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Docket Entry 364 - Filed response to defendants objection to admission of exhibit MS-1. 9/10/73 Entered record trial resumed

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11 UNITED STATES DISTRICT COURT
12 WESTERN DISTRICT OF WASHINGTON
13 AT TACOMA

15 UNITED STATES OF AMERICA,
16 et al.,

17 Plaintiffs,

18 v.

19 STATE OF WASHINGTON,
20 et al.,

21 Defendants.

Civil No. 9213

RESPONSE TO DEFENDANTS'
OBJECTION TO ADMISSION
OF EXHIBIT MS-1

22 Defendants have objected to admission of Exhibit MS-1
23 --a report by economist Dr. Gardner Brown, Jr. entitled
24 "Economic Implications of an Indian Fishery." Dr. Brown
25 reaches four conclusions which may be considered cumulatively
26 or independently:

- 27 1. The Puget Sound commercial fishery is not
- 28 economically efficient as it now operates.
- 29 2. A fishery utilizing fish traps is the most
- 30 efficient means for harvesting salmon.
- 31 3. Assuming the use of fish traps, an Indian fishery
- 32 could derive sufficient income from salmon fishing to support

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1 a large number of Indian families from a portion of the harvest,
2 still allowing for other fisheries and providing for escapement.

3 4. Analysis of several Indian fisheries shows no
4 indication that Indian fishing has failed to respond by reducing
5 fishing intensity at times when greater escapement is needed.

6 Defendants' objections are based upon an alleged lack
7 of factual foundation for Dr. Brown's conclusions. Each of
8 the defendants' four specific objections will be discussed.

9 First, defendants allege a misinterpretation of the
10 catch data contained in the Department of Fisheries' statistical
11 report for 1969. Absent additional explanatory matter concern-
12 ing this objection, it is assumed, based on the questions of
13 counsel in the deposition of Dr. Brown, that this refers to
14 the fact that Dr. Brown assumes as available for potential
15 Indian harvest all salmon spawned in Washington waters. The
16 crux of this argument is that since the State of Washington
17 lacks jurisdiction to limit or to regulate the harvest from
18 the entire run (because some are taken outside Washington
19 waters), Indian catch should not be seen as a percentage of
20 the total. This objection, if it is what defendants intended,
21 is just the converse of a serious objection plaintiffs have
22 to the so-called "management model" of the Department of
23 Fisheries in this case. That is, the failure of the Department
24 of Fisheries to consider fish which it claims are caught
25 outside the regulatory jurisdiction of the State when deter-
26 mining the basis of an Indian "fair share" of the total harvest.
27 See Exhibits F-6 and F-18. Indeed, the same basic statistics
28 are used in those reports and in Dr. Brown's report.

29 Certainly if the percentage of Indian catch is not
30 to be distorted artificially, it is inadequate to include only
31 those fish actually taken in waters under Washington juris-
32 diction.

1 Whether Washington fishermen, or Canadian fishermen,
2 or Alaskan fishermen take the fish is immaterial to the
3 plaintiff tribes. The point is that if the runs are depleted
4 to a certain extent when they reach Washington waters, it is
5 improper to see the balance as the total available run just
6 because others have fished on it. From the Indian viewpoint,
7 non-Indians--persons lacking any treaty right to fish--have
8 harvested fish which otherwise would have been available to
9 them. If it leaves an inadequate number of fish for treaty
10 and non-Indian fishermen both to be satisfied fully, limita-
11 tions must first be placed on non-treaty fishermen. State law
12 simply must impose restrictions on the portion of the harvest
13 over which the State has jurisdiction. If that portion of
14 the run which remains after the ocean troll is too small in
15 the eyes of the State and/or the Indians, the responsible
16 governmental entities--the other states themselves or the
17 United States in the case of a foreign fishery--must be
18 solicited to take action.

19 In any event, if the difference of opinion as to how
20 statistics are to be used is known to the court, there should
21 be no problem if the report is considered with the arguments
22 of each party in mind.

23 The second objection of the defendants to Dr. Brown's
24 report is that in analyzing the efficiency of the Washington
25 commercial fishery he has used data from a study of the same
26 subject made concerning the British Columbia fishery. Dr.
27 Brown testified in his deposition that he had been satisfied
28 by the sources from which he took his data and from his
29 consultation with acknowledged experts in the field that the
30 conditions in the British Columbia and Washington commercial
31 fisheries were sufficiently comparable for his conclusions
32 concerning the efficiency of the Washington commercial fishery.

1 Specifically, he used cost and efficiency ratings from British
2 Columbia.¹ See deposition, pages 109-113, 116. In addition,
3 Dr. Brown's conclusion coincides with the conclusions of
4 persons making a thorough study of Washington fishing recently.
5 See report, page 17.

6 Third, the defendants object that Dr. Brown's
7 assumptions concerning fish traps are not based in fact.
8 With respect to the cost data used by him, Dr. Brown has
9 documented adequately that he got his basic figures regarding
10 the Swinomish fish trap from the responsible source in the
11 Swinomish Indian Tribe and that he obtained general information
12 concerning fish traps from an official of the National Marine
13 Fishery Service. See Table 10, report, pages 19-20. He
14 further explained some of the bases of his assumptions at
15 pages 117-118 of his deposition. Further, Dr. Brown shows
16 in his report that the cost of traps relative to their great
17 efficiency is so low that even a considerable increase in
18 their cost would not alter his basic conclusions.

19 The amount of profit, for each percentage of
20 the fishery, is not very sensitive to the
21 cost of constructing traps or the labor cost
22 of harvesting fish. An error--underestimate--
23 of 100 percent of the construction cost would
24 decrease profit less than 15 percent to \$1.7
25 million at the 40 percent harvest level. A
26 doubling of the labor cost of catching fish
27 either by doubling the wage rate to \$5.00
28 per hour or by doubling the amount of labor
29 necessary to catch 1,000 pounds of salmon,
30 would decrease profit by less than 10 percent
31 for any harvest between 40 and 80 percent.
32 Profit level is sensitive to the portion
harvested and the price of salmon. Doubling
the harvest more than doubles the profit
(and almost doubles family employment) and
a 10 percent increase in the price of salmon
produces an equal percentage increase in
profit.

30 ¹It should be noted that the conclusions reached by
31 Dr. Brown concerning the present inefficiency of the commercial
32 fishery in Washington is not necessary to any of the other
conclusions in the report. Even if it were stricken entirely,
the other conclusions in the report would remain.

1 See report, pages 29-30. Thus, even if Dr. Brown's estimates
2 depart considerably from what in fact would be the cost of
3 fish traps (or the number required), his overall conclusions
4 would vary slightly, if at all.

5 The objection that Dr. Brown had no factual basis
6 for assuming that Indians would find fish traps an acceptable
7 means of harvesting fish is not well taken. He did use facts
8 and figures obtained from a tribe utilizing fish traps in the
9 case area. Testimony already in the trial has shown that
10 there are some traps being operated by Indians in the case
11 area and that fish traps are an historic means of Indian
12 harvest of salmonids. In any event, the conclusions regarding
13 levels of gross income that could be derived by Indians from
14 any given portion of the runs and the conclusion that Indians
15 need not take the entire runs nor impinge upon the portion
16 of the runs needed for escapement to reach such income levels
17 remain notwithstanding the manner in which fish are caught.
18 It merely is necessary for profit to be adjusted for the
19 relative inefficiency of other gear. See report, pages 31-32.

20 Finally, Dr. Brown's conclusions that Indian fishing
21 has not tended to threaten escapement in times of low runs is
22 challenged as lacking a factual basis. Based upon Department
23 of Fisheries data, particularly those reports which are
24 Exhibit F-6 and F-18 in this case, Dr. Brown has undertaken
25 a statistical exercise which would reveal whether Indian
26 fishing has been detrimental when its variations are seen in
27 relation to variations in run size. The conclusion is that
28 it cannot be shown statistically that Indian fishing practices
29 are detrimental to conservation.² Dr. Brown's method and
30 conclusions on this point are explained at pages 33-35 of

31 ²As with some other conclusions in Dr. Brown's report,
32 the remaining conclusions are not affected by the acceptance
or non-acceptance of this one and what weight is attached
to this conclusion will not affect the other conclusions in
the slightest.

1 his report.

2
3 CONCLUSION

4 It is urged that Exhibit MS-1 be admitted into
5 evidence and any doubts which the Court may have concerning
6 the validity of the facts underlying any of Dr. Brown's
7 conclusions be resolved by the relative weight placed on the
8 evidence.

9 Dated: September 7, 1973.

10
11 Respectfully submitted,

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