth at pages 17 through 27 of the  
20 Game Commission minutes of that meeting. Those minutes are admissible in  
21 evidence in this case as an accurate record of the proceedings before  
22 the Commission on October 2, 1972. The Game Department takes the position  
23 that the Game Commission's action on October 2, 1972, described in its  
24 minutes thereof, concerning off-reservation Indian net fishing, was not  
25 an "order", "rule", or "regulation" as those terms are used in the Wash-  
26 ington Administrative Procedure Act. RCW 34.04.025, RCW 34.04.010,  
27 RCW 77.12.040, RCW 77.12.050 or RCW 77.12.060. The Game Department de-  
28 scribes the Commission's action as "an order of policy for conservation"  
29 and states:

30  
31 What we were considering was whether an Indian net fishery  
32 would be inconsistent with the conservation of steelhead.  
We determined that Indian net fisheries, the establishment  
of Indian net fisheries would be inconsistent with conserva-  
tion.

1 The Game Department states also that the result of this consideration  
2 was the Commission's determination not to provide a regulation. The  
3 Game Commission further takes the position that this consideration and  
4 action by it constituted fulfillment of the following mandate of the  
5 Washington State Supreme Court in Department of Game v. Puyallup Tribe,  
6 80 Wn.2d 561, 571 (May 4, 1972):

7 We hold that it is incumbent upon the Department  
8 of Game to provide, annually, regulations for a Puyallup  
9 Indian net fishery of steelhead when it is determined by  
10 the department, upon supporting facts and data, that an  
Indian net fishery would not be inconsistent with the  
necessary conservation of the steelhead fishery.

11 3-442. The recent construction of the Game Department Chambers Creek  
12 Hatchery was financed by federal funds under the Anadromous Fish Conservation  
13 Act, 16 U.S.C. Section 757a-757f.

14  
15 3-443. Until the late 1940's, both the Department of Game and the  
16 Department of Fisheries engaged in programs designed to augment the  
17 State's steelhead resource by egg-taking and hatchery breeding. Thereafter  
18 the only state programs designed artificially to augment steelhead runs have  
19 been carried on by the Game Department.

20  
21 3-444. The Game Department is aware that planting of pre-smolt size  
22 steelhead may create an adverse competition with natural stocks which  
23 would not otherwise occur with smolt size plants.

1 3-445. The Game Department's steelhead planting program has grown from  
2 a relatively insignificant contribution in the 1940's to a significant  
3 contribution to steelhead fisheries since 1951. The Game Department in  
4 early 1973 was producing three million winter steelhead smolts and 1.5 -  
5 2 million summer steelhead smolts in its hatchery program. The Depart-  
6 ment plants steelhead in approximately 60 rivers currently, these gener-  
7 ally being the major rivers. Mr. Millenbach estimates generally a "five  
8 percent return" from steelhead plants in Washington State rivers. Not  
9 all river systems sustaining natural steelhead runs are planted. Not  
10 all planted rivers have been subject to marking experiments. In deter-  
11 mining where to plant steelhead and how much to plant, the Game Depart-  
12 ment considers the relative size of the river system, the punch card  
13 records of sports catch in previous years, the Department's capacity to  
14 produce steelhead smolts and the amenability of the river system to  
15 sport fishing. The capacity to produce smolts is considered as the most  
16 decisive factor. It is a general policy of the Game Department to plant  
17 at least 20,000 steelhead smolts in each planted river. This policy is  
18 a result of the Department's determination that such a volume of plant-  
19 ing is necessary to encourage a sufficient level of sport fishing to  
20 utilize the resulting augmented run.

21  
22 3-446. The Game Department knows of no instance where a steelhead run,  
23 either fully natural or artificially augmented, has been destroyed by  
24 fishing.

25  
26 3-447. The Game Department does not have data indicating the level  
27 of the natural steelhead resource prior to 1940.

28  
29 3-448. The Game Department is aware that there is an on-reservation  
30 Indian fish trap on the Skagit River, and that the trap takes mostly  
31 salmon and a small amount of steelhead. The trap has not destroyed or  
32

1 decimated the steelhead run in that river. The trap is an estuary trap  
2 and is not capable of destroying a steelhead run.

3  
4 3-449. As an abstract principle, if the Game Commission reduced the  
5 daily or total annual catch of steelhead in a river, there would be a  
6 corresponding increase in the number of fish arriving at the spawning  
7 grounds. A reduction in the number of steelhead fishing days would produce  
8 some increase in the number of steelhead surviving to spawn. However,  
9 it is Game's position that this is not a practical method of managing  
10 the steelhead resource.

11  
12 3-450. The Game Department steelhead seasons vary from river system  
13 to river system, due to the fact that the spawning period begins earlier  
14 in the smaller systems and that steelhead runs in different systems vary  
15 in quantity and timing. The Department attempts to protect steelhead  
16 spawning areas throughout the river environment, although it does permit  
17 fishing in some river areas where steelhead spawn. The Department has  
18 set upstream deadlines, above which no one may fish, in order to provide  
19 an undisturbed area for spawning. There is no downstream deadline. The  
20 Game Department permits fishing for steelhead in all marine areas within  
21 its regulatory jurisdiction. Salt water steelhead fisheries are insign-  
22 nificant. Most are located on Whidbey Island at Bush Point and Lagoon  
23 Point.

24  
25 3-451. From its experience, it is the opinion of the Game Department  
26 that immature steelhead are rarely taken during the winter season. The  
27 Department designs its seasons generally to prohibit fishing on the  
28 migrants which move to sea during the spring months. From its data re-  
29 garding trout and from its experience, the Game Department is also of  
30 the opinion that, of those immature steelhead which are taken and thrown  
31 back because they are not of legal size, there can be mortality, pre-  
32 venting the dying fish from later contributing to natural perpetuation  
of the run through spawning.



1 3-452. The Game Department has no recorded statistics indicating  
2 whether fishing on spawning grounds by means of drift nets, drag nets,  
3 dip nets, set nets, gill nets, or purse seines will cause "prespawning  
4 mortality" as that term was used in State v. Moses, 79 Wash.2d 104, 117  
5 (1971); but Game believes, based on observations, that such activities  
6 would cause prespawning mortality.

7  
8 3-453. Salmon and steelhead frequently spawn in the same areas of the  
9 various river systems.

10  
11 3-454. There is an operating understanding between the Department of  
12 Fisheries and the Department of Game regarding late fall commercial fish-  
13 eries on salmon in Puget Sound. Part of the understanding is that the  
14 Department of Fisheries will usually close those commercial fisheries  
15 prior to the date of November 20 if they begin to take substantial numbers  
16 of steelhead. This understanding has resulted from verbal, unrecorded  
17 information that in approximately 1968 a late gill net fishery for salmon  
18 in Puget Sound was taking substantial numbers from an unusually early  
19 steelhead run.

20  
21 3-455. The peak months of the winter steelhead run in Washington are  
22 December and January; the peak months for summer steelhead are July and  
23 August.

24  
25 3-456. The Game Department has not undertaken any studies to determine  
26 the effect on steelhead of special treaty Indian net fishing seasons for  
27 salmon which have been set in recent years by the Fisheries Department.  
28 The Game Department is unaware of any studies which reliably conclude that  
29 an Indian net fishery for steelhead located on a reservation and unregu-  
30 lated by the state has caused a decrease in the steelhead run.

1 3-457. Other than the Histata and Cumins report (USA-1), the Game  
2 Department has no records specifically detailing the catch of steelhead  
3 which is taken incidentally in the salmon commercial fisheries. The  
4 Game Department's knowledge of steelhead ocean distribution patterns is  
5 taken from Canadian-American research experiments in the North Pacific,  
6 from records of the limited sports catch near Widbey Island and from the  
7 incidental steelhead catch in the commercial salmon fisheries. Occasion-  
8 ally, steelhead are taken in southern Puget Sound both by shore fishermen  
9 fishing for steelhead and by boat (troll and spin) fishermen who are  
10 fishing primarily for salmon. The Game Department does not operate any  
11 test fisheries on steelhead runs in Puget Sound or the rivers emptying  
12 into the Sound.  
13

14 3-458. The Game Department considers that a generally beneficial es-  
15 capement percentage for steelhead is 25 to 50%. This general figure is  
16 based on general knowledge concerning steelhead and the opinions of Harry  
17 Wagner and Loren Donaldson. The Game Department has very limited data on  
18 the total number of fish in steelhead runs. The Game Department has not  
19 been able to determine whether an excess of steelhead spawners above the  
20 amount a river system could sustain would be harmful to the run.  
21

22 3-459. Currently the large number of factors which influence eventual  
23 survival of steelhead make the capability of the Game Department to pre-  
24 dict the size of steelhead runs extremely difficult. By examining the  
25 current water flow and plant records for the steelhead which will be re-  
26 turning in the coming year, and by examining spawning grounds counts for the  
27 brood year (when available), the Game Department does estimate whether the  
28 coming steelhead runs in named rivers will be greater or smaller than in  
29 prior years. These estimates are usually made in response to sport fisher-  
30 men inquiries concerning the location of the better runs in the coming  
31

1 year. The Department does not formally estimate or predict future run  
2 size but does make general comments on its relative abundance.

3  
4 3-460. The Game Department is aware that in the Columbia River, where  
5 the fisheries are regulated cooperatively by the States of Oregon and  
6 Washington, there are recreational fisheries for steelhead in the same  
7 areas of the river where treaty Indians are taking steelhead commercially  
8 by net. The Game Department believes that there is a conflict in these  
9 areas because the net fisheries appear to have swept the available stocks  
10 before they could reach the recreational fishermen and because in certain  
11 areas the net fisheries appear to have entangled the lines of the recrea-  
12 tional fishermen.

13  
14 3-461. The Department of Fisheries has in recent years operated a  
15 fish rack on the Samish River. The rack operators have recorded steel-  
16 head adults which have passed through a sports fishery below. Punch card  
17 data and records from the rack indicate that the sports fishery in that  
18 river took between 65 and 70% of the run. The Game Department was plant-  
19 ing approximately 50,000 smolts in the Samish River during this period.  
20 Although there would not have been a straight-line relationship, an  
21 increase in the planted smolts (if available) would have increased the  
22 size of the Samish River steelhead runs. There was no Indian on- or off-  
23 reservation fishery for steelhead on the Samish River during the period when  
24 the rack has been operated.

25  
26 3-462. Following are accurate data concerning steelhead runs in the  
27 Quillayute River system:

28 a. The lowermost 2-1/2 to 3 miles of the Quillayute River flow  
29 through the Quileute Indian Reservation and the Olympic National Park.  
30 The State of Washington has no jurisdiction over fishing by members of  
31 the Quileute Tribe in these areas. The State has never attempted to  
32

1 exercise its police power with respect to fishing activities by Indians  
2 on what it recognizes to be an Indian reservation.

3 b. Historically (prior at least to formation of the Game De-  
4 partment in 1933), members of the Quileute Tribe have fished with gill  
5 nets for salmon and steelhead in the Quillayute River both within and  
6 upstream from the above described area and in the lower portions of the  
7 Soleduck and Bogachiel Rivers.

8 c. The winter steelhead run in the Quillayute River system  
9 commences in strength about December 1 and extends in major strength in  
10 the lower portion of the system through March. During the period December  
11 through February the Indian catch is predominantly, if not entirely,  
12 steelhead. During the 1971-72 run approximately twenty to thirty Indian  
13 gill net fishermen fished the Quillayute River but not the entire system.

14 d. During this time of Indian net fishing sportsmen have fished  
15 the river system both as bank fishermen and as boat fishermen. This sport  
16 fishing is mostly upstream from the majority of Indian nets, but at times  
17 Indians and sportsmen fish the same stretches of water. Agents of the  
18 Game Department have arrested Indians who have fished for steelhead out-  
19 side of the reservation and park area in any time, place, and manner other  
20 than that permitted by state law.

21 e. Several of the locations desirable to Quileute Indians for  
22 effective set net fishing on the Quillayute River are located upstream  
23 from the Olympic National Park in waters under state jurisdiction. Since  
24 the creation of the Game Department the Indians have been permitted to  
25 fish in these waters for steelhead only in accordance with state law.

26 f. The Quillayute, Soleduck, Calawah and Bogachiel Rivers were  
27 open to steelhead fishing under the Washington Game laws and regulations  
28 from December 1, 1971, to February 29, 1972. The portions of those rivers  
29 west of U. S. Highway 101 were open for an additional period until  
30 April 30, 1972, and for an additional period during the summer season.  
31  
32

1 g. The State of Washington licenses guides to take parties  
2 of sport fishermen (usually consisting of two fishermen per boat), along  
3 the Quillayute River system. Operators of these boats generally charge  
4 parties \$60 per trip. The operators advertise to attract sport fisher-  
5 men to fish that river system.  
6

7 3-463. Prior to October 2, 1972, and currently, the Game Department  
8 has been aware of the following facts concerning steelhead runs in the  
9 Quillayute River system:

10 a. There is an Indian net fishery unregulated by the Game  
11 Department which takes steelhead within the boundaries of the Quileute  
12 Indian Reservation and within the boundaries of the Olympic National  
13 Park;

14 b. There is a relatively small recreational fishery for  
15 steelhead within the Olympic National Park regulated only by the National  
16 Park Service and a treaty Indian net fishery within the same water area;

17 c. There is a recreational fishery for steelhead regulated by  
18 the Game Department on the Quillayute River system above the eastern  
19 boundary of the Olympic National Park (hereafter referred to as the "upriver  
20 sports fishery");

21 d. Net fishing for steelhead by treaty Indians above the  
22 boundaries of the Park is prohibited by the Game Department;

23 e. All steelhead planting by the Game Department in the  
24 Quillayute River system occurs above the Park boundary;

25 f. Catch statistics from punch card data of the upriver sports  
26 fishery show an increase in steelhead catch in recent years;

27 g. Planting records of the Game Department show an increase  
28 in steelhead planting in recent years.

29 h. Since the planted steelhead smolts must pass through the  
30 Park and Reservation in their seaward migration and must in their return  
31 as adults pass through the Reservation and the Park before they become  
32

1 available to the upriver sports fishery, the increased catch in the up-  
2 river sports fishery could not have occurred unless increased numbers of  
3 steelhead had passed through the Indian net fishery;

4 1. The planted fish have also increased the Indian net catch.

5  
6 3-464. The Game Department is aware that there are considerable fluc-  
7 tuations in the percentages of steelhead runs taken by steelhead fisher-  
8 men from year to year.

9  
10 3-465. The number of winter steelhead smolts planted in the Puyallup  
11 River system has fluctuated, partly as a result of the fluctuating pro-  
12 duction of the Puyallup hatchery, but principally as a result of the  
13 Game Department's over-all steelhead planting program.

14  
15 3-466. Data from publications of the State of Washington show the  
16 following number of steelhead arriving at Buckley Dam above the Puyallup  
17 and Muckleshoot Indian net fisheries:

18	1951	1,122
19	1952	798
20	1953	1,424
21	1954	1,209
22	1955	204
23	1956	533
24	1957	368
25	1958	156
26	1959	163
27	1960	279
28	1961	204
29	1962	458
30	1963	265
31	1964	347
32	1965	683
	1966	906
	1967	789
	1968	447
	1969	476

33 3-467. In concluding that the Puyallup Indian net fishery in the  
34 lower Puyallup River from 1958 through 1960 increased the take of steel-  
35 head to the point that an inadequate number of fish escaped the total

1 fisheries below Buckley Dam ( including that fishery, a recreational  
2 fishery and the Muckleshoot Indian Reservation fishery), the Game Depart-  
3 ment has relied only on the data set forth in the documents designated  
4 in this Pretrial Order as Exhibits USA-15, USA-16, USA-17 and USA-18.  
5 This conclusion of the effect of the Puyallup Indian net fishing is con-  
6 fined to the effect on the natural runs in the White River system. Since  
7 1960, the Game Department has planted substantial amounts of steelhead  
8 smolts in the White River system. The Game Department's available data  
9 show that the sports catch and the total volume of steelhead transported  
10 around Buckley Dam have increased since the Department began planting  
11 steelhead in the White River.

12  
13 3-468. The Game Department has not been able to determine whether an  
14 excess of steelhead spawners above the amount a river system could sustain  
15 would be harmful to the run.

16  
17 3-469. As one basis for its conclusion that a hook and line fishery is  
18 the wisest use of the steelhead resource, the Game Department relies on a  
19 study which concluded that a steelhead fisherman contributes approximately  
20 \$60.00 in general benefit to the economy of the State of Washington for  
21 each fish caught.

22  
23 3-470. In the opinion of the Game Department, its steelhead planting  
24 program can be used to reestablish decimated runs when other environmental  
25 conditions are adequate.

26  
27 3-471. With respect to the estimate cited by Mr. Millenbach on October 2,  
28 1972, that gill nets have a capability of taking 98% of an anadromous fish  
29 run, Mr. Millenbach was referring to the 1956 Annual Report of the Inter-  
30 national Pacific Salmon Fisheries Commission, specifically at pages 19-20.  
31 Mr. Millenbach believes that the Fraser River system has never been planted  
32

1 with steelhead. He is aware that there is a commercial net fishery on  
2 the Fraser River which takes steelhead. He believes that that fishery  
3 has not destroyed or decimated the Fraser River steelhead runs.  
4

5 3-472. Indian net fishing which is confined geographically (similar  
6 to the limits provided by reservation boundaries on current on-reservation  
7 net fishing) in a manner may be regulated and controlled to prevent  
8 overharvesting, assuming that some power of effective regulation exists  
9 to limit fishing as to time and amount of gear and enforce the limita-  
10 tion effectively and assuming further that there is a geographically  
11 confined area.  
12

13 3-473. The Game Department would be able better to manage the steel-  
14 head resource if its facts and data were specific as to individual river  
15 systems, but budget limitations of the Game Department preclude  
16 the acquisition of this data at this time.  
17

18 3-474. The Game Department has avoided stocking the Quinault and  
19 Queets River systems because of limitations in their hatchery program  
20 and because of opposition by sportsmen groups among other reasons.  
21 Prior to October 2, 1972, and currently, the Game Department has been  
22 aware that there is a recreational fishery for steelhead outside and  
23 above the reservation on those rivers and that the steelhead resource  
24 on those rivers has been maintained.  
25

26 3-475. Prior to his retirement on July 31, 1973, Walter Neubrech was  
27 Chief of the Wildlife Management Division of the Game Department, and  
28 had been in that position since 1954. Mr. Neubrech had been with the  
29 Game Department for 36 years. The Wildlife Management Division is the  
30 law enforcement section of the Game Department. Mr. Neubrech referred  
31 major questions concerning Game Department law enforcement to the  
32



1 Director for determination. The only written instructions to wildlife  
2 agents regarding Indian hunting and fishing problems are contained in  
3 the Annual Game Department pamphlet. This does not imply that law en-  
4 forcement procedures are not otherwise given to wildlife agents.  
5

6 3-476. Mr. Neubrech describes the action of the Game Commission of  
7 October 2, 1972, concerning Indian net fishing outside reservation, as  
8 a refusal by the Commission to make any special concessions for the taking  
9 of steelhead by Indian people.  
10

11 3-477. Mr. Neubrech considers the Quinsult (with the Queets), the  
12 Lummi, Makah, Squaxin Island, Sauk-Suiattle, Skokomish, Yakima, Upper  
13 Skagit River, Stillaguamish, Quileute and Puyallup Tribes to be treaty  
14 tribes. He contends that the Muckleshoot Tribe is not a treaty tribe,  
15 and bases this contention on the decision of the Washington State Supreme  
16 Court in State v. Moses, supra.  
17

18 3-478. It is the position of the Game Department that a treaty Indian  
19 tribe possesses treaty rights to fish without a license only within the  
20 area which was ceded to the United States in the particular treaty  
21 wherein the tribe's rights are secured.  
22

23 3-479. The following are descriptions of the policies and practices  
24 of the Game Department with respect to nets, boats and other gear which  
25 may be seized in the course of the law enforcement duties of agents of  
26 that Department:

27 a. When an unattended net is seized and the owner is not  
28 immediately identifiable, the net is marked and stored in Game Department  
29 facilities, but no specific written record is made of each seized net;  
30 the nets themselves and the written summaries constitute records of  
31 seized gear;  
32

1           b. It is within the seizing officer's discretion whether to  
2 send the seized gear to Olympia or to keep it in the regional office  
3 where it was seized;

4           c. The only Game Department accounting of seized nets is a  
5 periodic check which results in a record of the number of nets which  
6 have been seized and the dates of seizure;

7           d. When there are only two or three fish seized with the gear,  
8 no record of the disposition of those fish is kept;

9           e. The Department has never asked a court to declare for-  
10 feiture of seized, unattended nets;

11           f. When the Department has seized boats or motors, they have  
12 been kept as evidence against an identified defendant;

13           g. Property is seized for the purpose of introduction as  
14 evidence in court;

15           h. If a person is acquitted of a charge, his gear is returned,  
16 but no restitution is made for fish which have been seized with the gear be-  
17 cause the fish are rendered valueless due to the passage of time and the  
18 delay in court actions. They are disposed of to charitable or public  
19 institutions.

20           i. It is contrary to policy to seize a net which has not been  
21 seen engaged in illegal use.

22  
23 3-480. For three or four years following a 4-4 decision by the Wash-  
24 ington State Supreme Court, the Game Department avoided enforcement of its  
25 regulations prohibiting Indian net fishing for steelhead on the Puyallup  
26 River. As a result of violent unrest among non-Indians, the Department  
27 reinstated enforcement, one of the results of which was the arrest of  
28 Marlon Brando and Bob Satiacum.

29  
30 3-481. There are approximately eighty-five to one hundred enforcement  
31 officers in the Wildlife Management Division stationed throughout the  
32

1 State of Washington. The Game Department has a fifteen-man, specifically  
2 equipped "Tactical Squad" which has been used in disturbances arising  
3 from controversy about Indians fishing for steelhead with nets.

4  
5 3-482. The Game Department and the Fisheries Department often cooper-  
6 ate in investigation and enforcement of laws and regulations which are  
7 within each other's jurisdiction.

8  
9 3-483. The Game Department has law enforcement jurisdiction to con-  
10 trol any actions which disturb the stream bed or gravel in the steel-  
11 head streams of the state outside federal enclaves.

12  
13 3-484. The Game Department has no data or opinions concerning the  
14 level of steelhead runs in the Washington Territory between 1840 and  
15 1860. It believes that during that period there were natural runs of  
16 steelhead and that they fluctuated due to natural conditions.

17  
18 3-485. The Game Department takes the position that laws enacted by  
19 the Washington State Legislature need not be shown reasonable and nec-  
20 essary for conservation of the fishery in order to be binding on treaty  
21 Indians fishing at usual and accustomed places outside reservation  
22 boundaries beyond the fact that said legislative acts must have the  
23 same degree of reasonableness to apply to Indians as is constitution-  
24 ally required to apply them to other citizens in the exercise of  
25 state police power.

26  
27 3-486. The Game Department has never given consideration to the  
28 claimed treaty fishing rights of any of the Plaintiff tribes as an  
29 interest to be promoted in the Department's regulatory, management  
30 and propagation program.

1 3-487. The Game Department has never considered permitting a fish-  
2 ery for steelhead outside reservation boundaries by any of the Plain-  
3 tiff tribes, using methods other than angling when the purpose of such  
4 a fishery would be:

5 a. To provide harvested fish only for dietary consumption  
6 by members of the tribe;

7 b. To provide harvested fish only for use in cultural cere-  
8 monies or practices of the tribe;

9 c. To provide, through sale or barter, funds necessary to  
10 sustain the economic well-being of individual Indians; or

11 d. To provide a supply of fish which can be commercially  
12 exchanged as part of a continuing tribal enterprise.

13  
14 3-488. The Game Department does not consider any of the holdings  
15 of Sohappy v. Smith, 302 F.Supp. 899 (D. Ore. 1969), influential in  
16 adopting regulations regarding the time, place and manner of taking  
17 steelhead.

18  
19 3-489. The Game Department's regulation of members of the Plaintiff  
20 tribes in the exercise of their claimed treaty fishing rights is prem-  
21 ised on the contention that, except for a right of access over private  
22 lands and the exemption from the payment of license fees, the treaties  
23 involved in this case afford those Indians no rights beyond those ac-  
24 corded under the Fourteenth Amendment to the United States Constitution  
25 and the provisions of the Washington State Constitution.

26  
27 3-490. With respect to Indian fishing outside reservation boundaries,  
28 the Game Department has never:

29 a. Provided the treaty Indians an opportunity to take by  
30 means feasible to them other than angling, a share of the fish re-  
31 source which is fair by comparison with the share available to sports  
32

1 anglers; Game denies any inference that the Indians are treated in any  
2 manner other than non-Indian citizens are treated; and further denies  
3 any inference that the Indians are entitled to a greater share than  
4 other sports anglers to the steelhead resource.

5 b. Considered perpetuation and improvement of the size and  
6 reliability of the fish runs as the sole controlling objective of its  
7 conservation regulations.

8 c. Adopted regulations regarding such Indian fishing on an  
9 annual basis upon specific supporting facts and data; Game denies that  
10 there is any duty under the treaty to set any special regulations for  
11 Indian fishing outside of their reservations.

12 d. Considered as fundamental to its regulatory choice con-  
13 cerning time, place and manner of Indian fishing the cultural and  
14 economic value of fish harvesting to Indians; Game denies any obliga-  
15 tion to provide special treatment for Indians fishing off the reser-  
16 vation.

17 e. Adopted, as its own, tribal proposals for regulation  
18 of the Indian fishery, except to the extent that it has shown that  
19 the tribal proposals will not be reasonable and necessary for con-  
20 servation of the specific run involved; Game denies any legal obli-  
21 gation to do so and states that to do so would be contrary to law.

22  
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1                   C. FISHERIES DEPARTMENT REGULATORY POLICIES AND PRACTICES

2           3-575.   Thor C. Tollefson has been Director of the Department of  
3           Fisheries since May 1, 1965. Prior to that time he had not had any  
4           experience in the biological aspects of fisheries management. The  
5           duties of the Director are set forth in the Revised Code of Washington.

6  
7           3-576.   The regulations and management by the Department of Fisheries,  
8           regarding salmon harvesting, govern the taking of those fish throughout  
9           their entire migratory course within the waters of the State of Washing-  
10          ton, except as to "convention waters" during periods of regulation by the  
11          International Pacific Salmon Fisheries Commission whose regulations the  
12          state is required to adopt. (See JX 2(a) pp. 101-103)

13  
14          3-577.   The Department of Fisheries takes the position that it has  
15          three clients: (1) sport fishermen, (2) commercial fishermen and (3)  
16          Indian fishermen. The Department attempts to design its regulations and  
17          management so that all three of these clients can participate in har-  
18          vesting the amount of fish which may be taken consistent with preserva-  
19          tion of the resource. In the years prior to 1968 the Fisheries Depart-  
20          ment did not list Indians as a separate client in its budget requests  
21          to the Washington State Legislature.

22  
23          3-578.   In recent years the Department of Fisheries has, on an area-  
24          by-area, tribe-by-tribe basis, begun to develop regulations permitting  
25          off-reservation, treaty Indian net fishing for salmon. Tribes involved  
26          in areas other than the Columbia River include the Hoh, Quilleute,  
27          Nisqually, Puyallup, Squaxin and Makah. As to the runs originating in  
28          these rivers, the Department is aware that, in addition to the Indian  
29          net fisheries, there are state-regulated river sport fisheries, marine  
30          sport fisheries, and commercial fisheries throughout the migration of  
31          those runs within the waters regulated by the State of Washington as well  
32          as fisheries outside those waters.

1 3-579. The Director of the Washington Department of Fisheries pro-  
2 posed in 1968, prior to the decision in Sohappy v. Smith, 302 F.Supp.  
3 899 (D. Ore. 1969), that the Oregon and Washington regulatory authorities  
4 provide a fair and equitable opportunity for treaty Indians to take fish  
5 above Bonneville Dam. Oregon did not agree to the proposal until after  
6 the decision in Sohappy v. Smith, supra.

7  
8 3-580. In regulating the various salmon fisheries, the Department of  
9 Fisheries compiles and examines daily catch reports, and compares those  
10 reports with reports in previous years. If the comparison and other  
11 indicia of run size should indicate that the particular run is larger  
12 than the Department's predicted run size, the Department generally ex-  
13 tends its seasons; if the comparison shows a smaller run, the Department  
14 takes emergency action to restrict the length of the seasons.

15  
16 3-581. In the past, the Department of Fisheries has not regarded the  
17 salmon sport fishery in Puget Sound to be of major regulatory concern,  
18 because, as compared with the commercial net fisheries, the sport fishery  
19 does not need to be managed on a day-to-day basis.

20  
21 3-582. The Department of Fisheries takes the position that it is more  
22 difficult to increase the salmon runs in the river systems involved in  
23 this case than in the Columbia River by the method of further restricting  
24 marine sport and commercial fisheries because fisheries in the case area  
25 harvest from mixed stocks. This fact decreases the predictable effect of  
26 a general marine fishery restriction on the number of fish reaching  
27 specific rivers. Additionally, the management technique of estimating  
28 escapement before any harvest by the use of dam counts is not available  
29 in the case area. A general restriction of marine fishing for salmon  
30 would result in wastage of salmon in the rivers.

1 3-583. The Department of Fisheries has moved further north the  
2 northern deadline of its south Puget Sound preserve (where no commercial  
3 fishing is permitted). The intended result, and the effect of this  
4 action, was to increase the salmon run available to treaty Indians in  
5 the Puyallup River by further restricting commercial fishing in the  
6 Sound. The Fisheries Department usually roughly estimates the number of  
7 salmon which will escape the marine fisheries as the season progresses.  
8

9 3-584. The Department of Fisheries has attempted to follow the spirit  
10 of Sohappy v. Smith, supra, and in doing so has, with some difficulty,  
11 attempted to enhance the Indians' harvest opportunities by limitations  
12 on other users.  
13

14 3-585. The principal method of limiting the commercial take from the  
15 salmon runs is limitation on the number of days when fishing is permitted.  
16 The Department attempts to provide that the number of days permitted is  
17 at the same point in a run, relative to its peaks and low points; such  
18 that, if the commercial fishermen in the north Sound are given their  
19 days during the time when the run is at its peak in those areas, the  
20 Indian fishermen in the rivers are given their days during the run's  
21 peak in the rivers. Gear limitation is another method of limiting the  
22 opportunity to catch fish.  
23

24 3-586. The Fisheries Department has determined that the best standard  
25 for achieving fair and equitable regulation of treaty Indian fishing is  
26 to provide a fair and equitable opportunity for the Indians to take a  
27 fair percentage of the harvestable fish within the waters of the State  
28 of Washington.  
29

30 3-587. The Fisheries Department licenses reef net operators and  
31 statutes of the State of Washington designate reef net fishing areas.  
32



1 3-588. The Fisheries Department is aware that the Quileute Indians  
2 fish off-shore for salmon by trolling. The only distinct regulatory  
3 treatment given to these fishermen has been to provide in one or two  
4 seasons a geographic area wherein other trollers may not fish.  
5

6 3-589. During certain portions of the year the taking of pink and  
7 sockeye salmon from certain waters of the State of Washington and of  
8 British Columbia, Canada, is regulated in accordance with regulations  
9 prescribed by the International Pacific Salmon Fisheries Commission  
10 pursuant to treaties between the United States and Canada. The provi-  
11 sions of these regulations are approved by said International Commission  
12 and forwarded to the respective governments for adoption as domestic  
13 regulations. These regulations as they apply to waters of the State of  
14 Washington are usually promulgated and enforced by the Director of the  
15 Washington Department of Fisheries as state regulations. However, under  
16 the applicable International treaties and statutes of the United States  
17 enacted pursuant thereto, the United States has both the authority and  
18 the obligation to enact the International Commission's recommendations  
19 as domestic federal regulation and directly enforce them if the State of  
20 Washington does not do so. While the Commission's jurisdiction is limit-  
21 ed to protection of pink and sockeye salmon, its regulations which limit  
22 the types of gear which may be used or the times during which certain  
23 types of gear may be used in Convention waters have a coincidental effect  
24 on the taking of coho, chum and chinook salmon which are present during  
25 the times that such regulations are in force. The waters to which such  
26 internationally prescribed regulations apply include some of the usual  
27 and accustomed fishing places of some of the treaty Indian tribes.  
28

29 3-590. In regulating the American and Canadian net fisheries on pink  
30 and sockeye salmon bound for the Fraser River system, the International  
31 Pacific Salmon Fisheries Commission has attempted, pursuant to provisions  
32

1 of the applicable treaty, to provide an equal take to the Canadian and  
2 the American commercial fishermen in the Strait of Juan De Fuca, Nor-  
3 thern Puget Sound and the Strait of Georgia; such that when it appears  
4 that for example, the Canadians have taken significantly more fish than  
5 the Americans, the Commission will adjust its regulations to permit  
6 Americans to catch up. All harvesting on Fraser River stocks is intended  
7 to take only so much as will not damage the run. While some tributaries  
8 to the Fraser River have shown an underescapement as a result of the  
9 fishing efforts in the Straits and elsewhere, the regulation of Fraser  
10 River stocks by the International Commission is generally regarded by  
11 fisheries biologists as well managed.

12  
13 3-591. Under guidelines established by the U. S. State Department at  
14 the instance of the Department of the Interior, the U. S. Commissioners  
15 on the International Pacific Salmon Fisheries Commission have sought re-  
16 cently in their activities on the Commission to protect the treaty fish-  
17 ing rights of one or more of the Plaintiff tribes. As a U. S. Com-  
18 missioner on the International Pacific Salmon Fisheries Commission, the  
19 Director of the Fisheries Department has attempted to obtain Canadian  
20 agreement to a greater number of fishing days for the Makah Indians on  
21 the Fraser River sockeye and pink salmon runs. The Canadians have re-  
22 fused. The Director has taken unilateral action to provide more days.

23  
24 3-592. The Departments of Game and Fisheries generally exchange pro-  
25 posed regulations for comments by the other department.

26  
27 3-593. Some of the pre-season factors which the Fisheries Department  
28 considers in estimating the relative size of salmon runs are: escapement  
29 volume of brood stock, water conditions prior to and during spawning,  
30 egg samplings, migration volume, water conditions during migration and  
31 time of migration.

1 3-594. J. E. Lasater has been with the Department of Fisheries for  
2 twenty-two years. He has been Assistant Director in Charge of Operations  
3 nine years. He is a fisheries biologist, with a degree in Fisheries  
4 from the University of Washington. He has done additional related gradu-  
5 ate work and has taken fisheries-management training courses. Mr. Lasater  
6 is head of the Fisheries Department staff team which considers and  
7 recommends fisheries regulations, among other things.  
8

9 3-595. Mr. Lasater is of the opinion that coho and chinook salmon  
10 compete to a certain degree for food and survival with steelhead in at  
11 least the following areas:

12 Hoko River	Snohomish River
13 Clallam River	Green River and its tributaries
14 Sekiu River	Stillaguamish River
15 Dungeness River	Skagit River
16 Elwha River	Nooksack River
17 Dosewallips River	Quillayute River system
18 Hamma Hamma River	Hoh River
19 Skokomish River	Queets River
20 Dewatto Creek	Quinault River
21 Tahuya Creek	Moclips River
22 Chico Creek	
23	

24 3-596. Mr. Lasater has testified that in many cases a program which  
25 required the entire salmon fishery to be located at the mouths of the  
26 rivers would be biologically more precise.  
27

28 3-597. In recommending regulations for the various types of salmon  
29 fisheries, the staff of the Department of Fisheries confine the commer-  
30 cial net fisheries to shorter times and less area because they believe  
31 that the commercial net fisheries can take more fish for the same amount  
32 of effort than other fishing techniques.

1 3-598. The Department of Fisheries takes the position that the de-  
2 cisions in Puyallup Tribe v. Department of Game, 391 U. S. 392 (1968),  
3 and Department of Game v. Puyallup Tribe, 80 Wash.2d 561 (1972), hold  
4 that the right of Indians to fish pursuant to treaty at their usual and  
5 accustomed places outside reservation boundaries is an empty right if  
6 there are no fish which the Indians can harvest at those places consis-  
7 tently with preservation of the resource. It also takes the position  
8 that it must give the treaty Indians fishing at those places an equi-  
9 table opportunity to take a portion of the salmon runs.

10  
11 3-599. The Department of Fisheries has undertaken to augment the  
12 volume of fish available to treaty Indians fishing at their usual and  
13 accustomed places outside reservation boundaries by at least the fol-  
14 lowing actions:

15 a. The Department considers the interests of the Indian  
16 fishery when formulating its regulations;

17 b. The Department attempts to determine how many Indians will  
18 fish, what their effort will be and what their estimated take of the  
19 Indian fishery will be;

20 c. The Department has adjusted the number of days when the  
21 commercial fleet can fish;

22 d. The Department has closed certain areas to non-Indian  
23 fishing in the marine waters, such as in East Pass and South Sound Pre-  
24 serve;

25 e. The Department has increased its planting effort in those  
26 streams where the Indian fisheries occur; and

27 f. The Department has carried on stream improvement work.

28  
29 3-600. The salmon which are protected from harvest by commercial net  
30 fishermen in East Pass are bound for the Deschutes and other river sys-  
31 tems, as well as for the Puyallup River system.  
32

1 3-601. The major steps in formulating pre-season fishing regulations  
2 within the Department of Fisheries are: (a) determination of escapement  
3 goals, (b) prediction of run size, (c) intra-staff discussion and  
4 recommendations, (d) conferences with the Director, (e) public hearing  
5 (under Washington Administrative Procedures Act) and (f) an adoption  
6 hearing. After the run begins its migration through the fisheries  
7 regulated by the Department of Fisheries, the Department continually  
8 collects catch reports and other data, and by comparing that information  
9 with similar information for prior years, it determines the relative  
10 size of the current run and then refines its earlier predictions of run  
11 size. As the fish approach the rivers, the Department's predictions  
12 become more precise and accurate. If the run size appears less than  
13 predicted, the Department adjusts its regulations by emergency order to  
14 further limit the take. Typically, the special treaty Indian fisheries  
15 are the last of the Department's three clients to take from the run.

16  
17 3-602. The Department of Fisheries takes the position, that if in the  
18 interest of conservation it were to consider and to propose an absolute  
19 prohibition of net fishing by treaty Indians at their usual and accus-  
20 tomed places outside reservation boundaries, the Department would be re-  
21 quired under the Washington Administrative Procedures Act to send a  
22 notice of its action to the Washington Code Reviser.

23  
24 3-603. Through agreement with the Department of Fisheries, the Squaxin  
25 Island Tribe has closed fishing on the small streams outside the Squaxin  
26 Island Reservation to protect the salmon spawning areas in those streams,  
27 and the tribal fishermen have shifted their treaty fishing into the  
28 marine areas of Puget Sound under a special Fisheries Department season.

29  
30 3-604. The Department of Fisheries has a cooperative rearing arrange-  
31 ment with the Squaxin Island Tribe whereby the Department furnishes  
32

1 immature salmon to the tribe which then raises them in salt water pens.  
2 The tribe takes some of the grown fish for commercial sale and releases  
3 the others into the Sound to augment the sports fishery there.  
4

5 3-605. The Department of Fisheries takes the position that it is not  
6 properly managing the salmon resource if there is so great a spawning  
7 escapement that there are fish on the spawning grounds not needed for  
8 spawning. Wastage of fish and potential harm to other species and to the  
9 spawning stock of the same species may occur as a result of overescapement  
10 of salmon at spawning grounds. The Department has some capability  
11 to utilize the treaty Indian river net fisheries so as to harvest numbers  
12 of fish which would be surplus to the numbers needed for spawning. They  
13 have utilized this capability in conjunction with the Muckleshoot, Nis-  
14 qually and Skokomish Tribes. Weather and the physical conditions of the  
15 stream limit this capability.  
16

17 3-606. As a result of increased salmon planting in the Nisqually River,  
18 the Department of Fisheries has augmented the salmon runs in that river  
19 for coming years.  
20

21 3-607. There is a Nisqually Indian net fishery for chum salmon on the  
22 Nisqually River. Prior to December 1, the Indian net fishery is permitted  
23 outside reservation boundaries under a special season established by the  
24 Department of Fisheries. After November 30, the Department of Fisheries  
25 prohibits any off-reservation Indian net fishery for salmon in that river.  
26 The peak of the chum run in the Nisqually River occurs after December 1.  
27 The prohibition of an off-reservation Indian net fishery is the result of  
28 a request from the Department of Game to the Department of Fisheries that  
29 the prohibition was necessary to preserve the winter steelhead run in the  
30 Nisqually River. The Department of Fisheries' agreement to the prohibition  
31 was not based on any concern for preservation of the Nisqually River chum  
32 run.

1 3-612. The Department of Fisheries takes the position that all of the  
2 fishing interests in the State benefit from hatchery and planting pro-  
3 grams. It takes a river-by-river approach, considering such things as  
4 its hatchery capacity, stream conditions and fishing effort, in deter-  
5 mining to what extent it will plant salmon in streams or rivers where  
6 there are Indian net fisheries at usual and accustomed places outside  
7 reservation boundaries.

8  
9 3-613. After the decision of the United States Supreme Court in  
10 Puyallup Tribe v. Department of Game, supra, the Department of Fisheries  
11 began to set special seasons for various treaty Indian tribes which pro-  
12 vided for fishing by net for salmon at usual and accustomed fishing  
13 places outside reservation boundaries. Some of these regulations permit  
14 Indian set gill net river fishing for salmon, even though state statutes  
15 prohibit use of such gear to take salmon.

16  
17 3-614. Habitat and stream improvement efforts of the Departments of  
18 Game and Fisheries generally benefit both salmon and steelhead. The De-  
19 partment of Fisheries generally carries on more of this activity than  
20 the Game Department.

21  
22 3-615. There are limitations which may be placed by the Department of  
23 Fisheries on the time, place and manner of sport and commercial fishing  
24 for salmon in the off-shore areas within the three-mile limit, the Strait  
25 of Juan De Fuca and Puget Sound which will effectively increase the size  
26 of salmon runs through the water areas of the usual and accustomed fishing  
27 places of the Plaintiff tribes.

1 3-608. According to the Department of Fisheries, the following are  
2 accurate statements concerning reef net fishing near Lummi Island:

3 a. The Department issues a reef net license to any non-Indian  
4 who applies and pays the fee;

5 b. The Department will also issue a license to any Indian who  
6 applies and no fee will be charged;

7 c. The Department does not determine the site where the  
8 license is used;

9 d. The Department regulates reef net fishermen by time and  
10 area;

11 e. The Department does not regulate the number of reef nets or  
12 the separation between reef nets and reef net boats, but the Department  
13 does regulate the distance between gears;

14 f. The reef net sites are occupied and sold according to agree-  
15 ments among the reef net fishermen.

16  
17 3-609. The Lummi Tribe and the Department of Fisheries currently dis-  
18 agree concerning whether the boundary of the Lummi Reservation goes  
19 directly across Bellingham Bay to Treaty Rock from Point Francis or  
20 whether it follows the line of low low water along the shore.

21  
22 3-610. The Department of Fisheries has established a time and area in  
23 the Strait of Juan De Fuca wherein the Makah Indians alone may fish for  
24 salmon by commercial trolling.

25  
26 3-611. Recently the Department of Fisheries has been given power to  
27 authorize the moving of fishing gear to places where the Department wants  
28 to harvest surplus fish in the rivers and to limit the entry into the  
29 fishery so authorized.



X. MISCELLANEOUS

1  
2  
3 3-650. Since 1967 the United States Bureau of Indian Affairs has  
4 issued identifications cards, or approved the issuance of tribal iden-  
5 tification cards, co-signed by an authorized Bureau official and tribal  
6 chairman, to persons who establish to the satisfaction of both the Bureau  
7 official and the tribe that they are members of a BIA-recognized Indian  
8 tribe which the Bureau recognizes as having off-reservation fishing  
9 rights pursuant to one of the treaties listed in Paragraph 3-1 above.  
10

11 3-651. From time to time each of the reservation tribes, through  
12 their respective governing bodies, have enacted regulations which they  
13 deem to be applicable to the exercise by their respective members of  
14 the fishing rights secured by their treaties. Said regulations deal  
15 with the times, places and manner of fishing. Examples of current  
16 tribal regulations are included in Exhibit JX 2(b).  
17

18 3-652. A number of depositions have been taken in accordance with  
19 the Federal Rules of Civil Procedure. These, together with the correc-  
20 tions submitted by the respective deposeses or counsel are on file  
21 with the Clerk. Mr. Harold Ikebe became deceased before he could sign  
22 his deposition but the parties agree that, with the corrections noted  
23 by Plaintiffs' counsel, the transcript on file accurately records his  
24 deposition testimony. Numerous Interrogatories and Requests for Ad-  
25 missions have been served on and responded to by the parties. These  
26 documents are on file with the Clerk.  
27

28 3-653. The Fisheries Department of the State of Washington licenses  
29 reefnet operations by non-Indians in specific areas which are fixed by  
30 law. The department does not license specific sites.  
31  
32

PART FOUR  
AGREED ISSUES OF LAW

1  
2  
3  
4 A. Jurisdiction.

5 4-1. Whether the jurisdiction of this action is limited to  
6 proceedings before the Indian Claims Commission pursuant to  
7 25 U.S.C. §§70 - 70v.  
8

9 B. Existence of the Right.

10 4-2. Do plaintiff tribes hold a right under the treaties  
11 involved in this case to fish at usual and accustomed places  
12 outside reservation boundaries?  
13

14 4-3. Did the treaty clause regarding off-reservation fishing  
15 at usual and accustomed grounds and stations in common with  
16 other citizens secure to the Indians rights, privileges or  
17 immunities distinct from those of other citizens?  
18

19 4-4. What is the effect of the admission of the State of  
20 Washington into the Union an equal footing with the original  
21 states upon the existence of claimed off-reservation Indian  
22 treaty fishing rights?  
23

24 4-5. Are any of the following tribes entitled to claim  
25 treaty rights to fish at usual and accustomed grounds and  
26 stations outside reservation boundaries: Muckleshoot Tribe,  
27 Stillaquamish Tribe, Sauk-Suiattle Tribe, and Upper Skagit  
28 Tribe?  
29  
30  
31

1 C. Scope of the Right.

2 4-6. If the treaties secure to the Indians a distinct right to  
3 take fish at their usual and accustomed places off their  
4 reservations, what is the scope and extent of this right?  
5

6 D. Regulation of the Exercise of the Right.

7 If the treaties secure to the Indians a distinct right  
8 to take fish at their usual and accustomed places off their  
9 reservations, then:

10 4-7. Does the State have power to regulate the taking of fish  
11 by such Indians at such places in the interest of conservation  
12 when such regulations:

- 13 (a) Are reasonable and necessary for conservation;  
14 (b) Meet appropriate standards;  
15 (c) Do not discriminate against the Indians?  
16

17 4-8. What is the definition of the following phrases:

- 18 (a) "Reasonable and necessary for conservation";  
19 (b) "Meet appropriate standards";  
20 (c) "Do not discriminate against the Indians"?  
21

22 4-9. Do plaintiff tribes have jurisdiction to enact laws relating  
23 to taking of fish at usual and accustomed grounds and stations  
24 outside of Indian reservations and to enforce the same against:

- 25 (a) Members of the regulating tribe;  
26 (b) Indians who are not members of the regulating tribe;  
27 (c) Non-Indians?  
28  
29  
30  
31

1 4-10. Does regulation of off-reservation Indian treaty  
2 fishing by the State, the United States, or the plaintiff  
3 tribes preempt the regulation by any of the other two and,  
4 if so, to what extent?

5  
6 4-11. Are existing State statutes, regulations, or management  
7 and enforcement practices which affect treaty Indians fishing  
8 at their usual and accustomed places outside of Indian  
9 reservations reasonable and necessary for conservation; do  
10 they meet appropriate standards; and do they discriminate  
11 against the Indians?

PART FIVE

AGREED ISSUES OF FACT

A. Jurisdiction.

5-1. No agreed issues.

B. Existence of the Right.

5-2. What was the understanding and intent of the parties to the treaties as to the meaning and effect of the provisions securing to the Indians the right to fish?

5-3. What were the purposes of the applicable treaty provisions?

5-4. What was intended to be secured by the applicable treaty provisions to the Indians?

5-5. What did the United States intend to secure by the applicable treaty provisions to the Indians?

C. Scope of the Right.

5-6. Did the treaty Indians or non-Indian citizens, either before or during treaty times, recognize a difference between salmon and steelhead in terms of the purpose and means of their harvest?

5-7. Were there commercial aspects of Indian fishing during treaty times?

1 5-8. As to each of the plaintiff tribes, did its predecessors  
2 have usual and accustomed fishing places at treaty times within  
3 the case area?  
4

5 5-9. To what extent is fishing economically or culturally  
6 important to the plaintiff tribes?  
7  
8

9 D. Regulation of the Exercise of the Right.  
10

11 5-10. Are the plaintiff tribes capable of regulating fishing  
12 by their members at usual and accustomed fishing places  
13 consistent with necessary conservation?  
14

15 5-11. Where and in what manner do the plaintiff tribes fish  
16 outside reservation boundaries?  
17

18 5-12. What has been the effect of State regulation upon  
19 fishing by the plaintiff tribes outside reservation boundaries?  
20

21 5-13. Whether the sites of non-Indian reefnet fishermen are  
22 on the usual and accustomed grounds and stations of the Lummi  
23 Indians?  
24

25 5-14. If the answer to issue 5-13 is in the affirmative,  
26 then have the non-Indian fishermen, acting in concert or  
27 singly, monopolized certain fishing grounds to the exclusion  
28 of the Lummi Indians?  
29  
30  
31

1 PART SIX

2 CONTENTIONS ON ISSUES OF LAW

3  
4 I. UNITED STATES' CONTENTIONS ON PRINCIPAL ISSUES OF LAW

5  
6 A. Jurisdiction.

7 6-1. The jurisdiction of the Indian Claims Commission is limited  
8 to the matters set out in 25 U.S.C. §70a and does not extend to  
9 (1) claims of Indian tribes against a state or private party, or  
10 (2) claims for protection and enforcement of rights not taken  
11 away from the tribes by the United States but expressly secured  
12 to the tribes by a treaty of the United States, or (3) claims  
13 brought against a state by the United States.

14  
15 B. Existence of the Right.

16 6-2. All plaintiffs contend that the questions posed in  
17 paragraphs 4-2, 4-3 and 4-5 (with respect to the Muckleshoot  
18 Tribe) are to be answered in the affirmative. With respect to  
19 paragraph 4-4 such admission had no effect upon the treaty rights  
20 of the plaintiff tribes except to subject Washington, equally  
21 with other states, to the provisions of treaties of the  
22 United States.

23  
24 C. Scope of the Right.

25 6-3. The right secured by the treaties to the plaintiff tribes  
26 is a reserved right, which is linked to the marine and freshwater  
27 areas where the Indians fished during treaty times, and which  
28 exists in part to provide a volume of fish which is sufficient to  
29 the present and future needs of the tribes. The right is to be

1 exercised in common with non-Indians, who may take a share which  
2 is fair by comparison with the share taken by the tribes. Neither  
3 the Indians nor the non-Indians may fish in a manner so as to  
4 destroy the resource or to preempt it totally. The right is not  
5 limited as to species of fish, the origin of fish, the purpose of  
6 use or the type or manner of taking, except to the extent  
7 necessary to achieve preservation of the resource.

8  
9 D. Regulation of the Exercise of the Right.

10 6-4. The United States contends that the state has the police  
11 power to regulate the off-reservation fishing activities of  
12 members of the treaty tribes, but only to the extent necessary to  
13 protect the fishery resource. This power does not include the  
14 authority to impair or qualify the treaty right by limiting its  
15 exercise to state-preferred times, manners or purposes except as  
16 such limitation may be necessary for preservation of the  
17 resource and protection of the interests of all of those entitled  
18 to share it. This power does not include the power to determine  
19 for the Indian tribes what is the wisest and best use of their  
20 share of the common resource.

21  
22 6-5. The plaintiff tribes having a federally recognized tribal  
23 government have jurisdiction (in conformity with their tribal  
24 constitutions or other applicable tribal rules or federal  
25 statutes) to enact and enforce regulations relating to the  
26 exercise outside reservation boundaries by their members of  
27 rights secured to said tribes by treaty. However, the tribes  
28 cannot enlarge the right beyond that secured in the treaty.



1 The United States contends that the tribes do not have  
2 jurisdiction to enforce tribal laws against nonmembers, whether  
3 Indian or non-Indian, outside of Indian reservations, with the  
4 possible exception of enforcement pursuant to inter-tribal agree-  
5 ment against members of the agreeing tribes. The United States  
6 contends that the scope of such latter jurisdiction, if any,  
7 should not be determined at this phase of this case.

8  
9 6-6.(a) As to paragraph 4-10, the jurisdiction of each entity  
10 to regulate is unimpaired by the exercise of another entity's  
11 regulatory jurisdiction. With respect to matters over which  
12 there may be multiple jurisdiction, the extent of exercise or  
13 nonexercise of regulatory jurisdiction by the entity having  
14 primary interest in the matter may be relevant to the appropriate-  
15 ness of another entity's exercise of its jurisdiction. Also the  
16 exercise of federal or tribal regulatory control may affect the  
17 finding of "necessity" which is required for the validity of a  
18 state regulation of the exercise of the treaty right.

19  
20 (b) The following state statutes and regulations do not  
21 meet the standards governing their applicability to the Indian  
22 exercise of treaty fishing rights and therefore may not lawfully  
23 be applied to restrict members of tribes having such rights from  
24 exercising those rights: RCW 75.08.260, RCW 75.12.060,  
25 RCW 75.12.070, RCW 75.12.160, RCW 77.08.020, RCW 77.12.100,  
26 RCW 77.12.130, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040,  
27 RCW 77.16.060, WAC 220-20-010, WAC 220-20-015(2) and WAC  
28 220-47-020.

1           The practice of seizing and retaining Indian fishing  
2 gear or other property without judicial determination of  
3 forfeiture or confiscation, and the failure to make restitution  
4 for fish taken from Indian nets in the absence of judicial  
5 determination that the fishing was illegal, constitute an illegal  
6 infringement of the Indians' treaty rights.

7  
8           (c) The following regulatory patterns are an arbitrary  
9 and unlawful restraint on the exercise of the tribes' off-  
10 reservation treaty fishing rights:

11  
12           (1) Use of a statute or regulation of broad applica-  
13 bility instead of one specific as to time, place, species and  
14 gear.

15  
16           (2) Prohibition of harvest by the tribes on future  
17 runs prior to a full, fair and public consideration and  
18 determination of specific need.

19  
20 6-7. The United States contends that the only method providing  
21 a fair and comprehensive account of the usual and accustomed  
22 fishing places of the plaintiff tribes is the designation of the  
23 freshwater systems and marine areas within which the treaty  
24 Indians fished at varying times, places and seasons, on different  
25 runs.

26  
27 E. Summary of Relief Requested.

28  
29 6-8. Declaration of the Tribes' Rights.

30           As the first pillar of appropriate relief in this case, the  
31 United States seeks a declaration that each of the plaintiff

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1 tribes holds a distinct, special right to take fish, reserved  
2 to it under the applicable treaty. That right entitles the  
3 tribes' members to take from the anadromous fish resource in the  
4 State of Washington a share which is equitable by comparison to  
5 the share taken by non-Indians and which is responsive to the  
6 tribes' present and future needs.

7  
8 6-9. Injunction and Continuing Jurisdiction.

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

18  
19 (1) Provide the tribes an opportunity to take, by  
20 means feasible to them, a share of the resource which is both  
21 fair by comparison with the share available to other user groups  
22 and adequate to the tribes' needs;

23  
24 (2) Consider perpetuation and improvement of the  
25 size and reliability of the fish runs as the sole controlling  
26 objectives of regulation of Indian fishing;

27  
28 (3) Adopt regulations on an annual or seasonal basis  
29 only upon specific supporting and current facts and data;

1 (4) Enforce their regulations with due regard for  
2 the person and property of Indian fishermen;

3  
4 (5) Consider as fundamental to their regulatory  
5 choice the cultural and economic value of fish harvesting to  
6 Indians;

7  
8 (6) Accept as prima facie proof of the tribes' needs,  
9 the tribes' estimates thereof;

10  
11 (7) Adopt, as their own, tribal proposals for  
12 regulation of the Indian fishery unless it can be shown that  
13 such tribal proposals are wasteful or are inadequate for necessary  
14 conservation of the specific run involved;

15  
16 (8) Protect off-reservation Indian fishing from  
17 interference by non-Indians in those instances when the State's  
18 regulation has limited the area of Indian fishing to less than  
19 the full extent of the tribes' usual and accustomed fishing  
20 places; and

21  
22 (9) Leave to the tribes in the first instance the  
23 authorization and regulation of the off-reservation fishing of  
24 their members.

25  
26 The first of such regulations shall be held ineffective until  
27 reviewed and approved by this Court.

28  
29 (b) In order to assure compliance with such an injunctive  
30 relief, the United States seeks also an order continuing the  
31

1 Court's jurisdiction for such other and further relief as may  
2 be just and proper, following issuance of the injunction.

3  
4 II. LEGAL CONTENTIONS OF THE MUCKLESHOOT, SQUAXIN,  
5 SAUK-SUIATTLE, SKOKOMISH AND STILLAGUAMISH  
6 TRIBES

7 A. Jurisdiction.

8 6-10. The Court has jurisdiction of this matter; and proceedings  
9 before the Indian Claims Commission to adjudicate the claims  
10 raised in this case are neither the exclusive remedy of, nor are  
11 they now available to plaintiffs where, as here, (a) the claims  
12 are not against the United States, (b) equitable relief is  
13 sought, and (c) the claims, at least in part, accrued subsequent  
14 to 1946.

15  
16 B. Existence of the Right.

17 6-11. The plaintiff tribes hold rights reserved to them in the  
18 treaties, to fish at their usual and accustomed places which are  
19 distinct from the rights of other persons.

20  
21 6-12. Washington's admission to the Union upon an equal footing  
22 with the original states left intact rights secured to the  
23 plaintiff tribes by treaty, and the State of Washington was and  
24 is bound to uphold and to do nothing inconsistent with those  
25 treaties, as they are the supreme law of the land.

26  
27 6-13. Each of these plaintiff tribes are treaty tribes and have  
28 rights to fish at their usual and accustomed places secured to  
29 them by the treaties.

1 C. Scope of the Right.

2 6-14. The right secured to these plaintiff tribes in their  
3 treaties entitled them to take at their usual and accustomed  
4 places sufficient fish to satisfy their present and future needs  
5 for a subsistence and livelihood.

6  
7 D. Regulation of the Right.

8 6-15. The State does not have power to qualify the right of  
9 the Indians to fish at their usual and accustomed fishing places  
10 as secured in the treaties unless such regulation, prior to its  
11 enforcement, has been shown to be necessary for conservation and  
12 that it meets appropriate standards and does not discriminate  
13 against the Indians' right to fish.

14  
15 6-16. In order for a regulation to be shown to be necessary  
16 for conservation, the state must demonstrate, based on current  
17 biological facts and data, that it has taken into account the  
18 effect of all tribal and federal regulations, that it has  
19 exhausted other methods of preventing destruction of the  
20 resource which are available to it, including regulations,  
21 restriction, and prohibition of non-treaty fishing, and that  
22 the resource is still in danger of destruction.

23  
24 6-17. State laws or regulations are discriminatory as to Indian  
25 treaty fishermen if they:

26 a. recognize no greater rights in such  
27 Indians than in persons not having treaty  
fishing rights;

28 b. operate to the detriment of the Indians  
29 because they prohibit or restrict fishing  
30 with gear or at places that are more avail-  
able to Indians or are customarily used by  
them;

31

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1 c. provide for meeting the needs and  
2 objectives of user groups such as sport  
3 or commercial fishermen, but do not provide  
4 for the needs of Indian treaty fishermen  
and fulfillment of the purposes of the  
treaty secured right.

5 6-18. A state law or regulation does not meet appropriate  
6 standards unless it is sufficiently precise, is based upon  
7 current facts and data objectively obtained, is enacted or  
8 promulgated with full representation and participation of Indian  
9 treaty fishermen, and is otherwise fully in compliance with  
10 standards of procedural due process.

11  
12 6-19. Existing state statutes and regulations as applied to  
13 treaty Indians, and the actions of state officials in attempting  
14 to enforce them against treaty Indians, are unlawful in that such  
15 statute and regulations have not been shown to be necessary for  
16 conservation, to meet appropriate standards, and not to be discrim-  
17 inatory, and they are unconstitutional in that they violate the  
18 supremacy clause of the Constitution.

19  
20 6-20. Each of these plaintiff tribes has the power and jurisdic-  
21 tion to regulate persons exercising fishing rights at the tribes'  
22 usual and accustomed places, which rights are secured to the  
23 tribes by treaty.

24  
25 6-21. The State of Washington must defer to regulations imposed  
26 by the tribes at their usual and accustomed places, or imposed by  
27 the United States, upon persons exercising rights secured to the  
28 tribes by the treaties.

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III. PLAINTIFF YAKIMA NATION'S CONTENTIONS\*

6-22. Under the Constitution of the United States all treaties made, under the authority of the United States are the supreme law of the land and every state shall be bound thereby.

6-23. A state cannot amend or abrogate a treaty entered into between this nation or another nation or Indian Tribe and a states admission into the union of States does not likewise amend or abrogate any such treaty.

6-24. Off-reservation fishing rights secured by treaty are reserved tribal rights and the unilateral grant of United States citizenship to individual Indians who are members of such tribe cannot effect this tribal treaty right.

6-25. Indian treaties should be construed to effect the purposes for which they were signed and the basic purpose of the Yakima Treaty was to reserve and preserve the Yakima Nation as a distinct, viable economic and political Indian community.

6-26. Congress has shown by current legislation that it is its intent that state police power over Indians "shall not deprive any Indian or Indian tribe, band or community of any right, privilege or immunity afforded under Federal Treaty, agreement or statute with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof." The Secretary of Interior has promulgated regulations regarding Indian off-reservation fishing in this area. Should regulation of Indian fishermen be necessary, the Federal Government has pre-empted the state from action.

6-27. Where such fishing is under tribal supervision, the

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\*/ The Yakima Nation here states both its legal and its factual Contentions.



1 State of Washington and its fish management agencies have no police  
2 power to regulate off-reservation fishing by Treaty Indians at usual  
3 and accustomed places.  
4

5 6-28. Even though some power to limit Indian Treaty fishing  
6 rights to insure the continued existence of the fish resource may  
7 exist where tribal regulation is ineffective in protecting the fish  
8 resource such power does not lie in the states unless Congress so  
9 provides. That Congress has not so provided and the regulation by  
10 the Yakima Nation is effective and as regards Yakima Indians only  
11 tribal or inter-tribal regulations are needed to insure the contin-  
12 ued existence of the fish resource.  
13

14 6-29. That at the time of the execution of the Yakima Treaty,  
15 the Indians who are now the plaintiff Yakima Nation were dependent  
16 upon a food gathering, fishing and hunting economy culture and  
17 ranged over 20 million acres following this method of livelihood  
18 and exercised absolute dominion over at least 10 million acres fol-  
19 lowing this method of livelihood. That the land reserved by treaty  
20 was approximately 5 percent of the greater area and approximately  
21 10 percent of the area where they exercised absolute dominion. That  
22 off-reservation fishing rights were a necessity for this group of  
23 Indians to survive.  
24

25 6-30. That at the time of the execution and ratification of  
26 The Yakima Treaty, Indians in the case area were making approximately  
27 95 percent of the landings of anadromous fish with the non-Indians  
28 landing 5 percent and that currently this percentage is just reversed  
29 with the Indians today landing less than 5 percent and the non-Indians  
30 taking approximately 95 percent of the harvest. That this is not the  
31 intent of the treaties involved.  
32

1 6-31. That the Indians were promised by the United States Treaty  
2 negotiators that the non-Indians would never dominate or monopolize  
3 the fisheries and it was the intention and expressed purpose of the  
4 United States that Indian fishing to the same pre-Treaty extent was  
5 reserved by the Indians without non-Indian monopolization or domina-  
6 tion; the United States being dedicated to restricting the Indians  
7 to as little land as possible in the bargaining process and being  
8 willing to let the Indians reserve extensive off reservation fish-  
9 eries to attain this primary non-Indian purpose.

10  
11 6-32. During the negotiation of the Yakima Treaty, representa-  
12 tives of the United States promised the Indians that now comprise  
13 the plaintiff Yakima Nation that they would forever be able to con-  
14 tinue the same off reservation food gathering and fishing practices  
15 as to time, place, method, species, use and extent as they had or  
16 were then exercising. These Indians relied upon these promises and  
17 they formed a material and basic part of the Yakima Treaty and the  
18 Indians' understanding of the meaning of said Treaty.

19  
20 6-33. That this right to fish in this manner (i.e., time, place,  
21 method, species and extent) was reserved by these Indians for all  
22 members of the now plaintiff Yakima Nation as a tribal right.

23  
24 6-34. That it was then necessary and is now necessary that this  
25 off reservation fishing right be reserved to maintain a livelihood  
26 for the Yakimas, a viable Indian Tribe and an Indian community on  
27 the Yakima Indian Reservation.

28  
29 6-35. That plaintiff Yakima Nation and its members have con-  
30 tinued to exercise this reserved fishing right. That exercise  
31 of this tribal right has been regulated and is now satisfactorily  
32

1 regulated by the plaintiff Yakima Nation.

2  
3 6-36. That under such regulation--by custom or tribal law--the  
4 exercise of this tribal right by Yakima Indians, has not and does not  
5 exceed the extent either in species, amount, time, method and use as  
6 was exercised at treaty or pre-treaty times. These regulated Yakima  
7 landings have not jeopardized the continued existence of the fish  
8 resource or jeopardized "conservation" no matter how it is defined.  
9

10 6-37. That the defendants have by their statutes, regulations,  
11 fish management policies and programs interfered with and limited  
12 this reserved tribal treaty right so as to fail to meet the objec-  
13 tives, purposes and intent of The Yakima Treaty. That this is an  
14 interference with an internal tribal right and also creates economic los  
15 loss to plaintiff Yakima Nation and its members that can only be  
16 corrected by this court's order prohibiting this State action.  
17

18 6-38. That in order that the intent of The Yakima Treaty  
19 be fulfilled, it is not only necessary that this court restrict the  
20 defendants from interference with Yakima Indians fishing in con-  
21 formity with tribal regulations but the state must further be di-  
22 rected to manage its fish management programs so that--as near as  
23 possible under present conditions--said Indians have the same oppor-  
24 tunity to make landings in the same manner, time, place, species,  
25 and extent as existed at treaty and pre-treaty times.  
26

27 6-39. That the best and only methods of regulating Indians ex-  
28 exercising their tribal treaty rights is to require individual Indians  
29 to fish inconformity with tribal or inter-tribal conservation regu-  
30 lations.  
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6-40. That the Yakima Indians fished at usual and accustomed places in the case area in a manner and extent that is not inconsistent with plaintiff Yakima Nation's now contemplated use. That the right to fish in these areas is retained today.

6-41. That the Yakima Indian landings in the case area both at treaty and modern times were for both commercial and personal use and modern and now Yakima Tribal contemplated fishing methods are not inconsistent with the use contemplated in The Yakima Treaty.

6-42. That in management of the fishery tribally, intertribally or by joint Indian and non-Indian regulation should meet the purpose and intent of The Yakima Treaty and other treaties, should have as its main purpose to accord to each user group the percentage of landings to that percentage taken by that user group at treaty times.

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1 IV. SPECIFIC PLAINTIFFS' CONTENTIONS OF LAW.

2 6-43. The Muckleshoot Indian Tribe of the Muckleshoot Reservation  
3 is the present-day tribal entity which, with respect to the matters  
4 which are the subject of this litigation, is a successor in  
5 interest to some of the Indian tribes or bands which were  
6 parties to the Point Elliott Treaty of January 22, 1855,  
7 ratified March 8, 1859, and proclaimed April 29, 1859  
8 (12 Stat. 927), and to some of the Indians to whom the Medicine  
9 Creek Treaty (10 Stat. 1132) was applicable. [United States  
10 and Muckleshoot Tribe.]  
11

12 6-44. As currently represented in this case, the Stillaguamish  
13 Indian Tribe is the present-day tribal entity, which with  
14 respect to the matters which are the subject of this litigation,  
15 is a successor in interest to the Stoluck-Wha-Mish Tribe and  
16 and other Indian bands who were parties to the Treaty of Point  
17 Elliott (12 Stat. 927). [Stillaguamish Tribe.]  
18

19 6-45. As currently represented in this case, the Sauk-Suiattle  
20 Indian Tribe is the present-day tribal entity which, with  
21 respect to the matters which are the subject of this litigation,  
22 is a successor in interest to some of the Indian tribes or  
23 bands who were parties to the Treaty of Point Elliott  
24 (12 Stat. 127). [Sauk-Suiattle Tribe.]  
25

26 6-46. The Upper Skagit River Tribe was organized by some of  
27 the descendants of Indians who were parties to the Treaty of  
28 Point Elliott of January 22, 1855, ratified March 8, 1859, and  
29 proclaimed April 29, 1859 (12 Stat. 927). As currently organized  
30 under its Articles of Association, the Upper Skagit River Tribe  
31

1 is the present-day tribal entity which, with respect to the  
2 matters which are the subject of this litigation, is a successor  
3 in interest to some of the Indian tribes or bands who were  
4 parties to the Treaty of Point Elliott (12 Stat. 927).

5 [Upper Skagit Tribe.]

6  
7 6-47. The State of Washington should have no regulatory authority  
8 whatever over Indians fishing off reservation in accordance with  
9 the right guaranteed them by the United States under treaty.

10 Counsel is well aware that language in a number of Supreme Court  
11 cases gives support to the view that the States may interfere  
12 with Indian fishing by regulation, and in particular, the most  
13 recent decision, Puyallup v. Department of Game expressly holds  
14 that the State may do so. Notwithstanding, counsel submits that  
15 a careful reading of these cases can lead to only one conclusion:

16 That comments to the effect that the State had regulatory  
17 authority made by the Court in Ward v. Racehorse, 163 U.S. 504  
18 (1896), United States v. Winans, 198 U.S. 371 (1905), and  
19 Tulee v. Washington, 315 U.S. 681 (1942) were dicta uttered with  
20 no record or analysis on which to base such comment, and that the  
21 holding of the Supreme Court in Puyallup v. Department of Game,  
22 391 U.S. 392 (1968) was based on a wholly improper construction  
23 of the treaty resulting from a failure to present to the Court  
24 a factual record which would provide a basis for construction of  
25 the treaty language in accordance with the principles applicable  
26 to Indian treaties laid down in Choctaw Nation v. Oklahoma,  
27 397 U.S. 620 (1970) and Jones v. Meehan, 175 U.S. 1 (1899).

28 [Makah, Lummi and Quileute Tribes.]

1 6-48. The precise question of the erroneous establishment of  
2 State regulatory authority over Indian treaty fishing was the  
3 subject of a recent Law Review article written by Professor Ralph  
4 W. Johnson of the University of Washington Law School in Volume 47  
5 Washington Law Review No. 2, 1972. That article correctly  
6 analyzes the body of case law. [Makah, Lummi and Quileute Tribes.]  
7

8 6-49. Never before in the entire history of the litigation  
9 affecting Indian treaty rights has the Court had before it two  
10 critical areas of evidence essential to a fair determination  
11 of the issue:

12 First, a complete and accurate anthropological history  
13 which spells out the position of the two parties to the treaty  
14 and the understanding of the parties when the treaty was made.

15 Second, a full exposition of the State regulatory scheme  
16 as a means of allocation among competing groups rather than a  
17 narrow "conservation" program. It is submitted that when this  
18 becomes clear from the evidence, the Court will understand why  
19 these intervenors cannot accept for a moment the proposition  
20 that the Indians must move under the umbrella of State regulation  
21 to have their federally secured rights measured by State political  
22 authority in competition with the entire tourist and sports  
23 fishing bloc and the commercial fishing bloc, major pressure  
24 groups within the State. [Makah, Lummi and Quileute Tribes.]  
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1 V. Defendants' Contentions of Law

2 A. Jurisdiction

3 6-50. Will the judgment of the Court in this action be binding  
4 on all persons who claim a treaty right to fish by reason of membership  
5 in the Plaintiff tribes? (ALL DEFENDANTS)

6 B. Existence of Right

7 6-51. Did the grant of United States citizenship to these  
8 Indians alter their right to claim immunity from law in off-reservation  
9 areas? (GAME and REEF NETTERS)

10 6-52. Where the Plaintiff tribes have been compensated or are  
11 seeking compensation before the Indian Claims Commission asserting the  
12 loss of the right of taking fish at usual and accustomed grounds and  
13 stations as a basis for compensation, are they barred by such conduct  
14 from maintaining this action? (ALL DEFENDANTS)

15 C. Scope of Right

16 6-53. Does the state have the power to apply Game laws and  
17 regulations to all persons outside of reservations, including treaty  
18 Indians, if the same are applied equally to all persons? (GAME)

19 6-54. Does the "reasonable and necessary for conservation"  
20 standard require state regulations to provide to the Indian tribes a  
21 fair and equitable share of the harvestable fish? (FISHERIES)

22 6-55. Is the requirement that state regulations which affect  
23 off-reservation treaty Indian fishing rights meet "appropriate standards"  
24 satisfied when those regulations are adopted in accordance with the  
25 Administrative Procedures Act? (FISHERIES)

26 6-56. Have each of the Plaintiff tribes satisfied its burden  
27 of proof to establish the locations of the usual and accustomed grounds  
28 and stations to which they claim rights within the meaning of the  
29 treaties? (GAME and REEF NETTERS)

30 6-57. Have the Plaintiffs sustained the burden of proof as to  
31 the existence of tribal rolls, approved by the Secretary of the Interior,  
32



1 to identify those individuals who may assert a claimed treaty right?  
2 (GAME)

3 6-58. Can the Department of Fisheries in the interest of con-  
4 servation require Indian tribal members to carry identification cards  
5 issued by the Department at no charge and conditioned only upon certifi-  
6 cation of the member by the tribe? (FISHERIES)

7 6-59. Does the treaty right prohibit the legislative classifi-  
8 cation of steelhead as a game fish and regulations which limit their  
9 taking to a recreational use if the state provides for the taking of an  
10 adequate number of salmon species by Indians to compensate, by substitu-  
11 tion of species, for the loss of their fair and equitable share of the  
12 harvestable steelhead not taken by them? (GAME)

13 D. Regulation of Right

14 If the Plaintiff tribes have a right to fish at their usual and  
15 accustomed grounds and stations outside of reservations, then:

16 6-60. If it is required that the state provide the Indians an  
17 opportunity to take a "fair and equitable share" of harvestable fish,  
18 does fair share requirement contemplate that the Indians share the oppor-  
19 tunity with other citizens or that non-Indians be prohibited from fishing  
20 to provide an exclusive opportunity to the Indians? (GAME and FISHERIES)

21 6-61. Is a specifically challenged statute or regulation valid  
22 when, considered in the context of a total regulatory plan, it is  
23 reasonable and necessary for conservation? (FISHERIES)

24 6-62. May the state require that those persons allegedly exer-  
25 cising a treaty right to take fish outside of reservations carry on their  
26 persons and produce on demand, proper identification as members of a treaty  
27 tribe whose names appear on an approved enrollment record? (GAME)

28 6-63. Is it necessary that the state deal with off-reservation  
29 treaty Indian fishermen as a distinct commercial harvesting group?  
30 (GAME and REEF NETTERS)

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PART SEVEN

CONTENTIONS ON FACTUAL ISSUES

I. UNITED STATES' CONTENTIONS ON DISPUTED FACTS.

A. Jurisdiction.

7-1. The Indian Claims Commission did not, and had no reason to, consider the value of the fishing rights involved in this case in establishing any compensation due from the United States to any of the plaintiff tribes since there had been no taking of such rights by the United States and hence no basis or jurisdiction for awarding compensation for such a taking. Moreover, any such consideration would be immaterial to any liabilities and obligations of these defendants since they were not parties to any Indian Claims Commission case.

1 B. UNITED STATES' SPECIFIC FACTUAL CONTENTIONS.

2 7-2. An initial effect of the influx of non-Indians into western  
3 Washington was to increase the demand for fish both for local consumption  
4 and for export. Almost all of this demand, including that for export,  
5 relied on Indians to supply the fish. Non-Indians did not engage as  
6 fishing competitors on any scale until the late 1870's.

7  
8 7-3. Indian fishing was not confined to types of locations. The  
9 Indians developed and utilized a wide variety of fishing methods which  
10 enabled them to take fish from nearly every type of location at which fish  
11 were present. The Indians harvested fish from the high seas, inland salt  
12 waters, rivers and lakes. They took fish at river mouths as well as at  
13 accessible points or stretches along the rivers all the way to the headwaters.  
14 Some locations were more heavily utilized than others.

15  
16 7-4. In pre-treaty and treaty times Indian fishermen, like all  
17 fishermen, shifted to those fishing locales which seemed most productive  
18 at any given time. The productivity of local sites varied with (1) volume  
19 of water in a stream at a particular season of year, (2) amount of mud  
20 or silt present at a given time, and (3) alteration in the water course  
21 due to flooding, log jams, and other natural causes. The use of particular  
22 sites varied over time. There were traditional fishing locations which were  
23 used for as long as people could remember, but these were not fixed and  
24 unchanging because the water courses themselves were not immutable or  
25 unalterable.

26  
27 7-5. Documentation as to which Indians used specific fishing  
28 sites is incomplete. Many fisheries can be documented in the historical  
29 record for which user groups are unspecified. Conversely, mention of  
30

1 user groups, where it occurs, is not necessarily complete or exclusive.  
2 George Gibbs, drawing on information gathered during treaty times, stated  
3 in 1877:

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

10 7-6. There is no record of the Chinook jargon phrase that was  
11 actually used in the treaty negotiation to interpret the provision "The  
12 right of taking fish, at all usual and accustomed grounds and stations,  
13 is further secured in common with the citizens."

14 7-7. Historically and to the present day, taking, preparing,  
15 eating and trading fish have been important functions in Indian communi-  
16 ties. As such, fishing provides a basis for cultural identity and a  
17 cohesive force in Indian society.

18 7-8. Traditional Indian fishing methods were highly efficient.  
19 These methods survived where Indians were allowed to maintain them; that  
20 is, where they were not outlawed or where Indians were not prevented  
21 access to areas where the methods were feasible. When necessary or  
22 appropriate, Indians, like non-Indians, have adopted new fishing techniques  
23 and gear. Indians no longer fish from dugouts, just as non-Indians no  
24 longer fish from wooden sailboats. Indians no longer use bark nets and  
25 whites no longer use cotton or linen nets.

26 7-9. There was no intention of creating a class society with  
27 Indians on the bottom economic rung as a result of the treaties. The  
28 treaty commission clearly undertook to provide the Indians the means of  
29 participating and prospering in the economy of the Territory.  
30  
31

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1           7-10.       The State Defendants and various of their officers and  
2 agents, acting in their official capacities on behalf of the State of  
3 Washington, have arrested and prosecuted, and expressed intent to con-  
4 tinue to arrest and prosecute, members of various of the Plaintiff Tribes  
5 who were fishing at their Tribe's off-reservation usual and accustomed  
6 fishing places contrary to the provisions of any state laws and regula-  
7 tions which said Defendants contend are applicable to such fishing  
8 activity and belonging to members of said Tribes who were engaged in  
9 said fishing activity.

10  
11           7-11.       The Plaintiff Tribes and United States of America are  
12 unable to be a party to criminal cases brought for the violation of said  
13 statutes and regulations and are without an adequate remedy at law or  
14 any remedy at law whatsoever to assert and enforce the fishing rights  
15 reserved or secured to the Indians by said treaties. The individual mem-  
16 bers of the Plaintiff Tribes are without an adequate remedy at law to  
17 redress or prevent unlawful interference with their exercise of fishing  
18 rights reserved or secured by said treaties because: (a) the treaty  
19 rights that are asserted are unique and the damages which have been or  
20 will be sustained are not susceptible of definite monetary determination;  
21 and (b) in the case of criminal prosecutions said Indians have no remedy  
22 at all except at the risk of suffering arrests, seizure of property,  
23 fines, imprisonment and confiscation of property involving a multiplicity  
24 of legal proceedings.

25  
26           7-12.       One of the purposes of the treaties was to provide for  
27 peaceful and compatible coexistence of Indians and non-Indians in the  
28 area which was ultimately to become the State of Washington. In return  
29 for the Indians' peaceful cession of their lands the United States under-  
30 took by the treaties to promote their education and training for the  
31 pursuant of their livelihood under the changed circumstances that would  
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result from the existing and anticipated non-Indian impact on the region.  
The fishing rights provision of the treaty was one means of accomplishing  
this purpose.

1           7-13.       From time to time agents of the State Defendants,  
2 acting in their official capacity and under color of state law, have  
3 unlawfully seized nets, fish and other property belonging to members of  
4 the Plaintiff tribes and being used in the lawful exercise of Plaintiff  
5 tribes' treaty-secured fishing rights and have failed to return said  
6 property or to obtain judicially authorized confiscation or forfeiture  
7 thereof. Defendants should be ordered to return said property or its  
8 value to the owners thereof and to equitably reimburse the owners for  
9 the unlawful seizure. The question of which seizures were made by De-  
10 fendants, the specific items of property taken, the value thereof, and  
11 any restitution to which the owners thereof may be entitled are segregated  
12 for later determination.  
13

14           7-14.       Each of the Plaintiff tribes has usual and accustomed  
15 fishing places within the area described in paragraph 5 supra, including,  
16 among others, the waters of Puget Sound, Strait of Juan De Fuca, off-  
17 shore marine waters, the Nisqually River, the Puyallup River and Commence-  
18 ment Bay, the White River, the Green-Duwamish River, Lake Washington,  
19 Cedar River, Stillaguamish River, Sauk River, Skagit River, the Nooksack  
20 River, the waters of Hood Canal and the rivers flowing into said Canal,  
21 the Hoko River, the Quillayute River and its tributaries, and the Hoh River.  
22

23           7-15.       Subsequent to the execution of the treaties and in reliance  
24 thereon, the members of the Plaintiff tribes have continued to fish for  
25 subsistence and commercial purposes at the usual and accustomed places.  
26 Such fishing provided and still provides an important part of their sub-  
27 sistence and livelihood.  
28

29           7-16.       The State Defendants have so framed their statutes and  
30 regulations as in many instances to allow all or an inappropriately large  
31 portion of the harvestable fish from given runs to be taken by those with  
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no treaty rights before such runs ever reach the usual and accustomed fishing places to which the treaties apply.

7-17. The State Defendants have by statute and regulation totally closed many of the usual and accustomed areas of said tribes to all forms of net fishing while permitting commercial net fishing for salmon elsewhere on the same runs of fish.

7-18. Defendant State of Washington has by statute and regulation set aside the species of fish commonly known as steelhead for the exclusive use and benefit of a single category of persons, namely sportsmen, and has imposed limitations on the means by which, the purpose for which, and the numbers of which said species may be taken that are designed to promote the use of this fish solely as a recreational attraction for residents of the state and out-of-state tourists.

7-19. The State Defendants have undertaken, or caused to be undertaken, almost no studies, research, or experimentation of the extent to which it is necessary for such Defendants to restrict the exercise of fishing rights secured to Indian tribes by treaties of the United States.

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2 7-20. In December 1971 and January 1972 a Wildlife Agent of the Washington  
3 Department of Game, acting in his official capacity and under color of state  
4 law, seized several unattended fishing gill nets from the Quillayute River and  
5 its tributaries. Neither the Department of Game, the State of Washington, nor  
6 any officer or employee thereof has instituted any judicial proceeding to  
7 declare a confiscation or forfeiture of these nets nor returned the nets to the  
8 claimed owners thereof.

9  
10 7-21. The Department of Game still has the nets referred to in paragraph 7-  
11 20 above in its possession.

12  
13 7-22. Since at least February 4, 1972, the State of Washington and the  
14 Game Defendants have been on notice that specifically identified members of  
15 the Quillayute Tribe have asserted under oath that nets belonging to them and  
16 approximating the descriptions of some of the nets referred to in paragraph 7-  
17 20 above were taken by unknown persons from specifically described locations  
18 on the Quillayute River at approximately the times which the Wildlife Agent  
19 says he seized the latter referenced nets.

20  
21 7-23. The State Defendants have from time to time acknowledged seizing nets  
22 and other property used for fishing from various waters of the state known to  
23 be frequented by Indian fishermen claiming treaty fishing rights thereon in addi-  
24 tion to the seizures referred to in paragraph 7-20 above and the Game Defendants  
25 have further acknowledged that no judicial proceedings for the confiscation or  
26 forfeiture of any such property have ever been instituted except in those in-  
27 stances where forfeiture was sought as an incident to prosecution of a specific  
28 defendant.

1 7-24. Since at least February 4, 1972, the State Defendants have been on  
2 notice that a specifically identified member of the Nisqually Tribe has asserted  
3 under oath that property belonging to him was taken from the Nisqually River by  
4 unknown persons, that said property has not been returned to him, and that he  
5 has neither been charged with any offense in connection with the use of said  
6 gear nor has any judicial proceeding for the confiscation or forfeiture of said  
7 gear been instituted.

8  
9 7-25. Because of many years of State enforcement action against Indians  
10 exercising their treaty right to fish, the members of plaintiff tribes  
11 have discontinued treaty fishing activities at many of their usual and  
12 accustomed fishing places.

13  
14 7-26. The cutting of a canal from Puget Sound through to Lake  
15 Washington lowered the level of the lake and thereby created the  
16 following alterations relating to fishing by Indians in the area:

17 a. The Black River, which flowed southerly from Lake  
18 Washington to join the Cedar and White Rivers, dried up.

19 b. The Cedar River changed course and began to flow  
20 northerly over the bed of the old Black River into Lake Washington.

21 c. At least three groups of important Indian weir sites  
22 were destroyed by the changes wrought by the elimination of the Black  
23 River and the new flow patterns of the Cedar and White Rivers.

24 d. The Black River silver salmon run was destroyed, as  
25 were some of the other spawning areas around Lake Washington.

1 Quileute Tribe

2 7-27. In the years following the treaty with the Quileute,  
3 Indians caught fish in the Quillayute River near La Push by  
4 using nets attached to two canoes which were floated downstream  
5 in the river. They also used spears and hooks similar to gaff  
6 hooks. They caught smelt along the ocean beach in front of  
7 La Push and north and south of the Quillayute River.

8  
9 7-28. In the years following the treaty the Quileute villages  
10 were located where the conditions of the river were best for  
11 catching fish and, consequently, each village obtained its  
12 principal supply from a trap located nearby. The traps were  
13 built in shallow water although not necessarily at the mouths  
14 of small streams. There was a permanent Quileute village  
15 located opposite the creek entering the Bogachile River about  
16 one mile above the junction of the Bogachiel and Soleduck Rivers.  
17 There were two big smokehouses in this village and about thirty  
18 or more people lived there. There was another permanent village  
19 located about one mile above the entrance of Mayfield's Creek  
20 into the Bogachiel River. There were three smokehouses at that  
21 place with about 35 people. There was another village located  
22 on the Bogachiel River about six miles below the mouth of the  
23 Calawah River in which about thirty people lived. There was a  
24 fish trap there from which they obtained their principal supply  
25 of food. There was a permanent village on the south bank of the  
26 Bogachiel about a mile below where the Calawah and the Bogachiel  
27 meet. This village had about twenty-five or thirty people.  
28 There was also a permanent village on the Bogachiel River about  
29 about one-half mile above its junction with the Calawah at which  
30 about forty people lived. There was a permanent Indian village  
31 located just above where the present U.S. Highway 101 crosses  
32 the river.

1 7-29. There were small Indian villages located at the mouths  
2 of the Quillayute and Dickey Rivers and also one at Dickey Lake.  
3 There were several villages on the Soleduck River. There was a  
4 village known as Shu-a-wah on the headwater of the Soleduck on  
5 Beaver Prairie. The Indians that lived there in the years  
6 following the treaty obtained the principal part of their food  
7 supply from a fish trap located near the village. These people  
8 would also go to the coast to catch smelt. The fish traps or  
9 weirs used by the Quilleutes were made of fine maple bows laced  
10 by spruce limbs. They entirely closed the streams in which  
11 they were built. When the Indians had enough fish for their own  
12 immediate needs and to dry for their year's supply, they would  
13 remove the weir from the river so that the fish could go up the  
14 stream to spawn. There was at least one smokehouse at Shu-a-wah.  
15

16 Makah Tribe

17 7-30. The Makah Indians were able to sustain their wealth, power  
18 and Northwest Coast culture because of their access to and  
19 ownership of the unique and valuable resource of the halibut  
20 banks which were peculiar to their territory.  
21

22 7-31. The usual and accustomed fishing sites of the Indian  
23 parties to the treaty with the Makah include the saltwater  
24 fisheries off-shore stretching from the eastern boundary of the  
25 Makah Indian Reservation around Cape Flattery down to and  
26 including Cape Alava and the freshwater fisheries on the Ozette  
27 River, the Big River, the Hoko River, the Sooes River, and the  
28 Sekieu River.  
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1 7-32. The group of Indians who lived in the upper reaches of  
2 the Skagit River system during treaty times were referred to as  
3 a distinct group, variously designated as Sock-a-muke, Sakhumehu  
4 and Sock a bute; they were accustomed to a different diet than  
5 that obtainable in saltwater. Travel to the upriver country  
6 where they lived was difficult, if not impossible, during the  
7 winter months.

8  
9 7-33. During treaty times, salmon and steelhead were the food  
10 staple of the Indians referred to as Sock-a-muke, Sakhumehu and  
11 Sock a bute, although their diet contained other items not  
12 generally eaten by downriver Indians in the Puget Sound area.

13  
14 7-34. Lummi Indians who were present at the negotiation and  
15 signing of the Treaty of Point Elliott later asserted that  
16 those signatories identified as Lummi Indians had received  
17 assurances that they would continue to hold the rights to their  
18 fishing grounds and stations, including their rights to their  
19 reef net locations which were private property.

20  
21 7-35. At the time of the Treaty of Point Elliott the Lummi,  
22 Semiahmoo and Samish Indians maintained prosperous communities  
23 by virtue of their ownership of lucrative saltwater fisheries.

24  
25 7-36. Some of the Lummi Indian signatories to the Treaty of  
26 Point Elliott were owners of reef net locations.

27  
28 7-37. In 1791, Indians in Boundary Bay fished with reefnets.  
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1 7-38. The following facts all indicate an Indian origin for  
2 the technique of reef netting: (a) Native materials were used  
3 initially for all parts of the gear; (b) each detail of gear  
4 and construction had a native name in each of the several dialects  
5 used by Indian groups participating in the fishery; (c) a unique  
6 and specialized set of ritual observances was associated with the  
7 reef net fishery, which observances were similar to other salmon  
8 rites of the general area but peculiar to reef netters; and  
9 (d) the reef netting technique was employed from the Straits of  
10 Juan de Fuca to Point Roberts, apparently to all feasible  
11 locations, and this necessarily implies an intimate local  
12 knowledge of salmon migration routes and the underwater  
13 topography of the region, coupled with close observance of  
14 salmon behavior.

15  
16 7-39. The traditional fisheries of the post-treaty Lummi  
17 included reef net sites in the San Juan Islands, off Point  
18 Roberts, Birch Point, Cherry Point, and off Lummi Island and  
19 Fidalgo Island. Other fisheries in the Straits and bays from  
20 the Fraser River south to the present environs of Seattle were  
21 utilized. Freshwater fisheries included the river drainage  
22 systems emptying into the bays from Boundary Bay south to  
23 Fidalgo Bay.

24  
25 7-40. The Lummi Indians continued after the Treaty of Point  
26 Elliott to use their reef net locations until approximately 1894,  
27 when fish traps owned by non-Indians were located so as to render  
28 valueless many of the Lummi's reef net locations.

1 7-41. Indian gill net fishing of the type and operation  
2 utilized by the plaintiff tribes is not an inherently destructive  
3 means of harvesting salmonids (including steelhead), and it may  
4 be regulated and controlled sufficiently to prevent over-  
5 harvesting.

6  
7 7-42. At its meeting on October 2, 1972, upon advice from its  
8 attorney, the Game Commission considered the facts and data  
9 presented by Mr. Millenbach as informative only, since the  
10 Commission believed that State law prohibited it from passing  
11 a regulation which authorized net fishing for steelhead by  
12 treaty Indians outside reservation boundaries.

13  
14 7-43. The Game Department has never limited the number of  
15 sport fishermen who may fish in Washington pursuant to purchased  
16 steelhead punch cards.

17  
18 7-44. In failing to timely send notice to appropriate persons  
19 of its intended consideration and action on October 2, 1972,  
20 regarding off-reservation Indian net fishing to the Washington  
21 Code Reviser, the Game Commission and its agent the Game Department  
22 failed to follow the requirements of the Washington Administrative  
23 Procedure Act, RCW Chapter 34.04, and applicable provisions of  
24 the Washington Administrative Code.

25  
26 7-45. Since May 4, 1972, the Game Department has refused to  
27 follow those portions of the opinion of the Washington State  
28 Supreme Court of May 4, 1972 (Department of Game v. Puyallup  
29 Tribe, 80 Wn.2d 561) with which it disagrees and concerning  
30

1 which it has obtained a writ of certiorari from the United States  
2 Supreme Court. The Game Department has not obtained an order  
3 from a court of competent jurisdiction staying the effectiveness  
4 of the Washington State Supreme Court decision of May 4, 1972  
5 in Department of Game v. Puyallup Tribe, supra.

6 As to the State Defendants

7 7-46. In regulating fishing by treaty Indians outside reserva-  
8 tion boundaries at usual and accustomed fishing places, the  
9 State and its Departments of Fisheries and Game:

10 a. Do not provide the Indians an opportunity to take,  
11 by means feasible to them, a share of the resource which is  
12 fair by comparison with the share available to its other two  
13 clients, or adequate to their needs;

14 b. Do not consider perpetuation and improvement of the  
15 size and reliability of the fish runs as the sole controlling  
16 objectives of its regulation of Indian fishing;

17 c. Do not issue or enforce its regulations so as to  
18 carry out the purposes of the treaties;

19 d. Do not adopt its regulations on an annual basis  
20 upon specific supporting and current facts and data.

21 e. Do not enforce its regulations with due regard for  
22 the person and property of Indian fishermen;

23 f. Do not consider as fundamental to its regulatory  
24 choice the cultural and economic value of fish harvesting to  
25 Indians;

26 g. Do not accept, as prima facie proof of the tribe's  
27 needs, the tribes' estimates thereof;

28 h. Do not adopt, as their own, tribal proposals for  
29 regulation of the Indian fishery to the extent they are unable to  
30



1 show that such tribal proposals are not reasonable and necessary  
2 for conservation of the specific run involved; and

3 i. Do not protect off-reservation Indian fishing from  
4 interference by non-Indians in those instances when their regula-  
5 tions have limited the area of those Indians' fishing to less  
6 than the full extent of the tribe's usual and accustomed fishing  
7 places.

8  
9 7-47. The treaties involved in this case are parts of the  
10 result of the policy described in paragraph 3-28 above. They  
11 are not treaties of conquest but were negotiated at arm's length.  
12 The word of the United States was pledged.

13  
14 7-48. From aboriginal times salmon and steelhead from the  
15 water areas involved in this case have been a highly prized  
16 source of food, and a major recreational attraction to sports  
17 fishermen.

18  
19 7-49. From the earliest known times, up to and beyond the time  
20 of the treaties, the Indians comprising each of the involved in  
21 this case fourteen plaintiff tribes were primarily a fishing,  
22 hunting and gathering people dependent almost entirely upon  
23 the natural animal and vegetative resources of the region for  
24 their subsistence, trade and culture. They were heavily dependent  
25 upon such fish for their subsistence and for trade with other  
26 tribes and later with the settlers. They cured and dried large  
27 quantities for year around use. With the advent of canning  
28 technology in the latter half of the 19th Century the commercial  
29 exploitation of the salmonid resource by non-Indians increased  
30

1 tremendously. Indians, fishing under their treaty-secured rights,  
2 also participated in this expanded commercial fishery and sold  
3 many fish to non-Indians packers and dealers.

4  
5 7-50. During the negotiations which led to the signing of the  
6 treaties involved in this case, tribal leaders expressed great  
7 concern over their right to continue to resort to their fishing  
8 places and hunting grounds. They were reluctant to sign the  
9 treaties until given assurances that they could continue to go  
10 to such places and take fish and game there. The official records  
11 of the Indians on this point as inducement for their acceptance  
12 of the treaties.

13  
14 7-51. It was the intent and understanding of both the United  
15 States and the Indian parties to the treaties, at the time of  
16 negotiation and execution, that the reservation lands were to  
17 be residential bases from which the Indians were to continue to  
18 utilize the whole environment, including specifically all of  
19 their fishing locations.

20  
21 7-52. The Indian parties to the treaties did not anticipate any  
22 post-treaty, non-Indian regulations as to the time, place,  
23 manner or purpose of their taking fish pursuant to their treaty  
24 right.

25  
26 7-53. The United States intended by the treaties to recognize  
27 pre-existing Indian tenure and use rights.

1 7-54. The United States intended the "in common with" language  
2 to permit non-Indians to fish subject to prior Indian rights  
3 specifically secured in the treaties.  
4

5 7-55. The treaties impliedly promised that the fishing rights  
6 were secured therein to assure a viable Indian community for each  
7 Indian group.  
8

9 7-56. The Treaty Commission undertook to provide the Indians  
10 with the means of participating and prospering in the economy  
11 of the area.  
12

13 7-57. As to each plaintiff tribe for whom an anthropological  
14 report has been compiled by Dr. Barbara Lane, the freshwater  
15 systems and marine areas identified therein contain usual and  
16 accustomed fishing places of the tribe, and such identification  
17 is as detailed as possible for designation of those places.  
18

19 II. FACTUAL CONTENTIONS OF THE MUCKLESHOOT, SQUAXIN,  
20 SAUK-SULATTLE, SKOKOMISH AND STILLAGUAMISH TRIBES.

21 A. Existence and Scope of the Right.

22 7-58. Before and during treaty times Indians, and later non-  
23 Indians, harvested steelhead and all species of salmon whenever  
24 the various species were available.  
25

26 7-59. During treaty times Indians engaged in commerce, including  
27 bartering and trading fish harvested by them with other Indians  
28 and with non-Indians.  
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1 7-60. The Indians relied heavily upon harvesting anadromous  
2 fish for years prior to the treaties, and they were concerned  
3 that the treaties preserve their right to continue taking such  
4 to meet their future needs.

5  
6 7-61. The Indians intended to secure a perpetual right to be  
7 able to continue fishing at their usual and accustomed places  
8 as they had been before the treaties.

9  
10 7-62. The United States intended that the Indians should  
11 be self-sufficient, should continue to be able to rely upon  
12 fishing to meet subsistence needs, should continue to engage  
13 in trade of fish with non-Indians, and that non-Indians should be  
14 able to fish at the Indians' usual and accustomed places so long  
15 as that fishing was not inconsistent with the right to fish  
16 reserved in the treaties.

17  
18 7-63. The purpose of the applicable treaty provisions was to  
19 reserve to the Indians a right to take sufficient fish to meet  
20 their present and future subsistence and livelihood needs,  
21 while permitting non-Indians to fish at the Indians' usual and  
22 accustomed places so long as the Indians' exercise of their  
23 right is not interfered with.

24  
25 7-64. Each of these plaintiff tribes have, and their predecessors  
26 had at treaty times, usual and accustomed fishing places within  
27 the area covered by this case.

1 7-65. The Indians continue to have a right to fish at their  
2 usual and accustomed places, as reserved in the treaties and  
3 have continuously exercised that right except when they have been  
4 prevented from doing so by attempted imposition of the State laws  
5 of Washington which are in conflict with such right.

6  
7 B. Regulation of the Exercise of the Right.

8 7-66. These plaintiff tribes are entirely capable of regulating  
9 fishing by their members at usual and accustomed fishing places  
10 consistent with conservation of the resource.

11  
12 7-67. Attempted enforcement of State laws and regulations  
13 concerning fishing as to treaty Indians at their usual and  
14 accustomed fishing places has resulted in prevention of the  
15 full exercise of Indian treaty fishing rights, loss of income,  
16 inhibition of valuable cultural practices, confiscation and damage  
17 to fishing equipment, and arrest and prosecution of Indians.

18  
19 7-68. The State does not recognize the effect of applicable  
20 tribal regulations concerning Indian fishing nor the tribes'  
21 power to enact and enforce such regulations.

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III. Defendants' Contentions of Fact

7-69. Did the Indian Claims Commission consider the value of fish and game in establishing the basis for compensation to Indian tribes on their claims based on the value of lands taken by the United States under the terms of treaties or by naked taking? (ALL DEFENDANTS)

B. Existence of Right

7-70. Did the United States assert the right to exercise its governmental power over Indians prior to the time of the treaties? (GAME)

7-71. Did either party to the treaties contemplate that governmental powers of the United States over Indians were being treated away by the United States? (GAME)

7-72. Did the United States treat for, or acquire, any of its governmental powers by the treaties in issue? (GAME)

7-73. Was Governor Stevens authorized by the United States to treat away or impair the sovereign power of the United States? (GAME)

7-74. Was it the intention of the parties to the treaties that the Indians would enact and enforce laws against Indians or non-Indians in off-reservation areas? (GAME)

7-75. Was it the intention of the parties to the treaties that the Indians would become integrated into the non-Indian society on an agrarian level? (GAME)

7-76. Were the treaty provisions relating to the off-reservation gathering cultures, including fishing, intended by the parties to be a temporary right to be extinguished as the Indians became integrated into the non-Indian society? (GAME)

7-77. Which of the Plaintiff tribes have sought or received compensation before the Indian Claims Commission for the loss or failure to provide the rights which they now allege? (GAME)

C. Scope of Right

7-78. Are there fishery management and regulatory schemes which would provide the Plaintiff tribes a reasonable opportunity to take a fair and equitable share of the harvestable fish? (FISHERIES)

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1           7-79.       If the tribes are entitled by treaties to a fair and  
2 equitable share of the harvestable fish, is that fair and equitable  
3 share to be determined to harvest a percentum of the harvestable fish?

4 (FISHERIES)

5           7-80.       To accomplish the percentage share of any given run of  
6 a particular species, can the state substitute the equivalent amount  
7 of other anadromous species? (FISHERIES)

8           7-81.       To accomplish the utilization of steelhead on a recrea-  
9 tional fish, can the state substitute the equivalent amount of other  
10 anadromous species? (GAME)

11          7-82.       What was the extent of the anadromous fishery by Indians  
12 or non-Indians before or during treaty times? (GAME)

13          7-83.       What was the intent of the treaties as to the future of  
14 the Indians in society? (GAME)

15          7-84.       Whether members of Plaintiff tribes desire an opportunity  
16 to fish commercially for salmon? (FISHERIES)

17          7-85.       Have Plaintiffs established the locations of their claimed  
18 "usual and accustomed" fishing grounds and stations? (GAME)

19           D. Regulation of Right

20          7-86.       Whether state enforcement laws and practices afford  
21 Indians charged with violation of laws enforced by the Departments of  
22 Fish and Game with due process? (GAME and FISHERIES)

1  
2 IV. DEFENDANT GAME'S SPECIFIC FACTUAL CONTENTIONS

3 A. Biology, Fisheries Management and Policies

4 7-86. The legislature of the State of Washington has  
5 declared steelhead to be a game fish and has prohibited com-  
6 mercialization therein. This has been true since 1933 when  
7 the Washington State Game Commission was created by act of  
8 the legislature.

9 7-87. Species of fish other than steelhead are game fish  
10 pursuant to state law or regulation.

11 7-88. The Fisheries Management Division is responsible  
12 programs involving steelhead which include fish cultural  
13 activities, habitat protection efforts, and development  
14 of fishing regulations aimed at conserving the resource.

15 7-89. Conservation means wise use and maintenance of  
16 the steelhead resource at an optimum level for the utilization  
17 of the greatest number of citizens.

18 7-90. Game's management of the steelhead resource involves  
19 protection of the natural reproduction of the steelhead species  
20 and development and operation of an artificial propagation  
21 program. Game regulations are designed to allow for harvest  
22 by sport angling gear and to protect the resource.

23 7-91. Steelhead, although taken incidentally in salt-  
24 water net fisheries, are not taken in any great numbers and  
25 it is not lawful to take them with commercial gear or enter  
26 them into commercial trade.

27 7-92. The harvest of steelhead occurs almost entirely  
28 in freshwater.

29 7-93. The populations of steelhead are not sufficient  
30 to support both a commercial and a recreational fishery.

31 7-94. The catch of every steelhead by a sportsman  
32 involves an expenditure in excess of \$60.

33 7-95. The Game Department is dependent, in large part,



1 on revenues derived from the sale of sport fishing and hunting  
2 licenses.

3 7-96. The hatchery program, with resultant programs,  
4 has substantially contributed to the harvest of steelhead in  
5 state waters.

6 7-97. A net is a more efficient method of taking steel-  
7 head than by hook and line.

8 7-98. A large number of citizens of the state avail  
9 themselves of the recreational opportunity of fishing for  
10 steelhead with hook and line gear.

11 7-99. Regulations of the Game Department do not dis-  
12 criminate against any group of people, including Indians.  
13 Game has only been able to obtain fragmentary information  
14 regarding Indian catch of steelhead within reservation boundaries.  
15 Complete data regarding Indian catch on reservation has not  
16 been provided to Game even though requested, from Indian  
17 tribes and federal agencies. Complete catch information is  
18 essential intelligent management of the steelhead resource.

19 7-100. It would be extremely hazardous to allow off-  
20 reservation commercial net fisheries for steelhead and still  
21 attempt to maintain a viable public recreational fishery.

22 7-101. It is not possible to predict, in advance, the  
23 numbers or size of steelhead runs.

24 7-102. The general management objective of the Game  
25 Department is to preserve, protect, and perpetuate the game  
26 fish and wildlife for all citizens.

27 7-103. Pursuant to state statutes, the Washington State  
28 Game Commission has the responsibility and does establish  
29 regulations relating to the time, place, and manner of taking  
30 game fish and wildlife, including steelhead.

31 7-104. The Washington State Game Commission considers  
32 a number of factors in establishing the time, place, and  
33 manner of taking steelhead and its meetings are open to the

1 public and conducted in accordance with the provisions of the  
2 Washington State Administrative Procedures Act.

3 7-105. Regulations promulgated by the Washington State  
4 Game Commission are promulgated in accordance with the pro-  
5 visions of the Washington State Administrative Procedures  
6 Act and policies and procedures established by the Office of  
7 the Code Reviser. The Washington State Game Department does  
8 not assert jurisdiction to manage or regulate fishing  
9 activities by Indians within Indian reservation boundaries.

10 7-106. Off-reservation netting by Indians for commercial  
11 purposes is not compatible with the sustained yield of  
12 steelhead coupled with a public recreational use of steelhead  
13 in the rivers of the state. The more nets that are placed in  
14 a river, the greater the chances of completely eliminating  
15 a run of fish such as steelhead.

16 7-107. The hook and line fishery has not proven itself  
17 capable of endangering a steelhead run.

18 7-108. In addition to the sport-recreational value of  
19 steelhead, it has a nonquantifiable aesthetic value to people.

20 7-109. Indian tribes in Western Washington have shared  
21 in the enjoyment of increased runs of steelhead due to  
22 Game Department hatchery propagation programs.

23 7-110. The Game Department is involved in a number of  
24 other environmental programs designed to protect and enhance  
25 the steelhead resource.

26 7-111.(a) It would be extremely difficult for two or more  
27 governmental agencies to manage the steelhead harvest for  
28 two conflicting purposes, i.e., commercialization and  
29 recreational.  
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1 7-111.(b) If the state is required to provide treaty Indians  
2 a fair and equitable share of the available harvest of steelhead,  
3 the state should be entitled to substitute salmon species because  
4 of the differing characteristics and higher recreational value of  
5 steelhead.

6 7-111.(c) The calculation of the equivalent amount of sub-  
7 stituted salmon species should take into account Indian-caught  
8 steelhead.

9 7-111.(d) Steelhead will be caught by Indians incidental to  
10 the harvest of salmon in off-reservation waters and will also be  
11 caught by Indians in on-reservation waters.

12 7-111.(e) Indian catch of steel head, whether incidental or  
13 on-reservation should be for personal use and not commercial pur-  
14 poses.

1           7-112. The management alternatives available to the  
2 Department of Game are limited by the legislature of the  
3 State of Washington.

4           7-113. Steelhead are at the next to last level of  
5 management of a natural resource, i.e., recreational use  
6 only. The final level of management of a resource is to  
7 completely prohibit any taking of it.

8           7-114. Steelhead trout are a unique product of the  
9 Northwest Coast of North America and are not found elsewhere  
10 in the world.

11           7-115. Juvenile steelhead spend two years rearing in  
12 freshwater before migrating to the ocean. This fact  
13 increased environmental hazards to their survival.

14           7-116. Since the Game Department was created in 1933 by  
15 the State Legislature, it has consistently taken the position  
16 that there were not sufficient numbers of steelhead in the  
17 rivers of the state to support a commercial net fishery.

18           7-117. If the amount of fishing effort required to take  
19 a single steelhead by sport angling gear were substantially  
20 increased, it is likely to have an adverse impact on the  
21 total number of people who would engage in this recreational  
22 activity.

23           7-118. Law enforcement policies of the Department of  
24 Game recognize that Indians cannot be excluded from a body  
25 of water by trespass laws.

26           7-119. Enforcement policies of the Department of Game  
27 recognize that treaty Indians may fish without licenses when  
28 it is otherwise lawful to do so within areas ceded under the  
29 particular treaty involved.

30           7-120. - Enforcement policies of the Department of Game  
31 do not include the authority to regulate Indian fishing within  
32 Indian reservation boundaries.

33           7-121. Enforcement of Game laws found in RCW Title 77

1 is carried out through and by trained wildlife agents employed  
2 by the Department of Game.

3 7-122. With the exception of the Yakima Tribe, enforce-  
4 ment of Game laws by wildlife agents is difficult due to the  
5 problem of ascertaining the identity and tribal affiliation  
6 of individuals claiming to be members of a treaty tribe.

7 7-123. Unattended nets capable of taking game fish in  
8 off-reservation waters are seized by wildlife agents pursuant  
9 to state law.

10 7-124. Seized nets are dried, tagged, and stored by the  
11 Department in the event that the identity of the individual  
12 who placed such a net in a river is subsequently known.

13 7-125. Apprehensions of individuals, Indian or non-  
14 Indian, who are felt to have violated game laws are handled  
15 by state courts and processed in accordance with judicial  
16 procedures.

17 7-126. Fish that are taken from a net that was unlawfully  
18 used is held for evidence or put in cold storage and held for  
19 evidence until the case is tried in state courts.

20 7-127. If fish are taken from an unattended set net and  
21 the identity of the operator is unknown, these fish are  
22 turned over to charitable institutions or schools.

23 7-128. Due to recent unrest and civil disorder concerning  
24 claimed Indian treaty fishing rights in off-reservation waters,  
25 a special "tactical squad" has been furnished with special  
26 defensive equipment and has received special training in  
27 how to handle mob and riot situations.

28 7-129. The additional defensive equipment which has  
29 been issued to the tactical squad may only be used for the  
30 protection of the officer or that of another citizen.

31 7-130. In recent years, when riot or mob situations  
32 are threatened, the Game Department has coordinated its  
33 enforcement activities with other governmental agencies and

1 enforcement units.

2 7-131. Game's wildlife enforcement division has assisted  
3 the Department of Fisheries in enforcing the violations of their  
4 regulation on the Puyallup River by persons claiming Indian  
5 rights.

6 7-132. Less than one percent of the total Indian popula-  
7 tion of the State of Washington actually engages in fishing  
8 with nets in off-reservation waters.

9 7-133. Indian-caught steelhead are normally sold on  
10 commercial markets.

11 7-134. None of the Indian tribes of Western Washington  
12 have exercised any control over Indian fishing activities  
13 outside reservation boundaries nor have they ever attempted  
14 to do so.

15 B. Anthropology

16 7-135. Information from living informants or historical  
17 reconstruction of past events must be used with great care and  
18 is less reliable than contemporary documents.

19 7-136. Litigation during the past few years involving  
20 claimed Indian fishing rights would probably color the views  
21 of present day Indian informants.

22 7-137. Indian tribes of Western Washington, including  
23 plaintiffs herein, have presented claims for compensation  
24 for the value of lands taken by the United States to the  
25 Indian Claims Commission.

26 7-138. The claims and compensation received include  
27 the value of fish and wildlife resources pertinent to the  
28 land for the claims mentioned above.

29 7-139. By the time of the signing of the treaties in  
30 Western Washington circa 1854-55, there was not a dense  
31 aboriginal population on the Western Washington coast.

32 7-140. Sharp declines in aboriginal populations  
33 occurred after extensive contact with Europeans and Americans

1 beginning around the period 1780.

2 7-141. Relatively a small number of Indians utilized a  
3 large number of fishing sites at the time of the signing of  
4 the treaties.

5 7-142. Indian villages in Western Washington were located  
6 normally near available food sources.

7 7-143. Indian bands in Washington at treaty times traveled  
8 a great deal, including traveling from one fishing location to  
9 another.

10 7-144. The average village size of Western Washington  
11 Indians at the time of the treaty would have probably been a  
12 few dozen people.

13 7-145. Each Indian village had its own traditional leader.

14 7-146. Each village was autonomous and there was no  
15 tribal structure involving an entire watershed. Each village  
16 did not have "sovereignty" or ability to control other villages  
17 even on the same watershed.

18 7-147. The Makah Tribal political structure was probably  
19 an exception to the general autonomous village structure of the  
20 other Western Washington Indians.

21 7-148. There was no single "chief" of several villages  
22 or bands within a river basin.

23 7-149. Fishery resources were not the sole stable  
24 foods for Indians in Western Washington at treaty times.

25 7-150. Indians, at treaty times, depended upon berries,  
26 camas root, other wild plant food, shellfish, hunting of  
27 animals and included a dependence upon agriculture particularly  
28 the potato.

29 7-151. At treaty times, the potato had become an important  
30 and essential element of Indian diet.

31 7-152. At the time of the treaties, Indians were engaged  
32 in agricultural activities primarily related to the potato,  
33 but including other introduced food crops such as peas, turnips,  
oats, and other similar crops.

1 7-153. Upriver Indian villages at treaty times differed  
2 from saltwater or lower river Indian villages.

3 7-154. During the treaty period, Indians were becoming  
4 extensively acculturated by the Western European contacts.

5 7-155. Indians, by treaty times, were beginning to  
6 imitate and copy American-European techniques and customs.

7 7-156. The earliest contacts between Indians and non-  
8 Indians occurred in the late 1700's with contact from various  
9 European trading ships and military expeditions. Intensive  
10 contact and sustained contact did not begin until the  
11 establishment in 1832 of the Hudson Bay Company post at  
12 Nisqually.

13 7-157. By the time of the treaties, most Indians had  
14 been in contact with non-Indians to a greater or less degree.

15 7-158. At the time of the treaties, Indians had expressed  
16 their desire for American doctors, and other Western  
17 European techniques which they desired to benefit from as  
18 evidenced by the treaty documents themselves.

19 7-159. In addition to the introduction of agricultural  
20 activities and plants to Indians, the domesticated animals  
21 were also introduced and accepted by the Indians.

22 7-160. There is no "native culture" in Western Washington  
23 today and Western Washington Indians today look at the world  
24 through Western European eyes.

25 7-161. The purpose of execution of the treaties between  
26 the United States and the Indian groups in Western Washington  
27 was to extinguish native occupancy rights to territory.

28 7-162. The overall philosophy of the American government  
29 at treaty times was to protect the Indians in dealing with  
30 American citizens settlers in the Western Washington area.

31 7-163. Another philosophy and purpose of the treaties  
32 was to Americanize, civilize, and Christianize the aboriginal  
33 natives of Western Washington.



1           7-164. The eventual purpose of the treaties was to absorb,  
2 after a period of appropriate training and instruction, the  
3 Indians into the mainstream of American life on an agrarian  
4 level.

5           7-165. Governor Stevens was under instructions to extinguish  
6 Indian rights of occupancy and to clarify and codify relationships  
7 between the Federal Government and the Indians.

8           7-166. The treaties involved indicate that it was the  
9 intention of the Federal Government for the Indians to become  
10 agriculturalists and to assist them in making a cultural transition  
11 from their past into the mainstream of American society.

12           7-167. When the treaties were negotiated, the Chinook  
13 jargon was used to explain their meaning.

14           7-168. At the time of the treaties, at least some  
15 Indians understood the English language.

16           7-169. At the time of the signing of the treaties,  
17 Indians did not have any common law concept of "title."

18           7-170. In the context of Indians at the time of the signing  
19 of the treaties, they were only interested in use rights of  
20 particular areas.

21           7-171. Use rights or patterns meant that individuals  
22 families, or villages traditionally had the primary right  
23 to use certain areas for certain purposes.

24           7-172. At the time of the signing of the treaties,  
25 none of the Indians of Western Washington would have claimed  
26 an exclusive right to a fishery or fishing location except  
27 where an individual built a fishing trap or spearing platform  
28 and that individual might claim that trap or platform as his  
29 as long as he used it. Villages did not claim "ownership"  
30 of beaches or fishing areas.

31           7-173. No individual rights to land were recognized by  
32 Indians except occupancy, and that to a rather limited degree.

33           7-174. The "usual and accustomed" provision of the  
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1 Stevens treaties were intended to provide a source of food  
2 supply for the Indians during the period of transition into  
3 reservation life. during the period of time between when  
4 the treaties were signed but not yet ratified by Congress  
5 or implemented.

6 7-175. The Indians who signed the treaties did not  
7 have authority to sign away territorial claims on behalf of  
8 other Indians because the Indians owned no territory in the  
9 common law sense of "title."

10 7-176. It is not possible for either of the contracting  
11 parties to the treaties involved to predict the future fantastic  
12 growth of the area or a period of time where there would not  
13 be an abundance of fish and other natural resources for everyone  
14 to enjoy without any need for governmental limitation.

15 7-177. The long range policy of the United States, at the  
16 time of signing of the treaties, was to assimilate the  
17 Indians and integrate them into American society as  
18 agriculturalists.

19 7-178. At the time of the signing of the treaties,  
20 the Indians did not have any method for enforcing any rules  
21 regarding their conduct other than unstructural familial  
22 obligations.

23 7-179. There was no superstructure of governmental  
24 authority in native culture at the time of signing of the  
25 treaties.

26 7-180. Governor Stevens was not authorized to grant to  
27 the Indians by virtue of the treaties any of the governmental  
28 powers of the United States.

29 7-181. At the time of the signing of the treaties, the  
30 Indians did not have such a concept of government that they  
31 could have treated with Governor Stevens for the acquisition  
32 of such sovereign or governmental powers.

33 7-182. Treaties with Indian tribes of Western Washington

1 were not negotiated on behalf of the United States on the same  
2 level or with the same intentions as the United States dealt with  
3 Great Britain under treaties for acquisition of their governmental  
4 authority over Washington Territory.

5 7-183. There was no such aboriginal entity known as the  
6 Muckleshoot Tribe of Indians.

7 7-184. Possibly some of the members of the group known  
8 today as the "Muckleshoot Tribe of Indians" are descendants  
9 of Indians who were parties to the Treaty of Point Elliott  
10 or Medicine Creek.

11 7-185. The only way that the bloodline of any member  
12 of the present day Muckleshoot group can be established is  
13 by performing detailed genealogies.

14 7-186. The United States does make treaties with individuals  
15 but rather with Indian tribes.

16 7-187. The severe population decline occurring among  
17 Indian populations of Western Washington prior to the time  
18 of the treaties led to a decline and breakdown in their  
19 culture by the time of the signing of the treaties.

20 7-188. The life of Western Washington Indians, as it  
21 existed aboriginally, disappeared by the later part of the  
22 19th Century.

23 7-189. The weight of North Coast Indian culture declined  
24 as it went southerward, i.e., the Western Washington tribes of  
25 Indians represented a dropoff in level of organization and  
26 culture compared to that of northern Indian groups such as  
27 the Tlingit and Haida in Canada.

28 7-190. Puget Sound Indians were subjected to slave raids  
29 by northern and more warlike tribes.

30 7-191. The aboriginal method of redistributing natural  
31 resources was quite primitive when compared with modern  
32 American usages.

33 7-192. In aboriginal times or at the time of the signing  
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1 of the treaties, the Western Washington Indians did not practice  
2 conservation except in a ritual or religious sense.

3 7-193. There were specific locations that would be usual  
4 and accustomed fishing grounds to a particular village or  
5 group of villages in Western Washington.

6 7-194. The Quileute and Hoh tribes of Indians spoke a  
7 language which was related and similar to the Chimakum  
8 group which lived at the head of Hoods Canal.

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2 V. FISHERIES DEFENDANT SPECIFIC FACTUAL CONTENTIONS

3 A. State Regulation

4 7-195. The Department of Fisheries has the authority to regu-  
5 late off reservation fishing of treaty Indians in the interests  
6 of conservation.

7 7-196. The Department of Fisheries has attempted to regulate  
8 off-reservation treaty Indian fishing in such a manner as to provide  
9 the Indians with a fair and equitable share of the harvestable fish.

10 7-197. The Department of Fisheries has demonstrated good faith  
11 in dealing with the plaintiff tribes since the determination that  
12 Indian tribes have special treaty rights to fish by the United  
13 States Supreme Court in 1968.

14 7-198. The statutes governing and the regulations of the Depart-  
15 ment of Fisheries, are reasonable and necessary for conservation,  
16 meet appropriate standards, and do not discriminate against Indians.

17 7-199. The Department of Fisheries has treated the treaty Indian  
18 off-reservation fishery as a distinct client and has established  
19 separate goals for its management of that fishery and separate  
20 regulations for it in recognition of the treaty right.

21 B. Indian Fishing Practices

22 7-200. The Upper Skagit, Sauk Suiattle and Stillaguamish tribes  
23 have no commercial fisheries and desire to fish for personal use  
24 only.

25 7-201. The Upper Skagit, Sauk Suiattle, Stillaguamish, Skoko-  
26 mish, Yakima (in case area) and Lummi tribes have no off-reserva-  
27 tion fishing regulations.

28 7-202. Tribes that have adopted off-reservation fishing regu-  
29 lations have not held public hearings on the regulations prior to  
30 adoption and have not provided for the interest of the general pub-  
31 lic to be represented in their regulation adoption process.

32 7-203. Tribal off-reservation fishing regulations have been  
33 drawn up and adopted by tribal councils and committees whose members

1 have a direct personal economic interest in the off-reservation  
2 fishing industry.

3 7-204. Some members of plaintiff tribes engage in the all  
4 citizen commercial fisheries in Washington and Alaska.

5 7-205. The Indian off-reservation commercial fishery and the  
6 all citizen commercial fishery have common goals, of which the para-  
7 mount goal is to maximize profits.

8 C. General Biological and Management Practices

9 7-206. The absence of a definite quantitative standard of the  
10 Indians' fair and equitable share of the harvest makes management of  
11 the state's salmon fish runs extremely difficult and endangers con-  
12 servation.

13 7-207. The court should quantify the Indian treaty right to  
14 fish off-reservation at usual and accustomed grounds and stations  
15 by establishing the Indians' fair and equitable share as a percent-  
16 age of the harvestable fish **that are under the regulatory jurisdiction**  
17 **of the state or the Indians.**

18 7-208. A determination of the Indian's fair and equitable share  
19 of the available harvest based on a percentage share of the harvest  
20 would be conservationally sound, as well as an objective and fair  
21 standard.

22 7-209. The percentage share fisheries management model proposed  
23 by the Department of Fisheries accurately portrays the salmon re-  
24 source and fisheries within the State of Washington waters and the  
25 salmon **natal** to Washington watersheds harvested in **international**.  
26 waters.

27 7-210. The Indians fair and equitable share of the harvestable  
28 fish should be a share only of the harvestable fish **that are under**  
29 **the regulatory jurisdiction of the state or the Indians.**

30 7-211. The International Pacific Salmon Fisheries Commission  
31 management of the Fraser River sockeye and pink salmon runs is  
32 based upon a management plan analogous to the percentage share  
33 fisheries management model proposed by the Department of Fisheries.

1 7-212. The data and calculations used to develop the percentage  
2 share fisheries management model proposed by the Department of  
3 Fisheries are data and calculations used commonly by salmon fishery  
4 management agencies of the United States, Canada, and the several  
5 states and provinces.

6 7-213. The Department of Fisheries has the necessary biological  
7 data, analysis and management capability to manage the salmon har-  
8 vest within its jurisdiction by its proposed percentage share man-  
9 agement model.

10 7-214. Conservation regulations of off-reservation Indian treaty  
11 fishing for salmon are inter-related to conservation regulations of  
12 all fishing for salmon in state managed waters.

13 7-215. Where conservation of fish runs is the goal, it is not a  
14 sound fisheries management practice to allow a user group to regu-  
15 late its own fishing.

16 7-216. The Department of Fisheries, or any of its employees,  
17 has no personal economic interest in the fishing industry of Wash-  
18 ington State.

19 7-217. Regulations adopted by the defendants in accordance with  
20 requirements of the Washington State Administrative Procedures Act,  
21 on their face, meet appropriate standards.

22 7-218. The term "conservation" means wise use and in the con-  
23 text of the salmon resource includes consideration, inter alia,  
24 of the preservation, enhancement, and harvest of the resource.

25 7-219. In the interest of conservation, commercial net fish-  
26 eries must be more restrictively managed than personal use and  
27 sport fisheries.

28 7-220. Unregulated Indian off-reservation fishing, as does  
29 unregulated fishing by any harvesting group, tends to lead to  
30 depletion of the resource.

31 7-221. The harvest of fish in their milling, holding, and  
32 spawning areas of a river and its estuary must be regulated more  
33 restrictively in the interest of conservation than the harvest of  
fish in waters of passage.

1 7-222. Regulation of the harvest of salmon by fishing time and  
2 gear type are necessary for the conservation of the resource and  
3 the regulation of any one harvesting group or area is inter-related  
4 to regulation of the harvest by any other group or area.

5 7-223. Regulation of the harvest of salmon in Puget Sound and  
6 coastal rivers in the case area differs from regulation of the  
7 harvest of salmon in the Columbia River because of the mixed stocks  
8 in marine areas and the lack of dams, geographically located prior  
9 to or in the harvesting areas, from which counts can be taken of  
10 passing fish in order to determine spawning escapements.

11 7-224. The regulatory pattern of the salmon harvest in the  
12 Columbia River is not analogous to the necessary regulatory pattern  
13 of the salmon harvest in Puget Sound or the coastal rivers in the  
14 case area.

15 7-225. A blanket restriction on sport or commercial fishing in  
16 Puget Sound marine areas would adversely affect the conservation of  
17 the salmon resource.

18 7-226. Large numbers of salmon whose natal streams are in the  
19 case area are harvested by Canadian and other fishermen in waters  
20 over which the State of Washington has no jurisdiction.

21 7-227. Neither the plaintiff tribes nor any advisors to them in  
22 adopting off-reservation fishing regulations have attempted to  
23 predict run size as a basis for determining the amount of fish  
24 which should be harvested from a particular run.

25 7-228. Plaintiff tribes do not follow accepted management  
26 practices in adopting off-reservation fishing regulations.

27 7-229. Neither plaintiff tribes nor the U.S. Bureau of Sport  
28 Fish and Wildlife have collected sufficient data, have the neces-  
29 sary management capability to regulate, or have effective enforce-  
30 ment procedures to enforce off-reservation treaty Indian fisheries.

31 7-230. Only the Department of Fisheries of all the parties to  
32 this action possesses the information and experience necessary to  
33 adequately predict and monitor the run size of returning species of  
salmon.



1 7-231. Prediction of run size and monitoring run size as the  
2 salmon return to Washington waters is essential if harvest of the  
3 fish is to be compatible with conservation.

4 7-232. Neither plaintiff tribes nor the U.S. Bureau of Sport  
5 Fish and Wildlife have the capability of predicting run size or  
6 monitoring returning runs of salmon upon which tribal members fish.

7 7-233. Fishing is economically and culturally important to  
8 citizens generally, as well as to Indians.

9 7-234. A definition of the Indian's "fair and equitable share"  
10 of the available harvest in terms of a fixed quota of a number of  
11 fish would be against the interest of conservation.

12 7-235. It is not possible to manage a fishery if the regula-  
13 tions governing one harvesting group are required to be the least  
14 restrictive necessary for conservation because regulations govern-  
15 ing all harvesting groups are inter-related.

16 7-236. Repeated court challenges to the validity of state fish-  
17 ing regulations after their adoption make management in the interest  
18 of conservation impossible.

19 7-237. A "fair and equitable share" of the available harvest  
20 for treaty Indians fishing in marine areas should be an extension  
21 of fishing time as provided for the Makahs in 1971 and 1972.

22 7-238. Estimating the harvest of Indians' on-reservation  
23 catches differs significantly from estimating the harvest of  
24 Indians' off-reservation catches, the former being capable of a  
25 degree of precision because of the limited geographical area, the  
26 latter being capable of no degree of precision.

27 7-239. In providing treaty Indians with a "fair and equitable  
28 share" of the available harvest, the state should be entitled to  
29 substitute the harvest of one run or species of anadromous fish  
30 for another run or species if the interests of conservation require.

31 7-240. The Department of Fisheries is the only management  
32 agency capable of managing both the Indian off-reservation fisher-  
33 ies and the all citizen fisheries in the interests of conservation

1 to provide the Indians with a fair and equitable share of the  
2 available harvest.

3 7-241. It is necessary in the interests of conservation that  
4 fish caught on Indian reservations should count toward the deter-  
5 mination of the Indians' fair and equitable share of the available  
6 harvest.

7 7-242. Members of the plaintiff tribes are currently harvesting  
8 the percentages of the salmon harvests as indicated in Exhibits F-6  
9 and F-26.

10 7-243. Biological aspects of fishery management are more im-  
11 portant than economic and cultural aspects for the conservation  
12 of the salmon resource.

13 7-244. Plants from hatcheries of the Department of Fisheries  
14 significantly contribute to the size of the plaintiff tribes'  
15 harvest of salmon.

16 7-245. The use of fish traps in rivers to harvest entire  
17 salmon runs is not physically feasible, economically practicable,  
18 desired by Indians or non-Indians, and does not allow precise  
19 biological management because of the inability to monitor returning  
20 fish runs without large expenditures for a test fishery which would  
21 in effect duplicate the present commercial fishery.



1           For all plaintiffs:

- 2           1. Carl Crouse (adverse witness),  
3           2. Clifford Millenbach (adverse witness),

4 [The defendants' presentation of the written direct testimony of  
5 these two witnesses and plaintiffs' cross examination thereon may  
6 be presented out of order immediately before plaintiffs' examina-  
7 tion in order to accommodate potentially conflicting commitments  
8 of the witnesses.]

- 9           3. Jack Ayerst (adverse),  
10          4. Walter Neubrech (adverse),  
11          5. Arthur Coffin (adverse),  
12          6. Thor C. Tollefson (adverse),  
13          7. J. E. Lasater (adverse),  
14          8. Henry Wendler (adverse),

15           For all plaintiffs, except the Yakima and Upper Skagit

16 Tribes:

- 17           9. Dr. Barbara Lane,

18           For the United States and the Muckleshoot Tribe:

- 19           10. D. Paul Weston,  
20           11. George Felshaw,

21           For defendants:

22           Defendants will for continuity of subject matter here  
23 present out of order their expert anthropological expert:

- 24           12. Carroll L. Riley,

25           For all plaintiffs:

- 26           13. James L. Heckman,

27           For the Muckleshoot, Skokomish, Stillaguamish,  
28 Sauk-Suiattle, and Squaxin Island Tribes:

- 29           14. Dr. Gardner Brown,

1           For the Makah, Lummi and Quilleute Tribes:

2           15. Dr. Robert Thomas,

3           For the United States and the Puyallup Tribe:

4           16. Lena Cultce Hillaire,

5           17. Benjamin R. Wright,

6           For the United States and the Nisqually Tribe:

7           18. William Frank, Sr.,

8           19. William Frank, Jr.,

9           For the United States and the Muckleshoot Tribe:

10          20. Louis Starr,

11          21. Bernice White,

12          For the United States and the Skokomish Tribe:

13          22. Georgia Miller,

14          23. Joseph Andrews,

15          For the United States and the Makah Tribe:

16          24. Charles Peterson,

17          25. Hillary Irving, Jr.,

18          For the United States and the Quilleute Tribe:

19          26. Chris Penn,

20          27. Earl Penn,

21          For the United States and the Hoh Tribe:

22          28. Mary Williams,

23          29. Herb Fisher,

24          For the Lummi Tribe:

25          30. John Finkbonner,

26          31. Forest Kinley,

27          For the Quinault Tribe:

28          32. Joe DeLaCruz,

29          33. Horton Capoeman,

1           For the Sauk-Suiattle Tribe:

2           34.    Jesse Harvey,

3           35.    James Enick,

4           For the Stillaguamish Tribe:

5           36.    Esther Ross,

6           37.    Lena Smith,

7           For the Squaxin Island Tribe:

8           38.    Cal Peters,

9           39.    Florence Sigo,

10          For the Upper Skagit River Tribe:

11          40.    Charles Boone,

12          41.    Dewey Mitchell,

13          For the Yakima Tribe:

14          42.    Louis Cloud,

15          43.    Johnson Meninick.

16    The tribal witnesses listed above, numbered 16-43, will testify  
17    according to the outlines previously submitted for those  
18    witnesses.

19  
20           B.    Defendants' Case.

21           9-2.   The Game Defendants will present their witnesses out  
22    of order as noted above.

23           9-3.   The Fisheries Defendant will present its witnesses  
24    as follows:

25           44.    Thor C. Tollefson,

26           45.    J. E. Lasater,

27           46.    Earl B. Jewell,

28           47.    Stephen Mathews.

29           9-4.   The defendant State of Washington considers itself  
30    fully represented by the Fisheries or Game Defendants and will  
31    present no other witnesses.

32    Page 161 - FINAL PRETRIAL ORDER

1 9-5. The Reefnetters Association will present its witnesses  
2 as follows:

- 3 48. John Brown,
- 4 49. Jerry Anderson,
- 5 50. Glenn Schular.

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1 PART TEN

2 ADMISSIBLE EXHIBITS

3 The exhibits listed below may be received in evidence  
4 without objection if offered. The parties agree that any party  
5 may offer additional exhibits in evidence, provided that co-parties  
6 and opposing parties have an opportunity to examine such exhibits  
7 at a reasonable time in advance of the offer of the exhibit.  
8 The offering party will provide four copies of the exhibit  
9 (for the sets required by this order for the Court, evidence,  
10 defendants and plaintiffs) and an additional copy for any  
11 party so requesting. Any party objecting to the admissibility  
12 of such exhibits shall have full opportunity to present its  
13 objection to the Court at the time the exhibit is offered.  
14 Exhibits will be coded by sponsoring party as follows:

15

16	<u>CODE LETTERS</u>	<u>SPONSORING PARTY</u>
17	D	All Defendants
18	F	Fisheries Defendant
19	G	Game Defendants
20	H	Hoh Tribe
21	JX	All Parties
22	L	Lummi Tribe
23	MK	Makah Tribe
24	MLQ	Makah, Lummi and Quileute Tribes
25	MS	Muckleshoot, Squaxin Island, Skokomish, Sauk-Suiattle and Stillaguamish Tribes
26	MU	Muckleshoot Tribe
27	PL	All Plaintiffs
28	RN	Reefnetters Association
29		
30		



1	QI	Quilcote Tribe
2	QN	Quinault Tribe
3	SK	Skokomish Tribe
4	SQ	Squaxin Island Tribe
5	SS	Sauk-Suiattle Tribe
6	ST	Stillaguamish Tribe
7	UPS	Upper Skagit Tribe
8	USA	The United States
9	W	State of Washington
10	Y	Yakima Tribe

11

12 A. Joint Exhibits of All Parties.

- 13 JX-1a: Colored Case Area Map
- 14 JX-1b: Black and White Case Area Map.
- 15 JX-2a: Joint Biological Statement through Appendix IV
- 16 JX-2b: Joint Biological Statement, Appendix V

17

18 B. All Plaintiffs' Exhibits.

19 PL-1: 4-page typed document of letter dated August 30, 1854 from

20 Charles E. Mix, Acting Commissioner of Indian Affairs to Stevens. Instructions

21 to Stevens regarding treaties.

22

23 PL-2: Excerpts from House Document 315, 54th Cong. 2d. Session, Report of

24 Joint Commissioners (United States and Canada) concerning the preservation of

25 fisheries in waters contiguous to the United States and Canada, December 31,

26 1896. Pages 1-2, 14-15, 163-178.

27

28 PL-3: Typed letter written by M.T. Simmons, Indian Agent, dated

29 October 26, 1859.

1 PL-4: Typed letter by M.T. Simmons, Indian Agent, dated  
2 December 13, 1859.

3  
4 PL-6: Typed report of 1860 from Commissioner of Indian Affairs  
5 to Secretary of the Interior. Report sent by M.T. Simmons, Indian  
6 Agent, Washington Territory, to Edward R. Geary, Superintendent of  
7 Indian Affairs, Oregon and Washington Territory.

8  
9 PL-7: One-page longhand letter dated December 6, 1856  
10 from Isaac I. Stevens to E.S. Fowler.

11  
12 PL-8: Three-page longhand letter dated December 16, 1856  
13 from E.S. Fowler to Isaac I. Stevens with one-page typed version  
14 attached.

15  
16 PL-9: 35-page typed document (pp. 8-42) of Report of George  
17 Gibbs, dated March 4, 1854 to Captain McClellan and published as  
18 Executive Document No. 91, House of Representatives for Second  
19 Session of 33rd Congress (from Pacific Rail Road Report).

20  
21 PL-10a: 14-page typed and longhand document, partial record of  
22 proceedings of commission to hold treaties with tribes in  
23 Washington Territory and Blackfoot country December 7-26, 1854.

24  
25 PL-10b: 14-page typed and longhand document, another copy of  
26 proceedings of Commission to hold treaties with tribes in  
27 Washington Territory and Blackfoot country between December 7,  
28 1854 and January 3, 1855.

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32 Page 165 - FINAL PRETRIAL ORDER  
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918

- 1 PL-11: 12-page longhand document, letter dated December 30,  
2 1854 from Stevens to Commissioner of Indian Affairs transmitting  
3 Treaty of Medicine Creek and proceedings of Treaty Commission  
4 between December 7-26, 1854, tracings of Nisqually, Puyallup  
5 and Squawksin Reservations.  
6
- 7 PL-12: 6-page typed documents of partial record of  
8 proceedings on January 22, 1855, Treaty of Point Elliott  
9 negotiated and executed.  
10
- 11 PL-13: 5-page longhand document of draft of Treaty of Point  
12 Elliott (with changes shown) drafted by U.S. Treaty Commission.  
13
- 14 PL-14: 14-page longhand document consisting of a letter dated  
15 May 4, 1855, from Stevens to Commissioner of Indian Affairs  
16 transmitting proceedings of Treaty of Point Elliott Treaty  
17 Commission, between January 5-23, 1855, and transmitting  
18 Treaties of Point Elliott, Point No Point and Neah Bay,  
19 negotiated and executed respectively January 22, 25 and 31, 1855.  
20
- 21 PL-15: 8-page longhand document of record of council  
22 proceedings, wherein Treaty of Point No Point negotiated and  
23 executed January 24-26, 1855.  
24
- 25 PL-16: 2-page longhand document consisting of a rough draft of  
26 portions of Treaty of Neah Bay drafted by U.S. Treaty Commissioners  
27 with changes shown.  
28  
29  
30  
31

1 PL-17: 7-page document (6 pages of longhand text ) consisting  
2 of record of council and negotiation proceedings prior to and  
3 including execution of Treaty of Neah Bay, January 29-31, 1855.  
4

5 PL-18: 7-page document consisting of 4-page longhand letter  
6 dated December 21, 1854 and 3-page typed letter dated January 6,  
7 1855 from George Gibbs, surveyor under Treaty of Medicine Creek  
8 to Stevens reporting survey of proposed Puyallup Reservation.  
9

10 PL-19: 4-page longhand document of letter dated February 14,  
11 1855 from Commissioner of Indian Affairs to Office of Indian  
12 Affairs reporting on Treaty of Medicine Creek.  
13

14 PL-20: 4-page typed document consisting of letter dated  
15 August 28, 1856 from Stevens to Commissioner of Indian Affairs  
16 recommending change in reservations initially proposed for  
17 Nisqually and Puyallup Indians.  
18

19 PL-21: 7-page longhand document of report dated November 29,  
20 1856 by board appointed by Stevens to formulate plan for carrying  
21 into effect Treaty of Medicine Creek.  
22

23 PL-22: Longhand letter of approximately 150 pages, from  
24 Stevens to Commissioner of Indian Affairs enclosing "Journal of  
25 Operations of Governor Stevens, Superintendent Indian Affairs  
26 and Commissioner treating with Indian Tribes East of the Cascade  
27 Mountains in Washington Territory and Blackfeet and neighboring  
28 Tribes near Great Falls of the Missouri in the Year 1855", which  
29 covers period January 20, 1855 and January 4, 1856.  
30  
31

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- 1 PL-23: Report of Dr. Carroll Riley regarding Muckleshoot Tribe.  
2
- 3 PL-24: Report of Dr. Carroll Riley regarding Nooksack Tribe.  
4
- 5 PL-25: 4-page letter dated November 14, 1958 from Bureau of  
6 Indian Affairs to Mr. Walter Neubrech.  
7
- 8 PL-26: Representation of areas ceded by treaties involved  
9 in this case (overlay map).  
10
- 11 PL-27: 3-page document dated in 1855 and 1856, including  
12 transmittals of treaties.  
13
- 14 PL-28: 7-page document consisting of letters dated May 9  
15 through June 7, 1853 from George W. Manypenny to Isaac I. Stevens.  
16
- 17 PL-29: 1-page document of letter dated June 10, 1854 from  
18 Charles E. Mix to Secretary of the Interior.  
19
- 20 PL-30: 7-page document including letter dated February 6,  
21 1854 from George W. Manypenny to Secretary of the Interior.  
22
- 23 PL-31: 7-page handwritten version of articles of Treaty of  
24 Medicine Creek.  
25
- 26 PL-32: 3-page document including letters of July 9, 1856 from  
27 George W. Manypenny to Secretary of the Interior.  
28
- 29 PL-33: Photographic print depicting ceded areas for treaties  
30 involved in this case.  
31
- 32 Page 168 - FINAL PRETRIAL ORDER  
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- 1 PL-34: 4-page letter of July 9, 1856 from George W. Manypenny  
2 to Secretary of the Interior.  
3
- 4 PL-35: Photographic print depicting map "from Wilkins charge  
5 of a portion of Puget Sound" forwarded January 1856 by Isaac  
6 I. Stevens.  
7
- 8 PL-36: Print of Olympic Peninsula portion of Washington  
9 Territory as mapped for Isaac I. Stevens, circa December 30, 1856.  
10
- 11 PL-37: Certified Game Commission Minutes, October 2, 1972.  
12
- 13 PL-38: Certified Game Commission Minutes, January 4, 1973.  
14
- 15 PL-39: Certified Game Commission Minutes, April 9, 1973.  
16
- 17 PL-40: Report of Agent M.T. Simmons to Colonel J.W. Nesmith,  
18 June 30, <sup>1858</sup> ~~1856~~.  
19
- 20 PL-41: Report of Agent M.T. Simmons to Superintendent Geary,  
21 July 1, 1860.  
22
- 23 PL-42: Report of Superintendent C.H. Hale to Commissioner of  
24 Indian Affairs, October 19, 1862.  
25
- 26 PL-43: Annual Report of Agent G.A. Paige to Superintendent  
27 C.H. Hale, July 20, 1863.  
28
- 29 PL-44: Report of Subagent F.C. Purdy to Superintendent  
30 C.H. Hale, July 20, 1862.  
31
- 32 Page 169 - FINAL PRETRIAL ORDER  
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- 1 PL-45: Report of Agent A.R. Elder to Superintendent T.J. McKenny,  
2 September 7, 1863.  
3
- 4 PL-46: Annual Report of Agent A.R. Elder to T.J. McKenny,  
5 July 28, 1867.  
6
- 7 PL-47: Report of Governor Stevens to Commissioner of Indian  
8 Affairs, September 16, 1854 (In Vol. 746, Executive Documents  
9 of the Senate, 33rd Congress 2d Session, 1854-1855, page 392).  
10
- 11 PL-49: George Gibbs Indian Nomenclature of Localities  
12 in Washington and Oregon Territories, 1853. Bureau of American  
13 Ethnology Manuscripts No. 714.  
14
- 15 PL-50: Report upon the Fishes Collected on the Survey;  
16 Report Upon the Salmonidae, G. Suckley, Pacific Rail Road Report,  
17 1854.  
18
- 19 PL-51: Notice and preliminary agenda of Game Commission  
20 meeting of October 2, 1972.  
21
- 22 PL-52: Final agenda, Game Commission meeting of October 2, 1972.  
23
- 24 PL-53: Exhibit 1 to deposition of William Frank, Jr. -- drawn  
25 map, with pages 31 to 38 of deposition.  
26
- 27 PL-55: Constitution of the Hoh Indian Tribe.  
28
- 29 PL-56: Constitution and Bylaws of the Lummi Tribe of the  
30 Lummi Reservation, Washington.  
31
- 32 Page 170 - FINAL PRETRIAL ORDER  
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- 1 PL-57: Constitution and Bylaws of the Makah Indian Tribe
- 2 of the Makah Indian Reservation.
- 3
- 4 PL-58: Constitution and Bylaws for the Muckleshoot Indian
- 5 Tribe of the Muckleshoot Reservation, Washington.
- 6
- 7 PL-59: Constitution and Bylaws of the Nisqually Indian Community
- 8 of the Nisqually Reservation, Washington.
- 9
- 10 PL-60: Constitution and Bylaws of the Puyallup Tribe of
- 11 the Puyallup Reservation, Washington.
- 12
- 13 PL-61: Constitution and Bylaws of the Quileute Tribe of the
- 14 Quileute Reservation, Washington.
- 15
- 16 PL-62: Constitution and Bylaws of the Skokomish Indian Tribe
- 17 of the Skokomish Reservation.
- 18
- 19 PL-63: Constitution and Bylaws of the Squaxin Island Tribe of
- 20 the Squaxin Island Indian Reservation.
- 21
- 22 PL-64: Constitution and Bylaws of the Sauk-Suiattle Indian
- 23 Tribe.
- 24
- 25 PL-65: Constitution and Bylaws of the Stillaguamish Indian
- 26 Tribe.
- 27
- 28 PL-66: Map by Governor Stevens of the Indian Nations and
- 29 Tribes of the Territories of Washington and Nebraska, 1857.
- 30
- 31
- 32 Page 171 - FINAL PRETRIAL ORDER  
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- 1 PL-67a: Oversize illustrative, hanging map of Columbia River  
2 system.  
3
- 4 PL-67b: Oversize, larger hanging map of Fraser River system.  
5
- 6 PL-67c: Oversize, smaller hanging map of section 29 of  
7 Fraser River system.  
8
- 9 PL-68: Illustrative overlay map of Washington Department  
10 of Fisheries Chum and Pink Study - Locations and information  
11 projections.  
12
- 13 PL-69: Illustrative overlay map of Washington Department of  
14 Fisheries Coho Study - Locations and Information projections.  
15
- 16 PL-70: Illustrative overlay map of principal Puget Sound  
17 and Coastal Net Fisheries (JX-2A, Figure 25).  
18
- 19 PL-71: Illustrative overlay map of streams producing  
20 Washington Department of Fisheries fair share base.  
21
- 22 PL-72: Illustrative overlay map of Washington Department of  
23 Fisheries Chinook and Sockeye Study - Locations and information  
24 projection.  
25
- 26 PL-73: Illustrative overlay map of usual and accustomed  
27 Indian fishing areas.  
28
- 29 PL-74: Catch - Millions of (Salmon) Fish - Histogram.  
30  
31
- 32 Page 172 - FINAL PRETRIAL ORDER  
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1 C. Exhibits of the United States.

2 USA-1: 5-page document known as Hizata and Cummins report,  
3 compiled in November 1972 (Millenbach deposition Exhibit 1).

4  
5 USA-2 through USA-11: 2 to 4-page documents consisting of  
6 summaries of Washington steelhead catch during years 1962  
7 through 1971.

8  
9 USA-12: 50-page document consisting of Game Department's  
10 "Winter Steelhead Planting and Return Record".

11  
12 USA-13: 21-page document entitled "Preliminary Report on the  
13 Western Washington Indian Steelhead Fishery Investigations,  
14 1971-1972".

15  
16 USA-14: 56-page document entitled "Puget Sound Indian Tribes  
17 Cooperative Meetings Report", October 1971.

18  
19 USA-15: 1-page document of Game Department data regarding  
20 steelhead plants and catch in White River from 1946 to 1971.

21  
22 USA-16: 1-page document of Game Department data regarding  
23 steelhead plants and catch in Puyallup River from 1947 to 1970.

24  
25 USA-17: 4-page document of Game Department data regarding  
26 planting records for Carbon River, White River, South Prairie  
27 portion of Puyallup River and Puyallup River from 1946 to 1972.

28  
29 USA-18: 11-page document of Game Department winter-run  
30 steelhead plants for Puyallup River from 1962 to 1972.

31  
32 Page 173 - FINAL PRETRIAL ORDER  
Corrected page 8/22/73

- 1 USA-19: 1956 annual report of International Pacific Salmon  
2 Fisheries Commission (29 pages).  
3  
4 USA-32: 53-page document of portions of Game Department Manual.  
5  
6 USA-33: 14-page document entitled "Natural Rearing Pond  
7 Production of Steelhead Trout" by Clifford Millenbach.  
8  
9 USA-34: 25-page document entitled "Studies on the Life History  
10 of the Puget Sound Steelhead (*Salmo gairdnerii*)", published 1940.  
11  
12 USA-35: Relevant background description of Dr. Barbara Lane.  
13  
14 USA-36: Direct testimony of James L. Heckman (objections noted).  
15  
16 USA-37: Designated deposition of R.W. Josephson.  
17  
18 USA-38: Designated deposition of Walter E. Neubrech.  
19  
20 USA-39: 1971 Edition of Game Code of the State of Washington.  
21  
22 USA-40: Document entitled "Some Factors Affecting Steelhead  
23 Harvest Rates in the State of Washington," by Duane O. Braaten,  
24 August 26, 1970.  
25  
26 USA-41: (a) Findings of Fact and Opinions of the Indian Claims  
27 Commission in Docket No. 98 (Muckleshoot Tribe) and (b) Court of  
28 Claims' order on appeal therefrom.  
29  
30 USA-43: U.S. Department of Interior, Bureau of Indian Affairs,  
31 "Governing Bodies of Federally Recognized Indian Group (Excluding  
32 Alaska), May, 1973.

1 USA-44: U.S. Department of Interior, Bureau of Indian Affairs,  
2 "American Indians and their Federal Relationship", March, 1972.  
3  
4 USA-45: Address of Benjamin F. Shaw, Volume V, proceedings of  
5 the Oregon Historical Society, 1903.  
6  
7 USA-46a: Letter of May 5, 1952 to Raymond H. Bitney from  
8 Edward G. Swindell.  
9  
10 USA-46b: Letter of September 5, 1962 to Mr. M. Schwartz from  
11 Walter Neubrech.  
12  
13 USA-46c: 25 C.F.R. Part 256.  
14  
15 USA-46d: Bureau of Indian Affairs Application Form for Indian  
16 Off-Reservation Treaty Fishing Identification Card.  
17  
18 USA-46e: Temporary (pink) Treaty Fishing Identification Card  
19 (Sample).  
20  
21 USA-46f: Permanent (blue) Treaty Fishing Identification Card  
22 (Sample).  
23  
24 USA-46g: Letter of September 6, 1967, to Bertha McJoe from  
25 George Felshaw.  
26  
27 USA-47: Record of Off-Reservation Treaty Identification  
28 Cards Issued.  
29  
30  
31  
32 Page 175 - FINAL PRETRIAL ORDER  
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1 USA-48: Notice from Portland Area Office, Bureau of Indian  
2 Affairs, to Washington Department of Game, dated September 21,  
3 1967, with distribution list.

4  
5 USA-49: "The Persistence of Intervillage Ties Among the Coast  
6 Salish," Wayne Suttles.

7  
8 USA-50: Volume 1, "As Told By the Pioneers", 1937, pp. 166  
9 through 184.

10  
11 USA-51: "Cultural and Natural Areas of Native North America,"  
12 A.L. Kroeber, 1939.

13  
14 D. Exhibits of the Yakima Tribe.

15 Y-1: 12-page longhand document consisting of portions of  
16 the Journal of James Doty, Secretary for Treaties in Washington  
17 Territory, showing proceedings between January 20 and May 21, 1855,  
18 assembling Indian people for councils in Walla Walla Valley.

19  
20 Y-2: 12-page longhand document of another copy of document  
21 described as Y-2a.

22  
23 Y-3: 93-page longhand document consisting of official  
24 proceedings at the council in Walla Walla Valley, negotiation  
25 and execution of Treaty with Yakima at council between June 9-11,  
26 1855, which record covers period between May 22 and June 11, 1855.

27  
28 Y-4: 75-page typed document of record of proceedings at  
29 council in Walla Walla Valley, June 9-10, 1855 (portions).

30  
31  
32 Page 176 - FINAL PRETRIAL ORDER  
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1 Y-5: 22-page longhand document consisting of Treaty of  
2 June 9 and 11, 1855 with Yakima and Confederated Tribes in  
3 Walla Walla Valley; 3-page letter from Isaac I. Stevens to  
4 Commissioner of Indian Affairs dated June 14, 1855; the treaty;  
5 proceedings of the council.

6  
7 Y-6: 6-page document consisting of accurately typed version  
8 of Treaty with Yakimas, June 9, 1855, 12 Stat. 951.

9  
10 Y-7: The Yakima Enrollment Act of August 9, 1946  
11 (60 Stat. 968) as amended (84 Stat. 1874).

12  
13 E. Exhibits of All Defendants:

14 D-1: Written direct testimony of Carroll L. Riley.

15  
16 F. Exhibits of the Fisheries Defendant:

17 F-1: Schematic drawing of typical river (for illustration  
18 only).

19  
20 F-2: Comparison of the Effects of a Quota and of a Percent of  
21 Harvest Upon a Treaty Indian Fishery (for illustration only).

22  
23 F-3: 1970 Fisheries Report of the Washington Department  
24 of Fisheries.

25  
26 F-4: Records of the Department of Fisheries concerning the  
27 Catch of Fall Chinook by Puyallup Indians and the Corresponding  
28 Return of Adults to the Puyallup River Salmon Hatchery.

29  
30 F-5: Outline of the Steps Followed by the Department of  
31 Fisheries in Establishing Annual Puget Sound Commercial Salmon  
32 Regulation.

- 1 F-6: Report of Dr. Stephen Mathews, commissioned by the  
2 Department of Fisheries concerning Catches of Salmon from Indian  
3 Fishery Rivers of Puget Sound, Coastal Washington, and the  
4 Strait of Juan de Fuca.
- 5 F-7: Salmon Catch and Escapement for Several Rivers on which  
6 Treaty Indian Fisheries Occur in Puget Sound and Coastal Areas,  
7 as determined by Dr. Stephen Mathews.
- 8
- 9 F-8: Salmon Catch and Escapement for Hoh River, as determined  
10 by Dr. Stephen Mathews.
- 11 F-9: Salmon Catch and Escapement for Hoko River, as determined  
12 by Dr. Stephen Mathews.
- 13 F-10: Salmon Catch and Escapement for Nisqually River, as  
14 determined by Dr. Stephen Mathews.
- 15 F-11: Salmon Catch and Escapement for Nooksack River, as  
16 determined by Dr. Stephen Mathews.
- 17 F-12: Salmon Catch and Escapement for Puyallup River, as  
18 determined by Dr. Stephen Mathews.
- 19 F-13: Salmon Catch and Escapement for Quillayute River, as  
20 determined by Dr. Stephen Mathews.
- 21 F-14: Salmon Catch and Escapement for Skagit River, as determined  
22 by Dr. Stephen Mathews.
- 23 F-15: Salmon Catch and Escapement for Skokomish River, as  
24 determined by Dr. Stephen Mathews.
- 25 F-16: Salmon Catch and Escapement for Snohomish-Stillaguamish  
26 Rivers, as determined by Dr. Stephen Mathews.
- 27 F-17: Salmon Catch and Escapement for Southern Puget Sound,  
28 as determined by Dr. Stephen Mathews.
- 29
- 30 F-18: Department of Fisheries Report on Salmon Escapement and  
31 Desired Escapement Levels to Certain Puget Sound Systems  
32 containing Indian Fisheries.

- 1 F-19: Records of the Department of Fisheries concerning  
2 Skokomish River Indian Chinook Catches.
- 3 F-21: Computer run by the Department of Fisheries concerning  
4 1971 Puget Sound Coho - All Gear Combined, Excluding Troll  
5 Strait of Juan de Fuca, pp. 1-4.
- 6 F-22: Records of the Department of Fisheries concerning  
7 Ozette River Indian Sockeye Catches, 1948-1972.
- 8 F-23: Records of the Department of Fisheries concerning  
9 Quinault River Sockeye Indian Catches, 1935-1972.
- 10 F-24: Accurate copy of a letter to Thor Tollefson from  
11 Quinault Tribal Council, June 13, 1973.
- 12 F-25: Accurate copy of a letter to Muckleshoot Tribal Council  
13 from A. Dennis Austin, Fisheries Management Biologist,  
14 June 21, 1973.
- 15 F-26: Analysis of Salmon Catches in Washington State Managed  
16 Waters Originating from Indian Fishery Rivers of Puget Sound and  
17 Coastal Waters (objections noted).
- 18 F-27: Direct testimony of Thor C. Tollefson (objections noted).
- 19 F-28: Direct testimony of J.E. Lasater (objections noted).
- 20 F-29: Designated testimony of James Heckman (objections noted).
- 21 F-30: Designated interrogatories answers of plaintiffs  
22 (objections noted).
- 23 F-31: Direct testimony of Dr. Stephen Mathews (objections  
24 noted).
- 25 F-32: Deposition of Dr. Kenneth Henry.
- 26 F-33: Deposition of Harold Eugene Ikebe.
- 27 F-34: Deposition of Benjamin R. Wright.
- 28 F-35: Deposition of Louis A. Cloud.

29  
30  
31



1 G. Exhibits of the Game Defendants.

2 G-1: Bibliography of Carroll A. Riley.

3  
4 G-2a: Aboriginal populations of the Lower Northwest Coast,  
5 Herbert C. Taylor, Jr., October 1963, Pacific Northwest Quarterly.

6  
7 G-2b: The Utilization of Archeological and Ethnohistorical  
8 Data in Estimating Aboriginal Population, Herbert C. Taylor, Jr.,  
9 Volume 32, 1962, Bulletin of the Texas Archeological Society.

10  
11 G-2c: The "Intermittent Fever" Epidemic of the 1830's on the  
12 Lower Columbia River, Herbert C. Taylor, Jr., Lester Hoaglin, Jr.,  
13 1962, Ethnohistory.

14  
15 G-3: Partial Recitation of Data on Native North America,  
16 A.L. Kroeber, 1939, University of California Publications in  
17 American Archeology and Ethnology.

18  
19 G-4: Tribes of Western Washington and Northwestern Oregon,  
20 George Gibbs, M.D., 1877, Department of the Interior.

21  
22 G-5: The Makah Indians: A Study of Political and Economic  
23 Organization, Carroll A. Riley, 196\_\_, Ethnohistory.

24  
25 G-6. Indians of the Urban Northwest, edited by Marian W. Smith,  
26 1949, Columbia University Press.

27  
28 G-7: The Early Diffusion of the Potato Among the Coast Salish,  
29 Wayne Suttles, 1951, Southwestern Journal of Anthropology.

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32 Page 180 - FINAL PRETRIAL ORDER

1 G-8: Three Year's Residence in Washington Territory (Shoalwater  
2 Bay), James G. Swan, 1857, Harper and Brothers.

3  
4 G-9: The Quinault Indians, Ronald L. Olson, 1936, University  
5 of Washington Publications in Anthropology.

6  
7 G-10: Accurate copy of a letter to George W. Felshaw to  
8 Clifford Millenbach, Chief, Fishery Management Division,  
9 January 25, 1971.

10  
11 G-11: Accurate copy of a reply letter to Clifford Millenbach  
12 from George W. Felshaw, Superintendent, Western Washington Agency,  
13 Bureau of Indian Affairs, January 27, 1971.

14  
15 G-12: Dollars and Recreation Use of Wildlife Resources in  
16 Washington State, published by the Game Department, December 1969.

17  
18 G-13: An Examination of the Anadromous Trout Program of the  
19 Washington State Game Department, report of Loyd A. Royal to the  
20 Washington State Game Department, 1973.

21  
22 G-14: Written direct testimony of Carl Crouse (objections noted).

23  
24 G-15: Written direct testimony of Clifford Millenbach  
25 (objections noted).

26  
27 G-16: Written direct testimony of Walter Neubrech (objections  
28 noted).

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32 Page 181 - FINAL PRETRIAL ORDER

- 1 G-17: Indian Claims Commission, Findings of Fact, (a)-(p):
- 2 (a) Duwamish Tribe, ICC Docket No. 109, Findings of Fact.
- 3 (b) Lummi Tribe, ICC Docket No. 110, Findings of Fact  
4 of October 30, 1957, Additional Findings of  
March 2, 1962 and February 18, 1966.
- 5 (c) Makah Tribe, ICC Docket No. 60, Findings of Fact of  
6 April 15, 1959, and Docket 60-A, Opinion of  
May 20, 1970.
- 7 (d) Nisqually Tribe, ICC Docket No. 197, Findings of  
8 Fact of June 25, 1969.
- 9 (e) Puyallup Tribe, ICC Docket No. 203, Findings of  
Fact of April 25, 1966.
- 10 (f) Quileute Tribe and Hoh Tribe, Docket No. 155,  
11 Findings of Fact of December 1, 1958.
- 12 (g) Quinault Tribe, Docket No. 242, Findings of Fact  
13 of December 1, 1958, Opinion of the Commission of  
December 1, 1958, and Findings of Fact re: Joint  
14 Motion for approval of proposed compromise settlement  
of July 9, 1962.
- 15 (h) Skokomish Tribe, Docket No. 296, Findings of Fact  
16 of March 6, 1958, Order Amending Finding No. 9  
dated June 18, 1959.
- 17 (i) Squaxin Tribe, Docket No. 206, Findings of Fact  
18 of June 30, 1969, Opinion of Commission of June 30,  
1969, and additional Findings of Fact of  
December 8, 1972.
- 19 (j) Steilacoom Tribe, Docket No. 208, Findings of Fact  
20 of September 21, 1962.
- 21 (k) Stillaguamish Tribe, Docket No. 207, Findings of  
Fact of February 26, 1965.
- 22 (l) Upper Skagit Tribe, Docket No. 92, Findings of  
23 Fact of March 25, 1960.
- 24 (m) Kikiallus Tribe, Docket No. 263, Findings of  
Fact of April 13, 1959.
- 25 (n) Snohomish Tribe, Docket No. 125.
- 26 (o) Snoqualmie and Skykomish Tribes, Docket No. 93.
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1 B. Authentic Exhibits of the United States.

2 USA-20: Summary

3  
4 USA-21: Makah Economy Circa 1855 and the Makah Treaty --  
5 A Cultural Analysis.

6  
7 USA-22: Anthropological Report on the Identity, Treaty Status  
8 and Fisheries of the Quilleute and Hoh Indians.

9  
10 USA-23: Anthropological Report on the Identity, Treaty Status  
11 and Fisheries of the Skokomish Tribe of Indians.

12  
13 USA-24: Anthropological Report on the Identity, Treaty Status  
14 and Fisheries of the Squaxin Tribe of Indians.

15  
16 USA-25: Anthropological Report on the Identity, Treaty Status  
17 and Fisheries of the Nisqually Tribe of Indians.

18  
19 USA-26: Anthropological Report on the Identity, Treaty Status  
20 and Fisheries of the Puyallup Tribe of Indians.

21  
22 USA-27a: Anthropological Report on the Identity and Treaty  
23 Status of the Muckleshoot Indians.

24  
25 USA-27b: Anthropological Report on the Traditional Fisheries  
26 of the Muckleshoot Indians.

1 USA-28: Anthropological Report on the Identity, Treaty Status  
2 and Fisheries of the Stillaguamish Indians.

3  
4 USA-29: Anthropological Report on the Identity, Treaty Status  
5 and Fisheries of the Sauk-Suiattle Tribe of Indians.

6  
7 USA-30: Anthropological Report on the Identity, Treaty Status  
8 and Fisheries of the Lummi Tribe of Indians.

9  
10 USA-31 a-e: Letters and portions of 1942 Swindell Report.

11  
12 USA-42: 4-page document of written testimony of Director of  
13 Game Department to Joint Committee on Natural Resources of  
14 Washington State Legislature. [Defendants object on grounds  
15 of relevancy only.]

16  
17 C. Authentic Exhibits of the Yakima Tribe.

18 Y-8: 4-page document of pages 15, 16 and 117 from 1972  
19 State of Washington Pocket Data Book. [Defendants object on  
20 grounds of relevancy only.]

21  
22 Y-9: 7-page document, portions of December 1972 report  
23 entitled "An Economic Analysis of the Labor Market for the  
24 Yakima Indian Nation" compiled by Battelle Northwest Pacific  
25 Laboratories. [Defendants object on grounds of relevancy only.]

26  
27 Y-10: 33-page document of study by Washington State Extension  
28 Service in connection with mitigation funds relating to Dalles  
29 Dam. [Defendants object on grounds of relevancy only.]

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32 Page 185<sub>a</sub> - FINAL PRETRIAL ORDER  
Corrected page 8/22/73

1 Y-11: 2-page document reporting on fish landings during  
2 treaty times (1853-1858) of predecessors to present-day Yakima  
3 Tribe. [Defendants object on grounds of relevancy only.]  
4

5 Y-12: 21-page document of portions of Report on Source,  
6 Nature and Extent of Fishing, Hunting, and Miscellaneous Related  
7 Rights of Certain Indian Tribes in Washington and Oregon.  
8 (Swindell 1942) [~~Defendants object on grounds of relevancy only.~~]  
9

10 Y-13: Written ~~to~~ direct testimony of Louis Cloud.  
11 (only p.4, line 13 thru p.6, line 6, object on ground of relevancy).

12 Y-14: Transcript of Proceedings, May 7, 1968,  
13 Department of Game v. Settler.  
14

15 D. Authentic Exhibits of the Muckleshoot, Squaxin Island,  
16 Sauk-Suiattle, Stillaguamish and Skokomish Tribes.

17 MS-1: Report entitled "Economic Implications of an Indian  
18 Fishery" by Dr. Gardner Brown, Jr. [Defendants object to the  
19 admissibility of this exhibit on the grounds of competency and  
20 that Dr. Brown does not show adequate factual foundation for his  
21 opinions.]  
22

23 E. Authentic Exhibits of the Makah, Lummi and Quilleute Tribes:

24 MLQ-1: Report entitled "A Brief History of the Salmon Fishing  
25 and Canning History on Puget Sound" by Robert Paul Thomas.  
26 [Defendants object to the admissibility of this exhibit on the  
27 grounds of competency and that Dr. Thomas does not show adequate  
28 factual foundation for his opinions.]  
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1 F. Authentic Exhibits of the Fisheries Department.

2 F-20: Department of Fisheries records concerning hatchery  
3 surplus salmon given to Indian tribes in 1972. [Plaintiffs  
4 object on grounds of relevancy and materiality.]  
5

6 G. Authentic Exhibits of the Reefnet Owners.

7 FN-1: Deposition of John R. Brown.  
8 RN-2: Deposition of Glenna H. Schuler.  
9 RN-3: Deposition of Jerry M. Anderson.  
10 RN-4: Deposition of Forrest L. Kinley.  
11 RN-5: Deposition of Herman Olsen.  
12 RN-6: Deposition of John B. Finkbonner.  
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1 12-7. Trial time will be during the hours of 9:00 a.m. and  
2 3:00 p.m., with appropriate recesses and lunch breaks.

3 12-8. For each witness, each side will designate a lead  
4 counsel who will conduct initial examination for his side.

5 12-9. Closing briefs together with proposed Findings of Fact  
6 and Conclusions of Law will be due at a time following the receipt  
7 of evidence as set by the Court. Final arguments will be set  
8 thereafter.

9  
10 12-10. All parties shall serve all counsel of record with copies  
11 of all pleadings, motions, memoranda, notices or other communica-  
12 tions with the Court.

13  
14 12-11. The following motions have been decided or taken under  
15 advisement as indicated:

- 16 A. Plaintiff's Motion to Strike Affirmative Defenses -  
17 Under Advisement;
- 18 B. Game Defendants' Motion for Summary Judgment has  
19 been denied;
- 20 C. Game Defendants' Motion to Delay Judgment or to  
21 Dismiss - Under Advisement;
- 22 D. State Defendants' Motion to Limit Environmental  
23 Issues - Order Issued;
- 24 E. Certain Plaintiff Tribe's Motion for Costs for  
25 Game Defendants Failure to Make Timely Response  
26 to Interrogatories has been denied.

27 The foregoing pretrial order has been approved by the  
28 parties hereto, as evidenced by the signature of their counsel  
29 hereon, and the order is hereby entered, as a result of which  
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1 the pleadings pass out of the case, and this order may be amended  
2 only by order of the Court pursuant to agreement of the parties or  
3 to prevent manifest injustice.

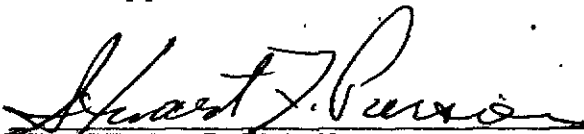
4 It is hereby so ORDERED.

5 DATED this 24 day of August, 1973.

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UNITED STATES DISTRICT JUDGE

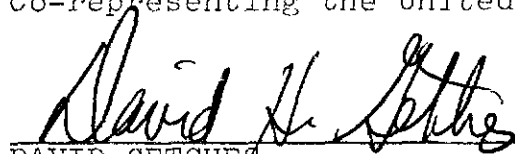
8 Form Approved:

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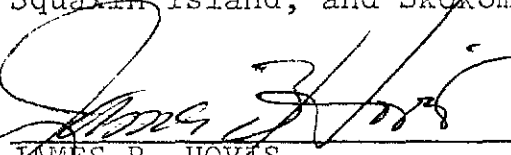
11 STUART F. PIERSON  
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13 United States Attorney  
14 Representing the United States

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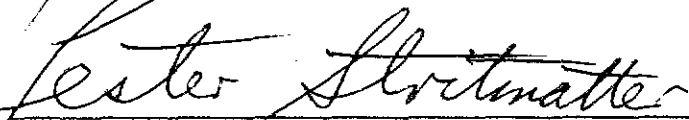
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31 Representing the Hoh Tribe

32 

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