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**Docket Entry 381 - Filed United States' supplement post-trial brief lodged United States' proposed decree**

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COURT BUILDING, 9  
U.S. DISTRICT COURT  
W.D. OF WASHINGTON  
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12 UNITED STATES DISTRICT COURT  
13 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

14 UNITED STATES OF AMERICA, )

15 Plaintiff, )

16 QUINULT 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 )  
TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE; )  
19 SQUAXIN ISLAND TRIBE OF INDIANS; SAUK- )  
SUIATLE INDIAN TRIBE; SKOKOMISH INDIAN )  
TRIBE; CONFEDERATED TRIBES AND BANDS OF THE )  
20 YAKIMA INDIAN NATION; UPPER SKAGIT RIVER )  
TRIBE; STILLAGUAMISH TRIBE OF INDIANS; and )  
21 QUILEUTE INDIAN TRIBE; )

22 Intervenor-Plaintiffs, )

23 v. )

24 STATE OF WASHINGTON, )

25 Defendant, )

26 THOR C. TOLLEFSON, Director, Washington )  
State Department of Fisheries; CARL CROUSE, )  
27 Director, Washington Department of Game; )  
and WASHINGTON STATE GAME COMMISSION; and )  
28 WASHINGTON REEF NET OWNERS ASSOCIATION, )

29 Intervenor-Defendants. )

CIVIL NO. 9213  
UNITED STATES'  
SUPPLEMENTAL POST-  
TRIAL BRIEF

1007 *39*

1 This brief is submitted as a supplement to the posttrial  
2 brief submitted by all plaintiffs. Its subject is the decree  
3 which has been proposed by the United States.  
4

5 I. INTRODUCTION

6 Through the three principle decisions of the United States  
7 Supreme Court which have interpreted the fishing rights provisions  
8 of the Stevens' treaties (*United States v. Winans*, 198 U.S. 371  
9 (1905), *Tulee v. Washington*, 315 U.S. 681 (1942) and *Puyallup*  
10 *Tribe v. Department of Game*, 391 U.S. 392 (1968), the Supreme  
11 Court's focus has been on the State's power to regulate the  
12 "manner" of treaty Indian off-reservation fishing. For the  
13 first time in *Sohappy v. Smith*, 302 F.Supp. 899 (D. Ore. 1969),  
14 a court confronted two basic practical realities of protecting  
15 the off-reservation fishing rights of Treaty Tribes in the modern  
16 context. The first of these realities is that the "manner" of  
17 fishing is actually only of secondary concern. The primary  
18 concern is the volume of harvest. Thus, in order to preserve  
19 and enhance the exhaustible anadromous fish resource, it is  
20 essential to assure that the aggregate harvest -- by Indians  
21 and non-Indians -- should leave a sufficient escapement for  
22 proper reproduction needs providing that the methods of harvest  
23 are not inherently destructive or totally preemptive of other  
24 users. The second of the realities is that, in the current  
25 state of anadromous fish management outside reservation  
26 boundaries, the State necessarily designs its fishing regulations  
27 so as to allocate shares of the harvest among different user  
28 groups. The court in *Sohappy* therefore found that the State  
29 has an obligation to consider the Treaty Tribes as a co-equal  
30 with non-Indian user interests in allocating harvest shares.  
31

1008

1 While the defendants may argue that there are differences between  
2 the Columbia River system and the area covered by this case,  
3 they cannot dispute that these two realities established in  
4 *Sohappy* fully apply to this case.

5 With these and the other relevant precedents as controlling  
6 and in view of the evidence, proposed findings of fact, conclu-  
7 sions of law and plaintiffs' posttrial brief, the United States  
8 presents its proposed decree.

9  
10 II. BASIC ELEMENTS

11 In light of our other posttrial submissions, the meaning  
12 of the proposed decree is generally self-evident. The following  
13 elements have governed its form and substance:

14  
15 1. After declaring in clear and certain terms the special,  
16 reserved nature of the Treaty Tribes' fishing rights, the ultimate  
17 question is how may the volume of the Tribes' off-reservation  
18 take properly be limited by the exhaustibility of the resource  
19 and the legitimate interests of the State and non-Indians.

20  
21 2. To be effective in protecting the Tribes' rights and  
22 in providing guidelines for the State's respective duties and  
23 powers, the following items must be included in the decree:

24 a. A clear, concise and simple declaration of what  
25 the Tribes' rights are, when viewed alone, when viewed in  
26 comparison to non-Indian fishing privileges and when viewed  
27 in the modern context of State off-reservation management of  
28 the resource. This declaration should be sufficiently clear  
29 that the parties to this case and other persons will have no  
30 doubt as to the basic scope and nature of the Tribes' rights,  
31

1 the scope of State duties to protect those rights and the  
2 standards governing the exercise of State power.

3 b. A comprehensive, mandatory and prohibitory  
4 injunction designed to protect the Tribes' rights in light of  
5 the evidence presented and to permit exercise of such of the  
6 State's police power as is necessary. This injunction should  
7 include a negative protection against State infringement of the  
8 Tribes' rights, and the requirement of affirmative action by  
9 the State to provide a harvestable share of fish to the Tribes'  
10 fisheries. The injunction must also take into account the  
11 needs of the Court in ensuring full implementation of the decree  
12 following its entry.

13 c. A provision for continuing jurisdiction.

14 d. Inducements to the parties to obey the  
15 injunction and to cooperate between themselves.

16  
17 The injunctive portion of the decree should clearly avoid any  
18 derogation from the declared rights of the Tribes. It should  
19 be designed to provide a workable structure in which the parties  
20 can face each other and cooperate, each confident of its rights  
21 or powers and the limitations thereon.

22  
23 3. Since over sixty years of Supreme Court precedent has  
24 been ineffective in providing practical protection of the  
25 Plaintiff Tribes' treaty fishing rights, the decree should  
26 specify: first, a certain minimum portion of the harvestable  
27 stock which the Tribes shall, under the decree, be absolutely  
28 entitled to take; second, an accurate means for determining  
29 the size of the harvestable stock; and third, crystal clear  
30

1 instructions to the State that it must regulate non-Indian  
2 activity so as reasonably to promise that the Tribes will have  
3 at least that minimum portion for harvest.  
4

5 4. The injunction should not intrude upon the time,  
6 place, manner or volume of the on-reservation fishing of the  
7 Tribes.  
8

9 5. The decree should recognize the wide variety of  
10 tribal capacity to manage and control Indian off-reservation  
11 fishing activity. Each Tribe should be given the opportunity  
12 to show that it can, without State interference, manage and  
13 control the activity of those exercising its treaty right so  
14 as to confine the harvest to beneficial use within the tribal  
15 share.  
16

17 6. The decree should utilize the full measure of the  
18 Court's authorized powers (a) to monitor the operation of the  
19 decree, (b) to bring the parties together as equals in a  
20 necessarily cooperative endeavor, (c) to gather facts concerning  
21 any disputes, and (d) to provide the parties with a forum for  
22 informal accommodation and out-of-court dispute resolution.  
23

24 7. The decree should operate to prohibit State actions  
25 against a treaty tribal fisherman, except when the person is  
26 fishing contrary to the Tribe's time, place, manner or volume  
27 of harvest and the Tribe is unable to terminate the misconduct.  
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1 III. DISCUSSION

2 1. A certain share.

3 The anthropological and documentary evidence concerning  
4 the negotiation and execution of the treaties indicates that  
5 the Tribes and their members were to continue fishing at  
6 off-reservation places in order to fulfill their needs.  
7 Fundamentally, this means that in current times the exercise  
8 of the tribal off-reservation fishing rights should be sufficient  
9 to provide for the current needs of the Tribes and their members.  
10 The evidence concerning efficient and reliable modern fisheries  
11 management indicates that the State should be provided with a  
12 means for determining in advance of the appearance of the  
13 anadromous fish runs, the volume of take which each Treaty  
14 Tribe will be entitled to take off-reservation in the coming  
15 season. This means that there must be a method for certainly  
16 determining, prior to each season, the off-reservation harvestable  
17 share which each Treaty Tribe will be entitled to take. The  
18 only definitive limitation upon the Tribes' volume of harvest  
19 is the required production escapement, that is the amount of  
20 fish which must escape the Indian fisheries to preserve and  
21 enhance the resource for Indians and non-Indians as well.  
22 Since the Tribes and their members are the only ones competent  
23 to state their needs, the proposed decree provides that in  
24 each season, after the optimum production escapement and planned  
25 on-reservation harvest are subtracted from the run size, each  
26 Tribe states the volume of the off-reservation harvestable stock  
27 which it will take to satisfy its needs. In any season, this  
28 stated need will be in certain terms, limited by the stock  
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1 which may be harvested consistent with conservation outside  
2 reservation boundaries, by the capacity of the Tribe (if the  
3 off-reservation share is greater than 50%) and by the requirement  
4 of beneficial usage. It should be noted here that with full  
5 opportunity to harvest in any manner on their reservations,  
6 the Treaty Tribes have only taken 5% of the total harvestable  
7 stock available at usual and accustomed places, and only 24%  
8 of the harvestable stock available in water areas on the  
9 reservations. [This excludes the Quinault Tribe.]

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1           2.    State duties.

2           The evidence in this case discloses that, with a few  
3 limited exceptions, the State has the ability to determine  
4 how many, if any, fish the Treaty Tribes will be able to take.  
5 It also has the power to regulate the non-Indian fishery.  
6 These two facts, taken in the context of an exhaustible resource  
7 and under the supremacy of the Tribes' treaty right, necessarily  
8 impose on the State the duty to regulate non-Indians so as to  
9 enable the Tribes to harvest at least the minimum portion which  
10 they are entitled to take.

11           The fact that most of the Treaty Tribes have managed their  
12 own on-reservation fisheries for a century, consistently with  
13 preservation of the resource, demonstrates that, however their  
14 management may be effected, they are capable of managing their  
15 own off-reservation fisheries without State interference. The  
16 State must, therefore, also be required to avoid imposition of  
17 State power upon a treaty Indian except where off-reservation  
18 tribal control is ineffective.

19  
20           3.    Doing equity.

21           The evidence of abuses of State power in seizing Indian  
22 property is overwhelming. The State must be required to make  
23 whole the victims of its unconstitutional seizure and retention  
24 of Indian fishing gear. The equitable powers of the Court are  
25 clearly available to perform this function.

26  
27           4.    An example.

28           One example of how the proposed injunction would operate  
29 might be helpful here.

1 The proposed injunction would require the management of  
2 off-reservation harvest to begin in each year for each species  
3 with three factors: (a) the run size, as estimated in advance  
4 by the State; (b) the optimum escapement, as determined by the  
5 State, both throughout the Western District and by water area  
6 where produced; and (c) the planned on-reservation take, as  
7 determined by each Treaty Tribe fishing on that species. With  
8 these three factors, the off-reservation harvestable stock  
9 will be determined by subtracting optimum escapement and on-  
10 reservation take from run size. This will be done for the  
11 district as a whole and for each production area. Then, for each  
12 species, the stated off-reservation harvest of all Treaty Tribes  
13 must be provided for, if the stated off-reservation tribal need  
14 is within the limits of the overall off-reservation harvestable  
15 stock and the limits of the off-reservation harvestable stock  
16 in each of the areas where each Tribe will fish.

17 Assume that A, B, C and D are the Treaty Tribes who fish  
18 on the fall Chinook run at Puget Sound. The State estimates  
19 the coming run size at 50,000 fish and determines the overall  
20 optimum escapement to be 10,000. The harvestable stock is  
21 therefore 40,000 fish.

22 C has no reservation. A, B and D state that their planned  
23 on-reservation harvest will be:  $A = 6,000$ ,  $B = 3,500$  and  
24  $D = 4,500$  fish. The off-reservation harvestable stock is  
25 therefore  $40,000$  minus  $14,000 = 26,000$  fish.

26 The stated treaty tribal needs are:  $A = 8,500$ ,  $B = 3,500$ ,  
27  $C = 4,000$  and  $D = 5,000$ . The proposed off-reservation tribal  
28 shares thus become:  $A = 8,500$  minus  $6,000 = 2,500$ ;  
29  $B = 3,500$  minus  $3,500 = 0$ ;  $C = 4,000$  minus  $0 = 4,000$ ; and  
30  $D = 5,000$  minus  $4,500 = 500$ . The total proposed off-reservation  
31 tribal share is then 7,000 Chinook.

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1 7,000 is less than the overall off-reservation harvestable  
2 stock of 26,000 fish. Assuming that the Tribes' proposed time,  
3 place and manner of fishing are not totally preemptive of other  
4 users or inherently destructive, and assuming that the volume  
5 at the places of off-reservation harvest will not exceed the  
6 off-reservation harvestable stock at those places, the State is  
7 required so to regulate non-Indian activities as to raise the  
8 highest possible probability that the total harvest set by  
9 A, B, C and D will be available, while maintaining the overall  
10 and individual - stream optimum escapement. This would leave  
11 9,000 Chinook to be taken by non-Indians at a time, place and  
12 manner designed by the State to coordinate with its regulations  
13 for the treaty tribal fisheries.

14 If any person claiming to exercise the off-reservation rights  
15 of A, B, C or D should violate the regulations for the tribal  
16 fishery, the particular Tribe will be given a reasonable  
17 opportunity to stop the violation. If the Tribe fails, the  
18 State may step in.

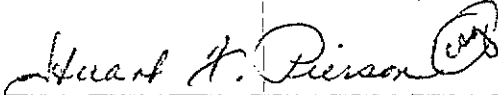
19  
20 IV. CONCLUSION

21 As with any proposal for relief in a complex situation,  
22 the Court and the parties will have questions concerning the  
23 operation of the proposed decree which cannot be anticipated  
24 here. The United States will attempt to answer all such questions  
25 at any time and to adjust its proposal to meet unanticipated  
26 circumstances or difficulties.

27 DATED this 31st day of October, 1973.

28 Respectfully submitted,

29 STAN PITKIN  
30 United States Attorney

31   
32 STUART F. PIERSON, Special Assistant  
to the United States Attorney

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29 STAN PITKIN  
30 United States Attorney

31   
32 STUART F. PIERSON, Special Assistant  
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38 Director, Washington Department of Game; )  
39 and WASHINGTON STATE GAME COMMISSION; and )  
40 WASHINGTON REEF NET OWNERS ASSOCIATION, )  
41 )  
42 Intervenor-Defendants. )

CIVIL NO. 9213  
UNITED STATES'  
PROPOSED DECREE

1018

1 Upon the Findings of Fact, Conclusions of Law and Opinion  
2 of the Court entered in this case, and following full pretrial  
3 preparation, trial and posttrial proposals and submissions of  
4 the parties, this decree is entered.

5  
6 I.

7 DECLARATORY JUDGMENT

8 In order clearly to delineate the off-reservation fishing  
9 rights held by certain Indian entities in this district under  
10 treaties made with the United States, it is hereby

11 ORDERED, ADJUDGED and DECREED that the right of each of  
12 the plaintiff tribes in this case to harvest anadromous fish  
13 in waters within the Western District of Washington, outside  
14 the boundaries of Indian reservations, is declared to be  
15 as follows:

16  
17 A. Definitions

18 All definitions contained in the Glossary of Terms  
19 of the Joint Biological Statement (Exhibit JX-2a) are hereby  
20 incorporated by reference. In addition and specifically for  
21 the purposes of interpreting all provisions of this decree,  
22 the following definitions shall be controlling:

23  
24 1. Anadromous fish: Any fish which spawns or is  
25 artificially produced in freshwater, matures in saltwater  
26 and returns to freshwater to reproduce, and which spends any  
27 portion of its life cycle in waters within the Western District  
28 of Washington.

1           2.   Optimum production escapement:   In an  
2 approximate number of anadromous fish, that level of escapement  
3 from all fisheries to spawning grounds and propagation facilities  
4 which is necessary to preserve and maintain the resource.

5  
6           3.   Harvestable stock:   The approximate number of  
7 anadromous fish which is surplus beyond optimum production  
8 escapement; that is, the number remaining when the optimum  
9 production escapement is subtracted from the run size.

10  
11           4.   To preserve and maintain the resource:   Upon a  
12 full consideration of (a) the history of State anadromous fish  
13 management, (b) the level of catch within the Western District  
14 of Washington in recent years, (c) the quality of freshwater  
15 and artificial production environments, (d) the most recent  
16 facts and data concerning anadromous fish production potential,  
17 (e) the potential for interspecific competition, and (f) the  
18 prospects for improvement of anadromous fish production, to  
19 perpetuate the runs of anadromous fish at least at their  
20 current level.

21  
22           5.   Run:   A group of anadromous fish on its return  
23 migration, identified by species, race and water area or areas  
24 where produced.

25  
26           6.   State:   The State of Washington, its agents,  
27 officers, agencies, assigns and subdivisions.



1           7. Stevens' treaties: Those treaties identified  
2 in the Findings of Fact and Conclusions of Law as having been  
3 negotiated between Isaac I. Stevens, for the United States, and  
4 certain Indian tribes and bands who lived in Washington Territory  
5 during the 1850's.

6  
7           8. Treaty Tribe: One of the Indian entities  
8 described in paragraph 10 below, or any other entity entitled  
9 to exercise the treaty tribal rights declared herein within  
10 the Western District of Washington.

11  
12           9. Usual and accustomed places: Those areas in, on  
13 and around the freshwater and saltwater areas within the  
14 Western District of Washington, which were understood by the  
15 Indian parties to the Stevens' treaties to be embraced within  
16 the treaty terms "usual and accustomed" "grounds", "stations"  
17 and "places".

18  
19           B. Treaty Tribal Rights

20  
21           10. Each of the plaintiff tribes listed below is a  
22 Treaty Tribe. The list given below is a declaration only as to  
23 those 14 Indian entities which have been represented on the  
24 plaintiff side in this case. A Treaty Tribe occupies the  
25 status of a party to one or more of the Stevens' treaties  
26 and therefore holds for the benefit of its members a reserved  
27 right to harvest anadromous fish at all usual and accustomed  
28 places outside reservation boundaries, in common with others:

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- Hoh Tribe of Indians;
- Lummi Indian Tribe;
- Makah Indian Tribe;
- Muckleshoot Indian Tribe;
- Nisqually Indian Community of the  
Nisqually Reservation;
- Puyallup Tribe of the Puyallup Reservation;
- Quileute Indian Tribe;
- Quinault Tribe of Indians;
- Sauk-Suiattle Indian Tribe;
- Skokomish Indian Tribe;
- Squaxin Island Tribe of Indians;
- Stillaguamish Tribe of Indians;
- Upper Skagit River Tribe;
- Confederated Tribes and Bands of the  
Yakima Indian Nation.

11. The right of a Treaty Tribe to harvest anadromous fish outside reservation boundaries arises from a provision which appears in each of the Stevens' treaties and which, with immaterial variations, states:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .

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

1022

1           13. From the earliest known times, up to and  
2 beyond the time of the Stevens' treaties, the Indians comprising  
3 each of the treating tribes and bands were primarily a fishing,  
4 hunting and gathering people dependent almost entirely upon the  
5 natural animal and vegetative resources of the region for their  
6 subsistence and culture. They were heavily dependent upon  
7 anadromous fish for their subsistence and for trade with other  
8 tribes and later with the settlers. Anadromous fish was the  
9 great staple of their diet and livelihood. They cured and dried  
10 large quantities for year around use, both for themselves and  
11 for others through sale, trade, barter and employment. With the  
12 advent of canning technology in the latter half of the 19th  
13 Century the commercial exploitation of the anadromous fish  
14 resources by non-Indians increased tremendously. Indians,  
15 fishing under their treaty-secured rights, also participated  
16 in this expanded commercial fishery and sold many fish to  
17 non-Indian packers and dealers.

18  
19           14. The taking of anadromous fish from usual and  
20 accustomed places, the right to which was secured to the Treaty  
21 Tribes in the Stevens' treaties, constituted both the means of  
22 economic livelihood and the foundation of native culture.  
23 Reservation of the right to gather food in this fashion  
24 protected the Indians' right to maintain essential elements  
25 of their way of life, as a complement to the life defined by  
26 the permanent homes, allotted farm lands, compulsory education,  
27 technical assistance and pecuniary rewards offered in the  
28 treaties. Settlement of the west and the rise of industrial  
29  
30  
31

1 America have significantly circumscribed the opportunities of  
2 members of the Treaty Tribes to fish for subsistence and commerce  
3 and to maintain tribal traditions. But the mere passage of time  
4 has not eroded, and cannot erode, the rights guaranteed by  
5 solemn treaties that both sides pledged on their honor to uphold.  
6

7 15. The treaty-secured right to resort to the usual  
8 and accustomed places to fish was a part of larger rights possessed  
9 by the treating Indians, upon the exercise of which there was  
10 not a shadow of impediment, and which were not much less  
11 necessary to their existence than the atmosphere they breathed.  
12 The treaty was not a grant of rights to the treating Indians,  
13 but a grant of rights from them, and a reservation of those not  
14 granted. In the Stevens' treaties, reservations were not of  
15 particular parcels of land, and could not be expressed in deeds,  
16 as dealings between private individuals. The reservations were  
17 in large areas of territory, and the negotiations were with the  
18 tribes. The treaties reserved rights, however, to every individual  
19 Indian, as though described therein. There was an exclusive  
20 right of fishing reserved within certain boundaries. There was  
21 a right outside of those boundaries reserved for exercise "in  
22 common with citizens of the Territory."  
23

24 16. The Stevens' treaties do not reserve to the Treaty  
25 Tribes any specific manner, method or purpose of taking fish;  
26 nor do the treaties prohibit any specific manner, method or  
27 purpose. Just as non-Indians may continue to take advantage  
28 of improvements in fishing techniques, the Treaty Tribes may,  
29  
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31

1 in exercising their rights to take anadromous fish, utilize  
2 improvements in traditional fishing methods, such for example  
3 as nylon nets and steel hooks, subject only to what is necessary  
4 to preserve and maintain the resource.

5  
6 17. The exercise of a Treaty Tribe's right to take  
7 anadromous fish is limited only by the geographical extent of  
8 the usual and accustomed places, the limits of the harvestable  
9 stock and the number of such fish as the Tribe reasonably needs.

10  
11 18. Because the right of each Treaty Tribe to take  
12 anadromous fish arises from a treaty with the United States, that  
13 right is preserved and protected under the supreme law of the  
14 land, does not depend on State law, is distinct from rights or  
15 privileges held by others, and may not be qualified by any  
16 action of the State.

17  
18 19. The treaty phrase "in common with" does not  
19 secure any treaty right or privilege to anyone other than the  
20 Treaty Tribes, nor does that phrase qualify any Indian's treaty  
21 right to fish. That phrase operates only to limit the exercise  
22 of the Tribe's right to a share of the resource which will be  
23 consistent with preservation and maintenance of the resource  
24 and with harvest by others of such fish as are not reasonably  
25 needed by the Tribe.

26  
27 20. The right of a Treaty Tribe to take anadromous  
28 fish may be regulated by an appropriate exercise of State power.  
29 To be appropriate, such regulation must:

1                   a.    Not discriminate against the Treaty  
2 Tribe's reserved right to fish;  
3                   b.    Meet appropriate standards of substantive  
4 and procedural due process; and  
5                   c.    Be shown by the State to be both reasonable  
6 and necessary to preserve and maintain the resource.  
7 When State laws or regulations affect the volume of anadromous  
8 fish available for harvest by a Treaty Tribe at usual and  
9 accustomed places, such regulations must be designed so as  
10 to carry out the purposes of the treaty provision securing  
11 to the Tribe the right to take fish.  
12

13                   21.   If any person shows reasonable proof that he is  
14 exercising the fishing rights of a Treaty Tribe and if he is  
15 fishing in a usual and accustomed place, he is protected under  
16 federal law against any State action, unless the State has  
17 established that such action is an appropriate exercise of  
18 its power.  
19

20                   22.   The currently effective laws and regulations of  
21 the State of Washington which affect the time, place, manner  
22 and volume of off-reservation harvest of anadromous fish by  
23 Treaty Tribes are unlawful for the reasons that (a) they  
24 are not, and have not been, necessary to preserve and maintain  
25 the resource; (b) they operate to discriminate against the  
26 Tribes' treaty right to fish; (c) they have been adopted and  
27 enforced in violation of appropriate standards; and (d) they  
28 have been adopted and enforced in derogation of the meaning and  
29 purposes of the treaty provision at issue in this case.  
30

1           23. All Findings of Fact and Conclusions of Law  
2 pertinent to the nature, scope and effect of the fishing rights  
3 of the Treaty Tribes are specifically incorporated by reference  
4 herein.

5  
6                                   II.

7                                   INJUNCTION

8           In order fully, practically and reasonably to protect and  
9 preserve the off-reservation fishing rights of the Treaty Tribes  
10 as declared herein above, and in order to permit appropriate  
11 State action as to non-Indians and persons who fish under a claim  
12 of treaty tribal right, it is hereby

13           ORDERED, ADJUDGED and DECREED that the State of Washington,  
14 the Washington Reefnet Owners Association, their agents, officers,  
15 successors in interest, and all persons acting in concert or  
16 participation with them are restrained and enjoined to obey  
17 and to respect all provisions of this injunction. Unexcused  
18 failure to do so will subject the failing party to conviction  
19 for contempt of court and will void any permission provided to  
20 the failing party in this injunction. Nothing in this injunction  
21 shall in any manner limit or qualify the declared rights of  
22 the Treaty Tribes.

23  
24           A. Additional Definitions (Only for Use in Interpreting  
25           This Injunction)

26           24. Beneficial use: Use of anadromous fish harvest for  
27 subsistence, ceremonial, or commercial purposes, without waste.

1           25. Facts and data: Information (whether in the  
2 form of numbers, counts, estimates, percentages or opinions)  
3 which is (a) specific to the run, location, time, gear and  
4 people involved; (b) as current as possible; (c) such that  
5 competent fisheries biologists would rely upon it in making  
6 expert judgments designed to preserve and maintain the resource.  
7

8           26. Minimum tribal share: An approximate number  
9 of anadromous fish (by species, race and place of taking) which  
10 under this injunction a Treaty Tribe is entitled in the coming  
11 season to take to satisfy its reasonable needs at usual and  
12 accustomed fishing places outside its reservation boundaries.

13           a. If (i) the off-reservation tribal need is  
14 50% or less of the off-reservation harvestable stock, and  
15 (ii) the Tribe states that its off-reservation harvest to  
16 satisfy that need will be put to beneficial use, the minimum  
17 tribal share shall be that particular percentage of the  
18 off-reservation harvestable stock.

19           b. If (i) the off-reservation tribal need  
20 is more than 50% of the off-reservation harvestable stock,  
21 (ii) the Tribe shows that its off-reservation harvest to  
22 satisfy that need will be put to beneficial use, and  
23 (iii) the Tribe shows that its fishermen have a reasonable  
24 probability of taking that percentage, the minimum tribal share  
25 shall be that percentage of the off-reservation harvestable  
26 stock.

27           c. The minimum tribal share shall be taken  
28 from off-reservation harvestable stock only.  
29  
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1           27.   Non-Indian: A person who is not exercising the  
2 fishing right of a Treaty Tribe.

3  
4           28.   Off-reservation harvestable stock: For any  
5 anadromous fish species and race in any year, that portion of  
6 the run size which is surplus beyond optimum production escape-  
7 ment and planned on-reservation harvest; that is, the number of  
8 fish remaining when optimum escapement, planned on-reservation  
9 harvest are subtracted from run size.

10  
11           29.   Off-reservation tribal need: In approximate  
12 numbers of anadromous fish, that portion of the treaty tribal  
13 need which a Treaty Tribe plans to satisfy in the coming season  
14 by off-reservation harvest at usual and accustomed fishing places.

15           a.   The off-reservation tribal need shall be  
16 the difference between the treaty tribal need and the Tribe's  
17 planned on-reservation harvest.

18           b.   If the stated treaty tribal need exceeds  
19 the harvest which the Treaty Tribe's fishermen (when fishing as  
20 planned on-reservation and at usual and accustomed fishing  
21 places off-reservation) would with reasonable probability take  
22 from the run involved in the full season, the off-reservation  
23 tribal need shall be the difference between that probable  
24 harvest and the planned on-reservation harvest.

25  
26           30.   Off-reservation tribal share: In approximate  
27 numbers of anadromous fish, that share which under this injunction  
28 a Treaty Tribe may harvest from a particular run in the coming  
29 season at usual and accustomed fishing places off-reservation.  
30 This share shall be at least the minimum tribal share.

1           31. Run size: In approximate numbers, the estimate  
2 by the State of the size of a run. As to all runs which  
3 pass through the Treaty Tribes' usual and accustomed fishing  
4 places, this estimate will be first made at least six months in  
5 advance of the run's appearance in the described area, and will  
6 be promptly revised upon new and supporting facts and data. This  
7 estimate shall be accepted as accurate by all parties unless  
8 shown by facts and data otherwise.  
9

10           32. Treaty tribal need: In approximate numbers of  
11 anadromous fish that portion of the harvestable stock which, in  
12 each season, for each species and race, the tribal council of  
13 a Treaty Tribe states will meet the present needs of the  
14 Tribe.  
15

16           33. Usual and accustomed fishing places: Those usual  
17 and accustomed places defined in paragraph 9 above, (a) which  
18 have been identified and listed in the Findings of Fact and  
19 Conclusions of Law, and (b) which this Court may determine  
20 should be added to that list following competent, satisfactory  
21 proof.  
22

23           B. Obligations of Defendants; Procedures and Activities  
24           Available to Treaty Tribes

25           34. There is hereby established one Court Advisory  
26 Panel. Upon agreement of all Treaty Tribes involved, a separate  
27 Court Advisory Panel will be established for all Treaty Tribes  
28 in a designated area.  
29  
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1           a. Each Treaty Tribe will designate one person  
2 to represent it on the Panel.

3           b. The Governor of the State will designate  
4 a number of State representatives equal to the number of  
5 tribal representatives on each Panel.

6           c. The Court will appoint a neutral person to  
7 serve in addition to the tribal and State representatives on  
8 the Panel.

9  
10           35. The purposes and duties of the Court Advisory  
11 Panel are:

12           a. To review in advance of each season:  
13 (i) The treaty tribal need and the minimum tribal share of each  
14 Treaty Tribe involved; (ii) the optimum production escapement,  
15 run size and off-reservation harvestable stock of each run  
16 which, absent any non-Indian harvest therefrom, would pass  
17 through the usual and accustomed fishing places where the  
18 respective Treaty Tribes plan to fish; (iii) State regulations  
19 of non-Indian activity which affect the volume of harvest  
20 available to the Treaty Tribes at usual and accustomed fishing  
21 places where they plan to fish; and (iv) all facts and data  
22 known or available to the Treaty Tribes or the State which  
23 are relevant to a fully informed review of (i), (ii) and (iii).

24           b. To determine, for each run through the  
25 usual and accustomed fishing places where the respective Treaty  
26 Tribes plan to fish, (i) the off-reservation tribal share for  
27 each Tribe, and (ii) the probability that such a share will  
28 be available to the Tribe for harvest.

1           c. To discuss, and to attempt in good faith  
2 and upon facts and data to resolve disputes, complaints and  
3 conflicts which arise concerning State regulation of fishing  
4 by Treaty Tribes and of non-Indian activity which affects the  
5 harvest by Treaty Tribes.

6           d. To report promptly to the Court the nature  
7 of any dispute which has not been resolved, indicating the  
8 position of each member of the Panel.

9           e. To report semiannually to the Court on the  
10 activities of the Panel.

11           f. To conduct all proceedings, activities and  
12 meetings with dispatch and in conformity with the provisions of  
13 this injunction and Roberts Rules of Order.

14           g. To perform all such other functions as  
15 the Court may require for the full implementation of this decree.

16  
17           36. The neutral member of each Court Advisory  
18 Panel shall be prepared to act, upon order of the Court, as a  
19 Master under Rule 53 of the Federal Rules of Civil Procedure.  
20 Unless otherwise determined by majority vote of the Panel, the  
21 neutral member shall be chairman of the Panel. The chairman  
22 shall select a secretary who shall keep and compile minutes  
23 of all meetings and take custody of all records and documents  
24 produced or received by the Panel. The secretary shall receive  
25 a copy of all pertinent correspondence between the tribal  
26 representatives and the State representatives. The United States  
27 shall provide such supplies and secretarial assistance to the  
28 secretary as may be required to keep all members of the Panel  
29 fully informed.

1           37.    Within twenty days from the date of this decree,  
2 each Treaty Tribe and the State shall advise the Court of the  
3 names and representation of its members of the Court Advisory  
4 Panel.

5  
6           38.    Within thirty days from the date of this decree,  
7 the parties may submit to the Court names of persons recommended  
8 for appointment as the neutral member of the Court Advisory  
9 Panel. Joint recommendations will be given great weight.

10  
11           39.    Within forty-five days from the date of this  
12 decree, the Court will select the neutral member of the Court  
13 Advisory Panel.

14  
15           40.    The Court Advisory Panel will meet sixty days  
16 from the date of this decree at a place and time set by the  
17 chairman. The Panel shall meet at least monthly thereafter.

18  
19           41.    On March 1, 1974 each Treaty Tribe shall inform  
20 the State of its treaty tribal need as to each anadromous fish  
21 run which it expects will be available where it plans to conduct  
22 off-reservation fishing in the coming season. In the following  
23 years this information shall be furnished to the State at least  
24 six months before the appearance of the run involved. This  
25 information shall be accompanied by a statement specifying,  
26 as to each run involved, (a) the place of tribal fishing,  
27 (b) the gear to be used, (c) the periods of fishing and the  
28 season, (d) pertinent tribal regulations, (e) the number of  
29 tribal fishermen, (f) a reasonable method for identifying tribal  
30 fishermen and their gear, and (g) planned on-reservation harvest.

1033

1           42.    Within thirty days following receipt of the  
2 information specified in paragraph 41 above, the State shall  
3 advise each Treaty Tribe whether it proposes alterations in the  
4 time, place, manner or volume of the tribal off-reservation  
5 harvest.

6           a.    If no such alteration proposals are made,  
7 the Treaty Tribe's stated off-reservation tribal need shall be  
8 its off-reservation tribal share, and the State shall regulate  
9 all non-Indian fishing so as reasonably to assure that the  
10 Tribe's fishermen will be able to take the off-reservation  
11 tribal share.

12           b.    If any alteration is proposed, and if the  
13 Treaty Tribe agrees to accept the proposal, the Tribe's time,  
14 place, manner and off-reservation tribal share shall be altered  
15 accordingly, and the State shall regulate all non-Indian fishing  
16 so as reasonably to assure that the Tribe's fishermen will be  
17 able to take the resulting off-reservation tribal share.

18           c.    If any alteration is proposed, and if the  
19 Treaty Tribe determines not to accept the proposal, the rules  
20 set forth in paragraph 43 below shall apply.

21  
22           43a.   The Treaty Tribe shall inform the chairman of  
23 the Court Advisory Panel of the nature of the dispute. The  
24 chairman shall then give at least two weeks notice to all  
25 Panel representatives and shall set a meeting to discuss the  
26 dispute within thirty days. A more expeditious schedule may  
27 be established upon agreement of all tribal and State  
28 representatives.

1           b.    The Treaty Tribe and the State shall furnish all  
2 Panel representatives with a statement of position and a copy or  
3 citation to supporting facts and data, at least one week in  
4 advance of the scheduled meeting.  A more expeditious schedule  
5 may be established upon agreement of all tribal and State  
6 representatives.

7  
8           c.    The Panel will meet in an effort to resolve the  
9 dispute in good faith upon all pertinent facts and data.

10  
11           d.    The Treaty Tribe will be entitled to insist that  
12 the State so regulate non-Indian activity as reasonably to  
13 assure that its members will take the planned on-reservation  
14 harvest and the Tribe's minimum tribal share of the run involved.

15  
16           e.    The State may not require the Treaty Tribe to  
17 alter in any manner the harvest by its members on reservation;  
18 the State may insist that facts and data concerning prior  
19 on-reservation take be furnished by the Tribe.

20  
21           f.    The dispute will be resolved when an off-  
22 reservation tribal share is agreed upon and when the State's  
23 proposed regulations are shown to control non-Indian activity  
24 so as reasonably to assure with highest possible probability  
25 that the Tribe's fishermen will be able to take the planned on-  
26 reservation harvest and the Tribe's off-reservation tribal share.

27  
28           g.    No agreement reached between a Treaty Tribe and  
29 the State shall operate in any manner to modify or to qualify  
30 the Treaty Tribe's right to fish or to regulate the exercise of

1 that right or the State's duty or authority to regulate  
2 appropriately. The purpose of any such agreement shall be to  
3 accommodate the problems, policies and convenience of the Treaty  
4 Tribe and the State, as such may exist in any particular season.  
5

6 h. A dispute will be considered appropriate for  
7 report to the Court if, after ten days from the meeting, it  
8 remains unresolved.  
9

10 i. Each tribal and State representative and the  
11 neutral member shall have one vote. A majority vote of those  
12 present and voting will rule. An abstention counts as no vote.  
13 The neutral member shall not cast a vote, except in case of a tie.  
14

15 44. If the Court Advisory Panel reports an unresolved  
16 dispute to the Court, the Court will determine whether to hear  
17 the matter immediately or to refer it to the neutral member as  
18 a Master under Rule 53 of the Federal Rules of Civil Procedure.  
19 If the matter is referred to the neutral member, the order of  
20 reference to him shall include the following responsibilities:

21 a. To collect and to take custody of all  
22 pertinent materials;

23 b. To take relevant testimony under oath;

24 c. To admit relevant exhibits as evidence;

25 d. To recommend Findings of Fact, Conclusions  
26 of Law and appropriate relief; and

27 e. To make a full and prompt report to the  
28 Court, which shall include his rulings, his recommended findings,  
29 conclusions and relief, and the record.  
30  
31



1 The order of reference shall limit the scope of the Master's  
2 duties to the interpretation and implementation of the terms  
3 of this decree. All proceedings shall be in conformity with  
4 Rule 53 of the Federal Rules of Civil Procedure.

5  
6 45. The State or a Treaty Tribe may seek the  
7 Court's review of any action of the Court Advisory Panel. In  
8 order to obtain such review, the moving party shall first file a  
9 petition for leave of Court to move for review. The petition  
10 shall be supported by competent factual material. Other  
11 interested parties will then be given opportunity to respond to  
12 the petition. The Court will then determine whether immediately  
13 to review the described action or to refer the matter to the  
14 appropriate neutral member as provided in paragraph 44 above.

15  
16 46. No division of State fisheries management jurisdic-  
17 tion or responsibility may alter the Treaty Tribe's rights,  
18 the State's power, or the obligations of the parties under this  
19 decree.

20  
21 47. If more than one Treaty Tribe proposes to harvest  
22 from the same run off-reservation, the off-reservation tribal  
23 share of all such Tribes shall be limited by the off-reservation  
24 harvestable stock of the entire run and by the off-reservation  
25 stock in each of the run's freshwater production areas.

26  
27 48. Nothing in this decree shall be construed to  
28 prevent a Treaty Tribe from taking, upon agreement with the  
29 State, an off-reservation tribal share greater than its minimum  
30 tribal share.

1           49.    The State's determination of the optimum  
2 production escapement shall be accepted as accurate by all  
3 parties unless shown to the satisfaction of the neutral member  
4 or the Court by facts and data to be otherwise.

5           a.    When in any season a off-reservation Tribe's  
6 treaty tribal share of any run has been determined, the State  
7 and all of its agents shall utilize all available techniques,  
8 resources and manpower in managing the resource and the non-  
9 Indian harvest therefrom so as to raise the highest possible  
10 probability that the Tribe, fishing as agreed, will have an  
11 opportunity to take at least the planned on-reservation and the  
12 off-reservation tribal share. Proper adoption and fair enforce-  
13 ment of State regulations which are reasonably designed to  
14 accomplish this end and which conform to the specific requirements  
15 of this injunction shall be deemed an appropriate exercise of  
16 State police power.

17           b.    When in any season a person claiming to be  
18 exercising the off-reservation fishing rights of a Treaty Tribe  
19 is acting contrary to the time, place, manner or volume of  
20 fishing which has been established for harvesting the off-  
21 reservation tribal share, and if after a reasonable time the  
22 Tribe has been unable to cause the discontinuance of such action,  
23 the State may then by appropriate measures prohibit that person  
24 from continuing such action.

25  
26           50.    If after any season the members of any Treaty Tribe  
27 have been unable to take the off-reservation tribal share of  
28 the Tribe by reason of either the low size of the run at their  
29  
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1 place of fishing or substantially inaccurate predictions by  
2 the State, the Tribe's minimum tribal share in the next succeeding  
3 year shall be increased by the difference between the actual  
4 catch and the Tribe's off-reservation tribal share in the  
5 under-harvested season.

6  
7 51. If in any season there are usual and accustomed  
8 places off-reservation which all Treaty Tribes have determined  
9 not to use in the interest of preserving and maintaining the  
10 resource, the State shall control the conduct of non-Indians  
11 so as to prevent them from interfering with treaty tribal fishermen  
12 who fish as and where the Tribes have determined according  
13 to this decree that they will fish.

14  
15 52a. Within 30 days from the date of this decree,  
16 each person who claims to be suffering from a State seizure of  
17 fishing gear taken while he was exercising the rights declared  
18 in Part I above shall so notify the Governor of the State.  
19 Such notification shall state:

20 (i) The identity and address of the claimant;

21 (ii) An accurate description of each item of  
22 gear seized;

23 (iii) The best description of the date and place  
24 of seizure;

25 (iv) An accurate estimate of the fair market  
26 value of each item of gear as of immediately  
27 prior to seizure;

1 (v) The identity of the seizing agents, if  
2 known; and

3 (vi) The Treaty Tribe whose rights were being  
4 exercised.

5 Each such notification shall be counter-signed by a representative  
6 of the respective Treaty Tribe as proof that the Tribe agrees  
7 that the claimant was exercising its rights. Such notification  
8 shall not be used against any defendant in any criminal  
9 proceeding based on events preceding the date of this decree.

10  
11 b. Within sixty days from the date of this decree,  
12 the State shall respond to each notification submitted under  
13 paragraph (a) above. Such response shall include:

14 (i) A statement that the described gear has  
15 been, or has not been, seized by State agents;

16 (ii) If the gear has been seized, a statement  
17 whether the State will retain the gear or  
18 will return the gear or its fair market value;

19 (iii) If the gear has been seized and if it or its  
20 value will be returned, a statement of a  
21 reasonable time, place and manner when the  
22 return will be made; and

23 (iv) A copy of the claimant's submission.

24 The State may retain a seized item of gear and its fair market  
25 value only if such gear is necessary to its proof in a court  
26 case and only if such case is not based upon a prosecution for  
27 violation of State laws or regulations against a person who was  
28 exercising the declared rights of a Treaty Tribe within usual  
29 and accustomed fishing places. The State may elect to return  
30

1 the fair market value of any seized item of gear (determined as  
2 of immediately prior to seizure). The State must return the  
3 fair market value of a seized item of gear (determined as of  
4 immediately prior to seizure) if it no longer holds the item  
5 or if the usefulness of the gear has been materially decreased  
6 during or since seizure. The State's response to each claimant's  
7 submission shall be sent to the claimant, the respective Treaty  
8 Tribe, all plaintiffs' counsel and the Court.

9  
10 III.

11 CONTINUING JURISDICTION

12  
13 53. The Court retains jurisdiction of this case for  
14 the life of this decree to take evidence, to make rulings and  
15 to issue such orders as may be just and proper upon the facts  
16 and law and in implementation of this decree.

17  
18 54. All parties who seek the protections provided by  
19 the injunction in this decree are expected in good faith to  
20 participate in those procedures and activities which are made  
21 available to them in the injunction. In assessing the equities  
22 in any subsequent proceeding which involves such a party and the  
23 subject matter of this case, the Court will consider, together  
24 with all other pertinent circumstances, whether such good faith  
25 efforts have been made by that party.

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IV.

AMENDMENT AND DISSOLUTION

55. Upon making and succeeding upon an appropriate motion for leave of Court, any party may move at any time to amend the provisions of this decree. Copies of all pleadings shall be served on all parties.

56. After five years from the date of this decree, any defendant may move to dissolve the injunctive portions of this decree which bind him. Such motion will be granted if, after a hearing, there appears a satisfactory showing that the moving party has fully and fairly performed his obligations and fulfilled his duties hereunder. A determination on such a motion shall be a final appealable order pursuant to Title 28, United States Code, Section 1292(b).

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1974.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE