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Docket Entry 399 - Filed Post Trial Brief of Fisheries Defendant

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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. 9 2 1 3 POST TRIAL BRIEF OF FISHERIES DEFENDANT

* * *

I. STATEMENT OF THE CASE

A. Introduction

An era of litigation came to an end on November 19, 1973, when the United States Supreme Court handed down its opinion in Department of Game v. Puyallup Tribe, No. 72-481 (a copy of the opinion is attached to this brief). The Court made clear to all parties before this Court that the treaties between the United States and the Indian tribes, securing to the Indians the rights to take fish at their usual and accustomed grounds and stations in common with other citizens conferred upon those Indians and their descendants special privileges and immunities from the application of state law. A new era of litigation has begun with this case. The issue of the existence of the right having been decided, it is now for this Court to make a determination of the scope of that right.

FISHERIES sincerely hopes that the determination of this second issue will not be as protracted, painful and tortuous as was the resolution of the first issue. Much of the delay that accompanied the Puyallup litigation can be arrested initially by a decision from

this Court setting clear, objective and simple guidelines that will win the cooperation and confidence of all parties.

B. Pending Motions

FISHERIES is neither a proponent nor an opponent of any pending motion before this court. Its position on the motion to delay judgment has been obviated by the decision of the Supreme Court referred to above.

C. FISHERIES' Position

FISHERIES acknowledges the special treaty fishing right. All plaintiff tribes, excepting the Muckleshoot, Stillaguamish and Upper Skagit Tribes, are entitled to exercise the special treaty right.

The treaty right was intended to secure to the Indians, who were being removed to reservations, access to their fisheries to enable them to continue to rely on fish as a staple of their diet. Although rudimentary attempts at commercial fishing existed at treaty times, the treaty fishing right was not meant to secure to the Indians a monopolistic or predominent role in the commercial fishing industry. The development of the commercial fishing industry, both Indian and non-Indian, occurred 30 years after the treaty period and its magnitude and concomitant need for regulation was not contemplated by any of the parties to the treaties.

The treaty right to fish is subject to valid state regulation in off-reservation areas. To be valid state regulation must be reasonable and necessary for conservation, meet appropriate standards and not discriminate against treaty Indians. These standards are met when: (1) treaty Indians, entitled to exercise the right, are allowed to fish at their usual and accustomed fishing places in a manner compatible with conservation of the fishery resources; (2) state regulations are adopted pursuant to the requirements of the Washington Administrative Procedures Act (RCW 34.04); and (3) treaty Indians are provided an opportunity to take a share of the resource which is fair in comparison to the share harvested by commercial and sport fishermen.

The right of the state to regulate in off-reservation areas is pre-eminent until such time as pre-empted by an Act of Congress, and treaty tribes may not regulate their off-reservation fisheries in a manner inconsistent with state law. In no event may tribal enforcement officers enforce tribal regulations off-reservation.

Current state regulations affecting treaty Indian fishermen meet appropriate standards. The real issues are conservation and the accommodation of the "rights of the Indians under the Treaty and the rights of other people," i.e., the Indian share of the harvest.

Regarding the former, FISHERIES proposes that the Court enter findings determining in general the areas where treaty tribes, entitled to exercise the right, have usual and accustomed fishing places. Members of such tribes should be allowed to fish in those areas subject to restrictions necessary for conservation. Fishing should only occur, with rare exception, in transportation areas and not spawning grounds, holding or milling areas. FISHERIES proposes that the court appoint, as a master pursuant to Fed. R. Civ. Proc. 53, a competent, neutral fish biologist who will take evidence presented by all parties and determine, subject to the Court's approval, those portions of the areas, where the respective tribes' usual and accustomed fishing places are located, which can be fished compatibly with conservation in a limited gear personal use fishery and/or a commercial net fishery. Once determined FISHERIES would establish fishing seasons in those areas designed to provide the Indians an opportunity to take a fair share of the harvestable catch, while assuring that optimum production escapement is achieved.

<u>The key to the issue of accommodating the Indian right with the interests of other users is providing Indians an opportunity to take a fair share of the harvest</u>.

In the case of the marine fisheries, other than terminal areas, that is easily done because Indians can fish in the all-citizen commercial and sport fishing seasons without payment of license fees or landing taxes. To the extent that Indians avail themselves of that

opportunity they are afforded an opportunity to catch a share of the fish commensurate with their effort. Since the treaty right does not require that non-Indians be restricted to a greater degree than treaty Indians, the treaty right to fish in marine waters, if usual and accustomed places are located there, is satisfied when Indian fishermen can fish in regular all-citizen fishing seasons without payment of license fees and landing taxes. Alternatively, FISHERIES proposes that if that alone does not satisfy the treaty right, additional fishing time can be added to the regular commercial fishing seasons for a treaty Indian only fishery.

In the case of Indian river and terminal marine area fisheries, providing an opportunity to take a fair share of the harvest is more difficult because such fisheries are at the end of the harvesting chain. In the past and presently FISHERIES has established for some of the treaty tribes who are plaintiffs herein fishing seasons for their river or terminal marine fisheries and attempted to insure that significant numbers of fish are present in their fisheries. An expanded version of such fisheries for all of the tribes is proposed as an interim measure, should the court establish a percentage share management plan requirement.

FISHERIES proposes the percentage share plan as the fairest means of assuring Indian fishermen of an opportunity to take their fair share of the harvest. The Indian share should be fair in comparison to the share taken by the commercial fishermen and sportsmen, who together with the Indians, make up the three user groups for whom FISHERIES manages the salmon fisheries of this state. In the case of Indian river and terminal marine fisheries, the Indian share should be not less than one third of the harvestable fish by species, over and above what is needed for the tribes' members' personal food, harvested within the territorial waters of the State of Washington of fish originating in and returning to the river or terminal marine area wherein the Indian fishery is located. Reservation catches would count toward the Indian share. Where Indians are presently harvesting

one third or more of the total harvestable stock as defined above, the treaty right is met when they are allowed to fish off-reservation, under state regulation, in the areas of their usual and accustomed fishing places that are compatible with conservation of the resource.

FISHERIES proposes that the master appointed by the court, in addition to determining fishing areas compatible with conservation, also take evidence from all parties and establish the production base year estimates of salmon populations for each river and terminal marine fishing area. These estimates will then be used by FISHERIES in accounting for the fish harvests on a production area, and not tribal affiliation, basis. When the master has completed his findings, reported to the court, and the court has approved the findings, he will be discharged subject to recall by the court in the event that changed circumstances or justice requires a re-examination of any of the questions on which he has made findings.

For statistical information purposes FISHERIES should be allowed to require Indian fishermen fishing off reservation, and the tribe should require fishermen fishing on reservation, to obtain from FISHERIES directly or through the tribe a Department of Fisheries statistical license to record commercial catches and a Department of Fisheries punch card to record personal use catches. FISHERIES should also be allowed to require Indian fishermen fishing off reservation, and the tribe shall require fishermen fishing on reservation, to report their catches. Indian tribes should at appropriate times furnish to the Department of Fisheries information on proposed fishing effort, catch and other matters necessary to regulate the fishery to achieve conservation.

Existing state statutes and regulations as set forth in RCW, Title 75 and W.A.C., Title 220, including enforcement practices, are reasonable and necessary for conservation, meet appropriate standards, and do not discriminate against Indians.

II. STATEMENT OF THE FACTS

A. Jurisdiction

FISHERIES does not challenge the jurisdiction of this court to adjudicate this action.

B. Existence of Right

1. Generally

With the exception of Muckleshoot, each of the plaintiff tribes was a party to one of the treaties at issue in this case. Each of those treaties provided (with insignificant variation):[1]

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

2. Muckleshoot, Stillaguamish and Upper Skagit

The Muckleshoot Tribe was created after the treaties from bands of Indians, some of whom were parties to the Treaties of Medicine Creek and Point Elliot, who were placed on the Muckleshoot Reservation. Not all Indians placed on the Muckleshoot Reservation, however, were parties to treaties.[2]

The Stillaguamish Tribe is composed of descendants of the Stoluch-wa-mish which was a party to the Treaty of Point Elliot.[3] The tribe is not recognized by the federal government as a currently functioning Indian tribe, and its membership role, though voted on by the tribe, has never been approved by the Secretary of the Interior or his designate.[4]

The Upper Skagit Tribe is a successor in interest to groups of Indians who were parties to the Treaty of Point Elliot.[5] The tribe is not recognized by the federal government as a currently functioning Indian tribe and no enrollment has been approved by the Secretary of the Interior or his designate.[6]

C. Scope of Right

1. Purpose of the Right

At the treaty negotiations the primary concern of the Indians was that they have freedom to move about to gather food,

particularly salmon, at their usual and accustomed fishing places. The words of One-lun-teh-tat, an old Skokomish Indian, addressed to Governor Stevens, expresses the Indian concern best:[7]

> I wish to speak my mind as to selling the land--Great Chief. What shall we eat if we do so? Our only food is berries, deer and salmon. Where then shall we find these? I don't want to sign away all my land. Take half of it and let us keep the rest. I am afraid that I shall become destitute and perish for want of food.

The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but that the white man also would be allowed to fish.[8] In 1856 it was felt that development of the non-Indian fisheries in the case area would not interfere with the "subsistence" of the Indians.[9]

It was the intention of the United States government, in negotiating the treaties with the Indians, to make them agriculturists, to diversify their economies, to teach them western skills and trades.[10] Indeed, the treaties on their face specifically contemplate that the reservations would become productive farms and obligated the United States to provide schooling and tradesmen to train the Indians.[11] The annual reports of the Indian agents in the years immediately following the signing of the treaties reveal the government was attempting to carry out those treaty provisions.[12] Making allowances for the fact that the treaties were explained to the Indians in Chinook jargon and viewing the treaties liberally in favor of the Indians, on cannot draw any different conclusion than that the Indians understood that their way of life was changing, but that their immediate concern was that if they sold their land and removed to the reservations, they would loose access to their food supply. The treaty fishing clause must be read in the context of the whole treaty document. The most likely interpretation of the treaty clause is that the Indians were secure in their right to take fish for the purposes that they were taking fish at the time of the treaty and that it was contemplated that the Indians would become less dependent on fish as they became increasingly westernized and turned to agricultural pursuits.[13]

That, in fact, is exactly what has happened. Dr. Lane testified that employment acculturation has caused the drastic decline in the number of Indian men engaged in fishing since treaty time.[14] Mr. Andrews, the Skokomish Tribal witness, put it more subtly in speaking of the younger members of his tribe:[15]

> Well, they are getting educated and they seem to be going out and finding different methods of securing a living.

Mr. Andrews, himself, was a surveyor and fished commercially only part time to supplement his income.

The "needs" of the Indians were to be provided by the terms of the whole treaty and not just the fishing clause alone. The purpose of the fishing clause was primarily to secure to the Indians a right of access to their traditional food supply. This is not to say that the treaty right to fish does not encompass the right to fish commercially, but it is to say that it was not the purpose of the treaty right to put the Indians in a pre-eminent position in a commercial fishery as is being suggested by the plaintiffs.

2. Trade and Commercial Sale

At the time of the treaties, trade in fish among the Indians occurred throughout Western Washington and between interior tribes across the mountains and tribes on the Sound.[16] Commercial fishing enterprises were, however, rudimentary and unsuccessful.[17] There was no statistically measureable fishery at that time,[18] and it is clear that an intensive commercial salmon fishery did not develop until after the introduction of the canning process in the last decades of the Nineteenth Century.[19] Not until then did it become necessary to regulate the harvest of fish.[20]

It was clearly the intention of Governor Stevens and the early settlers to develop the economic exploitation of the fish resources in the case area, and it was contemplated that Indians would fish to supply part of the demand created by a commercial fishery.[21]

The evidence indicates that it was contemplated by both parties that there would be an accommodation of Indian and non-Indian

user interests. In fact, Governor Stevens made this point to the Makah's at the treaty negotiations.[22] It was clearly not the case that Indians had a monopolistic position in a commercial fishery at treaty times nor could it have been contemplated that they would occupy such a position in the future.

3. Meaning of "in common with"

Dr. Lane and Dr. Riley both agreed that although Chinook jargon, the trade medium through which the language of the treaties was interpreted to the Indians, was inadequate to express precise legal effects, the general meaning of the treaty language could be explained through it.[23] Dr. Lane also testified that the term "in common with" was probably used in its common parlance and the meaning of it as found in a contemporaneous dictionary, would be what was intended.[24] The 1828 and 1862 Editions of Webster's American Dictionary of the English Language define the word "common" as follows:[25]

> Belonging equally to more than one, or to many indefinitely . . . belonging to the public; having no separate owner . . . general; serving for the use of all . . . to have a joint right with others in common ground.

Dr. Lane testified that the Indians who negotiated the treaties would have understood the concept of common ownership interest and that concept could have been conveyed to them in Chinook jargon.[26] Clearly the term was understood by the Indians to mean shared use rights, with neither Indians nor citizens having the power to exclude the other. The language called then, as it does now, for an accommodation of the different user groups.

4. Usual and Accustomed Places

Dr. Lane testified that the terms "usual and accustomed" were probably used in their common parlance and their meaning as found in a contemporaneous dictionary would be what was intended.[27] The 1828 and 1862 Editions of Webster's American Dictionary of the English Language define the terms as follows:[28]

> accustomed - being familiar by use; habituated; inured . . . usual; often practiced.

usual - customary; common; frequent; such as occurs in ordinary practice or in the ordinary course of events.

Dr. Riley testified that these terms were most likely used in their restrictive sense and did not intend to include areas where use was occasional or incidental.[29] Dr. Lane testified that the restrictive sense of these terms could have been conveyed to the Indians in Chinook jargon and would have been understood by the Indians.[30] Clearly the treaties intended and the Indians understood that the treaty right was restricted geographically, so that there is no validity to contentions such as that of Mr. Peters, the Squaxin Tribal witness, who testified[31] that his treaty fishing area included all waters of Western Washington.

Although all parties agree that today it would be impossible to establish a complete inventory of all fishing sites of each plaintiff tribe, Dr. Lane did testify that in a general way it is possible to identify the general areas in which particular tribes have usual and accustomed places with the caveat that, because all sites are not known, a tribe could have a fishing site on a river or stream not identified as a usual fishing place for that tribe.[32] The lists of the usual and accustomed places for the respective tribes as compiled from Dr. Lane's reports are contained in FISHERIES proposed Findings of Fact.

There is a need to identify specific water courses as containing the usual and accustomed fishing places of particular tribes both for protection of the individual tribes' fishing grounds from encroachment of other Indians and out of fairness to all citizens whose share of the fish is derogated by the Indian treaty right. The Court should find that the usual and accustomed fishing places known today of the plaintiff tribes are where they are presently entitled to exercise their treaty fishing right compatably with conservation. If the Court does not with specificity determine the usual and accustomed places, there are no acceptable alternatives. There is no justification of conferring on all treaty Indians in the case area

the right to exercise the treaty fishing right on any and every water course in the case area.

A determination of the water course on which plaintiff tribes have usual and accustomed places would be fair to the tribes because the likelihood that they will get to fish in areas on the water courses that were not their historical grounds or stations is as likely as the likelihood that by having specified the water courses the Court will have left out a ground or station not heretofore identified. Any determination could be subject to future modification if more evidence becomes available.

The determination of water courses on which are located the respective tribes' fishing places will also facilitate modern conservation practices because the court can then determine what areas on each water course can be fished compatably with conservation, rather than be bound by rigid tabulations of historical fishing sites which may not be compatable with present-day realities.

5. Economic and Cultural Aspects of Indian Fishing

Today Indians fish for subsistence, sport and commercial purposes.[33] They allow non-Indians to fish in their reservation sport fisheries.[34] Several of the tribal witnesses testified that Indian cultural identification with fishing is dietary and related to the subsistence fishery and not to the commercial fishery where Indian fishermen, like their non-Indian counterparts, are economically motivated to maximize profits.[35] The motivation of the modern, as distinguished from the older generation, Indian commercial fisherman was testified to by Mr. Cloud, the Yakima tribal witness, who said:[36]

> A. Well, let's put it this way: Our Indians are getting educated like the white man, and they are getting greedy. They have no self-control like the old Indian ways that we was taught how to conserve. The white-man education is, you know, the dollar means more to him than the conserving, sometimes.

Members of the plaintiff tribes fish in the regular commercial seasons of this state and other states, and when fishing in Washington waters are not required to purchase a license or pay a

landing tax.[37] Almost all the fishermen who fish in the river commercial fisheries have other occupations and fish to supplement their income.[38] The Hoh and the Puyallup Tribes, for which FISHERIES has established off-reservation Indian only fishing seasons for rivers on which they have usual and accustomed places, testified that their part-time river fishermen earn on an average $5,000 annually.[39] Both expert anthropologists testified that acculturation of Indians into western society began prior to treaty times and has continued to the present day.[40] Both Dr. Lane and tribal witnesses testified that employment acculturation has had a significant impact on the numbers of Indians who fish.[41] Traditional religious rites and ceremonies are no longer observed by most tribes.[42]

The evidence is unrefuted that Western Washington Indians are largely acculturated and the importance of salmon in their diet, economy, and culture has greatly diminished since treaty times. In view of these facts plaintiffs' argument that the very survival of their tribes depends on the ability of them to catch all the fish they feel they "need" is rhetoric, not fact. This is not to deny the special significance of salmon to the Indian diet, economy and culture as testified to by the tribal witnesses, but it is to say that it would appear that plaintiffs' counsel have overstated the case to persuade the Court to accept their more extreme position.

D. Regulation of the Right

1. Need for Regulation

At the time the treaties were negotiated, Indian settlements were dispersed throughout Western Washington. The Indians generally lived next to waterways, traveled on them, and depended on the resources of the waters for an important part of their diet.[49]

There had been a sharp decline in the Indian population in the case area between 1780 and 1840, and this decline continued during the decades following the signing of the treaties.[44] In the case area there were approximately 7,559 Indians and 2000 non-Indians at the time the treaties were negotiated.[45] Because of the great abundance

of fish resources and these limited populations, there was no need to regulate the taking of fish by either Indians or non-Indians at treaty times.[46] The arguments of some of the plaintiffs that the state cannot regulate because, in effect, the Indians were not told of and did not contemplate regulation avoids the reality of the treaty times and the reality of today. At treaty time there was a great fish resource compared with the small population. Today there is a small fish resource compared to the great population. At treaty time no one thought of regulation. Today even the plaintiffs concede that an unregulated fishery is unthinkable. The need for regulation of Indian treaty fishing is attested to by the fact that most of the plaintiff tribes have adopted or admit the need to adopt tribal regulations.[47] A material condition has changed from the time the treaty was negotiated, and the treaty, like a contract,[48] has to be interpreted in the light of this changed condition.

2. Tribal Off-Reservation Regulation

The testimony of Mr. Heckman, the tribal witnesses, and the tribal answers to interrogatories all reveal that, with the possible exception of the Quinault and Yakima Tribes, which have not established any regulations in off-reservation areas in the case area, none of the plaintiff tribes is presently capable of managing an off-reservation fishery to achieve conservation of the resource. Plaintiffs' own biologist testified, and he was supported by the testimony of Mr. Cloud of the Yakima Tribe, that fishing regulations for an off-reservation fishery should be based on estimates of predicted run size, adopted annually, contain emergency clauses, impose penalties for violations and have a formal enforcement procedure.[49]

The evidence shows, however, that almost all tribal regulations have been drafted by committees of fishermen without expert biological advice and are not approved by the Bureau of Indian Affairs on the basis of content,[50] that no tribe uses estimates of predicted run size,[51] that few tribes adopt annual regulations,[52] about half the regulations provide for emergency closures,[53] and

that enforcement varies from no enforcement,[54] through vigilante groups of fishermen,[55] to regular tribal enforcement officers and court systems.[56] Mr. Heckman testified that the pattern of tribal regulations was designed to achieve a percentage escapement through the Indian fishery,[57] and then admitted that spawning escapement should be a fixed figure and to manage a fishery on a percentage escapement would achieve only a haphazard escapement.[58] Six plaintiff tribes have no off-reservation regulations.[59]

The plaintiffs contend that FISHERIES must take into account tribal regulations to determine the conservation necessity of its own regulations, but the federal biologists, whose responsibility it is to advise the tribes on the biological aspects of their fishery regulations, could not estimate the potential impact of the three tribal regulations with which he was most familiar.[60] It is not reasonable that they require an assessment by the state which their own biological staff is not capable of making.

With some plaintiff tribes there is not only a lack of scientific competence in the regulatory plans, there is also a lack of will to restrict their fishing when they have information that it will endanger the necessary escapement from the run. Both Mr. Lasater and Mr. Heckman testified that the fall chinook run to the Puyallup River should not be fished this year.[61] The state had closed all other commercial fishing on that run over which it had control and requested the tribe to not fish.[62] The state regulations for the Puyallup River Indian fishery had a closed season on fall chinook.[63] Mr. Heckman agreed to urge the tribe not to fish, and at least one member of the tribe's fish committee had discussed the situation with Mr. Heckman.[64] But the Puyallups' fish committee never even met to discuss the situation and the tribe's fishermen continued to fish in violation of state regulation.[65] This year the Puyallup River Hatchery is having the lowest return of fall chinook in twenty years.[66] Similarly, the Muckleshoot Tribe's liaison officer to the Department of Fisheries was caught fishing in the Green-Duwamish River one week

after he had been urged to not fish on the fall chinook run because all fish were needed for escapement.[67] It would be one thing if these tribes had ignored state regulations and advice because other commercial fisheries controlled by the state were fishing. But in both instances the other state controlled commercial fisheries had been closed to protect the runs.

What is perhaps even more appalling than the Puyallup Tribes' total disregard for the condition of the fall chinook run in their river, was plaintiffs' counsel's attempt, after the hatchery manager refuted his insinuation that the cause of the low returns was low water conditions, to divert the Court's attention from the real conservation issue by charging that the state was being wasteful because it took six returning males, surplus to spawning needs, to a fish educational exhibit at the state fair. With this type of attitude on the part of the United States, plaintiff tribes and their counsel, is there any wonder why the Department of Fisheries has absolutely no confidence in any scheme to manage the fisheries of this state on an equal footing with the Indian tribes.

3. Present FISHERIES' Regulation

a. Indian Share of the Harvest

Under the present FISHERIES regulations the plaintiff tribes in the case area, less the Quinaults, and plus the Tulalip and Swinomish, are taking in their river commercial fisheries approximately one fourth of the harvestable fish harvested in Washington managed waters that are native to the rivers on which their fisheries are located.[68] In addition they are taking personal use fish, sport fish, commercially caught fish in marine waters,[69] and receiving hundreds of thousands of pounds of surplus hatchery fish annually. Add to this the catch of the Quinault Tribe, and it is readily apparent that Indians in the case area are catching substantial numbers of fish.

The plaintiffs challenge this conclusion and add six million Fraser River fish to the catch statistics for the case area to minimize the Indian share. There are two things which make their

technique inaccurate and deceptive. First, their own anthropologist testified that only the Makah and Lummi Tribes had usual and accustomed fishing grounds in marine areas where Fraser River stocks would be intercepted.[70] Second, the International Pacific Salmon Fisheries Commission, not the State of Washington, controls the harvests of Fraser River stocks.[71] The Commission controls the areas and the seasons where those harvests take place. The most that the state can unilaterally do, as it has done with the Makahs, is allow extra fishing days in contravention of the Commission's regulations. This is no doubt tolerated by the Commission because of its present de minimus impact on the runs. The state, however, cannot make wholesale readjustments in Commission regulations as suggested by the plaintiffs.

Plaintiffs contend that the state's special purse seine season at Minter Creek is an example of discrimination against Indians because Indian only fisheries were not established on that hatchery coho run. The record is clear that FISHERIES has been and will continue to plant hatchery plants in rivers and creeks where there are Indian fisheries to supplement the natural runs.[72] Minter Creek and Deschutes River, however, are examples of entirely artificial fish runs created by the state. Minter Creek is a small creek with an extremely large coho run, completely out of proportion to anything that could have existed in treaty times.[73] The Deschutes River had a natural falls barricade at its mouth in Tumwater. There were no anadromous fish runs there until FISHERIES laddered the falls and planted the river.[74] In the case of native runs supplemented by hatchery plants, the department is willing to allow treaty fishermen to share the harvest of the hatchery fish planted to augment natural runs damaged by the development of this area. But in cases of entirely artificial runs there is no special treaty right to share in their harvest. See Concurring Opinion in Department of Game v. Puyallup Tribe, No. 72-481, attached. Squaxin, as well as all other tribes, were notified of the purse seine fishery at Minter Creek. They, as do other tribes, have members who fish in the regular commercial

seasons.[75] Thus, they had an opportunity to participate in the Minter Creek fishery. There can be no claim of discrimination.

Plaintiffs also cite Minter Creek as an example of FISHERIES being able to harvest small streams and rivers near their mouths in areas of segregation rather than in the Sound in areas of mixing. Mr. Lasater testified that there were 239 small streams that empty directly into salt water.[76] The runs to these streams are small individually but in the aggregate make a substantial contribution to the total fish harvest.[77] Because of this situation it is necessary to harvest the production from these streams in areas of mixing where the impact on a run to a particular stream in light of the investment in the harvest is optimum.[78] For example, if 50 fish can be harvested from one small stream, it is better to harvest those fish in a mixed area, in terms of the cost to the fisherman to harvest and to the Department of Fisheries to manage the harvest, than to harvest those 50 fish in the stream. Plaintiffs contend that is not a valid conservation consideration, but in doing so they interpret the term conservation in its narrowest, literal sense, completely ignoring all logic and the broader issues of conservation. If a major segment of the Department of Fisheries budget and time must be turned to administering the stream harvest of these stocks, there will be less money for areas of research and management that will aid in preserving and enhancing fish runs as a whole. The Court should not be beguiled into such a literalist construction that it ignores the reality of fish management.

Furthermore, there are valid conservation reasons that apply individually to these streams. Mr. Lasater testified that in many of them spawning occurs almost immediately from tidewater and in others the presence of fishermen in the stream will disturb and molest the fish.[79] In almost all of them a net fishery could take the entire harvestable portion of the run in a matter of hours, making control of the harvest impossible to enforce.[80] Plaintiffs have stipulated that restricting areas in which fishing occurs is designed to protect

and conserve adequate spawning populations,[81] and the Squaxin Tribe agrees with the Department of Fisheries that in southern Puget Sound it is necessary for conservation to prohibit their fishermen from fishing at their usual and accustomed places in the small creeks, and to fish in salt water areas where fish from the individual creeks are mixed.[82]

In this context, plaintiffs' cite the exception, Minter Creek where there is a large artificial run from a hatchery on the creek, to prove their proposition that small creeks can be harvested in the streams or at their mouths. The Court should not be misled by their basic lack of understanding of fisheries management.

b. Treaty Right Recognition

Following the Puyallup decision in 1968, FISHERIES recognized the special nature of the Indian treaty right, began treating Indians as a distinct user group, and set up special Indian only fisheries for some of the plaintiff and other treaty tribes.[83] The number of areas and tribes covered under these special regulations would have increased, but for the instigation of this lawsuit. Where FISHERIES has set up special seasons, we have on our own sought to cooperate and consult with the tribes involved, and the tribes have regarded our regulations as being reasonable and necessary for conservation.[84]

Additionally, all parties agree that FISHERIES has undertaken to augment the volume of fish available to treaty Indians fishing at their usual and accustomed places outside reservations by at least the following actions:[85]

(a) considering the Indian fishery when formulating regulations;

(b) attempting to estimate and allow for the fishing effort of the Indian fishery;

(c) restricting the commercial fleet to allow greater numbers of fish to reach the Indians;

(d) closing certain marine areas, e.g. East Pass at Vashon Island, to increase numbers of fish reaching the Indians;

(e) increasing hatchery plants on streams where Indian fisheries occur;

(f) carrying out stream improvements.

Plaintiffs make light of FISHERIES efforts to abide by the spirit of the SoHappy decision in our attempt to accommodate the Indian fisheries. But any fair reading of the record in this case can only lead to the conclusion that FISHERIES has attempted in good faith to give special recognition to the treaty fishing right.

c. Enforcement Practices

Plaintiffs contend that FISHERIES enforcement practices violate the treaty fishing right and deny due process to the Indians. They seek to enjoin our enforcement of the state's fishery laws. Enforcement of fishery laws is governed by chapters 75.08 and .36 R.C.W. In particular, plaintiffs object to the seizure and forfeiture of property for violations under chapter 75.36. RCW 75.36 is constitutionally valid on its face, and the evidence is that in all cases the Department of Fisheries personnel follow the statutory requirements in a non-discriminatory manner. 86

The record contains only one specific allegation relating to a gear seizure by the Department of Fisheries. Mr. Frank, a Nisqually tribal witness, alleged that some of his unmarked, unattended nets were seized from the Nisqually River on several occasions. 87 On one occasion in 1964 he actually observed the nets being seized and informed the officers that the nets were his. The officers refused to turn the nets over to him, and Mr. Frank took no further action. 88

It is Department policy not to turn over unidentified seized gear to any person claiming to be the owner, since once seizure has occurred, determination of ownership becomes a judicial matter. RCW 75.36.010, governing seizure of property, provides a remedy to which Mr. Frank did not avail himself. He could have gone to the district court, identified his ownership interest in the gear, posted a bond and received the gear. Then if his treaty status exempted him from

application of state law in that instance, he would have received a judicial determination. It should not be the obligation of individual patrol officers to have to make an on the spot determination of the validity of the law they are enforcing. To the extent that state laws regulating Indian fishing by time, season, location, and gear restriction are valid, the enforcement procedures in RCW 75.08 and .36 afford due process of law and do not contravene the treaty right. Furthermore, it should be noted that Mr. Frank testified that seizures of his off-reservation fishing gear have not occurred in the last several years, 89 which coincides with the period that FISHERIES has been according special recognition to the treaty right.

There is no basis in this record to support an injunction against the enforcement practices of the Department of Fisheries.

4. Proposed Regulatory Plan

a. Unique Area

The Puget Sound and Washington Coastal Rivers involved in this case are unique and require the application of a regulatory plan that accounts for their peculiarity. Plaintiffs have attempted to draw analogies between the case area and the Columbia River. They claim that in both there are areas of mixed stocks. They ignore the fact that in the Columbia the stocks originate in a few major tributaries and there are both commercial and Indian fisheries on the river. There the concept of shared fishing time assures fairness among different user groups. In the case area Puget Sound has many major tributaries and numerous small creeks emptying into salt water. The commercial fisheries are in marine areas, the Indian fisheries predominently in rivers. Shared fishing time would not necessarily assure fairness or even be biologically possible, except in those marine areas where Indian and non-Indian commercial fisheries are intermingled. In those areas, however, Indians already have an opportunity to participate equally with non-Indians.

b. Dr. Mathews' Studies

Because Indian fisheries are predominently place oriented

on rivers, FISHERIES undertook, during the course of preparing for this law suit, special studies to analyze the fishery and suggest to the court a biologically sound management plan to allow the court to establish in some quantitative way how to accommodate the interests of Indians and other users of the resource.

All parties agree that it is possible to estimate the river origins of major fish stocks contributing to each definable fishery in the State of Washington. 90 This is exactly what Dr. Mathews' studies (Exhibits F-6 and F-26) have done. These studies are statistically valid and even plaintiffs' biologist concurs with the opinions of Dr. Mathews and Mr. Lasater that the studies reasonably portray the actual distribution of the catches of salmon from the rivers analyzed. 91 The evidence is also without contradiction that the methodology used by Dr. Mathews, including his projection of Olympic Peninsula stream data from studies on Grays Harbor and Willapa Bay stocks of fish, are generally accepted and reliable methods of studying fish populations in use by all salmon fishery management agencies. 92 Even though plaintiffs try to discredit Dr. Mathews because he and his sons troll fish in the ocean during his summer vacation, they rely on his analysis in proposing their own plan for guaranteeing an Indian harvest because without it, it is not possible to know how to restrict the marine fishery to get a quantitatively predictable result in river fisheries. 93

c. Only Washington Harvest Counts

The analysis performed by Dr. Mathews clearly indicates that substantial portions of the fish produced in Indian fishery rivers in the case area are harvested in ocean waters outside of the state's jurisdiction. More than half of chinook and coho and almost one-third of pink salmon harvested from fish produced in these rivers occurs outside the state's control. 94 Most of these fish caught outside state waters are being intercepted by Canadian fishermen. 95 There is nothing the state can do to account for those harvests. Any management plan designed to share the harvest must, therefore,

consider only fish actually harvested within state waters.

d. Reservation Catches Count

Dr. Mathews' studies also show that the commercial harvests by Indians in their river fisheries is a substantial percentage of the harvest in Washington managed waters of fish produced in those rivers.[96] A significant amount of the Indian harvest is taken in reservation fisheries.[97] Not to count reservation caught fish in computing the Indian share would leave a substantial statistical gap, and make the model proposed by Dr. Mathews unworkable.[98] Tacitly acknowledging this fact, Plaintiffs' proposed decree specifically counts reservation catches in computing the Indian share of the harvest to be taken in off-reservation areas.

It is a common practice for Indians to sell off-reservation caught fish to buyers on the reservation.[99] If reservation catches did not count toward the Indian share of the harvest, there would be an incentive to increase reservation fisheries and to report off-reservation caught fish as being caught on the reservation.[100] Plaintiffs deride this as an assumption of deceit, when in reality, it is a recognition of our human condition, to which even the tribal witnesses candidly testified:

Mrs. Miller, a Skokomish Indian, said of modern Indian commercial fishermen:[101]

> ...I think when this commercial fishing comes on they are just out there for the money, for what they can get.

When asked if she thought they were greedy, she replied:[102]

> Just like a white man, if they are going to get, they will get it.

Mr. Wright of the Puyallup tribe referred to some of his tribe's fishermen as mercenaries,[103] and Mr. Cloud said that Yakima Indians were "getting greedy," had "no self control" and the dollar meant more to them than conservation.[104] When Mr. Frank of the Nisqually Tribe was asked what share of the fishery he thought would be fair, he replied 100 percent.[105]

The most important reason that the reservation catches should count is that this Court sits in equity and fairness should be its guiding principle - fairness to the all citizen fishery, fairness to Indian tribes who have no reservations (Puyallup, Sauk-Suiattle) or on whose reservations there are no salmon runs (Squaxin), fairness to all tribes because of the disparities of their reservation fishery potentials.

e. A Percentage Share

The basic outline of the FISHERIES' proposal is set out in the "FISHERIES' Position" section, supra, and in the Summary, infra.

The fundamental biological rule in allocating the harvestable portion of a fish run is that the method of allocation must take into account run size fluctuations.[106] The allocation of the harvestable portion of a fishery based on a percentage share, allows the harvest to correspond with run size fluctuations.[107]

Plaintiffs urge a quota be set based on Indian need. Though they speak in terms of percentages, their 50 percent figure is merely an arbitrary dividing line below which a tribe would not have to prove its need, and above which it would. They urge a quota despite the stipulated testimony that harvesting quotas are used only in situations where the manager has a sophisticated knowledge of run size, such as actual counts through counting stations at dams or locks.[108] Other than the locks at the Ship Canal entrance to Lake Washington, there are no places in the case area where such sophisticated knowledge of run sizes exist.[109]

Fixed quotas do not take run size into account.[110] Plaintiffs argue that is not a drawback because the quota can always be limited to only the harvestable portion of the run. Though theoretically correct, their position fails to appreciate the manner in which a fishery manager must plan and regulate a harvest.

Fishery management is a relative science. The whole purpose of keeping accurate catch statistics and records of fishing effort is so that the manager can compare the data he is receiving

with prior years data to determine relative run strength and the affect his regulations will have on spawning escapement. Prior to the return of a run the manager predicts its estimated run size. He can predict strong, weak, average runs and estimate ball park figures, but he cannot say there will be 50,000 fish returning to the Puyallup River this year. As the fish enter the Straits they are intercepted by the fisheries there, and by comparing the catches with past catches, the manager begins refining his estimates. If the catch, as the run progresses through the fishery, shows that the harvestable portion is 25 percent below the same run last year, other factors being equal, the manager can cut back his fishery 25 percent to achieve the same spawning escapement that he did the year before. The manager has to work in percentages during the harvest because his information about the harvest is relative.

Under the percentage share plan, once the manager has initially determined how to adjust the fisheries to get at least a one third share to the Indians, he can in successive years manage on a comparative basis. If catches indicate the run is greater or lower than under comparable circumstances in prior years, the manager can adjust the fisheries accordingly with confidence that the shares will come out roughly as in the years to which he compares his data.

The quota system, on the other hand, does not fit this management pattern because it is set in terms of absolutes. Unlike the percentage share plan which will require a major retuning of the regulatory scheme initially and thereafter settle into a reliable pattern based on a comparison of different years relative run strengths, the quota system will be on the hit and miss basis every year because the fixed numbers of fish for past years are not comparable to the unknown numbers of fish returning during the year being regulated. Without an exact knowledge of run size in the case area, the quota system not only makes management extremely onerous, but also makes achievement of spawning escapement less predictable.

Plaintiffs did not introduce expert testimony to prove

the feasibility of the quota system they propose in their final decree. Although Mr. Heckman said he thought a quota system could work, he freely admitted on more than one occasion his lack of credentials as a fisheries manager. There is no biological testimony in the record to support plaintiffs' proposal as a feasible management alternative.

Indeed, the record is to the contrary. In response to the hypothetical question (Exhibit F-38) put to Mr. Heckman concerning a regulatory plan for five tribes in south Puget Sound that would be based on a statement of needs, he replied that there were not sufficient fish, if all fisheries in the State of Washington were closed, to supply the tribes' commercial requirement without even considering the ceremonial and subsistence needs.[111] The needs stated were not extravagant and comport with the evidence in regard to numbers of fishermen, tribal members, and fish necessary for subsistence.[112]

Even more telling was his response to the hypothetical question concerning a regulatory plan for the 1971 Puyallup River pink salmon run. In 1971 the Indian fishery harvested 6,173 pinks.[113] Their fifteen year average harvest had been 10,852 pinks.[114] Mr. Heckman was asked to suggest changes in the 1971 regulations of the Department of Fisheries which could have provided a harvest of 10,000 pinks to the Indians that year.[115] Mr. Heckman replied that he would close commercial fisheries in Areas 4, 4a and 6 and on West Beach in north Puget Sound, as well as certain sport fisheries.[116] On cross examination, Mr. Heckman said the closure of the sport fisheries would have caused only a minor gain in fish available to the Indian fishery and could not have made up the deficit.[117] What apparently Mr. Heckman had overlooked in preparing his answer was that in 1971 the commercial season on pinks was either closed or had mesh net restrictions to allow escape of pinks throughout the area regulated by the state during the pink run.[118] When confronted with that fact, Mr. Heckman replied he knew of no other action the state could have taken to assure the Indian fishery quota.[119]

The hypothetical questions illustrate two points about the

quota scheme proposed by plaintiffs. First, there are not enough fish in the fishery to realistically speak of Indian need in terms of economic parity for the tribes' members. Second, even a modest quota can sometimes not be achieved. Combined, these hypothetical questions raise the prospect that to achieve an Indian quota based on tribal members' needs, as defined by the plaintiffs, it will be necessary in some years of low returning runs to completely close the fishery to all commercial fishing in order to provide the Indians their share. If the Indian treaty right can require that circumstance, as plaintiffs suggest, then the right becomes an exclusive right and the phrase "in common with" is stripped of the meaning that even plaintiffs' anthropologist testified the Indians understood, i.e., the fishery was to be shared.

If, however, the right really is to be exercised "in common with" other citizens then the percentage plan is the fairer and more closely represents the situation at the time of the treaty. Run sizes fluctuated at treaty times. Indeed, in the winter of 1857 low salmon runs were causing near starvation among the tribes of the Puget Sound.[120] Dr. Lane testified that salmon run fluctuations caused hardship to the Indians[121] and that because of them the Indians had no "absolutely reliable resource supply every time."[122] Under the percentage share plan, Indians and non-Indians would, as in treaty times, share together the bounty and suffer together the deprivation caused by salmon run fluctuations. The treaty right would be, as the courts have declared, non-exclusive and an accommodation between user Groups could be reached.

f. Panel Unworkable

The percentage share plan can win the confidence and respect of all users. Tribal witnesses, with few exceptions, agreed that a percentage share set by the court would be fair recognition of their treaty right.[123] On the other hand, tribal witnesses felt they could not speak for their tribes in recommending the panel suggested by plaintiffs' counsel and were completely unfamiliar with how it

g. Interim Regulation

FISHERIES witnesses have testified that the percentage share model presented in Dr. Mathews' studies is not a management plan, and that it would take approximately three years to implement a management plan based on the model.[128] In the interim FISHERIES proposes that the court approve its plan to adopt for each of the plaintiff tribes interim regulations set out in its proposed decree. The regulations would be adopted in accordance with the Washington Administrative Procedures Act, and the department would restrict the non-Indian fishery in marine areas to insure that significant numbers of fish will be present in the Indian fisheries. These regulation proposals are similar in kind to the regulations presently in effect for some of the plaintiff tribes,[129] but would in addition create subsistence fisheries with gear limitations (gaff, spear, dip net) and liberal seasons.

h. Statistics

It is stipulated by the parties that accurate catch statistics and information on the number of units of gear and their efficiency is needed to effectively regulate a salmon fishery.[130] Although the Department of Fisheries has no authority to regulate on reservations, information from those reservation fisheries is necessary to achieve spawning escapement.[131]

FISHERIES would like the permission of the Court to require Indians fishing off-reservation, and to have the tribe require persons fishing on-reservation, to obtain a Department of Fisheries statistical license to record commercial catches and a statistical punch card to record personal use catches. These licenses and cards would be issued free to any one possessing a valid B.I.A. treaty fishing identification card. The purpose of the license and card is to coordinate the retrieval of catch information for a computerized catch recording system. The license and card number would be keyed to a computer program.

Additionally, the Court should order Indian tribes and their fishermen to report catch information to the Department. In January

might work.[124] It became quite obvious at trial that neither the tribal witnesses nor their counsel thought out the proposal. As Mr. Pearson suggested, it was off the top of their heads.[125]

FISHERIES is absolutely and unalterably opposed to the panel plan because it puts the Department in an antagonistic position with Indians by being placed on the opposite side in a manufactured controversy. FISHERIES has a sincere desire to represent all three user Groups for whom it regulates fairly and in the ultimate best interest of the resource. Mr. Lasater, the only qualified fisheries manager to testify, said without qualification that such a plan could not work, and that in his opinion the resource would suffer.[126]

Plaintiffs' panel is not comparable to the International Pacific Salmon Fisheries Commission. The Salmon Commission has its own fisheries management staff and relies on it for the formation of its regulations. Plaintiffs' panel would have no staff, and the opinions of the FISHERIES technical staff would apparently carry no more weight than the views of other members with no training in the field of fish management or biology. The Salmon Commission operates with a specific objective goal - a 50 percent split-harvest. Plaintiffs' panel would have a subjective goal - to provide for Indian need. If the goal were to be 50 percent only, then there would be no need for the panel. The Salmon Commission regulates one river and two species. FISHERIES regulates numerous rivers and five species. If every year, the question of Indian need statements had to be resolved, it would become literally impossible for FISHERIES to plan the harvest. Plaintiffs would require the submission in March of information that FISHERIES has testified, without contradiction, it needs in January.[127]

The plan is conceived with a complete lack of understanding of basic fishery management. Since plaintiffs introduced no expert testimony to prove the feasibility of their plan, one can only conclude it is the product of the imaginations of lawyers.

of each year tribes should be required to report to the department an estimate of their predicted subsistence fishery harvest and the locations at those fishing places approved by the Master where their fishery will take place. At the same time estimates of the number of commercial fishermen and the locations approved by the Master where their fishery will take place, as well as the estimated size of the reservation fishery, should be furnished. This information will then be used by the department in formulating its regulations for the Indian fisheries.

i. Summary of FISHERIES Plan

(1) Interim regulations for 1974

FISHERIES restricts non-Indian fishery to assure significant number of fish in Indian fisheries; regulate seasons to protect spawning escapement.

(2) In 1974, Master determines the specific areas on the watersheds, determined by the Court to be usual and accustomed places of the respective tribes, where Indians can fish compatibly with conservation, and determines where commercial net fishing can take place and where limited gear (gaff, spear, dip net) subsistence fishing can take place.

(3) 1975 FISHERIES expands interim regulations to include all areas determined by Master to be fished compatibly with conservation. FISHERIES restricts non-Indian fisheries to provide significant numbers of fish in Indian fishery; regulates seasons to protect spawning escapement.

(4) 1975, Master determines base production area estimates, i.e., estimates, such as are contained in Dr. Mathews' studies, of production for the river and terminal marine areas where the Indian fisheries are located.

(5) 1976, FISHERIES begins managing under percentage share plan:

(a) Areas - as determined by Master

(b) Gear - as determined by Master

(c) Seasons and Gear Limitations - as determined by FISHERIES

(d) Production Area Estimates - as determined by Master. If Indians fishing in the production area harvest at least one-third of the harvestable surplus, over and above what is harvested for subsistence, harvested in Washington waters from fish produced in the production area where the Indian fishery is located, then the seasons and gear limitations, e.g., net length, mesh size, distance between gear, etc. are valid and it is presumed that the Indians harvested their need for subsistence fish.

(e) Substitution of Species - The one-third share is accountable by species. If it is not possible to regulate the harvest elsewhere to assure sufficient fish of one species, FISHERIES may substitute in that year salmon of another species in an equivalent value.

(f) Deficit - If Indians do not harvest their one-third share because not enough fish reached the Indian fishery, FISHERIES is obligated to make up the share in the subsequent year. If a chronic problem develops, special hatchery plantings may be used to augment the Indian share.

(6) Marine areas - 1974/ - same as all citizen fisheries. (Alternately: additional fishing in days a week.)

5. Reef Net Controversy

The evidence establishes that Lummi Indians reef netted in and around the San Juan Islands at treaty times. The controversy centers around the reef net sites at Village Point, Lummi Island. There is no hard evidence other than informant testimony once or more

removed and opinion that the sites existed there. Two navigational charts dating from before the treaty, 1859 and 1863, contain Lummi reef net sites, but do not note any at Village Point.[132] It would be surprising if the Village Point site existed and was not recorded since one map shows a ship's track through the passage west of Lummi Island and the other contains soundings along the west coast of Lummi Island. There is one map with a notation of a Lummi reef net site at Village Point but it is undated, though Dr. Lane was clearly of the opinion that it was a post treaty map.[133] Dr. Lane's testimony was that reef netting did not have commercial significance to the Lummis until 1878,[134] and it would appear that the Lummi interest to fish at Village Point has always been a commercial interest because the Indians abandoned the site when the cannery closed in 1924 and began to fish again when the cannery opened in 1939.[135] The most likely conclusion to be drawn from the evidence is that Lummi's began fishing at Village Point sometime after the treaty was signed when commercial fishing became important to them.

There is no evidence that the state has discriminated against Lummi Indians. A Lummi can get a reef net license without paying the fee. The state does not determine the site where the licensee may set, nor does the license entitle its holder to a site. The state does regulate reef net fishermen by time, area, and distance between rows of gears, but does not regulate the number of reef nets or the separation between reef nets and reef net boats within a row.[136] It is stipulated by the parties that regulations restricting the times when fishing is permitted and restricting the areas in which particular types of fishing is permitted are biological regulations establishing limits of allowable harvests, and are designed to protect and conserve adequate spawning populations of fish stocks.[137]

I. LAW OF THE CASE

A. Jurisdiction

The FISHERIES defendant does not challenge the jurisdiction of this court to adjudicate this action.

B. Existence of Right

1. Generally

The United States Supreme Court has held that treaty Indians have a distinct, non-exclusive right to fish at their usual and accustomed stations not shared by citizens generally. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) The Court also held that right may be regulated by an appropriate exercise of the police power.

> . . . the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

391 U.S. at 398. The Court emphasized that:

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

391 U.S. at 399. Two things are clear from the Puyallup decision: (1) Treaty Indians have a distinct fishing right, and (2) the state can regulate in the interest of conservation the exercise of that right off reservations.

2. Treaty Tribes Status

Muckleshoot Tribe - The Supreme Court of the State of Washington declared in State v. Moses, 70 Wn.2d 282, 286, 422 P.2d 775 (1967) that:

> . . . it seems to us clearly established that the then nonexistent Muckleshoot Tribe, as such, had no treaty rights; that the named individual defendants, as Skope-ahmish descendants, failed to establish that their tribe was signatory to the Point Elliott Treaty and, hence, failed to establish that they had any rights thereunder.

It would appear that the law of this jurisdiction is that only Muckleshoot tribal members who can trace their lineage to a band or group that was signatory to one of the treaties is entitled to exercise

treaty fishing rights. The Department of Fisheries is bound by the law of the State of Washington.

Stillaguamish and Upper Skagit - Neither of these tribes is recognized by the Bureau of Indian Affairs as a currently functioning tribal entity. The right to exercise treaty rights is dependant upon a tribe's being recognized by the United States. The Kansas Indians, 5 Wall 737 (1866) wherein the Court stated at pp. 755-757:

> If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from others," . . . separated from the jurisdiction of Kansas . . . As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress . . .

Since neither Stillaguamish nor Upper Skagit are so recognized at this time, they are not now under the protection of the treaties to which their predecessors in interest may have been a party.

C. Scope of Right

1. Fair Share

In its recent decision, Washington Game Department v. Puyallup Tribe, No. 72-481, November 19, 1973, attached hereto, the United States Supreme Court made clear that the rule of law in the area of Indian treaty fishing rights is a rule of fair apportionment between Indian and non-Indian fishermen. At p. 5, the Court said:

> . . . If hook and line fishermen now catch all the steel head which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables--the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook and line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people. [Emphasis supplied.]

This ruling, sub silentio, affirms the ruling of Judge Belloni in SoHappy v. Smith, 302 F.Supp. 899 (D. Ore. 1969). It is the rule of "fair share." The decision, though succint, is instructive in several regards. Most importantly because it establishes the fair share standard, but also because it indicates that the particular formula governing a fair share must be determined on an individual basis considering the variables present in each case. It also makes clear that the right to a share is to a share of a particular species.

The variables the Court recognized that might legitimately be considered include biological considerations, numbers of fishermen, catch allocation.

In light of this decision the SoHappy case becomes extremely important because it is the only instance, prior to consideration of the present case, where a court has taken an in depth look at the scope of the treaty right and set down guidelines.

In SoHappy, the Court interpreted the Puyallup "conservation" standard as requiring the State of Oregon, by its fishing regulations, to provide treaty Indians who fish on the Columbia River with an opportunity to take a fair and equitable share of the fish that Oregon allows to be harvested on the Columbia. In SoHappy, as in this case, the United States and plaintiff intervenor tribes sought declaratory relief against the state.

The Court interpreted the term "conservation," as used in Puyallup, to mean:

> . . . conservation in the sense of perpetuation or improvement of the size and reliability of the fish runs.

302 F.Supp. at 908. The Court discussed the fact that regulation of any harvesting group is interrelated to regulation of every other harvesting group and that conservation of the fish run is only achieved by the whole regulatory scheme. It concluded that:

> Oregon's conservation policies are concerned with allocation and use of the state's fish resource as well as with their perpetuation.

302 F. Supp. at 909. In other words, directly or indirectly,

allocation of the harvest among different harvesting groups is inherent in any regulatory scheme that attempts to perpetuate or improve the size and reliability of fish runs. A similar conclusion was drawn in the trial of this case. Director Tollefson testified:[138]

> . . . when you have two or more groups of fishermen fishing on the same runs of salmon at different times, any regulation of one group is interrelated with the regulation of the other group. Regulation of one group is as much a conservation necessity as regulation of the other group.

In SoHappy the court found that Oregon attempted to equitably divide the harvest between the non-Indian commercial and sports groups without consideration for the Indians. The Court accepted the position of the United States that:

> . . . in the case of anadromous fish the total impact of the state's regulations on the entire run as it proceeds through the area of the state's jurisdiction must be considered; that a non-discriminatory set of regulations requires that treaty Indians be given an opportunity to catch fish at their usual and accustomed places equal to that of other users to catch fish at locations preferred by them or by the state.

392 F.Supp. at 910. The Court went on to say that Oregon would in the future have to consider the interests of three groups: Non-Indian commercial fishermen, sport fishermen and Indian fishermen, and enact regulations that would assure the Indians of an opportunity to take a fair share of the fish harvested in the Columbia River. The effect of its decision, said the Court, was:

> . . . that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians. . . .

302 F.Supp. at 911. In practice the SoHappy decision has resulted in a concept of shared fishing time between the Indian and non-Indian commercial fishermen and the establishment of an Indian personal use fishery with time and gear limitations analogous to the sport fishery but making allowance for peculiarly Indian methods of fishing.

For reasons discussed, supra, shared fishing time would not be fair in the case area except where Indian and non-Indian fisheries are mingled. Marine waters, other than terminal areas, are, however,

places where Indian fishermen do have, without the need for special treatment, an equal opportunity with non-Indians to fish. If it is not a fair opportunity, additional fishing days per week can be given. River and terminal marine areas pose a different problem. There a sharing formula is needed because the Indians are at the end of the harvesting line. FISHERIES has suggested a percentage share plan.

At trial the Department of Fisheries did not state to the Court what percentage it thought would be a fair share for the Indians. In closing argument we take the position that a one-third share is a fair recognition of the treaty right when Indian subsistence fish do not count. We think subsistence fish should be exempted from the share because clearly the evidence reveals that the Indians' main concern at the treaty negotiations was access to their food supply. They were promised that access by the treaty commissioners. Conditions have changed since treaty times. Indians are less dependant on salmon for their diet, but that change is manifested in less consumption and not in diminution of right.

As to other uses of salmon, there is evidence of minor commercial sales occurring at treaty times, and it was contemplated the Indians would play a role in the developing commercial fishery. But certainly there is no evidence to show that Indians were to be guaranteed a pre-eminent role in it. Nor is there any evidence that Indians would run sport fish businesses such as the Quinault, Makah or Skokomish. Certainly it was not intended by the commissioners or understood by the Indians that they would have exclusive rights for these purposes.

A one-third share recognizes the Indians as a separate user group with separate goals, and at the same time gives recognition to the legitimate goals of other user groups. Since the different user groups' goals vary and create different demands on the fishery, it would not be fair to divide the harvest based strictly on numbers of fishermen. It does seem fair, however, for the Court to consider numbers of fishermen in determining whether the Indian share is fair

to them. Similarly, the fact that Indians enter the all-citizen commercial and sport fisheries should not be used to deny them their distinctly treaty share, but it should be considered in determining whether the share they receive is fair.

There is precedent for a one-third share. Although the So-Happy Court did not state the fair share in terms of a percentage share, it impliedly recognized the percentage share concept. In citing testimony to support its conclusion that Oregon conservation regulations were concerned with allocation of the harvest, the Court cited the testimony of the Director of the Oregon Fish Commission:

> Q. Correct. Now, if a single entity has that authority and that responsibility, is it not true that that single entity must make some determination between the various user groups or taking groups as to what percentage or what use or what landing of the resource that this particular user group may make of it? (Emphasis original.)
>
> A. In some way, deliberately or inadvertently, this decision must be made. (Emphasis original.)

302 F.Supp. at 909. The Court in determining that Oregon must recognize three user groups (commercial, sport and Indian) and provide each with an equal opportunity to catch fish, impliedly recognized an opportunity for each group to take a percentage, i.e., one-third, share of the fish since an opportunity to fish when no fish were present would be an empty opportunity.

This percentage share principle finds precedent also in the administrative regulations of the Wisconsin Department of Natural Resources, wherein of the 150,000 pounds of lake trout that were allowed to be harvested in Lake Superior, sportsmen received 50,000 pounds and the commercial catch of 100,000 pounds was divided so that the non-Indians received 40,000 pounds, the treaty Indians received 40,000 pounds, and the state for research purposes reserved 20,000 pounds which could be divided equally between non-Indian and Indian commercial fishermen. See Wisconsin Administrative Code NR §§ 25.14-25.17

Both the SoHappy Court and the State of Wisconsin were guided

in their determination of how to accommodate the Indian interest by the phenomenon, common to this case, that there are three broad user classifications, and when the many variables are considered, it is fair as an overall policy to treat them equally at least to the extent of ruling that the Indians must be treated equally with the other two groups. The concept of treating broad user groups as the basis for comparison is specifically recognized in the latest Puyallup decision because the Court ruled as between Indian and sport fishing there must be a fair apportionment. This ruling precludes the approach taken by the plaintiffs in this case.

2. Present and Future Needs

Plaintiff intervenor tribes argue that the scope of the treaty right should be defined in terms of the "present and future needs" of the Indians. In asserting this measure they rely on water appropriation law. Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908); United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), cert. den. 352 U.S. 988; 330 F.2d 897 (9th Cir. 1964); 338 F.2d 307 (9th Cir. 1964), cert. den. 381 U.S. 924; United States v. Walker River Irr. Dist., 104 F.2d 332 (9th Cir. 1939). The "present and future needs" standard is commonly known as the Winters Doctrine. In Winters the Court held that although the treaty with the Indians and the subsequent agreement establishing the Fort Belknap Reservation in Montana had not reserved any water rights in the bordering Milk River, there was an implicit reservation of sufficient water rights to meet the "present and future needs" of the Indians settled there. Although the allocation allowed the Indians was only that sufficient to meet their contemporary uses, the Court did declare in Arizona v. California, supra, that the ultimate measure of that right was an amount of water sufficient to meet the requirement of irrigating all of the irrigatable acres on the reservation.

The water law and the Winters Doctrine are distinguishable from and not analogous to the area of Indian treaty fishing rights for the following reasons:

(1) As the Puyallup II decision makes clear, the fishing right allocation is based on a rule of fair apportionment between user groups. The water law doctrine of appropriation, on the other hand, is based on a rule of prior right. There is no attempt to accommodate different interests.

(2) Conservation of the resource, except for elimination of waste, is not a consideration in water law. In water law 100 percent of the water can be appropriated. The right to appropriate merely establishes a priority of access to the water among users. If the particular water supply is lower in some years, then those with the lowest priority suffer diminution of their right. With anadromous fish on the other hand, a certain number of fish must escape all fisheries to spawn if the resource is to be preserved. One hundred percent harvest would destroy the resource. It is for this reason that a fixed quota of fish to be harvested cannot be a standard for measuring the treaty right, even though it may be an appropriate standard in water law where total use is conservationally permissible.

(3) The "present and future needs" test is a definite, objective standard in the context of water rights but not in the context of fishing rights. In the water rights context "present need" is the amount of water needed to irrigate the number of acres presently under cultivation on the reservation plus domestic needs; "future need" is the amount of water needed to irrigate the total number of irrigatable acres on the reservation plus domestic needs. As Arizona v. California, supra, indicates, the future need is a fixed standard that can be presently set by the Court in amounts of acre-feet of water.

In the fishing rights context, the word need is not defined. If need be purely sustenance, then FISHERIES would agree that the treaty so intended. The proposed FISHERIES' model would not count personal use fish taken by Indians against their share. In terms of the commercial take of fish, plaintiff tribes would define need as some vague form of economic parity between the Indian standard of living and that standard of living of the state's population as a

whole. There is no basis for the plaintiff tribes' economic parity idea in the treaties, or the circumstances surrounding their negotiation, or in the Winters Doctrine. In addition to there being no legal basis for the economic parity idea, factually the proof of such parity is not susceptable to judicial administration. Justice and equity will not permit such a standard. The low estate of the Indian tribal economy is the cause of many diverse factors, not the least of which are the broken promises and inept administration of the plaintiff United States. An attempt to correct so complex a problem by solely penalizing this state's non-Indian fishermen is neither capable of doing justice to the Indians or being fair to other citizens. Such an interpretation would completely strip away from the treaty the recognition that the Indian right was to fish "in common with citizens of the territory."

(4) The courts in finding an implied reservation of water rights relied heavily upon the fact that the clear intent of the treaties was to make farmers out of the Indians, and concluded that the United States would not have so intended and then not have reserved for them sufficient water to farm their lands. The Ahtanum Irrigation District case involved the Yakima Tribe. The Court there stated in 236 F.2d at 327:

> . . . The implied reservation looked to the needs of the Indians in the future when they would change their nomadic habits and become accustomed to tilling the soil.
>
> It is plain from our decision in the Conrad Inv. Co. case, supra, that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.

See also, United States v. Walker River Irr. Dist., supra, at 339. The evidence in this case does not support an interpretation of the treaty right to fish as intending that the Indians be given a monopoly on a modern commercial fishing industry which was technically impossible and could not have been foreseen at treaty time. At most the

evidence has shown that limited commercial trade in fish was transacted by the Indians. The primary intention of the government to make farmers out of the Indians is the cornerstone of the Winters Doctrine. No analogous primary intention to make commercial fishermen out of the Indians can be implied.

(5) Finally, the water appropriation right is restricted to waters on or bordering the reservation or for the exclusive use on the reservation. In the case before this court, the issue is off-reservation fishing. The plaintiff tribes already are secure in their exclusive use of their reservation catches.

D. Regulation of the Right

1. State Regulation

Inherent in the sovereignty of a state is the power to preserve fish and game within its borders. Kennedy v. Becker, 241 U.S. 556 (1916); Geer v. Connecticut, 161 U.S. 519 (1896). That power includes the power to regulate treaty Indian off-reservation fishing in the interest of conservation provided the state's regulations meet appropriate standards and do not discriminate against the Indians. Puyallup Tribe v. Department of Game, supra; Washington Game Dept. v. Puyallup Tribe, No. 72-481, Nov. 19, 1973.

Tribal consent is not required for restrictions on the exercise of treaty rights to fish at usual and accustomed places. SoHappy v. Smith, supra. The treaties do not give the Indians the right to insist that the state restrict non-Indians to a greater degree than it restricts Indians. Id.

Plaintiffs' proposed decree violates each one of these principles of law. First, the panel in essence supplants the state's authority to regulate off-reservation fisheries. Tribal consent through the panel is required. Plaintiffs' demand that non-Indians be restricted to whatever extent necessary, including prohibition, to afford Indians sufficient fish for their livelihood requires the state to restrict non-Indians more than Indians.

Under Puyallup the Court is supposed to measure the state's

performance by the standards there laid down. If the state's performance does not match up, the laws found to be inadequate are not enforceable against treaty Indians. Puyallup does not permit Indians, or panels, to take over management for the state. The parties seek a declaratory judgment and the plaintiffs seek an injunction. It is a proper judicial function to declare whether or not present state laws meet the requirements of Puyallup and to enjoin the state from enforcing those laws found to be invalid. It is not the Court's function to write new laws. The Court may, and FISHERIES sincerely hopes that he will, declare what guidelines the state should follow in regulating the treaty right. But telling the state that it will meet guidelines for a fair share if it provides for at least a one-third share harvest, is quite different than forcing upon state agencies a panel designed for dispute maintenance, not resolution. Furthermore, by referring all of these issues to a panel deprives the state of its right to have the Court pass on its regulations in the first instance.

2. Federal Regulation

Absent express legislation by Congress authorizing the Secretary of the Interior to regulate off-reservation treaty Indian fishing, the secretary is without authority to do so. See Village of Kahe v. Egan, 369 U.S. 60, 64 (1962); Kennedy v. Becker, 241 U.S. 556, 564 (1916). Cf. Mason v. Sams, 5 F.2d 255 (D. Wash. 1925); United States v. Cutler, 37 F.Supp. 724 (D. Ida. 1941). This is the position of the Department of the Interior. See testimony of John A. Carver, Jr., Undersecretary of the Department of Interior, in Hearings before the Subcommittee on Indian Affairs of the Comm. on Interior and Insular Affairs, U.S. Senate, 88th Congress, 2d Sess., S.J. Res. 170 and S.J. Res. 171, August 5-6, 1964. Congress has not given such akthorization.

3. Tribal Regulation

While Indian tribes are possessed of internal sovereignty to exercise self-government, they do not have the authority to regulate fishing outside of the territorial boundaries of their reserva-

tions in conflict with state law. Kennedy v. Becker, 241 U.S. 556 (1916). In Kennedy a New York law prohibiting spear fishing was sustained against the challenge that the Seneca Tribe, in reserving its hunting and fishing rights off the reservation, reserved the sovereignty to regulate the exercise of that right. The Court stated at 562-563:

> . . . The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty quoad hoc. As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." We are unable to take this view.

In their pretrial brief, the Yakima Tribe relied on Skiriotes v Florida, 313 U.S. 69 (1941). That reliance was misplaced. Skiriotes upheld the right of Florida to enforce its laws regulating its citizens' harvest of sponges in international waters. Skiriotes is distinguishable. In Skiriotes Florida's exercise of jurisdiction was in an area where no other sovereign was exercising jurisdiction. As the Court stated at 73:

> . . . the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. [Emphasis supplied]

In the instant case clearly tribal regulation of off-reservation fishing, to the extent that it conflicts with valid state regulation, does infringe the right of the state to regulate such fishing.

The issue of tribal sovereignty off-reservation in the context of fishing regulations was addressed by the Court in Puyallup Tribe v. Department of Game, 391 U.S. at 399-400, when it cited from Kennedy v. Becker:

> "We do not think that it is a proper construction of the reservation [of fishing rights] 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."

4. Pre-emption

Tribal regulations to the extent that they conflict with valid state fishing regulations are invalid. Puyallup v. Department of Game, supra; Kennedy v. Becker, supra. The reason is clearly stated by the Court in Kennedy at 563:

> . . . It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

Judge Powell's memorandum decision in Settler v. Lameer, on appeal to the 9th Circuit, No. 71-2364, attached to the pretrial brief of the Yakima Tribe, is not in conflict with this conclusion. He there states at page 8:

> Any exercise of authority by the Yakima Indian Tribe to regulate off-reservation fishing must coincide with the valid exercise of the police power of the state.

After trial in the present matter, Judge Powell on the remand of the Settler v. Lameer, No. 2454 (D.E.D. WA), by a memorandum opinion filed September 26, 1973, held that while the Yakima Tribe could pass fishing regulations not in conflict with state law for its off-reservation fisheries, its tribal officers could not make arrests or otherwise enforce the regulations outside the reservation.

5. Specifically Challenged Statutes

Plaintiffs particularly challenge the validity of certain statutes and regulations as not being necessary for conservation. For brevity the challenged statute is set out below, with a brief description, followed by FISHERIES answer to the challenge.

RCW 75.08.260 (makes violation of state fishery laws and regulations a gross misdemeanor)

Plaintiffs' biology expert testified that state penalty provisions are necessary if regulations are to achieve their conservation goals.[139]

RCW 75.12.060 (makes fishing with certain fixed gear, including traps, weirs, and set nets illegal.)

Where it is shown that such gear endangers the conservation of the resource the statute can be validly enforced against Indians.[140] It is not necessary that the legislature amend this statute to add in the case of Indians: "when necessary for conservation." The Supreme Court has already done that. Furthermore, the Joint Biological Statement[141] states that regulations which restrict the type of fishing gear used are biological regulations "concerned with establishing limits of allowable harvests, and are designed to protect and conserve adequate spawning populations."

RCW 75.12.070 (prohibits, inter alia, gaffing and spear fishing.)

Same reason given for RCW 75.12.060 above.

RCW 75.12.160 (makes reef net fishing unlawful except in designated areas.)

Where it is shown that such restrictions are necessary for conservation, they can be validly enforced against Indians. The Joint Biological Statement[142] states that regulations "restricting the areas in which . . . particular types of fishing is permitted" are biological regulations "concerned with establishing limits of allowable harvests, and are designed to protect and conserve adequate spawning populations."

W.A.C. 220-20-010 (Regulation with twelve subparagraphs prohibiting certain practices, e.g., leave fishing unattended, unmarked gear, gaffing, spearing.)

As with the above statutes FISHERIES recognizes that these restrictions are subject to proof that they are necessary for conservation. In some circumstances they will be enforceable against Indians, in others they will not. There is no need for the legislature to amend the laws, the Court has done that. But this Court should not hold these laws invalid on their face. That determination must be made on an individual case by case basis.

W.A.C. 220-20-015(2) (sets salmon preserves at river mouths for radius of three miles.)

The stipulated testimony is that salmon preserves are restrictions necessary to protect and conserve adequate spawning escapement.[143] This is because river estuaries and bays are often holding and milling areas.[144] Some parts of these areas can be fished safely, e.g., FISHERIES is proposing a Commencement Bay Indian fishery for 1974.

E. Appointment of Special Master

The United States' proposed decree sets up a panel, members of whom it is suggested, may from time to time be appointed Special Masters. The duties outlined for that panel are broad and it is contemplated as an ongoing body to adjudicate continuing disputes arising out of state regulation of Indian fisheries. By no stretch of the imagination is the United States' proposal a proper application of Fed. R. Civ. Pro. 53. La Buy v. Howes Leather Co., 352 U.S. 249 (1947) See, generally, 5A Moore's Federal Practice, ¶ 53.05 (1971); 9 Wright and Miller, Federal Practice and Procedure, § 2601-03, 2605; Kaufman, Masters in The Federal Courts, 58 Col. L. Rev. 452 (1958). Such a broad appointment on issues that are in no way exception would be an abdication of judicial responsibility and reversible error.

FISHERIES does, however, suggest that if the Court restricts the area of inquiry to the two issues suggested in its proposed decree, i.e., conservationally compatible fishing sites and base area production estimates, and appoints a Special Master who, in addition to being neutral, has competence in the area of fish management and biology, the reference would be a proper utilization of Rule 53. There are compelling circumstances for this reference. In order to properly evaluate testimony on stream areas it is necessary to have someone with expertise in the field. The same is obviously true about determinations of base area production estimates. This is a one shot proposition: When the Special Master has completed his findings and submitted them he will be discharged. This procedure is exactly what the rule contemplates and is analogous to the procedure followed in Arizona v. California, 373 U.S. 546 (1962). Masters are to make findings on technical questions beyond the Court's competence. They

are clearly not, as the United States has proposed, junior courts or arbitration boards, that deprive parties of their right to trial in a court.

IV. CONCLUSION

FISHERIES wants a simple, objective, fair declaration of what is the scope of the treaty right to fish. We do not want complex schemes. We are thoroughly competent to manage the fisheries of this state if given objective guidelines.

We would hope that whether the Court adopts a specific management plan or not, that the guidelines set will be manageable. A quota for the Indian fishery is not manageable in the case area. If the Court is going to quantify the right in numerical terms, it should be expressed in a percentage of the harvest.

The rule of law is a fair share. There are three user groups that harvest fish in this state. If the state manages the fishery so that Indians fishing at their usual and accustomed places harvest at least one-third of the production from that watershed, over and above their subsistence needs, the state will have fulfilled its obligation to recognize the treaty right.

Two questions have to be solved, which require the taking of more expert testimony and the appointment of a Special Master for their determination: (1) where can Indians fish today compatibly with conservation; (2) what is the basis of their percentage share.

DATED this 29th day of November, 1973.

Respectfully submitted,

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FOOTNOTES

1. FPTO §3-1
2. FPTO §3-14
3. Ex. USA-28, p.15
4. Ex. USA-43; FPTO §3-22
5. Ex. G-17 ( ), p.477
6. Ex. USA-43; FPTO §3-23
7. Ex. PL-15; Tr. 2172, l.3-12
8. Ex. PL-17
9. Ex. PL-8
10. Ex. D-1, p.23, l.9-25, p.23, l.33 to p. 24, l.25; Tr. 1917, l.5-9
11. See, e.g., Treaty of Medicine Creek, art. 10, 10 Stat. 1132, Treaty of Point No Point, art. 11, 12 Stat. 933.
12. Ex. PL-6, P1-40, PL-41, PL-42
13. Ex. D-1, p.27, l.3-15
14. Tr. 1992, l.5-10
15. Tr. 2599, l.2-10
16. Ex. USA-20, pp.2-10; Tr. 1778-1774
17. Ex. PL-50, p.310; Ex. MLQ-1, p.1
18. Ex. MLQ-1, p.15
19. Ex. MLQ-1, pp.1-3
20. Ex. JX-2a, §2.3.1, pp.60-62
21. Tr. 1685, l.21 to 1686, l.17; Tr. 1999, l.19-23; Tr. 2001, l.18 to 2002, l.3; Exs. USA-65, 66, 67
22. Ex. PL-16b
23. Tr. 1886, l.11-18; 2404, l.1-6
24. Tr. 1946, l.12-21
25. Ex. PL-86
26. Tr. 2026, l.22 to 2028, l.3; 2048, l.14 to 2049, l.3
27. Tr. 1946, l.12-21
28. Ex. PL-86
29. Tr. 2176, l.19-22; Tr. 2178, l.4-5

30. Tr. 1951, 1.11 to 1952, 1.4

31. Tr. 2489, 1.12-14

32. FPTO §3-34; Ex. USA-52, p.4, 1.7 to p.5, 1.29; Tr. 1963, 1.1-19; Tr. 1972, 1.19 to 1974, 1.19

33. See, e.g., Exs. QN-2 and QN-3; Ex. H-1; Tr. 2596, 1.24 to 2597, 1.2

34. Tr. 2601, 1.21-22; Tr. 3475, 1.5-13; Tr. 3511, 1.23 to 3512, 1.11

35. Ex. F-40, p.8, 1.2-14, p.18, 1.17 to p.19, 1.12; Ex. F-45, p.17, 1.3 to p.18, 1.2; Tr. 741, 1.12-22; Tr. 2566, 1.24 to 2567, 1.4; Tr. 2897, 1.4-7; Tr. 3031, 1.24 to 3032, 1.3

36. Ex. F-35, p.24, 1.15-20

37. See, e.g., Tr. 721, 1.5-9; Tr. 2489, 1.17-19; Tr. 3342, 1.24 to 3343, 1.2

38. Tr. 2600, 1.2-7; Tr. 2602, 1.14-16; Tr. 2886, 1.3-16

39. Tr. 3124, 1.23 to 3125, 1.19; Tr. 2885, 1.17 to 2886, 1.16; Tr. 2888, 1.17 to 2889, 1.7

40. Tr. 1991, 1.13 to 1992, 1.25; Tr. 2431, 1.9-16; Tr. 2439, 1.9 to 2441, 1.7; Tr. 2448, 1.8 to 2450, 1.4

41. Tr. 1992, 1.5-10; Tr. 2599, 1.2-10; Tr. 3469, 1.1-8; Ex. F-40, p.12, 1.14 to p.13, 1.3

42. See, e.g., Tr. 2507, 1.17-19; Tr. 2508, 1.8-10; Tr. 2609, 1.2-4; Ex. F-30, Tribal Answers to Question No. 40 in each set of Interrogatories

43. FPTO §3-32

44. Ex. D-1, pp.9-12; Ex. G-4, pp.181-184; Ex. MLQ-1, pp. 14, 16

45. Ex. D-1, pp.9-12; Tr. 2475, 1.7 to 2476, 1.8

46. Tr. 1849, 1.18-22

47. Ex. JX-2b; Tr. 3231, 1.25 to 3232, 1.5; Tr. 3255, 1.17-20

48. See Sullivan, et al. v. Kidd, 254 U.S. 433 (1921)

49. Tr. 1354, 1.3 to 1355, 1.16; Tr. 3305, 1.9-18

50. See, e.g., Tr. 2983, 1.14 to 2984, 1.2; Tr. 2519, 1.25 to 2520, 1.7; Tr. 2554, 1.1-8; Tr. 2587, 1.20-23; Tr. 2645,

1.2-7, 1.18 to 2646, 1.5; Ex. F-72; Ex. F-30, Ans. No. 10 to Interrogatories to Tribes; Tr. 1610, 1.1 to 1611, 1.2

51. See, e.g., Tr. 2977, 1.25 to 2978, 1.6; Tr. 2579, 1.10-15; Tr. 1285, 1.12-17; Tr. 1349, 1.18 to 1350, 1.1; Tr. 2646, 1.10-14; Tr. 2879, 1.4 to 2880, 1.3; Tr. 3210, 1.11-22; Tr. 3212, 1.20 to 3213, 1.7; Ex. F-30, Ans. No. 15 to Interrogatories to Tribes

52. Tr. 2984, 1.6-15; Tr. 3129, 1.7-10; Tr. 3136, 1.13-20; Tr. 2554, 1.9-16; Ex. F-33, p.3, 1.17-22

53. Ex. F-30, Ans. No. 11 to Interrogatories to Tribes

54. Ex. F-33, p.17, 1.8-22

55. Tr. 2874, 1.9-15; Tr. 2883, 1.15-24

56. Ex. F-30, Ans. Nos. 17-20 to Interrogatories to Tribes

57. Tr. 1418, 1.16-19; Tr. 1422, 1.10-12

58. Tr. 1420, 1.3-6

59. Ex. F-30, Ans. No. 12 to Interrogatories to Tribes

60. Tr. 1414 - 1416

61. Tr. 1394, 1.20-24; Tr. 3578, 1.18 to 3580, 1.20

62. Tr. 3573, 1.2-4; Tr. 3578, 1.18 to 3579, 1.15

63. Tr. 3580, 1.14-18

64. Tr. 3580, 1.5-10; Tr. 2881, 1.14 to 2883, 1.5

65. Tr. 3580, 1.21 to 3581, 1.2; Tr. 2881, 1.10-13

66. Tr. 4214, 1.20-23

67. Tr. 3572, 1.24 to 3574, 1.1

68. Ex. PL-74

69. Tr. 3607, 1.25 to 3608, 1.6; Ex. F-20

70. Tr. 2847, 1.13 to 2850, 1.23

71. Ex. JX-2a, pp.101-103

72. FPTO §§3-599(e); 3-606

73. Tr. 1045, 1.19 to 1046, 1.6

74. Ex. JX-2a, Fig. 1

75. Ex. F-45, p.14, 1.23 to p.46, 1.4

76. Tr. 3592, 1.13-19

77. Tr. 3592, 1.23 to 3593, 1.8

78. Tr. 3594, 1.4 to 3596, 1.12

79. Tr. 3596, 1.17-23; Tr. 3595, 1.14-15

80. Tr. 3593, 1.9 to 3594, 1.3; Tr. 3595, 1.25 to 3596, 1.12

81. Ex. JX-2a, pp.81-82

82. FPTO §3-603; Tr. 2485, 1.18 to 2486, 1.12; Tr. 2493, 1.6 to 2494, 1.11

83. FPTO §3-613

84. See, e.g., Ex. JX-2a, App. II; Tr. 1048, 1.17 to 1049, 1.7; Tr. 2488, 1.7-15

85. FPTO §3-599

86. Ex. USA-37

87. Tr. 2657, 1.14 to 2659, 1.6

88. Tr. 2688, 1.1-22

89. Tr. 2659, 1.3-4

90. Ex. JX-2a, p.32, 34

91. Ex. JX-2a, p.29; Ex. F-28, p.35, 1.3-9: Ex. F-31, p.5, 1.13-27; Tr. 4136, 1.9 to 4140, 1.3

92. Tr. 4181, 1.5-15

93. Ex. F-7

94. Ex. F-28, p.13, 1.11-15; Ex. F-32, p.11, 1.4 to p.12, 1.1; Ex. JX-2a, pp.29, 30, 33

95. Exs. F-46 through F-71; Tr. 4189, 1.8-9

96. Tr. 4188, 1.1 to 4189, 1.9

97. Tr. 4189, 1.3-9

98. Tr. 3960, 1.2 to 3961, 1.15

99. Tr. 3961, 1.16 to 3963, 1.2: Tr. 3605, 1.22 to 3606, 1.18; Tr. 921, 1.17 to 922, 1.12

100. Ex. F-40, p.18, 1.17-25

101. Ex. F-40, p.19, 1.10-12

102. Tr. 2897, 1.4-7

103. Ex. F-35, p.24, 1.15-20

104. Tr. 2653, 1.10-22

105. Tr. 1067, 1.10-19; Tr. 1373, 1.13 to 1374, 1.2; Tr. 3583, 1.6 to 3585, 1.6

106. Ex. F-28, p.14, 1.31 to p.15, 1.3; Tr. 1453, 1.5-8

107. Ex. JX-2a, p.57; Tr. 1071, 1.13 to 1072, 1.20

108. Tr. 1074, 1.12-16; Tr. 1437, 1.17 to 1438, 1.16

109. Tr. 1074, 1.17-21; Tr. 1447, 1.1-18

110. Ex. F-37(a)

111. See F-30, Tribal Answers to Interrogatories Nos. 37-44

112. Ex. JX-2a, Table 51

113. Id.

114. Tr. 1363, 1.21 to 1364, 1.5 The 1971 regulations and amendments are found in Ex. JX-2a, App. III, Table 31

115. Ex. F-37(b)

116. Ex. F-37(e), p.12, 1.2-6, 1.23 to p.13, 1.5

117. Ex. JX-2a, App. III, Table 31: Ex. F-37(d)

118. F-37(e), p.15, 1.3-18

119. Ex. PL-40; Ex. F-39

120. See generally, Tr. 2006, 1.17 to 2010, 1.25

121. Tr. 2010, 1.25

122. Tr. 2559, 1.24 to 2560, 1.6; Tr. 2598, 1.9-17; Tr. 2897, 1.20 to 2990, 1.24; Ex. F-41, p.18, 1.22 to p.19, 1.3

123. See, e.g., Tr. 3138, 1.22 to 3140, 1.14; Tr. 3497, 1.9-21

124. Tr. 3516, 1.24 to 3517, 1.1

125. Tr. 3882, 1.23 to 3883, 1.15

126. Tr. 1079, 1.7 to 1082, 1.18; Tr. 1088, 1.19 to 1089, 1.2; Ex. F-5

127. Tr. 3655, 1.20 to 3656, 1.11; Tr. 3879, 1.23 to 3880, 1.15; Tr. 4166, 1.9-24

128. Ex. JX-2a, App. II

129. Ex. JX-2a, pp.54-55

130. Ex. JX-2a, p.73

131. Exs. USA-62, 63; Tr. 1699, 1.2 to 1701, 1.21

132. Ex. USA-61; Tr. 1701, 1.22 to 1702, 1.13; Tr. 2838, 1.14-24

133. Ex. USA-30, p.22

134. Tr. 2933, l.8-12; Ex. L-5, p.4, l.4-17, p.4, l.26 to p.9, l.9; Ex. L-6, p.1, l.29 to p.2, l.8

135. FPTO § 3-608

136. Ex. JX-2a, pp.81, 82

137. Ex. F-27, p.4, l.30 to p.5, l.1

138. Tr. 1354, l.22 to 1355, l.12

139. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968)

140. Ex. JX-2a, § 2.6.6, pp. 81, 82

141. Id.

142. Id.

143. Ex. F-1

I N D E X

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF GAME OF WASHINGTON *v.* PUYALLUP TRIBE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 72–481. Argued October 10, 1973—Decided November 19, 1973*

Commercial net fishing by Puyallup Indians, for which the Indians have treaty protection, *Puyallup Tribe* v. *Dept. of Game*, 391 U. S. 392, forecloses the bar against net fishing of steelhead trout imposed by Washington State Game Department's regulation, which discriminates against the Puyallups, and as long as steelhead fishing is permitted, the regulation must achieve an accommodation between the Puyallups' netfishing rights and the rights of sports fishermen. Pp. 2–6.

80 Wash. 2d 561, 497 P. 2d 171, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BURGER, C. J., and STEWART, J., joined.

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*Together with No. 72–746, *Puyallup Tribe* v. *Department of Game of Washington*.

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SUPREME COURT OF THE UNITED STATES

Nos. 72–481 AND 72–746

Department of Game of the State of Washington, Petitioner, 72–481 *v.* The Puyallup Tribe et al. Puyallup Tribe, Petitioner, 72–746 *v.* Department of Game of the State of Washington.	On Writ of Certiorari to the Supreme Court of Washington.

[November 19, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1963 the Department of Game and the Department of Fisheries of the State of Washington brought this action against the Puyallup Tribe and some of its members, claiming they were subject to the State's laws that prohibited net fishing at their usual and accustomed places and seeking to enjoin them from violating the State's fishing regulations. The Supreme Court of the State held that the tribe had protected fishing rights under the Treaty of Medicine Creek and that a member who was fishing at a usual and accustomed fishing place of the tribe may not be restrained or enjoined from doing so unless he is violating a state statute or regulation "which has been established to be reasonable and necessary for the conservation of the fishing." 70 Wash. 2d 245, 262, 422 P. 2d 754, 764.

On review of that decision we held that, as provided in the Treaty of Medicine Creek, the "right of taking fish, at all usual and accustomed grounds and stations [which] is . . . secured to said Indians, in common with all citizens of the Territory" extends to off-reservation fishing but that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." 391 U. S., at 395, 398. We found the state court decision had not clearly resolved the question whether barring the "use of set nets in fresh water streams or at their mouths" by all, including Indians, and allowing fishing only by hook and line in these areas was a reasonable and necessary conservation measure. The case was remanded for determination of that question and also "the issue of equal protection implicit in the phrase in common with" as used in the Treaty. *Id.*, 401–403.

In Washington the Department of Fisheries deals with salmon fishing while steel head trout are under the jurisdiction of the Department of Game. On our remand the Department of Fisheries changed its regulation to allow Indian net fishing for salmon in the Puyallup River (but not in the bay nor in the spawning areas of the river). The Department of Game, however, continued its total prohibition of net fishing for steel head trout. The Supreme Court of Washington upheld the regulations imposed by the Department of Fisheries which as noted were applicable to salmon; and no party has brought that ruling back here for review. The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steel head trout. We granted the petitions for certiorari. — U. S. —.

The Supreme Court of Washington, while upholding the regulations of the Department of Game prohibiting fishing by net for steel head in 1970, 80 Wash. 2d 561, 497 P. 2d 171, held (1) that new fishing regulations for the Tribe must be made each year, supported by "facts and data that show the regulation is necessary for the conservation" of the steel head; (2) that the prohibition of net fishing for steel head was proper because "the catch of the steel head sports fishing alone in the Puyallup River leaves no more than a sufficient number of steel head for escapement necessary for the conservation of the steel head fishing in that river." *Id.*, at 573.

The ban on all net fishing in the Puyallup River for steel head [1] grants in effect the entire run to the sports fishermen. Whether that amounts to discrimination under the Treaty is the central question in these cases.

We know from the record and oral argument that the present run of steel head trout is made possible by the planting of young steel head trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen. The Washington Supreme Court said:

> "Mr. Clifford J. Millenback, Chief of the Fisheries Management Division of the Department of Game, testified that the run of steelhead in the Puyallup River drainage is between 16,000 and 18,000 fish annually; that approximately 5,000 to 6,000 are native run which is the maximum the Puyallup system will produce even if undisturbed; that approximately 10,000 are produced by the annual hatchery plant of 100,000 smolt; that smolt, small

[1] "ANNUAL CATCH LIMIT—STEELHEAD ONLY: Thirty steelhead over 20" in length . . ." 1970 Game Fish Seasons and Catch Limits, 3 (Dept. of Game).

> steelhead from 6 to 9 inches in length, are released in April, and make their way to the sea about the first of August; that during this time all fishing is closed to permit their escapement; that the entire cost of the hatchery smolt plant, exclusive of some federal funds, is financed from licensee fees paid by sports fishermen. The record further shows that 61 per cent of the entire sports catch on the river is from hatchery planted steelhead; that the catch of steelhead by the sports fishery, as determined from "card count" received from the licensed sports fishermen, is around 12,000 to 14,000 annually;[2] that the escapement required for adequate hatchery needs and spawning is 25 per cent to 50 percent of the run; that the steelhead fishery cannot therefore withstand a commercial fishery on the Puyallup River." 80 Wash. 2d, at 572.

At oral argument counsel for the Department of Game represented the catch of steel head that were developed from the hatchery program were in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the cost of that program was financed by the license fees of sports fishermen. Whether that issue will emerge in this ongoing litigation as a basis for allocating the catch between the two groups, we do not know. We mention it only to reserve decision on it.

At issue presently is the problem of accommodating net fishing by the Puyallups with conservation needs of the river. Our prior decision recognized that net fishing by these Indians for commercial purposes was covered by the Treaty. 391 U. S. 398-399. We said that "the

[2] The Washington Supreme Court noted "that substantially all the steel head fishing occurs after their entrance into the respective rivers to which they return." 80 Wash. 2d, at 575.

manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the State in the interest of conservation, provided the regulation . . . does not discriminate against the Indians." *Id.*, 398. There is discrimination here because all Indian net fishing is barred and only hook and line fishing, entirely pre-empted by non-Indians, is allowed.

Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook and line fishermen now catch all the steel head which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook and line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger

pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets.

We reverse the judgment below insofar as it treats the steel head problem and remand the case for proceedings not inconsistent with this opinion.

So ordered.

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MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring in the opinion and judgment.

I agree that consistently with the Treaty commercial fishing by Indians cannot be totally forbidden in order to permit sports fishing in the usual volume. On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. The opinion below, as I understand it, indicates that the river, left to its own devices, would have an annual run of 5,000 or 6,000 steelhead. It is only to this run that Indian Treaty rights extend. Moreover, if there were no sports fishing and no state-planted steelhead, and if the State, as the Court said it could when this case was here before, may restrict commercial fishing in the interest of conservation, the Indian fishery cannot take so many fish that the natural run would suffer progressive depletion. Because the Court's opinion appears to leave room for this approach and for substantial, but fair, limits on the Indian commercial fishery, I am content to concur.

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