

11-9-1973

**Docket Entry 392 - Lodged proposed conclusion of law of  
Muckleshoot Indian Tribe, Squaxin Island Tribe, Sauk-Suiattle  
Indian Tribe, Skokomish Indian Tribe and Stillaguamish Tribe**

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

NOV 9 1973

**EDGAR SCOFIELD, CLERK**

By ls Deputy

8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 UNITED STATES OF AMERICA; MUCKLESHOOT )  
INDIAN TRIBE; SQUAXIN ISLAND TRIBE OF )  
11 INDIANS; SAUK-SUIATTLE INDIAN TRIBE; )  
SKOKOMISH INDIAN TRIBE; STILLAGUAMISH )  
12 TRIBE OF INDIANS; QUINAULT TRIBE OF )  
INDIANS on its own behalf and on behalf )  
13 of the QUEETS BAND OF INDIANS; MAKAH )  
INDIAN TRIBE; LUMMI INDIAN TRIBE; HOH )  
14 TRIBE OF INDIANS; CONFEDERATED TRIBES )  
AND BANDS OF THE YAKIMA INDIAN NATION )  
15 and UPPER SKAGIT RIVER TRIBE, )

16 Plaintiffs, )

17 vs. )

18 STATE OF WASHINGTON; THOR C. TOLLEFSON, )  
Director, Washington State Department )  
19 of Fisheries; CARL CROUSE, Director )  
Washington State Department of Game; )  
20 WASHINGTON STATE GAME COMMISSION and )  
WASHINGTON REEF NET OWNERS ASSOCIATION, )

21 Defendants. )  
22

CIVIL NO. 9213

23 PROPOSED CONCLUSIONS OF LAW OF MUCKLESHOOT INDIAN TRIBE,  
24 SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN  
25 TRIBE; SKOKOMISH INDIAN TRIBE AND STILLAGUAMISH TRIBE OF  
INDIANS

26 The plaintiffs, Muckleshoot Indian Tribe, Squaxin Island  
27 Tribe of Indians, Sauk-Suiattle Indian Tribe, Skokomish Indian  
28 Tribe and Stillaguamish Tribe of Indians join in the conclusions  
29 of law proposed by the plaintiff United States in this case, ex-  
30 cept with respect to paragraphs 20, 21, 22, 23, 24, 25, 28, 29,  
31 31, 32, 33, and 34. In place of such paragraphs, the following  
32 paragraphs should be substituted.

1.

1272-392

1 "20. The rights secured by the treaties to the plaintiff  
2 tribes is a reserved right, which is linked to the marine and  
3 fresh water areas where the Indians fished during treaty times,  
4 and which exist to provide a volume of fish which is sufficient  
5 to meet the present and future needs of the tribes. The right is  
6 to be exercised in common with non-Indians, who may have access to  
7 the fishing places which were utilized by the Indians prior to the  
8 treaties and who may take fish which are not needed for harvest by  
9 the tribes. Neither the Indians nor the non-Indians may fish in a  
10 manner so as to destroy the resource.

11 "21. The rights secured by the treaties to the plaintiff  
12 tribes is not limited as to species of fish, the origin of fish,  
13 the purpose or use, or the time or the manner of taking, except  
14 that the right does not extend so far as to permit destruction of  
15 the resource.

16 "22. The passage of time and changed conditions affect-  
17 ing the water courses, the fishery resources, the economy, and  
18 social structure in the case area have not eroded and cannot erode  
19 the rights secured by the treaties, but have made necessary plac-  
20 ing restraints upon the State of Washington and non-Indian fisher-  
21 men in order to permit the fulfillment of the treaty terms and  
22 purpose.

23 "23. The State of Washington has no police power to  
24 regulate the off-reservation treaty fishing activities of members  
25 of the treaty tribes except when it has shown that the exercise of  
26 its police power is necessary to prevent the imminent destruction  
27 of the resource which cannot and will not be prevented by tribal  
28 or federal regulation. Such power as the state has, does not in-  
29 clude the authority to impair or qualify the treaty right by limit-  
30 ing its exercise to state preferred times, manners or purposes,  
31 nor does it include the power to determine for the Indian tribes  
32 what is the wisest and best use of the resource to which the tribes

1 are entitled.

2 "24. The Stevens treaties do not prohibit or limit any  
3 specific manner, method or purpose of taking fish. The treaty  
4 tribes may utilize improvements in traditional fishing techniques,  
5 methods, and gear.

6 "25. The exercise of a treaty tribe's right to take ana-  
7 dromous fish is limited only by the geographical extent of the  
8 usual and accustomed fishing places, the limits of the harvestable  
9 stock, and the tribe's capacity to take fish needed by it.

10 "28. The phrase "in common with" operates only to limit  
11 the exercise of the tribe's right to harvest a portion of the re-  
12 source which fills its needs to the extent that such harvesting  
13 will not destroy the resource and to permit the harvest by non-  
14 treaty fishermen of such fish as are not needed and will not be  
15 harvested by the tribes.

16 "29. The right of the treaty tribe to take anadromous  
17 fish may not be regulated by an exercise of state police power ex-  
18 cept for the extraordinary circumstances described in paragraph  
19 23. Before such regulation may be applied to any member of the  
20 treaty tribes, however, it must be shown to be an appropriate ex-  
21 ercise of state police power. To be appropriate, such regulation  
22 must: (a) not discriminate against the treaty tribe's reserved  
23 right to fish; (b) meet appropriate standards of substantive and  
24 procedural due process; and (c) be shown by the state to be nec-  
25 essary to prevent destruction of the resource. Whenever state laws  
26 or regulations so applied affect the volume of anadromous fish  
27 available for harvest by a treaty tribe at usual and accustomed  
28 places, they must be designed so as to carry out the purposes of  
29 the treaty provision securing for the tribe the right to take fish.

30 "31. The protection of the treaty rights of the plain-  
31 tiff tribes to take fish at their usual and accustomed places must  
32 be an objective of the state's regulatory policy and may not be

1 subordinated to other objectives and goals such as the preservation  
2 and propagation of fish runs for other users.

3 "32. In order to accord the treaty rights of the plain-  
4 tiff tribes the appropriate protection required by paragraph  
5 31, the state and its regulatory agencies may not restrain the ex-  
6 ercise of such rights by: (a) use of a statute or regulation of  
7 broad applicability instead of one specific as to time, place,  
8 species and gear; or (b) prohibition of harvest by the tribes on  
9 future runs prior to a full, fair and public consideration and  
10 determination of the specific necessity for the regulation con-  
11 ducted in accordance with the requirements of the Washington Admin-  
12 istrative Procedure Act and regulations adopted under it.

13 "33. The plaintiff tribes have jurisdiction to enact and  
14 enforce regulations in conformity with their tribal constitutions  
15 or other applicable tribal ordinances, enactments, or customs or  
16 federal statutes, relating to the exercise outside their reservation  
17 boundaries of fishing rights secured to such tribes by treaty.

18 "34. Although the federal government has not pre-empted  
19 regulation of treaty fishing rights, any applicable federal or  
20 tribal regulatory control over fishing pursuant to rights held by  
21 the plaintiff tribes, is an essential consideration in determining  
22 the necessity which is required for the validity of any state ex-  
23 ercise of police power in order to protect the fishery resource  
24 from destruction."

25 Dated: November 5,  
26 1973

Respectfully submitted,

Douglas R. Nash  
David H. Getches  
Native American Rights Fund

28 By David H. Getches  
29 David H. Getches

30 John Sennhauser  
31 Legal Services Center.

32 By John Sennhauser  
John Sennhauser

Attorneys for Plaintiffs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF COLORADO )  
                              ) ss.  
COUNTY OF BOULDER )

Carol J. Kerlinger, being first duly sworn says:

I am a citizen of the United States, I am more than  
eighteen years of age, and I am not a party to this action.  
My business address is 1506 Broadway, Boulder, Colorado 80302.

I served upon each of the following named persons one  
copy of the attached PROPOSED CONCLUSIONS OF LAW OF MUCKLESHOOT  
INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE  
INDIAN TRIBE, SKOKOMISH INDIAN TRIBE AND STILLAGUAMISH TRIBE  
OF INDIANS by placing them in envelopes addressed as follows:

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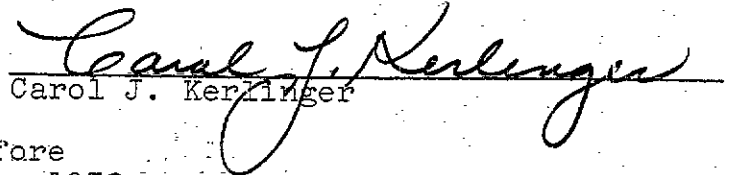
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Each envelope was then, on November 7, 1973, sealed and  
deposited in the United States mail at Boulder, Colorado, in the

1 county in which I am employed with air mail postage fully prepaid.  
2 Executed at Boulder, Colorado on November 7, 1973.

3  
4  
5 DATED: November 7, 1973

6  
7   
8 Carol J. Kerlinger

9 Subscribed and sworn to before  
me this 7th day of November, 1973.

10  
11   
12 NOTARY PUBLIC  
My Commission Expires November 4, 1975