

11-5-1973

Docket Entry 384 - Lodged Yakima Nation's Proposed Findings of fact

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LOGGED
FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NOV 5 1973

EDGAR SCOFIELD, CLERK

By EW Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 UNITED STATES OF AMERICA,)

11 Plaintiff,)

12 QUINULT TRIBE OF INDIANS on its own)
13 behalf and on behalf of the QUEETS BAND)
14 OF INDIANS; MAKAH INDIAN TRIBE; LUMMI)
15 INDIAN TRIBE; HOH TRIBE OF INDIANS;)
16 MUCKLESHOOT INDIAN TRIBE; SQUAXIN)
17 ISLAND TRIBE OF INDIANS; SAUK-SULATTLE)
18 INDIAN TRIBE; SKOKOMISH INDIAN TRIBE;)
19 CONFEDERATED TRIBES AND BANDS OF THE)
20 YAKIMA INDIAN NATION; UPPER SKAGIT RIVER)
21 TRIBE; STILLAGUAMISH TRIBE OF INDIANS;)
22 and QUILEUTE INDIAN TRIBE;)

23 Intervenor-Plaintiffs,)

24 v.)

25 STATE OF WASHINGTON,)

26 Defendant,)

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

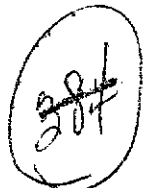
Intervenor-Defendants.)

CIVIL NO. 9213

YAKIMA NATION'S PROPOSED
FINDINGS OF FACT

27 The attached proposed Findings of Fact are submitted pursuant to the
28 Court's direction of September 18, 1973, as modified by the Court's memorandum
29 of October 12, 1973. The proposed Findings of Fact are alternative Findings
30 to those Findings concerning the Yakima Indian Nation that are included in the
31

32 TRANSMITTAL OF
YAKIMA PROPOSED FINDINGS - Page 1

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Findings of Fact being separately submitted on behalf of all Plaintiffs.

Dated this 31st day of October, 1973.

On behalf of JAMES B. HOVIS,
Counsel for the Yakima Nation

By *George D. Dysart*
George D. Dysart
Assistant Regional Solicitor
Of Counsel for the United States

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1 YAKIMA INDIAN NATION

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

12 "Articles of agreement and convention made and
13 concluded at the treaty ground, Camp Stevens,
14 Walla Walla Valley, this ninth day of June, in the
15 year one thousand eight hundred and fifty five, by
16 and between Isaac T. Stevens, governor and superintendent
17 of Indian Affairs for the Territory of Washington,
18 on the part of the United States, and the undersigned
19 head chief, chiefs, headmen and delegates of the
20 Yakama, Palouse, Piquouse, Wenatshapam, Klikatat,
21 Klinquit, Kow-Was-say-ee, Li-ay-was, Skin-pah, Wishham,
22 Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat,
23 confederated tribes and bands of Indians, occupying
24 lands hereinafter bounded and described and lying
25 in Washington Territory, who for the purposes of this
26 treaty are to be considered as one nation, under
27 the name of 'Yakama', with Kamiakun as its head
28 chief, on behalf of and acting for said tribes and
29 bands, and being duly authorized thereto by them. "

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

1. The Salish speaking tribes:

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

FINDINGS OF FACT

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1 quite fine and packing the resultant mass in containers lined
2 with fish skin. In this process oil was used where available and
3 the oil from male steelhead was used for this purpose. Because of
4 the monotony of this fish diet, variety in the kind of salmon
5 and other fish caught was a desired goal. [FPTO S3-102, page 53]

6
7 3. With the exception of the spear, gaff and like gear
8 which to a great extent depended on the skill and dexterity of the
9 individual operator, methods used by these Yakima Indians to land
10 salmon and steelhead were very efficient. These Yakima Indians
11 used traps, weirs, net gillnets, baskets, seines to land salmon
12 and steelhead. They were proficient in the manufacture of strong
13 twine from native materials. [FPTO S3-103, pg. 54]

14
15 4. 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
18 the tribes on Puget Sound by the use of the Snoqualmie, Naches and
19 Stevens Passes as weather permitted. This continual
20 communication created bilingualism, custom interchange, inter-
21 marriage, and utilization of the natural resources in the Puget
22 Sound area. In the main this communication and intermarriage
23 was with the tribes now considered Nisqually, Puyallup, Muckleshoot
24 and Snoqualmie. [FPTO S3-104, pg. 54]

25 5. The Yakimas in the Puget Sound area were intermarried as
26 far North as the Skokomish and controlled them to a certain extent.
27 Gibbs in his treaty time census placed approximately 400 Yakimas
28 located in this area. [Ex.Y-15a and 15b, Tr. 2133, l. 1-10]

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1 6. These Indians of the Yakima Nation used fisheries located
2 in the Puget Sound area for the purpose of obtaining salmon and
3 steelhead for their use. They took these fish there by the consent
4 of the tribes in that region. Since there was more intermarriage
5 and communication with those Indians now called Nisqually, Puyallup,
6 Muckleshoot, and Snoqualmie, fisheries in their area of residence
7 were more commonly used by members of the Yakima Indian Nation.
8 These fisheries in the area of this case's inquiry included the
9 waters of the Snoqualmie, Snohomish, Green, Puyallup, Nisqually,
10 Stuck, Duwamish, White, Carbon, and Black Rivers and their
11 tributaries. [FPTO S3-105, pg. 55] That at treaty times Indians
12 in the case area were making approximately 95% of the landings
13 of salmon and steelhead.
14 The portion of these fish landed by Yakima Indians were consumed by
15 them or traded to others. (Ex. Y-13, pg. 9)
16

17 7. Isaac I. Stevens was appointed governor, and ex-officio
18 Superintendent of Indian Affairs of the territory of Washington
19 shortly after it was organized by the Act of March 2, 1853
20 (10 Stat. 172). He had been in charge of the federal surveys for
21 a railroad to the Pacific on the Northern route. Stevens had
22 selected Captain George B. McClellan as commander of the Western
23 Division of the Northern Pacific Railroad exploration party. George
24 Gibbs, as secretary for this party, recorded information about
25 the Indian tribes in this area in preparation for the execution of
26 treaties with the Indians in the area of the tribes which later
27 formed the Yakima Nation under the Yakima Treaty. This report,
28 which is dated March 4, 1854, clearly indicated that the tribes of
29 the Yakima Treaty ceded area were friendly to the Indians of the
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1 Puget Sound, bilingual, and intermarried with one another, and
2 communicated regularly to this Puget Sound area. [FPTO S3-106,
3 Ex. P1-9, pg. 55]
4

5 8. Thereafter on August 30, 1854, the Acting Commissioner
6 of Indian Affairs gave written instructions to Governor Isaac I.
7 Stevens directing him to negotiate treaties with the Indian
8 tribes, bands, and groups of Washington Territory for the extinguish-
9 ment of thier title to land in their territory and conveying his
10 principal concern that this be done as rapidly and economically
11 as possible. [FPTO S3-107, Ex. P1-1, pg. 56]
12

13 9. Agents of Governor Stevens made preliminary contact with
14 the Indians that comprised the Yakima Indian Nation on May 29, 1855.
15 The Yakima Chiefs attended at council and listened to an explanation
16 of the treaty terms. This discussion continued from day to day
17 until June 9, 1855 while Governor Stevens explained to the tribes
18 that the Indians were to cede their vast land holdings and move to
19 a reservation. Provisions for this off-reservation treaty
20 food gathering and grazing were written into the Yakima Treaty in
21 Article III thereof.
22

23 Treaty with the Yakimas (Article 3)

24 "The exclusive right of taking fish in all the streams,
25 where running through or bordering said reservation,
26 is further secured to said confederated tribes and
27 bands of Indians, as also the right of taking fish at
28 all usual and accustomed places, in common with the
29 citizens of the Territory, and of erecting temporary
30 buildings for curing them; together with the privilege
31 of hunting, gathering roots and berries, and pasturing
32 their horses and cattle upon open and unclaimed land."
[FPTO S3-108, Ex. Y-1, Y-2, Y-3, Y-4, Y-5, Y-6, pg.
56]

FINDINGS OF FACT

10. There had been little non Indian contact with the Yakimas prior to the treaty negotiations. [Ex. Y-26, pg. 7-8, Tr. 2496] These Yakimas spoke three different languages Sahaptin, Salish and Ch nookan. [Ex. Y-26, p. 7] In addition to the three language groups among the Yakimas they had many dialects in the two principal language groups. [Ex. Y-26, pg. 7, Tr. 3383] All three language groups were difficult but Chinookan was the most difficult. [Tr. 3388-91, Tr. 2459] The treaty negotiations were translated from English or one of these three groups or numerous dialects into Chinook jargon [Ex. Y-26, pg. 9, Ex. D-1, pg. 24] which has a limited vocabulary and contained none of the words "citizens", "territory", "state", "regulations", "commercial", and "usual and accustomed". (Ex. Y-21, Tr. 3393) This jargon was used principally for trade purposes and was inadequate to convey the legal concepts involved. [Tr. 2460, Tr. 3392-3396, Ex. D-1, pg. 27]

11. The Yakima Indians at the Walla Walla Council grounds where the Yakima Treaty was negotiated in 1855, were promised by the United States treaty commissioners that the non Indians would never dominate or monopolize the fisheries [Tr. 3371] and United States negotiators did promise and the Indians did understand that the Yakimas would forever be able to continue the same off reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising [Ex. Y-13, pg. 8, Ex. Y-26, pg. 8-9, Tr. 3371, Tr. 3295-97] The Yakima Indians relied on these promises and they formed a material and basic part of the Yakima Treaty and the Indians understanding of the meaning of the Treaty. [Ex. Y-13, pg. 8, Ex. Y-26, pg. 8, Tr. 3295-97]

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1 12. That after the execution and ratification of the Yakima
2 Treaty the Yakima Indians continued to fish as they had. During
3 territorial times officials of the United States and Washington
4 Territory took the position that the off reservation fisheries
5 were those the Yakima Indians had exercised at treaty or
6 pre treaty times. These officials took the position that the words
7 of the Yakima Treaty reserved to the Yakima Indians "the right to
8 enjoy all of these fisheries as they had heretofore". [Ex. Y-23,
9 pg. 10] The Supreme Court of Washington Territory not only
10 sustained this interpretation of the treaty but took notice as a
11 matter of common knowledge that the Yakima Indians were "tenacious"
12 in adhering to these past customs and traditions. [Ex. Y-23,
13 pg. 10]

14
15 13. The Yakima Indians have continued to assert their
16 off reservation fishing rights [Tr. 610-615] including fisheries
17 in the case area. [Tr. 3321] The salmon and steelhead landed
18 were consumed or sold commercially. [Ex. Y-13, pg. 9, Tr. 3321]
19 While there was no statewide enforcement of state regulations
20 against Yakima Indians fishing in conformity with tribal regulations
21 until 1966, after that time arrests of Yakima Indians in the
22 case area caused Yakima fishermen to decrease their fishing
23 effort in the case area. [Ex. Y-13, pg. 9] The Yakima Nation
24 has not encouraged its fishermen to fish in the case area as time
25 and money limitations would not allow the tribe to protect its
26 fishermen from conviction though the tribe's efforts had been
27 successful as regarded other state arrests. [Ex. Y-13, pg. 9-10]

28
29 14. The Yakima off reservation fisheries are regulated. Prior
30 to 1953, and thereafter in areas where the fishing was not
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1 intensive, by regulation by Indian leaders at the site. [Ex. Y-13,
2 pg. 10, Tr. 3307-08] Since 1953 the Yakima Nation has regulated
3 by written regulations. [Ex. Y-13, pg. 11] These regulations
4 provide for annual review [Tr. 3291], emergency closures, off
5 reservation enforcement and identification cards. [Tr. 3292,
6 3335] Where untended gear is used this is likewise identified by
7 tags issued by the Yakima Nation. [Ex. Jx2bp, Tr. 3328-3329] The
8 Yakima Nation through its Tribal Council and its Fish, Wildlife,
9 Law and Order Committee gathers biological and other information and
10 holds meetings with its fishermen and others interested before
11 setting seasons or passing other conservation regulations. [Ex. Y-13,
12 pg. 2, pg. 11, Tr. 1618-19] This tribal regulation is enforced
13 by a large law and order department and the annual budget in this
14 area exceeds \$400,000.00. [Ex. Y-26, pg. 1, Tr. 3300] Fishermen
15 are expected to respect the regulations of the tribes in the
16 area [Ex. Y-13, pg. 11] Should further regulation be necessary it
17 is the intent of the Yakima Nation to confer with other tribes
18 in the area for the purpose of joint regulation but if they did not
19 protect the fishery then the Yakima Nation's expressed intention
20 is to pass conservation regulations of its own covering the
21 case area. [Tr. 3303-3305] It is likewise the expressed policy of
22 the Yakima Nation in its scheme of regulation to provide for
23 commercial, subsistence and ceremonial landings of salmon and steel-
24 head by net where the fishery will sustain the pressure. Where
25 in its opinion the fishery will not sustain the pressure, it is
26 its announced policy to provide for the following priorities:
27 (1) ceremonial landings; (2) subsistence landings and (3)
28 commercial landings. [Tr. 946-7] The Yakima Nation has had
29 successful experiences in joint tribal regulation on the Columbia
30 River [Tr. 3329] and joint regulation with the state and federal
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1 government on the Klickitat River. [Ex. Y-13, pg. 11-12] That
2 under Yakima Tribal regulation, by custom or written law, the
3 exercise of this tribal off reservation right by Yakima Indians in
4 the case area has not and does not exceed the extent either in
5 species, amount, time, method and use as was exercised by Yakimas
6 at treaty or pre treaty times or in the immediate past. [FPTO S3-101
7 3-102, pg. 53, Ex. Y-13, pg. 14] That these Yakima landings in the
8 case area have not jeopardized the continued existence of the
9 fish resource or jeopardized "conservation" no matter how it is
10 defined and there is no need to regulate Yakima fishermen by other
11 than tribal regulation. [Tr. 3340-3341, Tr. 1504, Tr. 958-60] That
12 Yakima tribal regulation of Yakima fishermen at usual and
13 accustomed places in the case area is an internal tribal matter
14 and desirable. [Tr. 291, 292, 293, 295, 960]

15
16 15. The Yakimas continue as a religious rite not only the
17 first salmon ceremony but the basic undying salmon culture herein,
18 described as existing in this northwest area and this religious
19 concept of the interdependence and relatedness of all living
20 things is a dominant feature of their conservation program.
21 [Ex. Y-13, pg. 7, Tr. 3297, 3343, 3348-3370, 3402, Tr. 2467-8]

22
23 16. These Yakima Indians have been and continue to be very
24 dependent on anadromous fish to sustain their way of life.
25 [Ex. Y-13, pg. 13-14, Y-10, pg. 28-34, Y-12, pg. 7] These Yakima
26 Indians live close to the poverty level and have not reached
27 economic or social parity with other citizens of the State of
28 Washington. [Ex. Y-13, pg. 4, Y-10, pg. 16-28, Y-9, pg. 2-8,
29 Y-8, pg. 1-4] Anadromous fish are vital to the Indians diet with
30 approximately 2,000 of the enrolled members fishing for that

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purpose. Approximately four hundred fish for a livelihood and the important role that anadromous fish play in the religious life of the Yakimas is practically universal. [Y-13, pg. 13-14, 4, Tr. 3322-3326]

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