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THE WHITE HOUSE

WASHINGTON

March 28, 1975

MEMORANDUM FOR

JERRY JONES

FROM:

MIKE DUVAL

SUBJECT:

THOR TOLLEFSON'S MEMORANDUM
ON SALMON FISHING

I have pulled together the facts concerning the salmon fishing controversy raised by Mr. Tollefson. This controversy is fast breaking and complicated.

BACKGROUND

Perhaps the easiest way to track through this problem is to begin from the perspective of the Indians. With respect to the fishing waters under the jurisdiction of the United States, the Indians have certain treaty rights. Competing with the Indians are commercial fishermen from the State of Washington (and probably elsewhere).

To determine what the Indian rights were, vis-a-vis other U.S. fishermen, the United States brought suit in Federal District Court out there, for the purpose of defining the fishing rights. The Court rendered an opinion, holding that the Indians do have a treaty right to certain areas where they customarily fish (generally around the mouths of rivers). In order to divide up the fishing between the Indians and the commercial fishermen, the Court allotted specific days for each group to fish. It is a very complicated formula but, in essence, it sets aside certain days out of the year for exclusive fishing by Indians.

On an entirely separate track, there is the problem of the Canadian rights to fish in certain areas (including the areas involved in the court case) used by U.S. fishermen (particularly from the State of Washington). The jurisdictional base for this issue is found in the Convention agreed to by U.S. and Canada in 1939. This covers fishing in the Frazier River (a particularly salmon-rich area) and was designed to divide up the fishing rights between Canadian and U.S. fishermen. The mechanism chosen was the establishment of a Commission consisting of Canadians and Americans. The Chairman is the



Director of the State of Washington's Department of Fisheries. Under the rules of the Commission, U.S. fishermen can fish on certain days in this area and Canadians on others. Difficulty arises when you superimpose the rules of the Canadian-U.S. Commission on top of the U.S. Court decision concerning Indian rights. When this happens, the Indians get a certain number days of exclusive fishing out of the total number of days granted to the U.S. For example, (I have no idea what the actual numbers are -- this is for illustrative purposes only) if the total fishing days is thirty, and under the Commission rules the U.S. gets fifteen and the Canadians fifteen; then you would apply the formula developed by the Court and give the Indians their percentage of the fifteen which, let's say, is seven days. That would leave only eight days for U.S. commercial (i.e., non-Indian) fishermen.

One major problem is that the Indians have very limited capability to fish and thus, they do not maximize the harvest in the amount of time allotted to them. The result is that the total catch by U.S. (Indian and non-Indians) is less than the amount we should be taking, vis-a-vis the Canadians.

In order to work this mess out, the State of Washington (representing commercial fishermen, essentially) tried to get the Court to rationalize the Commission rules, vis-a-vis the Court and State rules. The Court decided that its plan, allocating the fishing between the Indians and commercial fishermen, is restricted by the rules of the U.S. Canada Commission.

Because, in practice, the U.S. is taking less fish than the Canadians -- due to the limited fishing ability of the Indians -- U.S. interests have asked the Canadians to give our people (Indians and non-Indians) more days out of the total available. Initially, the Canadians rejected this, but I now understand they may have come around considerably. I am checking on this.

State of Washington officials generally reflect the commercial fishermen interests and, therefore, bitterly oppose the Court decision respecting Indian treaty rights. They have generally used the apparent conflict between the Court decision and the Commission regulations as a means to attack the Court.

The Ninth Circuit Court of Appeals is considering an appeal by the State of Washington and a Master has been assigned to sort out all the facts. I understand that we are about 99% sure that the District Court decision will be upheld, i.e., the Indians must take a certain number of days out of the total U.S. share, and the U.S. share is subject to the Commission regulations.



THE WHITE HOUSE
WASHINGTON

February 13, 1975

MEMORANDUM FOR:

JAMES CAVANAUGH

FROM:

JERRY H. JONES

Attached is a memo from Thor Tollefson, a member of the National Pacific Salmon Fisheries Commission. In the memo he claims that the Department of State, the Department of Interior and the Department of Justice have urged the Commission to violate the terms of the treaty between the United States and Canada. Would you please investigate and see what is the case and also provide the background on the issues involved. Needless to say, the Department should not feel threatened by this inquiry and the Tollefson memo should not be sent beyond your office. I am not concerned about wrong doing, but simply want the facts of the case.

Thank you.

Attachment



It is true that the State Department, Interior, Justice and others have tried to get the Indians more fishing days. I am not sure exactly what has transpired in terms of official and unofficial communication, both to the State of Washington officials and the Commissioners. By keeping my involvement in this very low key, I do not feel that I have a full knowledge of all the facts. I do, however, feel that the Federal actions have been correct, as I know them. I have found no facts supporting Mr. Tollefson's claim that Federal officials have pressured him to adopt illegal regulations.

If you like, I can dig further into this matter.



Memorandum Concerning Fisheries

Confronting U. S. Members of the
International Pacific Salmon Fisheries Commission

In February 1974, U. S. District Court Judge George Boldt held that treaty tribe Indians were entitled to one half of the harvestable portion of salmon runs entering Puget Sound waters. He also held that they were entitled to subsistence fish, ceremonial fish, and all fish caught on Indian reservations and in streams adjacent thereto.

He furthermore held that the Indians must abide by the fishing regulations of the International Pacific Salmon Fisheries Commission. This Commission was created under a treaty between the U. S. and Canada under which the two countries jointly manage the sockeye and pink salmon runs of the Fraser River which is entirely a Canadian River. The area over which the Commission has jurisdiction is known as Convention waters and includes waters on both sides of the U. S.-Canada boundary.

One of the objectives of the Commission is to so manage the salmon runs that the harvestable portion is divided as equally as possible between the fishermen of both countries. To do this, the Commission, by regulations, sets days of fishing time for each nation. The Commission closely monitors the catches, and modifies the fishing days if necessary to achieve equal division of catch.

The three U. S. members of the Commission have been under strong pressure from State Department, Interior Department and Justice Department representatives to obtain one or two extra days each week for the U. S. treaty Indians (who may also fish on the regular days set for U. S. fishermen). We have tried several times to obtain the concurrence of the three Canadian Commissioners. The latter have consistently refused. They contend that the integrity of the Commission would be threatened and that such concurrence would generate Canadian Indian problems.

The latest pressure upon U. S. Commissioners includes a proposal that I, as Director of the Washington State Department of Fisheries (who is almost always automatically a member of the Salmon Commission), unilaterally adopt a regulation which would give the U. S. Indians extra fishing time in Convention waters while the Salmon Commission has jurisdiction. The Washington State Attorney General's office advises me that such action on my part would be illegal. - It is my firm conviction that neither I nor the other U. S. Commissioners should be requested to support such a proposal.

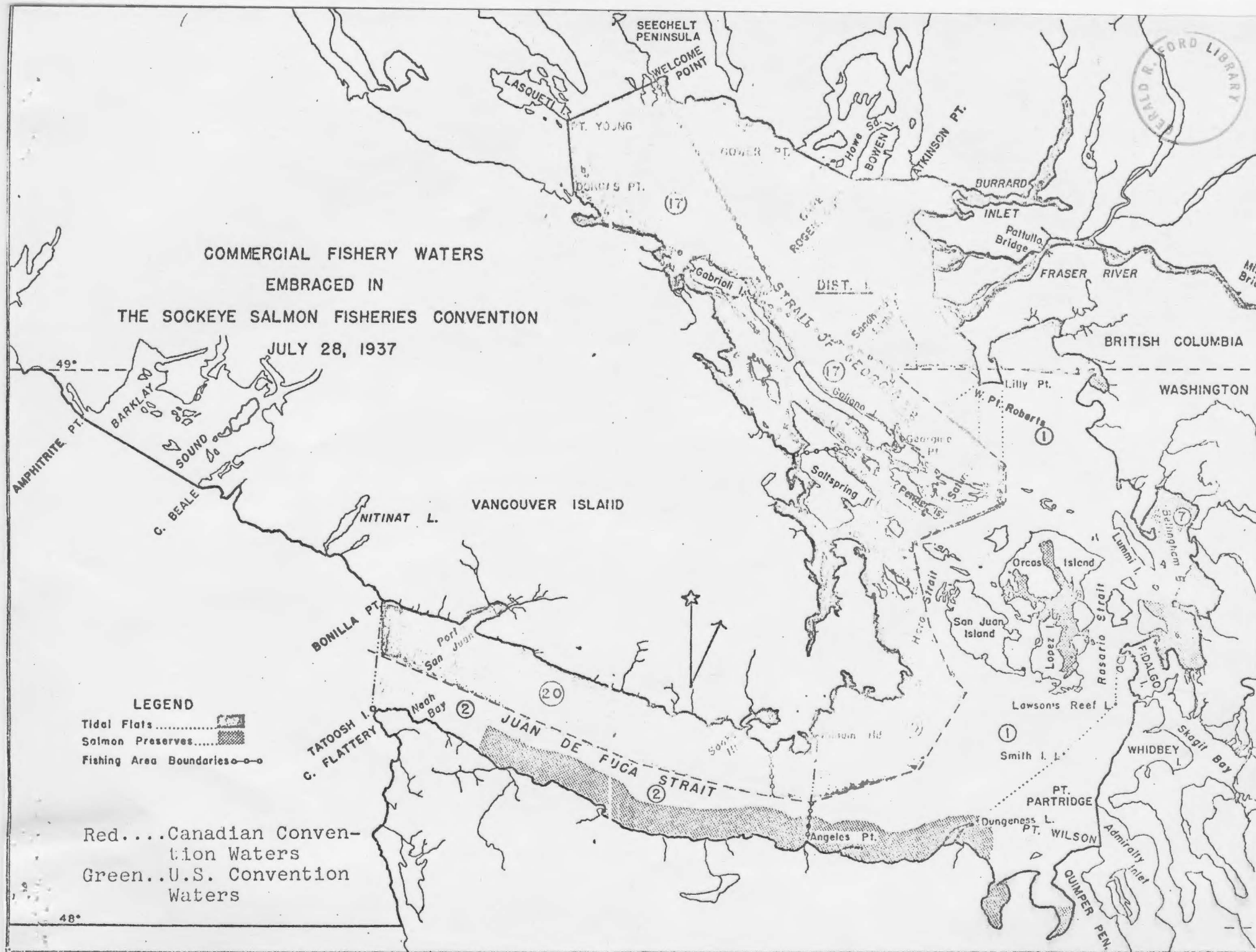
Thor C. Tollefson
Thor C. Tollefson

P.S. Attached is a map which outlines the Convention waters. As you can see, some of the waters lie within the area covered by the so-called Boldt decision.



COMMERCIAL FISHERY WATERS
EMBRACED IN
THE SOCKEYE SALMON FISHERIES CONVENTION

JULY 28, 1937



LEGEND

- Tidal Flats.....
- Salmon Preserves.....
- Fishing Area Boundaries.....

Red....Canadian Convention Waters
Green..U.S. Convention Waters

March 17, 1975

MEMORANDUM FOR: JERRY JONES
FROM: NORM ROSS
SUBJECT: Memo from Thor Tollefson on the
Court Decision on Washington State
Fisheries

The issues raised by Tollefson involve:

- Whether the regulations of the Washington State Departments of Fisheries and Game which restrict fishing at the usual and accustomed locations of Washington Indian tribes violate the rights of the tribes as established by treaties between the tribes and the United States
- Whether the failure of the Departments of Fisheries and Game to restrict non-Indian fishing so as to insure the presence of an adequate number of fish at usual and accustomed Indian fishing places to satisfy treaty requirements is violative of the treaties.
- Whether the tribes have off-reservation fishing rights under treaties with the United States.

In September 1970, the United States, on its own behalf and as trustee for several Washington Indian tribes, filed a complaint against the State of Washington, seeking a resolution of the long-continuing controversy concerning off-reservation Indian fishing rights under treaties of the United States. The Washington Department of Fisheries and the Washington Game Department



subsequently intervened as additional defendants. The plaintiffs sought a declaratory judgment and injunctive relief to provide protection for and enforcement of Indian treaty fishing rights.

In argument, the positions taken by the various parties were essentially as follows:

The Department of Game argued that except for a right of access over private lands and an exemption from the payment of license fees, the treaties afforded the Indians no rights not enjoyed by other citizens and thus any regulation treating Indians and others equally is valid. The Department of Fisheries, contrary to Game, recognized that the treaties in question provided the tribes with fishing rights at their usual and accustomed places and obligated it to afford the tribes a "fair equitable share" of the harvestable salmon returning to those waters. It contended that its regulations are a lawful exercise of State policy power, but it requested the court "to quantify the treaty right by reference to an objective, definite standard". The standard, according to Fisheries should be stated in terms of a "percentage set by the court of the harvestable salmon which originate in and return to waters of the State of Washington in the case area."

The tribes argued essentially that the State is without authority to regulate their fishing and that it also has no right to permit such heavy fishing by non-Indians before the fish reach the Indians; that the Indians contrary to the treaties, are prohibited from taking fish necessary to satisfy their needs. They argued that the test is their needs, not a percentage of the harvest.

The United States conceded that the State has the power to regulate off-reservation Indian fishing but only if it is shown that the regulation is reasonable and necessary for conservation, meets appropriate standards, and does not discriminate against



the Indians by making them suffer the brunt of conservation measures rather than requiring conservation by non-Indian fishermen as well.

The district court held that:

- Tribes had reserved to itself and its members an exclusive right of fishing within their boundaries, and a right to fish at the usual and accustomed grounds and stations outside those boundaries but "in common with citizens of the territory".
- Treaties do not restrict either the tribes or non-Indians to any specific method of taking fish or limit their purpose in taking fish.
- The right of a treaty tribe to take anadromous fish may be regulated by the States, but only if such regulation does not discriminate against the treaty tribes' reserved right to fish.

The court ordered the State defendants to make reductions in non-Indian fishing as necessary to achieve realization of Indian treaty fishing rights and set a formula for determining the maximum extent of the tribes' entitlement.

In a post-decision ruling, the court has ruled that the regulations adopted by the International Pacific Salmon Fisheries Commission are to be controlling and the State may enforce their provisions in international waters against treaty Indians. There is still a question of whether international agreements take priority over Indian treaties. The Indian tribes have been working with the Canadians on the specifics. The Justice Department has taken a hands-off policy.

The case is now being appealed in the Court of Appeals for the Ninth Circuit.

Ross/p 3-17-75
cc: WH files



File
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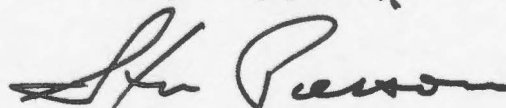
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Re: U. S. v. Washington

Dear Mr. Ross:

I am enclosing a copy of the Government's brief in the Ninth Circuit in this case. I look forward to talking further with you about the meaning and actual impact of Judge Boldt's decision.

Very truly yours,



Stuart F. Pierson

Verner, Liipfert, Bernhard
and McPherson

ndb



12/19

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 74-2414, 74-2567, 74-2705
and 74-2437 through 2440

UNITED STATES OF AMERICA, ET AL.,

Appellees,

v.

STATE OF WASHINGTON, ET AL.,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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UNITED STATE COURT OF APPEALS

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v.

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Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

STATEMENT OF ISSUES

1. Whether the regulations of the Washington State Departments of Fisheries and Game which restrict fishing at the usual and accustomed locations of the plaintiff Tribes violate the rights of the Tribes as established by treaties between the Tribes and the United States.



2. Whether, the failure of the Departments of Fisheries and Game to restrict non-Indian fishing so as to insure the presence of an adequate number of fish at usual and accustomed Indian fishing places to satisfy treaty requirements is violative of the treaties.

3. Whether, under the circumstances of this case, the district court's injunction requiring the state to meet certain standards in allocation of the fishery resource and permitting certain tribal self-regulation constitutes a proper exercise of the district court's equitable jurisdiction.

4. Whether the Muckelshoot Tribe, the Upper Skagit Tribe, and the Stillaguamish Tribe have off-reservation fishing rights under treaties with the United States.

TREATIES INVOLVED

The treaties involved are the Treaty of Medicine Creek (10 Stat. 1132); the Treaty of Point Elliott (12 Stat. 927); The Treaty of Point No Point (12 Stat. 933); The Treaty with the Makahs (12 Stat. 939); The Treaty with the Yakimas (12 Stat. 95); and the Treaty of Olympia (12 Stat. 971). With immaterial variations these treaties each provide:

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: * * *



ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz * * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use:

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing. * * *

STATEMENT OF THE CASE

1. Positions of the parties.

In September, 1970, the United States, on its own behalf and as trustee for several Washington Indian tribes, later joined by some of the named Tribes on their own behalf and by additional Tribes, filed a complaint against the State of Washington, seeking a resolution of the long-continuing controversy concerning off-reservation Indian fishing rights under treaties of the United States.^{1/} The Washington Department of Fisheries

1/ The parties plaintiff recognized by the court, in addition to the United States, are the following Indian Tribes:

Hoh Tribe, Lummi Tribe, Makah Tribe, Muskleshoot Tribe, Quileute Tribe, Quinault Tribe, Sauk-Suiattle Tribe, Skokomish Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe and Yakima Nation. See the complaints in intervention of these tribes at R. 75, 77, 81a, 82, 83, 84, 85. "R" references are to the document numbers of items in the record. The Nisqually and Puyallup tribes named in the United States' complaint are also "Plaintiff Tribes" but did not separately intervene. R. 1. See also findings of fact (hereinafter "Findings") pp. 1-2. We have attached as an appendix a map of the case area. It is a copy of the oversize exhibit JX-1a.



and the Washington Game Department, their respective Directors, and the Washington Reef Net Owners Association subsequently intervened as additional defendants. The plaintiffs sought a declaratory judgment and injunctive relief to provide protection for and enforcement of Indian treaty fishing rights.

The essential questions were the extent of the fishing rights provided the Tribes by treaty, whether the present state regulatory scheme infringed upon those rights, and if so what relief should be granted.

The United States provided the services of its Bureau of Sport Fisheries and Wildlife in studying Indian fishing and the entirety of fish management in the case area. This, together with anthropological evidence provided by the United States and various experts provided by the State, extensive depositions and exhibits, and an eighteen-day trial, provided the court with a thorough picture of Indian fishing practices, past and present, and the practices of the State Departments of Fisheries and Game in the case area (see Decision, pp. 3-4).

In argument, the positions taken by the various parties were essentially as follows. The Department of Game argued that except for a right of access over private lands and an exemption from the payment



of license fees, the treaties afforded the Indians no rights not enjoyed by other citizens and thus any regulation treating Indians and others equally (such as a prohibition of net-fishing) is valid.^{2/} The Department of Fisheries, contrary to Game, recognized that the treaties in question provided the Tribes with special fishing rights at their usual and accustomed places and obliged it to afford the tribes a "fair and equitable share" of the harvestable salmon returning to those waters (Fisheries, Pre-Trial Brief, R. 348, p. 2; Final Pre-Trial Order, pp. 137-138). It contended that its regulations are a lawful exercise of State police power, but it requested the court "to quantify the treaty right by reference to an objective, definite standard" (Fisheries Pre-Trial Br., p. 22, see also pp. 2, 8). The standard, according to Fisheries should be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to waters of the State of Washington in the case area." (Id.) Fisheries further stated that it accepts the "fair share approach of [Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969)],"^{3/} but argued that, without a percentage

^{2/} Game, Pre-Trial Brief, R. 336, p. 3; Final Pre-Trial Order, R. 353, pp. 79, 137; See also Game, App. Br., pp. 57, 59, 61.

^{3/} Fisheries App. Br., p. 14.



quantification, "the escapement goal at the river mouth, which must be the keystone of any new regulatory plan, is lost."^{4/} In its post-trial brief (R. 399, p. 36) and at final argument (Tr. 4384) Fisheries proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the Tribes.

The Tribes argued essentially that the State is without authority to regulate their fishing, and that it also has no right to permit such heavy fishing by non-Indians before the fish reach the Indians that the Indians, contrary to the treaties, are prohibited from taking fish necessary to satisfy their needs. They argued that the test is their needs, not a percentage of the harvest, drawing an analogy to water rights in Winters v. United States, 207 U.S. 564 (1908). (See, e.g., Muckleshoot, et al., Pretrial Brief, pp. 8-11).

The United States conceded that the State has the power to regulate off-reservation Indian fishing, but only if it is shown that the regulation is reasonable and necessary for conservation, meets appropriate standards, and does not discriminate against the Indians by making them suffer the brunt of conservation measures rather than requiring conservation by

^{4/} Fisheries Pretrial Br., p. 7.



non-Indian fishermen as well. The United States argued that Tribes which can show their ability to regulate themselves have the right to do so; and that non-Indian fishing should be regulated in such a manner as to permit the Tribes at their off-reservation fisheries the opportunity to catch as many fish as needed to fill their needs, but because of the requirement of fishing "in common with citizens of the territory", the Tribes, in their off-reservation fisheries, are entitled to not more than 50 percent of the harvestable portion of the runs involved. With experience, such a system would probably result in actual tribal catches considerably below 50 percent of any given run; and tribal and state regulations could be adjusted to account for variances in fishing capacity, desires and legitimate regulatory needs. (Plaintiffs Post Trial Brief, R. 387, pp. 81-84).

2. The Findings of Fact.

The court entered detailed findings of fact (Findings, 1-253)^{5/} which are not contested by the parties and are amply supported by the evidence. The Findings are summarized in the Appellant Tribes' opening

5/ The Findings of Fact and Conclusion of Law will be cited herein by numbered paragraph. The Final Decision, pp. 1-48, as amended will be cited as "Decision".



brief at pages 3-15, and the Department of Game's brief, pp. 9-27.^{6/}

We do not repeat those summaries but only point out certain essential findings.

a. Findings concerning the treaties.

"In pretreaty times [prior to 1855] Indian settlements were widely dispersed through Western Washington. * * * one common cultural characteristic among all of these Indians was the almost universal and generally paramount dependence upon the products of an aquatic economy, especially anadromous fish" (Finding 3). By the time of the treaties the Indians were fishing commercially as well as for subsistence and ceremonial purposes. (Findings 3-8) This fishing was done by a number of efficient methods including gill-netting, reef-netting and weirs. (Finding 9) Indeed, Governor Stevens, who negotiated the treaties, noted that the Indians caught most of the fish used by the non-Indians. (Finding 7) At that time the Indian population of western Washington was approximately three times that of the non-Indian population. (Finding 9)

The principle purpose of the United States in making the treaties was to extinguish Indian claims to land in western Washington so that

^{6/} Game and Fisheries have, however, included a number of proposed but rejected findings. (Finding 197)



non-Indians could settle there, and to provide for peaceful co-existence with the settlers. At the negotiations a primary concern of the Indians, however, "whose way of life was so heavily dependent upon harvesting anadromous fish," was that they continue to be able to do so. (Finding 19) In obtaining the agreement of these Indians to give up most of their land the treaties thus assured the Indians that:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing,
* * * " (Finding 1)

Most of the Indians at the treaty councils neither understood nor spoke English, and the treaties were negotiated in a limited trade jargon. (Finding 19) There is no record that the Indians were told that their fishing would be restricted in any way by the treaty except that it can be implied that they understood they would have to share their fishing grounds with non-Indians. (Finding 26)

b. Findings concerning post-treaty fishing.

"Subsequent to the execution of the treaties and in reliance thereon, the members of the Plaintiff tribes have continued to fish for subsistence, sport and commercial purposes at their usual and accustomed places." (Finding 31) They have also continued to fish on their reservations, many



of which straddle the mouths of major river systems,^{7/} thus making the essential spawning escapement for any run dependent upon passage through the reservation. The Tribes have fished on their reservations free of state regulation,^{8/} but there has been no showing that this fishing is detrimental to conservation. Indeed, examples abound in the record of the efficacy of Indian self-regulation. For instance, the court found that the Quileute Tribe regulates a commercial gill net fishery in its reservation at the river mouth in a manner that has not only preserved the run, but in fact has allowed an increase in upriver sports fishery which is wholly dependent upon escapement beyond the reservation. (Findings 111-114) Many of the tribes have adopted written fishing regulations for on- and off-reservation fishing designed to assure proper escapements. (Findings 34, 42, 59, 69, 79, 90, 99, 116, 124, 147, 159, 160) Some tribes have their own biologists (Finding 29) and all have access to biological experts from the federal Bureau of Sports Fisheries and Wildlife. (Finding 192) Several of the Tribes, independently, or with the United States, are engaged in fish cultivation programs.^{9/}

^{7/} There are sixteen reservations in the case area. See attached map.

^{8/} See Decision, p. 10 and n. 12. See also, Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 Pac. 557 (1930).

^{9/} E. g., the Quinault Tribe, Finding 125, Squaxin Island Tribe, Finding 143.



With respect to Indian off-reservation fishing, the District Court concluded:

With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

Unfortunately, insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court. (Decision, p. 26, n. 26)

c. Findings concerning State regulation.

The court found that "enforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and prosecution of Indians" (Finding 193);^{10/} that tribal fishermen have

10/ Some fishing areas have been lost, not by action of the Department of Fisheries, but by State alteration of river courses. (See Finding 78)



avoided using some usual and accustomed fishing places because of State enforcement actions (Findings 33); and that the Departments of Fisheries and Game have seized and detained Indian boats, nets, and fish caught by Indians without notice to their owners and without judicial proceedings (Findings 194, 195). The court also found that "[t]he regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places to which the treaties apply." (Finding 217)

3. The court's rulings.^{11/}

The district court held that each of the plaintiff Tribes under the several treaties at issue had reserved to itself and its members an exclusive right of fishing within their reservation boundaries, and a right to fish at all usual and accustomed grounds and stations outside those boundaries but "in common with citizens of the Territory". (Decision, pp. 9-12, 13, 15) The court held that the Treaties do not restrict either the Tribes or non-Indians to any specific method of taking fish or limit their purpose in taking fish. (Judg., p. 7)^{12/}

^{11/} The parties stipulated eleven issues of law. (Final Pre-Trial Order, pp. 93-95)

^{12/} "Judg." refers to the Declaratory Judgment and Decree entered by the Court, February 12, 1974.



Because the right of each Treaty Tribe to take anadromous fish arises from a treaty with the United States, the court held their fishing rights to be protected by the Supremacy Clause of the United States Constitution and not to have been altered by Washington's admission into the Union. Washington, equally with other states, has "the obligation to observe and carry out the provisions of treaties of the United States". (Conclusion 17)

The court held further that the right of a treaty tribe to take anadromous fish may be regulated by the States, but only if such regulation (a) does not discriminate against the treaty tribe's reserved right to fish, (b) meets appropriate standards of substantive and procedural due process, and (c) is shown to be both reasonable and necessary to preserve and maintain the resource. (Conclusion 29; Decision, p. 13)

The court cautioned:

The protection of the treaty rights of the Plaintiff tribes to take fish at their usual and accustomed places must be an objective of the State's regulatory policy co-equal with the preservation and propagation of fish runs for other users. Before it can restrict the treaty rights of the Plaintiff tribes to take fish at their usual and accustomed places, the State and its regulatory agencies must treat such treaty rights as an obligation and interest to be promoted in the State's regulatory, management and propagation programs. (Conclusion 34)



As to the scope of the right the court held:

The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times, and which exists in part to provide a volume of fish which is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the sarhe taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally. (Conclusion 20, see also Conclusions 21-28)

The court also held that the plaintiff Tribes have jurisdiction to enact and enforce regulations relating to off-reservation (as well as on-reservation) fishing by their members. (Conclusion 36) However, the court added:

Regulation of off-reservation Indian treaty fishing by the United States, the State, or the Plaintiff tribes does not preempt the regulation by any of the other two [but] the exercise of federal or tribal regulatory control may affect the finding of "necessity" which is required for the validity of any state exercise of its police power to preserve the resource. [Emphasis added. Conclusion 37]

Finally, the court held that certain listed State statutes, and regulations, and certain State management and enforcement practices violate the plaintiff Tribes' rights and are invalid as applied. (Conclusions 38-44)



4. Relief granted.

The specific relief granted is set forth in the Decision, the Injunction of March 22, 1974 (R. 508), the Ruling on Post Decision Motions (R. , 507) and the Interim Plan and Stay Order. (R. 506)

To qualify for self-regulation of its off-reservation fishing, the court held, a Tribe must demonstrate in a number of specific ways its ability to regulate its members. (Decision, pp. 31-32) In addition, the Tribe must establish written complete fishing regulations, provide identification of fishermen, allow monitoring of catches by the State, and report both on- and off-reservation fish catches to the State. (Id. pp. 32-33)

The district court preserved the power of the State to restrict Indian off-reservation fishing, even of a self-regulating tribe, upon a showing of necessity for conservation and procedural and substantive fairness to Tribe. (Decision, pp. 34-35; Post-Decision Ruling, R. 507, Ex. A, ##5, 8, 11, 15; Injunction, R. 508, pp. 506) The court further provided for the imposition of emergency regulations by the departments without its prior approval. (Injunction, R. 508, p. 12)

The court also declared the obligation of the State to take action, within its ability, to assure that treaty fishermen would have an equal opportunity with non-treaty fishermen to take fish that would normally pass



through the usual and accustomed off-reservation fishing places of the treaty Tribes. To this end it ordered the State defendants to make reductions in non-Indian fishing as necessary to achieve realization of Indian treaty fishing rights. In response to requests by both the United States and Fisheries, the court set forth a formula for determining the maximum extent of the Tribes' entitlement. (Decision, pp. 35-40; Post Decision Ruling, R. 507, Ex. A, §§ 12, 16) The formula provides basically that the Tribes are entitled to have the opportunity to catch up to one-half the run of fish that normally would pass by their off-reservation sites, with various adjustments for fish caught beyond State jurisdiction and for subsistence and ceremonial fishing. (Id.) On-reservation catches are not to be included in the one-half.

The court directed the State defendants, prior to each fishing season, to obtain data from the Tribes as to the types of gear they expect to use and the quantity of fish they expect to be able to take, and to take account of such information and the limits of the Tribes' entitlement in making its predictions and regulations for the coming season. (Injunction, pp. 11-12) The court also entered an Interim Plan and Stay Order for the gradual and orderly implementation of its judgment. (R. 506)

These appeals followed.



ARGUMENT

Introduction and Summary of Argument

This is an allocation case, not a conservation case. All of the parties agree that before anyone may properly take fish from any run, the spawning escapement necessary for perpetuation of the resource must be assured. The district court has recognized this in its provision for escapement goals set by the State prior to harvest and by its limitation of all shares to the harvestable portion of the resource which remains after escapement goals have been met. The court has at the same time provided necessarily specific declarations of the nature and scope of Indian treaty fishing rights and detailed definitions of the permissible exercise of the State police power to regulate off-reservation treaty Indian fishing for anadromous fish.

There is no reason to believe that a ruling which grants the Indians their full treaty rights will affect the necessary escapement of fish in the least. The only effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago. (Decision, p. 44; Sohappy, at 911)

This case does not guarantee the Indian tribes any proportion of the fishery resource of the State. It guarantees them a fair opportunity to fish effectively, but an opportunity necessarily limited by their own number and ability as well as the court's definition of their entitlement.



The history of the growth of non-Indian fishing, the nature and scope of State fishing regulations and the impact of those events upon the exercise of the Tribes' treaty rights have demonstrated the clear necessity to advise all those who regulate and all those who fish of the practical extent of their rights, privileges and powers. Since it was first addressed by the Supreme Court in 1905 in Winans, infra, the line of demarcation between the free exercise of off-reservation tribal treaty fishing rights and the appropriate exercise of the regulatory power of the State of Washington has been delimited only in pronouncements of broad legal principles. This case presented to the district court, in the context of a detailed and comprehensive record, a situation to which it was required to apply those legal principles in a manner which realistically promises that they would be given faithful practical effect. In reviewing and finding the facts, analyzing the law, and fashioning a remedy, the district court has produced a practical resolution to a difficult, often violent, controversy. Its judgment is a classic exemplar of the appropriate exercise of the equity powers of the United States District Court.



I. THE COURT'S DECLARATION OF TRIBAL FISHING RIGHTS, THE JURISDICTION OF THE TRIBES, AND THE JURISDICTION OF THE STATE ARE CORRECT.

- A. The court correctly found that the Tribes' fishing rights are federally protected, reserved rights entitling the Tribes to a fair share of the fish harvest, subject to regulation by the State only upon particular proof.

The treaties that provide fishing rights for the plaintiff Tribes all follow the same pattern. (See e.g., Treaty of Medicine Creek, 10 Stat. 1132) In the first Article the Tribes "cede[d] * * * to the United States" large specifically described areas of land. In the Second Article they reserved for themselves, out of the land ceded, small tracts of land "for their exclusive use". In the Third Article, they reserved the right "of taking fish, at all usual and accustomed grounds and stations * * * in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing * * *". Through these treaties the United States obtained vast areas of land for what was later to become the State of Washington.



The United States Supreme Court, in interpreting these treaties has been mindful that the extent of what the Indians kept is to some extent measured by the extent of what they gave up. Thus in United States v. Winans, 198 U.S. 371, (1905) the court rejected arguments, similar to those made by the State in this case, that a state law treating all citizens equally is valid even though it has the effect of prohibiting treaty fishermen from taking fish at a usual and accustomed place off-reservation.^{13/} To hold that the Tribe received no more than it would have received without the Treaty, would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more". (Id. at 380) The Court explained that "the treaty was not a grant of rights to the Indians but a grant of rights from them -- a reservation of those not granted." What was reserved was "an exclusive right of fishing * * * within certain boundaries. * * * a right outside those boundaries reserved 'in common with citizens of the Territory'". The Court then made clear that "the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees." (Emphasis supplied; Id. at 198)

^{13/} The respondent in Winans had so argued, both from the language of the treaty and the "equal footing" doctrine of Ward v. Racehorse, 163 U.S. 504 (1896). (Id. at 375-376) Both arguments were rejected by the Court.



Winans concerned state trespass laws and a State license held by a non-Indian for a fish wheel. Later, when State conservation laws sought to require Indian commercial fishermen to pay a commercial license fee, the Supreme Court struck down that requirement, emphasizing the treaty right of the Indians and the lack of authority of the State to interfere with that right by charging a tax upon its exercise. The Court noted that the license requirement was not shown to be indispensable to conservation. Tulee v. Washington, 315 U.S. 681, 684-685 (1942).

Then when substantive regulations of the State Department of Fisheries and Game, made in the name of conservation or "wise use" of the fish, had diminished Indian fisheries, the validity of those regulations was reviewed by the United States Supreme Court. In Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) the Court quoted with approval from Winans as to the continuing right of the Indians to take fish at their usual and accustomed places (Id. at 397); and held that this "right to fish * * * may, of course, not be qualified by the State * * *". (Id. at 398) But it went on to recognize a power in the State to regulate off-reservation fishing in the interest of conservation, but only if the regulation is "reasonable and necessary for conservation". (Id. at 401) Moreover, such a regulation must not discriminate against the separate Indian right. (Id. at 398) In



a footnote the Court explained that the State does not have to show that the regulation is "indispensable" as required for the license tax, but that, as the regulation affects a "federal right", it must be "necessary for the conservation of fish". (Id. at 401-402, n. 14) The Court noted that the power of the State to enact conservation measures affecting Indians is thus less than its plenary police power as described in cases not involving a federal right, citing Williamson v. Lee Optical Co., 348 U.S. 483 (1955). (Id.) After remand, in Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973), the Supreme Court struck down a regulation of the Department of Game, which prohibited any person from fishing for steelhead with nets, when applied to the Puyallup Indians, as not necessary for conservation, discriminatory against the Indian fishery and thus inconsistent with the Treaty of Medicine Creek. The court also held that the steelhead resource "must in some manner be fairly apportioned between Indian net fishing and non-Indian sport fishing". (Id. at 48)^{14/} In so holding the court rejected arguments of the Department of Game that under Geer v. Connecticut, 161 U.S. 519 (1896) and New York ex rel Kennedy v. Becker, 241 U.S. 556 (1916) the State has the right "to apply its laws equally to all citizens in off-reservation waters." See Petition of the Department of Game, No. 72-481, October Term 1972, pp. 13-15.^{15/}

^{14/} Compare Game's brief in this court, pp. 40-54, adopted by reference by the Department of Fisheries which makes the same repudiated argument. The Supreme Court had been informed of the pendency of this suit in which a formula was being sought.

^{15/} Filed with the district court in this case by defendant Game.



(11-1) Winans and the Puyallup decisions make certain general principles clear as to tribes which are beneficiaries of treaties such as those at issue here:

1. The Tribe has an exclusive fishing right on its reservation.
2. It has off-reservation rights which the State is not free to limit as it can the fishing privileges of other citizens.
3. The State may regulate Indian off-reservation fishing but only if the regulation is necessary for conservation and does not seek to accomplish that conservation goal through imposing unfair sacrifices on Indian fishing for the benefit of non-Indian fishing.
4. Both on and off-reservation rights are reserved rights retained by the Indians in the bargain by which they gave up large areas of land; they must be preserved in a meaningful manner, giving the Indians a fair share of the available catch according to a formula to be worked out.

These precedents in our view, fully support the conclusions of the district court as to the nature of the treaty right and the limitations of State jurisdiction.

B. The court correctly found that the Tribes are entitled to regulate their own off-reservation fishing, subject to state regulation when necessary for conservation.

1. The State's briefs attempt to give the impression that the State presently controls a unified system of fish management that will be



endangered by the decision of the district court (Fisheries Br., pp. 17-19)

This impression is false.

To begin with, the fisheries in question have never been under unified management, and, to the extent that they have been managed successfully, have been managed through co-operation, not domination of any one party.

The pink and sockeye salmon fisheries of northern Puget Sound and the Strait of Juan de Fuca waters are regulated by a United States-Canadian Commission under treaties which require the affirmative vote of each country for the adoption of any regulation. (50 Stat. 1355, as supplemented by TIAS, 8 U.S.T. 1058. See also, Ex. JX-2a, pp. 101-103.) The regulations for the salmon fishery of the portion of the Columbia River over which Washington and Oregon have concurrent jurisdiction require the mutual consent and approbation of both states. 40 Stat. 515; RCW 75.50.010. Indian tribes regulate the fisheries on their reservations astride the mouths of thirteen major rivers. Fishing in international waters is largely unregulated.

Secondly, the district court, over the objections of the Tribes, preserved for the State both the right to supercede tribal regulation by any Tribe upon a showing of necessity, and the power to impose emergency



regulations. Even the Tribes which qualify as self-regulating have an exemption from State regulation only so long as they continue to meet the 16/ Qualifications and Conditions prescribed in the district court's decision.

The limited self-regulation permitted to the Tribes was consistent with the court's findings that the tribes had not threatened conservation in their previous fishing 17/ and that

"state regulation of off-reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future." 18/

2. The State contests the jurisdiction of an Indian Tribe to enforce its fishing regulations against tribal members fishing at usual and accustomed off-reservation fishing grounds and stations. (Fisheries App. Br., p. 21, Game App. Br., pp. 40-54) That question was resolved against the State's position and in favor of tribal jurisdiction by this Court

16/ The State's strong reliance on Kennedy is thus wholly misplaced. In that case, a totally different clause in a different type of treaty, executed under totally different circumstances and containing different language, reserved only a "privilege" to fish. Under the treaty provisions at issue in this case, the Supreme Court has repeatedly held in decisions post-dating Kennedy that a "right" was reserved. Moreover, here, unlike the lower court in Kennedy, the district court has preserved State regulatory control shown to be necessary for preservation of the resource.

17/ Decision, p. 26, n. 26; Findings 111-114.

18/ Decision, p. 26.



on November 26, 1974. Settler v. Lameer, Nos. 71-2364, 74-1627, and 74-1656. That decision is in our view, correct and is controlling in this case. We rely on the opinion of the court of appeals in refutation of the State's position on this issue.

3. The State argues that in some instances subsequently adopted regulations of the International Pacific Salmon Fisheries Commission must be enforced by the State against Indian fishermen and that the State is therefore required to show those regulations to be necessary for conservation. (Fisheries App. Br., pp. 21-26)

In a post-decision ruling under its continuing jurisdiction, the court has ruled that the regulations adopted by the International Commission are presumed to be controlling and that the State defendants may enforce their provisions against treaty Indians, until a full hearing on the question convinces the court otherwise. (Par. 7, Order of July 18, 1974) Such a hearing would presumably consider the State's efforts before the International Commission to enforce and protect the Tribes' treaty rights, as well as the extent to which related State regulations not adopted by the Commission may be adjusted so as to reduce the impact on the Tribes' share resulting from the imposition of the Commission regulations. Since the Commission and the State have never before functioned under a clear



and detailed explication of the Tribes' rights and the State's powers, it would be premature now to anticipate the course of subsequent Commission regulations under the district court's decision. For these reasons we submit that this Court should not address questions arising from future regulatory action of the International Commission. The district court's retention of jurisdiction is appropriate and adequate for that task, when and if it should be presented.

It is important to bear in mind here that there is clearly no conflict between the salmon treaty with Canada which created the International Commission (50 Stat. 1355) and the Stevens treaties with the Indians. (Cf. Post Decision Rulings, Ex. "A", ¶18) Since the Stevens treaties between the United States and the Indian Tribes could only deal with rights and powers within United States' jurisdiction, their provisions apply only to such entitlement as the United States has. Under the salmon treaty with Canada, the fishermen of the United States are entitled to take one-half of the Fraser River sockeye and pink salmon run. It is to this portion that the Tribes' rights attach. There is nothing in the salmon treaty which in any manner conflicts with full enforcement and protection of the Tribes' rights to harvest a fair share of the United States portion. Absent irreconcilable conflict, repeals or modifications of Indian treaties are not to be implied. Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); United States v. Payne, 264 U.S. 446, 448 (1924), United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902); Whitney v. Robertson, 124 U.S. 190, 194 (1888).



II
**THE HISTORY OF STATE INFRINGEMENT OF INDIAN FISHING
RIGHTS REQUIRED THE COURT TO PROVIDE SPECIFIC RELIEF.**

A. **The history of regulation by the Department of Game called for specific relief.**

The steelhead trout is one of the anadromous fish covered by the Stevens treaties and thus subject to special Indian fishing rights. (Finding 20) Despite this, the State of Washington during the last forty years has classified the fish exclusively as a game fish and, through the Department of Game, ^{19/} has reserved it for resident and non-resident sports fishermen as a special group. (Findings 184, 219-220) The Washington Supreme Court, recognizing the Puyallup Tribe's treaty right to take such fish, ordered the Department to hold hearings to see if a net fishery could be established consonant with conservation. ^{20/} The Department, in violation of the State Administrative Procedure Act, gave no notice to the affected parties of the "hearings"; ^{21/} and, without the supporting facts and data required by the State court, it continued its absolute prohibition of all Indian off-reservation net fishing for steelhead. ^{22/} Its decision was based upon fisheries management

^{19/} The State regulatory jurisdiction of Game is generally set forth in Findings 168 and 219. In addition the federal Bureau of Sport Fisheries and Wildlife participates to a limited degree in steelhead enhancement programs (Ex. JX-2a, pp. 97-98) and the Tribes who occupy reservations exclusively manage the steelhead which pass through their reservations (Decision, p. 10; Findings 111-114.)

^{20/} Cited by the district court as "Game II", 80 Wn. 2d. 561, 571 (1972).

^{21/} Findings 228-234; Conclusion 42.

^{22/} Findings 231-232.



evidence supplied by its chief biologist who recommended against Indian net fishing with no knowledge of how many Indians would fish, how many fish would be in the run, what was the best escapement level, or where the Tribes' usual and accustomed places are located. (Findings 227, 229)

Along with the Department of Fisheries, Game continued to arrest and prosecute Indian fishermen, seize and confiscate indefinitely their gear, and attempt to prevent the Indians from disposing of their catch as they desired. (Findings 194-195) These enforcement actions have been partly responsible for prevention of the full exercise of Indian treaty fishing rights, loss of Indian income, inhibition of their cultural practices, and damage to Indian gear. (Finding 193)

Following the Supreme Court's decision in Puyallup II, Game stated that it would thereafter begin to recognize the Tribes' rights as enunciated in that case. (Game's Position, Rec. 398) In its brief on appeal, however, Game reverts to its position, twice repudiated by the United States Supreme Court, that the Tribes are only entitled to a non-discriminatory right of access to their usual and accustomed fishing places (Game App. Br., pp. 57, 59, 61), that they are not entitled to a share of the harvestable steelhead (Game App. Br., pp. 40-54), and they are only entitled to fish "on



the same basis as other citizens of the territory". (Game App. Br., p. 57) This demonstrated and continuing intransigence is one reason why the detailed directives of the district court were essential.

B. The consistent failure of the Department of Fisheries to permit Indian fisheries an opportunity to take a fair share of the harvest called for specific relief.

Although its pronouncements and statements of legal position are more measured than those of Game, the Department of Fisheries has effectively denied the Tribes much more than Game has. It has accomplished this by fostering a regulatory scheme which has, as the district court found (Finding 217), vastly reduced the tribal harvest for the benefit of other fishermen.

Although Indians outnumbered non-Indians three to one (Finding 9) and caught most of their fish (Finding 7) at the time of the treaties, non-Indians, of course, now far outnumber the Indian population. ^{23/} It was the expansion of the non-Indian fisheries which made regulation of the harvest necessary. (Finding 8) The expansion of the non-Indian fishery

23/ Findings 35, 43, 60, 71, 81, 94, 103, 119, 133, 139, 147, 150, 188; See also, Findings 8, 188; JX-2a, Figs. 49-54; and the article by Henry Wendler of Fisheries, designated Ex. PL-89, cited in Finding 170.



has occurred without any significant attempt by the State to limit the new entry of non-Indian gear. (Ex. PL-89, Findings 205-206) In addition to this vast increase in units of non-Indian gear, Fisheries has fostered a geographic pattern for the commercial salmon fishery which causes the majority of the harvest to occur in the marine areas of northern Puget Sound and the Straits of Juan de Fuca, far from the streams, rivers and bays where most of the Tribes' usual and accustomed fishing places are now located. (Ex. JX-2a, Figs. 25, 49-54) This allocation allows non-Indian marine fisheries to harvest indiscriminately from runs originating in many different river systems,^{24/} despite the State's recognition that it could more precisely control the harvest on particular runs if the fisheries were located closer to the river mouths. (Final Pretrial Order, 3-596)

The Fisheries Department has the authority to limit entry into the non-Indian salmon fisheries and to move the location of those fisheries as needed. (Finding 205) With few exceptions, it has not undertaken to

^{24/} Findings 202; Ex. PL-89; Ex. JX-2a, Figs. 49-54; Fisheries App. Br., pp. 55-58. The assertion at p. 56 that in the rivers a greater portion of the salmon are needed for spawning simply states the obvious fact of discrimination against the tribal right. Findings 198, 204, 217. Moreover, the suggestion in n. 207, p. 57, that the smaller-stream runs cannot sustain a gill net fishery is not supported by the record; in fact, Fisheries does not know. Finding 207.



do either. (Finding 206) In the one notable instance where it has moved a fishery, it was to provide a special non-Indian purse seine fishery at the mouth of a creek in extreme southern Puget Sound. (Finding 206)

The result of the expansion and current location of the non-Indian fisheries is a massive reduction in the number of salmon that reach the river fisheries of the treaty Indians. (Finding 217; Ex. PL-74) In fact, by conscious "value"^{25/} judgments of what constitutes "beneficial use" of the resource,^{26/} the Fisheries Department determines as a matter of policy that it is "in the interest of proper utilization of the total fishery" for the non-Indian mixed-stock fisheries to overharvest some runs in order to assure that those fisheries fully harvest other more abundant runs. (Finding 202) Fisheries has made these judgments despite the existence of tribal usual and accustomed fishing places in almost all of the rivers and bays to which the runs are bound,^{27/} and despite the recognized availability of utilizing those fisheries to crop overabundant runs. (Findings 203, 206) As a consequence of these regulatory policies and practices favoring non-Indian fishermen, not based on conservation but

^{25/} Finding 202.

^{26/} Finding 177, 202; See Fisheries App. Br., p. 56.

^{27/} Exhibit JX-2a, Fig. 25.



allocation of the resource, the total Indian tribal share from salmon harvested in State waters has been only 5 percent. ^{28/} Fisheries' limited special Indian net fishing seasons ^{29/} have not altered this fundamental antitribal allocation of the resource.

The Findings of the district court made clear that the Department of Fisheries has important technical abilities but that these abilities have been used in a way that denied a fair share of the harvest to Indian fishermen, in order to allocate a greater share to non-Indians. ^{30/} At the same time, the Tribes have managed their meager share without fault.

^{28/} Ex. PL-74. Fisheries has attempted in its brief to present a misleading picture of what the evidence shows in this case concerning relative harvest shares under the district court's decision. The pie diagram set forth at page 42 of its brief is wholly unsupported by any citation, evidence, or findings. More importantly, since the total Indian harvest (on-reservation and off-reservation) has in fact been only 5 percent of the Washington State salmon catch (Ex. PL-74), the gray portion of the Fisheries' pie diagram (except the "additional equitable adjustment") should properly be only 5 percent, instead of the more than 50 percent, as shown. Compare also Fisheries exhibit with plaintiffs' exhibit PL-76 below.

^{29/} Ex. JX-2a, Appendix II shows regulations for seven special Indian off-reservation fisheries.

^{30/} Findings 200, 204-206; See also Ex. JX-2a, pp. 69-89; Ex. F-19; Tr. 1082-1087.



Upon the amply supported conclusions that the State had wholly failed to show any necessity for its regulation of Indian off-reservation treaty fishing and had failed adequately to restrict non-Indian fishing, the district court was clearly correct in describing in detail how and on what basis Fisheries may regulate the Indian fishermen and what measures it must take and consider in designing a regulatory scheme which promises realistically to protect the tribal treaty right.

C. The history of Indian fishing, the applicable law and Congressional policy require a limited range of tribal self-regulation.

During treaty times and thereafter, fishing by the Tribes was controlled by unwritten modes of conduct^{31/} which included removing weir sections to permit spawning escapement^{32/} and prohibition of water pollution while the fish were running.^{33/} In recent years, many of the Tribes have promulgated written regulations;^{34/} some of them have enacted off-reservation regulations enforceable beyond reservation boundaries;^{35/} and some are

^{31/} Finding 28.

^{32/} Id.

^{33/} Finding 6.

^{34/} Findings 34, 190; JX-2a, App. V.

^{35/} E. g., the Yakima Nation, Findings 159-160; Settler v. Lameer, supra.



engaged in extensive fish enhancement programs. ^{36/} None of the State defendants presented any credible evidence of any Tribe having adversely affected a fish run. ^{37/} These facts show that the State has been wholly unable to demonstrate the necessity of its prescriptive control over Indian fishing, and that the Tribes are responsible fish harvesters and managers in their own right. The evidence shows that the Tribes have in fact managed the resource with more care and success than the State. ^{38/}

Since it has been shown that State regulation of Tribal fishing was not required by conservation, such regulation is an infringement upon tribal self-government; and specific relief was, therefore, required.

^{36/} E. g., the Quinault Tribe, Finding 125.

^{37/} See, e. g., Decision, p. 26, n. 26, and Findings 114, 123, 247.

^{38/} See exhibits PL-81 through PL-84 showing the number of instances in which the State has failed to meet its established salmon escapement goals.



III

**THE SPECIFIC RELIEF GRANTED WAS AN APPROPRIATE
EXERCISE OF THE COURT'S EQUITABLE JURISDICTION.**

As demonstrated above, the history of non-Indian fishing and State regulation required detailed relief. The Department of Fisheries recognized this in part when it argued to the district court that the establishment of a fixed percentage share for the Tribes is essential to the effective operation of its regulatory scheme. (Fisheries Pretrial Brief, Rec. 348, p. 7)

- A. A definition of tribal entitlement was essential and the court's definition was a correct interpretation of the applicable law.

For years the Tribes have held a vacant right. By the expansion of the non-Indian fisheries, the growth of State regulatory power, and the State policy of preference toward non-Indian fisheries, the Tribes stood before the district court having lost the practical benefit of much of their off-reservation fishing rights.^{39/} In order to restore those rights, the court had to fashion a guideline by which the parties could know the extent of the tribal entitlement. The guideline had to be applicable to varying run sizes, diverse configurations of fishing units and differing tribal fishing

^{39/} Not all of the tribes have reservations, e.g., the Stillaguamish, Sauk-Suiattle and Upper Skagit. Findings 129-132, 144-148.



groups. Both the plaintiffs and Fisheries proposed a percentage guideline,^{40/}
50 percent by the United States^{41/} and one-third by Fisheries.

The district court held that the Tribes are entitled under the treaties^{42/}
to an opportunity to take up to 50 percent of the harvestable stock. Given
the undisputed fact that there were but two parties to the treaties -- Indians
and all citizens of the Territory -- 50 percent, as a guideline of Indian
entitlement, was reasonable. Fisheries' one-third proposal is an attempt
to divide one of the parties into two, so that non-Indians get a greater share.

But it should be clear that the 50 percent guideline used by the
court is not a guarantee of any harvest. It is simply a readily understand-
able measure of what portion of the harvest the Tribes as a group may
rightly insist they should have a chance to take in variable circumstances.
The shares worked out for specific runs in particular years with specific
tribes will surely vary from the guideline, in accordance with the extent
of Indian fishing capability, the degree of Indian and non-Indian interest in

^{40/} Plaintiffs Post Trial Brief, R. 387, pp. 81-84.

^{41/} Fisheries Post Trial Brief, R. 399. Game proposed no guideline.
Game App. Br., pp. 55-65.

^{42/} Decision, p. 38.



the run, and the give and take of cooperative operations. The power of the State to restrict Indian fishing even within those limits, of course, is preserved, but conditioned upon proof (either before or after the regulation, as required by the decree) that conservation, not unfair allocation to others, requires the limitation.

B. The definition of the divisible harvest conforms to the meaning of the treaties.

During treaty times and for some time thereafter, the Indians took a wide variety of fish from widely dispersed fishing locations. (Findings 10-13) The harvest was not confined to fish originating in particular water areas. (Decision, pp. 16-17) Similarly today, fishermen on the Olympic Coast or in Puget Sound take salmon which have originated in the Columbia and Fraser Rivers, and elsewhere, as well as those spawned in Peninsula rivers or those emptying into the Sound. (Ex. JX-2a, Figs. 11) There can be no reason now to confine the Tribes' share to harvestable stock originating in a limited number of river systems. Only a definition of the base stock in terms of all fish harvested at "usual and accustomed grounds and stations" will properly accord with the intent and proper interpretation of the treaties. The district court's decision thus correctly defined the "harvestable stock" as all fish returning to all usual and accustomed Indian fishing places. (Decision, p. 37)



- C. The "equitable adjustment" takes proper account of that portion of the harvest taken by United States fishermen under the International Pacific Salmon Fisheries Commission rules.

In 1937, the United States and Canada agreed by treaty to establish the International Pacific Salmon Fisheries Commission (IPSFC) to regulate the harvest of Fraser River sockeye in the Straits of Juan de Fuca and northern Puget Sound, so as to distribute the take equally between the fishermen of the two nations. (Finding 214; Ex. JX-2a, p. 101-103) Later the treaty was extended to cover Fraser River pink salmon. (Ex. JX-2a, p. 101; TIAS 3867) Those species pass through the usual and accustomed fishing places of at least two of the treaty Tribes.^{43/} Other Fraser River fish are taken in central Puget Sound;^{44/} and fish bound for other rivers in Washington are also taken under regulations within IPSFC waters.^{45/} The non-Indian citizens' 50 percent share of that variety of fish runs is taken from stock which would otherwise be available to tribal fishermen at their usual and accustomed places.

^{43/} Lummi, Finding 45; Makah, Finding 65. Fraser River chinook are harvested in all of Puget Sound, except the most southerly portions and Hood Canal, as well as the Olympic Coast (Ex. JX-2a, Fig. 11); and, therefore, other plaintiff Tribes would have some Fraser river fish available at their usual and accustomed places.

^{44/} Ex. JX-2a, Fig. 11.

^{45/} Finding 214; Ex. JX-2a, Figs. 7-8.



Although the State should exert its best efforts to obtain an IPSFC regulatory structure which fully provides the Tribes a fair share of fish under the Commission's jurisdiction,^{46/} once the Commission regulations are adopted, they carry the force of Congressional statute.^{47/} In order to protect the Tribes' rights in this circumstance, it is necessary to compensate the Tribes for any excessive harvest share which non-Indian citizens may take under IPSFC, but the extent of compensation depends upon Commission rules adopted in the future. The district court accordingly provided for such an equitable adjustment, correctly leaving its precise application to subsequent circumstances as they arise.

D. The court properly found that the Tribes' reservation take is not subject to equal sharing.

The reservations established under the treaties were set aside for the Indians' exclusive use. It has long been the law that the State has no jurisdiction over tribal fishermen on their reservations.^{48/} It is also well established that the reservation by the Indians of a right to fish outside

^{46/} Decision, pp. 39-40.

^{47/} Post Decision Rulings, Ex. "A", ¶18; 16 U.S.C. §776a(a). Fisheries' assertion that it has the obligation of proving IPSFC regulations reasonable and necessary following adoption (Fisheries App. Br., p. 25) is unsupported by any provision of the district court's judgment.

^{48/} See e.g., Pioneer Packing Co. v. Winslow, 159 Wn. 655, 294 Pac. 5572 (1930).



their reservations is "in common" and not exclusive. ^{49/} The court thus reasonably declined to include, in the definition of the Tribes' share of the resource under its in-common right, fish harvests under the Tribes' exclusive right.

The State argues, however, that failure to include the Tribes' reservation take in their share of the in-common harvest provides the Tribes with a power to require that the State provide them an opportunity to harvest an unlimited portion of the run on reservation. ^{50/} The evidence shows, however, that in those few instances where there has been a substantial share of a harvest available within a reservation, the on-reservation take has been modest. For example, the commercial net fishing take of steelhead on the Quileute Reservation has, in fact, passed enough of the harvestable stock to permit an increase in the sportsmen's take. ^{51/} There is no reason to believe that the Tribes could or would seek to use the court's decision as a means for demanding all of a harvestable stock traditionally shared by non-Indians. ^{52/} Indeed, their limited membership renders

^{49/} Winans, Tulee, Puyallup I, Puyallup II, Sohappay, as cited and discussed in the Decision, pp. 18-27.

^{50/} Fisheries App. Br., pp. 38-39.

^{51/} Findings 110-114. There is also a continuing upriver sport fishery for steelhead above the Quinault Reservation while there has been a substantial regulated sport and commercial fishery on the reservation, and even though the Game department has refused to supplement the run with hatchery plants (Findings 123)

^{52/} It should be noted that at least one of the Tribes currently harvests almost all of the harvestable portion of a run of "chum salmon" on its reservation. (Findings 87-89) There is no evidence that this harvest has disrupted the operation of any non-Indian fishery. We note further that Fisheries' further assertions that Indians will misrepresent the location of their catch is based on the unverified opinion of a Fisheries' biologist -- testimony which the district court properly refused to credit. (Fisheries App. Br., pp. 37-38; Tr. 921-923, 3605-3606, 3961-3963).



such a prospect improbable at best.^{53/} If, however, such a situation should occur, the court's retention of continuing jurisdiction is the appropriate vehicle for accurately developing the facts and for fashioning an appropriate remedy.

E. The court properly defined "conservation" and "necessity".

As used by biologists and agencies which manage the resource, the term "conservation" often is used to refer, not merely to preservation of the resource, but also to apportioning the harvest in terms of "beneficial use". (Finding 177) In the process of such regulation, the managers respond to political and economic pressures^{54/} and often make value judgments which cut into the regenerative capacity of particular runs. (Finding 202) There is nothing in the treaties or the pertinent evidence which even suggests that by reserving a fishing right to be exercised in common with non-Indians the treaty Indians were subjecting their exercise of that right to non-Indian prescriptions of beneficial use and allocation. In fact, the evidence is to the contrary. (Decision, pp. 16-17) The district court recognized this and, carefully acknowledging the biologists' and managers'

^{53/} Findings 35, 43, 60, 71, 81, 94, 103, 119, 133, 139, 147, 150, 188. The total Indian tribal membership is only about 11,000, of which 6,000 are Yakimas. The number of fishermen is only about 800. Non-Indian fishermen number 6,600 commercial and 283,650 sport. (Finding 188)

^{54/} Fisheries App. Br., pp. 53-55, 60-61; Decision, p. 35.



concepts of "conservation", specifically instructed that the term "conservation", in the phrase "reasonable and necessary for conservation", refers only to the preservation of the resource. A less detailed holding would have left the Tribes' at the mercy of the State's value judgments and allocations, the same position of practical incapacity they were in when the case began.

The State insists that the court was also wrong in defining "necessary" as "essential to conservation", arguing that that definition is the same as the "indispensable" phrasing disapproved by the Supreme Court in Puyallup 55/

I. This argument, in our view, misapprehends the district court's use of the definition. That permissible regulations, under the district court's decision, need not be "indispensable" to conservation is evident from those portions of the district court's judgment which provide for "equal sharing". 56/

The State need not show that the resource will be harmed if it restricts Indian fishing where the Tribes would have an opportunity to take more than their entitlement. What the district court accomplished by its definition of "conservation" and "necessity" was, to emphasize, quite correctly, that, in

55/ Fisheries App. Br., pp. 53-54.

56/ Decision, p. 38.



seeking to regulate Indian off-reservation treaty fishing within the entitlement, the State must be concerned only with preservation of the resource, ^{57/} not further allocations. ^{58/}

F. The court's provision for limited tribal self-regulation was correct.

As we have explained earlier, the Tribes' have jurisdiction to regulate their members' off-reservation fishing, subject to necessary restrictions by the State to preserve the resource, and to allocate equal shares. The district court implemented this principle in light of the facts of the case, recognizing "self-regulating" Tribes who meet certain conditions and qualifications and other Tribes which do not. (Decision, pp. 28-38) The State mounts a broad attack on this ruling, much of which has been shown to be refuted by this Court's recent decision in Settler. As we have also shown, the district court did not "preempt" State jurisdiction to regulate treaty Indians fishing off-reservation. (Conclusion, p. 37) The necessary exercise of State power is preserved; in fact, emergency regulations may be immediately imposed without prior approval. (Injunction, p. 12) Drawing ^{59/} on the demonstrated responsibility and capacity of the Yakima Nation

^{57/} Decision, pp. 34-35.

^{58/} Finding 178; Decision, p. 38.

^{59/} Findings 159-161; See also Settler.



and the Quinault Tribe, ^{60/} as well as the State's views of elements of competent regulation, ^{61/} the district court provided for limited tribal self-regulation under stringent conditions designed to assure responsible control (Decision, pp. 31032); but, even so, the Tribal regulations, under the court's opinion, only establish a rebuttable presumption of validity, subject to testing under the continued jurisdiction of the court. Moreover, co-operation between the Tribes and the State has always been required because of on-reservation fishing. This decision, defining the permissible scope of tribal and State off-reservation regulation, thus provides the vehicle to accomplish a greater coordination in the proper allocation of the entire harvestable portion of the resource. ^{62/}

G. Continuing jurisdiction is necessary.

Almost all of the parties proposed that the court retain jurisdiction. (Decision, p. 46) An equitable decree is, by its nature, flexible and dependent on a fair and reasoned response to events following judgment, as well as those preceding it. The district court has recognized this principle, implementing it through appointment of a Special Master, ^{63/} a court expert ^{64/}

^{60/} Findings 124-128.

^{61/} Finding 179.

^{62/} We note that it is not unusual at all for federal and State authorities to have cooperative and concurrent jurisdiction over the same offenses, e.g., bank robbery. Simple robbery is a crime in Washington, RCW §9.75.101; and State sheriffs hold the power to arrest for robbery, RCW §36.28.010. Robbery of a federally insured bank is also a federal offense, 18 U.S.C. §2113, for which the FBI holds arrest power, 18 U.S.C. §3035.

^{63/} Order of March 22, 1974.

^{64/} Order of March 22, 1974.



and post-decision hearings designed to guide the parties in their attempts to conform their conduct to the decree.^{65/} In addition, recognizing the need of the Departments of Game and Fisheries to change some procedures to conform to the decree, and the pendency of this appeal, the court has entered an Interim Plan and Stay Order.^{66/}

As one facet of its continuing jurisdiction, the district court has required either its prior approval or the Tribes' agreement to any proposed State restrictions on tribal off-reservation treaty fishing. The State objects to this as inconsistent with the presumptive validity of regulations passed according to the State's Administrative Procedure Act.^{67/} The plain answer to this is that judicial review following adoption of the regulation has, on the basis of an extensive record, been determined by the court to be inadequate. This conclusion is supported by findings that: (1) the Department of Game has violated the State Administrative Procedure Act and has resolutely violated Indian fishing rights;^{68/} (2) the State and all of its agencies have consistently violated the Tribes' right by the substance of their regulations;^{69/}

^{65/} Post Decision Rulings and Transcript of hearings, March 5, 6, 18-20, 1974.

^{66/} Order of March 22, 1974.

^{67/} Fisheries App. Br., pp. 61-64.

^{68/} Conclusion 42.

^{69/} Conclusion 38.



(3) the State A. P. A. governs only procedural actions, it does not cover the additional standards of "reasonable and necessary for conservation" and "not discriminatory against the Tribes' right";^{70/} and (4) the numerous post-trial hearings^{71/} demonstrate the need, for the time being, of a close scrutiny of State actions affecting Indian treaty fishing. The district court's rulings requiring prior approval are, therefore, necessary to effective implementation of its judgment and, accordingly, should be upheld.

^{70/} Conclusions 29-32.

^{71/} E.g., March 5, 6, 18-20, 1974.



IV
**THE MUCKLESHOOT, STILLAGUAMISH AND UPPER SKAGIT
TRIBES ARE TREATY TRIBES.**

The district court properly determined that the Muckleshoot, Stillaguamish and Upper Skagit Tribes are successors in interest to and have all of the rights and powers of the Indian parties to the treaties of Medicine Creek and Point Elliott. ^{72/} To avoid duplication we refer the Court to the brief on behalf of the Muckleshoot Tribe, et al.

72/ Findings 71-80, 144-148; Conclusions 9-16; Decision, p. 15.



CONCLUSION

Although there has been disagreement about how they are to be applied, the general principles of law regarding the exercise and regulation of Indian treaty fishing rights are settled. This case concerns the practical application of those principles to the Tribes, the non-Indian fishery and the regulations of the State of Washington. Through careful attention to necessary factual detail, the district court has applied the established principles and fashioned a system of relief which holds remarkable promise of settling a seventy year old controversy.

None of the parties would ever reach agreement among themselves on the appropriate method for solving the dispute which brought this case to court. By its exercise of its equitable powers, the district court's judgment not only faithfully applies the law, but reaches a fair and workable result.



Accordingly, the judgment below should be affirmed.

Respectfully submitted,

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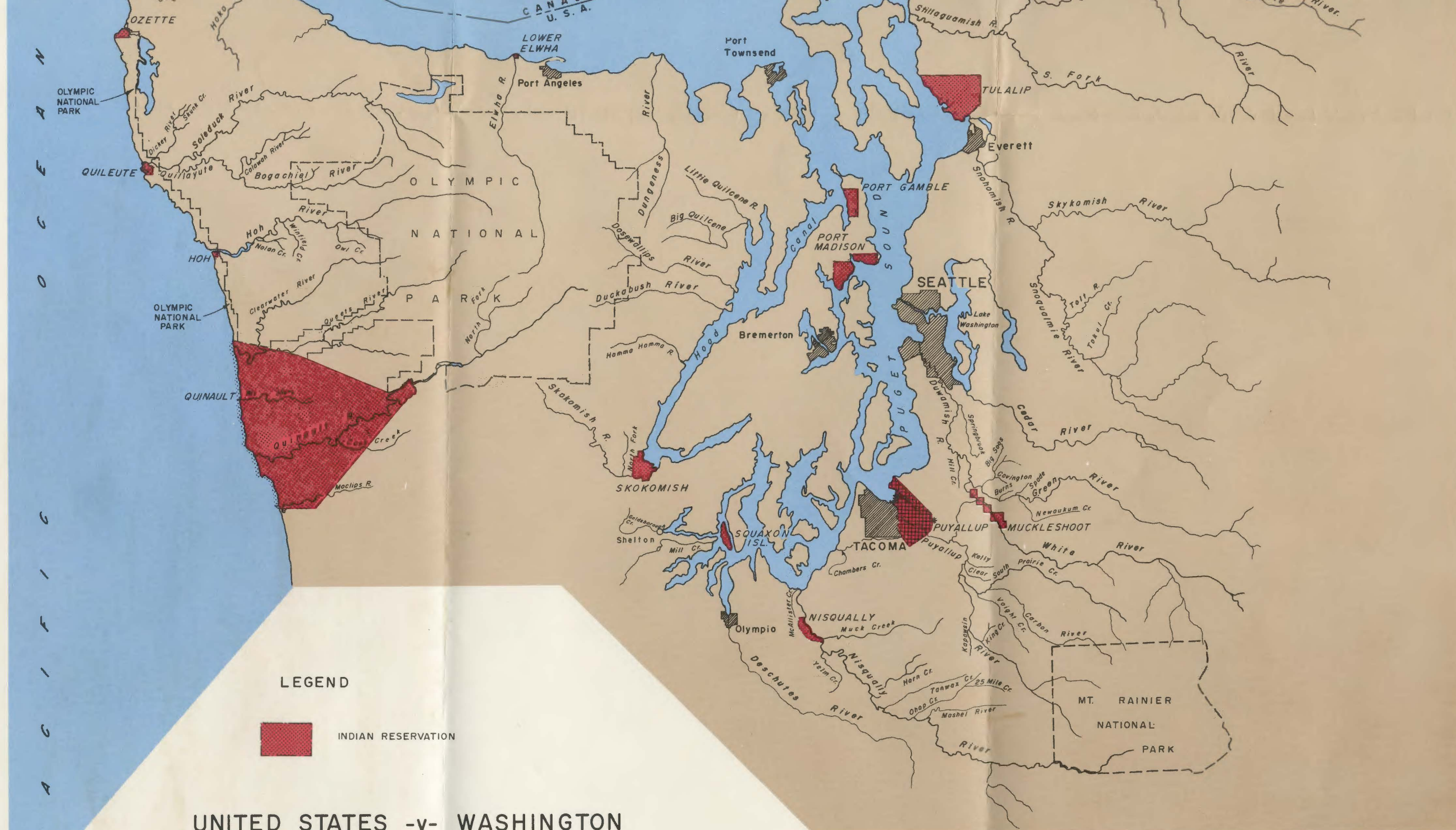
DATED: December 12, 1974.



MAP
OF
THE
CASE
AREA







*PUYALLUP RESERVATION BOUNDARIES AS ESTABLISHED THROUGH 1874. PRESENT LEGAL EXISTENCE AND/OR BOUNDARIES OF THIS RESERVATION IS CURRENTLY IN DISPUTE AND IS SUBJECT OF OTHER PENDING LITIGATION.

