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Docket Entry 396 - Filed Post-Trial Memorandum of Intervenor-Defendant Washington Reef Net Owners Association

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al,)
Plaintiffs,)
vs.)
STATE OF WASHINGTON, et al.,)
Defendants.)

CIVIL NO. 9213

POST-TRIAL MEMORANDUM OF INTERVENOR-DEFENDANT WASHINGTON REEF NET OWNERS ASSOCIATION

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ADDITIONAL ERRATA TO TRANSCRIPT

We concur in the thought expressed by Mr. Dysart in his letter of November 16, 1973, that in order to insure as accurate a transcript as possible, corrections of additional errata should be made as discovered. In that spirit, it is suggested:

"Stewart Island" Tr. p. 3707, l. 18, should be changed to "Stuart Island".

"years" Tr. p. 3711, l. 19, should be changed to "gears".

"the" Tr. p. 3747, l. 19, should be changed to "these".

"own ship" Tr. p. 3763, l. 10, should be changed to "ownership".

OBJECTIONS TO PLAINTIFFS' PROPOSED DECREE

No attempt will be made to set forth objections item by item, or even page by page, to plaintiffs' proposed decree. Rather, the entire approach set forth in it is objected to most vigorously on the ground that it is an unwarranted attempt to preempt state jurisdiction over the management of the fisheries resources of the state contrary to the unbroken line of legal decisions holding that such jurisdiction should remain in the state to be managed, in a non-discriminatory fashion, under its Police Power.

In Puyallup Tribe vs. Dept. of Game, 391 U.S. 392, Justice Douglas, at page 399, quotes from the previous case of Tulee vs. Washington, 315 U.S. 681, that a treaty, such as the one of Point Elliott involved in the issues at hand between the Lummi Tribe and the Reef Net Owners Association in this case, leave the state,

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

Later, on the same page, he states,

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

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Later, on pp. 399 and 400, he quotes from Kennedy v. Becker, 241 U.S. 566, as follows,

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

The Supreme Court of the State of Washington in State vs. Towessnute, 89 Wash. 478, and State vs. Alexis, 89 Wash. 492, hold, as stated in the latter case,

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

Many other federal cases at both circuit court and supreme court level, cited in various briefs previously submitted to this Court, in dealing with fish or game hold to the same effect. This Court should not be swayed, therefore, into changing such a long standing rule.

An appropriate decree, defining the rights of the various parties as the Court may find them, can be entered herein and thereafter proper steps for its enforcement be taken by means which are not at all unusual or uncommon for a review, by this Court, either by a judge or by a referee or master then to be appointed, whenever a subsequent violation is charged.

HAS THERE BEEN DISCRIMINATION AGAINST, OR EXCLUSION OF, LUMMIS FROM REEFNETTING?

The record is abundantly clear, both in the transcript and

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exhibits, that no member of the Lummi Tribe has been calculatingly, intentionally or by common design excluded from obtaining reef net gear, moving it to an available location and thereafter fishing in precisely the same manner as and "in common with" non-Lummis who may be fishing in appropriate areas.

The Lummis' witness, Herman Olsen, conceded, Tr. p. 2939, there were positions open for reefnetting in the Village Point and Legoe Bay areas to which Indians could go and "make a living". The same witness also states, Tr. p. 2940, that no one "blackballed" his fish. Further, at Tr. p. 2972, he conceded that if he got two reef net boats he could go back and resume reef net fishing.

The Lummi witness, John B. Finkbonner, acknowledged, Tr. p. 2980, ls. 7-10, that he had not talked to anyone who had expressed a desire to get into the reef net industry.

Reef Net Association member, Jerry Anderson, pointed out, Tr. p. 3683, that locations are still available and there had been no barring of Lummis, Tr. pp. 3684-5. Lummi witness, Forrest L. Kinley, in his pretrial deposition, Exhibit RN-4, p. 24, ls. 14-16, said that he knew of no Lummis who had attempted to get a license to reefnet and had been denied one.

Reef Net Association witnesses, John R. Brown, Glenn H. Schuler and Jerry M. Anderson, in their pretrial depositions, Exhibits RN-1, RN-2 and RN-3, also state unequivocally there had been no exclusion of or discrimination against Lummis seeking to reefnet.

How have the locations been utilized or retained? Reef Net Owners Association witnesses, both in their pretrial depositions already referred to and in their testimony at the trial, indicated there was a common understanding, referred to several times as "a gentlemen's agreement", that any reefnetter could return to the location he had used the previous year and that he would leave

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his anchors there until the next season upon the completion of a season. The testimony of plaintiffs' principal witness, Dr. Barbara Lane, states that it was the custom, and recognized right, among pre-treaty Lummis that a reef net operator returned year after year to the same location previously used for such purposes. That is all that has been done by the reefnetters and is the only feasible and fair way that such a fishing operation can be conducted in the face of the unquestioned fact that no one can attain ownership of a given portion of the ocean, or Puget Sound, bottom. Practical considerations, then, have compelled both the pre-treaty and post-treaty reefnetters to follow the same principle and to attempt to uproot it now would be a glaring act of discrimination against whomever suffered therefrom.

Locations nonetheless regularly become available through changes of circumstances affecting the prior fishermen who operated thereon, even in the fishing year just ended, 1973, when there had been a substantial increase in the number of reefnets operating, locations were still available. See Tr. p. 3683, ls. 12-25, p. 3684, ls. 1-4. (The same witness, at Tr. 3684, ls. 5-25, and p. 3685, ls. 1-13, stated that there had been no exclusion of Lummis.)

WHAT IS THE MEANING OF THE POINT ELLIOTT TREATY LANGUAGE?

The treaty rights given to the Lummis, by the foregoing treaty, turn upon the meaning of the words underlined in the following quote:

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

As has already been pointed out in the Reefnetters Pretrial Brief, courts must accept the treaties as written and cannot alter or amend them. Kansas or Kaw Tribe of Indians vs. United States, 80 Ct.Cl. 264, (1934), cert. denied 296 U.S. 577, 80 L.Ed. 408,

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56 S.Ct. 88 (1935); Osage Tribe of Indians v. United States, 66 Ct. C. 64 (1928), appeal dismissed and cert. denied, Osage Indians v. United States, 279 U.S. 811, 73 L.Ed. 971, 49 S.Ct. 251 (1929).

In Northwestern Shoshone Indians v. United States, (1944) 324 U.S. 335, at p. 353, Justice Reed, writing the majority opinion, states,

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

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

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

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

> "Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Factor v. Laubenheimer, 290 U.S. 276, 294, 295, 78 L.Ed. 315, 324, 325, 54 S.Ct. 191; Cook v. United States, 288 U.S. 102, 112, 77 L.Ed. 641, 646, 53 S.Ct. 305. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' Tulee v. Washington 315 U.S. 681, 684, 685, 86 L.Ed. 1115, 1119, 1120, 62 S.Ct. 862. See also United States

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v. Shoshone Tribe, 304 U.S. 111, 116, 82 L.Ed. 1213, 1218, 58 S.Ct. 794; Choctaw Nation v. United States, 119 U.S. 1, 28, 30 L.Ed. 306, 315, 7 S.Ct. 75. But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. United States v. Choctaw Nations, 179 U.S. 494, 531, 533, 45 L.Ed. 291, 305, 306, 21 S.Ct. 149; United States v. Mille Lac Band, 229 U.S. 498, 500, 57 L.Ed. 1299, 1302, 33 S.Ct. 811." (Emphasis supplied.)

In short, then, when a treaty's meaning is clear it cannot be rewritten merely for the redressing of an alleged wrong, (especially if such a "wrong" actually does not exist).

To requote from pages 7 through 9 of our Pretrial Brief:

"C. 'Usual and Accustomed Grounds and Stations.'

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

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

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

'Accustomed' is defined in the same work as,

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

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

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

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

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

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

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

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

Putting the foregoing definitions together, we cannot come up with any other possible meaning for them than that the treaty Indians were given the right to continue to fish at their usual places, on land, but their enjoyment thereof was to be equal to, in all respects, but not superior to, the rights of the other citizens of the Territory, i.e., the present citizens of the State of Washington. No 'super' rights or special privileges can be inferred.

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

Incidentally, as to the meaning of the language "in common with all citizens of the Territory", it is to be noted that Dr. Barbara Lane at p. 2048, ls. 20-24, admitted that the Indian people who were parties to the treaty were agreeing to share the

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waters of the Sound with non-Indian fishermen. She even adds, "I don't think there is any question about that." Commencing at l. 25 of p. 2048 and through ls. 1-3 on p. 2049, when asked, "Then you think that is what the meaning of the words 'in common with' really were put into the treaty for, is that correct?" She answered, "Yes, I do." Lastly, the same witness, on ls. 12 through 19 of the transcript acknowledges that the Lummis had not been given the right to any fixed spots or locations or areas.

ARE REEFNETTERS OPERATING IN THE "USUAL AND ACCUSTOMED GROUNDS AND STATIONS" OF PRE-TREATY LUMMIS?

Even assuming the Lummis have a preferred right to take salmon by the provisions of the Treaty of Point Elliott, such a right could apply and give them a preference over other reef-netters only if it were first shown that the areas now used for reefnetting were a part of the "usual and accustomed grounds and stations" used by them prior to treaty times.

Dr. Lane concedes, Tr. 2156, ls. 12-15, that she is unable to state whether the present reefnet locations are in locations which would have been used by the Lummi Indians.

Exhibit RN-7 shows the area now utilized for present day reefnetting is large and extensive. Yet the affidavit of Harry Sewalton, Exhibit RN-14 (also admitted as PL-94u), in the first paragraph of page 5, states,

> "At Village Point [which is at the northern end of Legoe Bay] the reef is very short and abrupt and it is possible for said Indians to use at most but few nets upon such reef;" (Emphasis supplied.)

It is also manifestly impossible, for technological reasons, that the pre-treaty Lummis could have fished where the reefnetters now do.

The affidavit of John Elwood, Exhibit RN-13, (also PL-94y), from the same 1895 federal court action as the one referred to

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above, states, at p. 1, in speaking of the use by the Lummis of their nets,

> "[nets] such as are now and have been from time immemorial used by the Indians is on the reef over which they cross and at such places on such reefs where the water is not to exceed two fathoms in depth." (Emphasis supplied.)

The affidavit of Jack Sumptilino, Exhibit RN-12 (PL-64-d), in referring to the materials used for nets and anchor ropes states,

> "We fished on the reef with nets made of young willow and for anchor ropes we used ropes made out of cedar withes and bark;"

Even Lummi witness, Herman Olsen, states, Tr. 2955, that the cedar ropes were only twenty feet long. He repeats this statement on the following page, 2956.

Such ropes were, therefore, by far, too short to have enabled them to have fished at the depths shown in Exhibits RN-9 and RN-11.

Also, they would not have had the strength such as the three-quarter inch steel cables nor the one and one-eighth inch synthetic lines now used for anchor lines, Tr. 3699, 3700. They could not have sustained thirty-two tons of anchors such as are now used in front, Tr. 3704. Even manila ropes would not have lasted a season, Tr. 3752.

The four witnesses, Jerry Anderson, Warren C. Granger, John R. Brown and Glenn Schuler, all thoroughly experienced reefnetters, stated positively and unequivocally that in their opinion pre-treaty reefnet boats owned by the Lummis, (one of which is shown in Dr. Lane's report), could not possibly have fished in the areas now used with the lines and anchors then available because of the extreme tidal conditions which sometimes prevail and which have necessitated the use of large concrete anchors of the present boats.

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Further, there has been a topographical change. As the witness, Warren C. Granger, stated, Tr. p. 3736, there has been, since his childhood on Lummi Island, erosion at Village Point, on the southerly side thereof. This would have caused a carrying away of the shallow area which most probably was the area where the pre-treaty Lummis at one time fished.

Obviously and unquestionably, therefore, present day reefnetting is being conducted in an area which would never have been capable of use by pre-treaty Lummis and is not, therefore, within an area which may have ever have been a "usual or accustomed ground or station". Present day reefnetters are clearly operating outside the area referred to, and included in, the provisions of the treaty; the treaty does not, therefore, apply to them.

PROPOSED FINDINGS OF FACT

Among the multitude of findings of fact which the Court will be compelled to make in disposing of this case, we submit the following should be included:

1. Lummi tribal members have not been excluded from reefnetting in Puget Sound by other reefnetters nor deprived of any tribal rights by actions of the State of Washington.

2. At the time of the execution of the Treaty of Point Elliott, in 1855, the Lummi Tribe, throught its representatives, were agreeing to share the waters of Puget Sound with non-Indians.

3. Neither was there, at said time, intended to convey a grant of any fixed locations.

4. The area at Village Point, at the north end of Legoe Bay, where Lummi tribal members fished in pre-treaty times, is not the same area as is now used by the individuals presently reefnetting in Legoe Bay.

5. The equipment used for anchor lines in reefnetting

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operations prior to the Treaty of Point Elliott were not capable of being used for the necessary anchoring requirement in the area now occupied by present day reefnet operators, neither as to depth nor strength.

PROPOSED CONCLUSIONS OF LAW

Many conclusions of law will be necessary as a basis for the decree. Among those to be entered resolving the issues between the intervenor-plaintiffs, Lummi Indian Tribe, and intervenor-defendants, Washington Reef Net Owners Association, should be the following:

1. The language appearing in the Treaty of Point Elliott, relating to the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory was not intended to secure priorities of any nature to Lummi tribal members. Anyone choosing to do so may fish there in accordance with lawful and non-discriminatory laws and rules promulgated by the State of Washington.

2. Present day reefnet operations not being carried on at the usual and accustomed grounds and stations used by the Lummi Indian Tribe in 1855, present day reefnet operators may continue operate as they heretofore have done.

CONCLUSION

For the reasons hereinbefore stated, nothing in the decree to be entered by this Court in disposing of this pending case should restrict or alter present day reefnetting methods as

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Respectfully submitted,

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