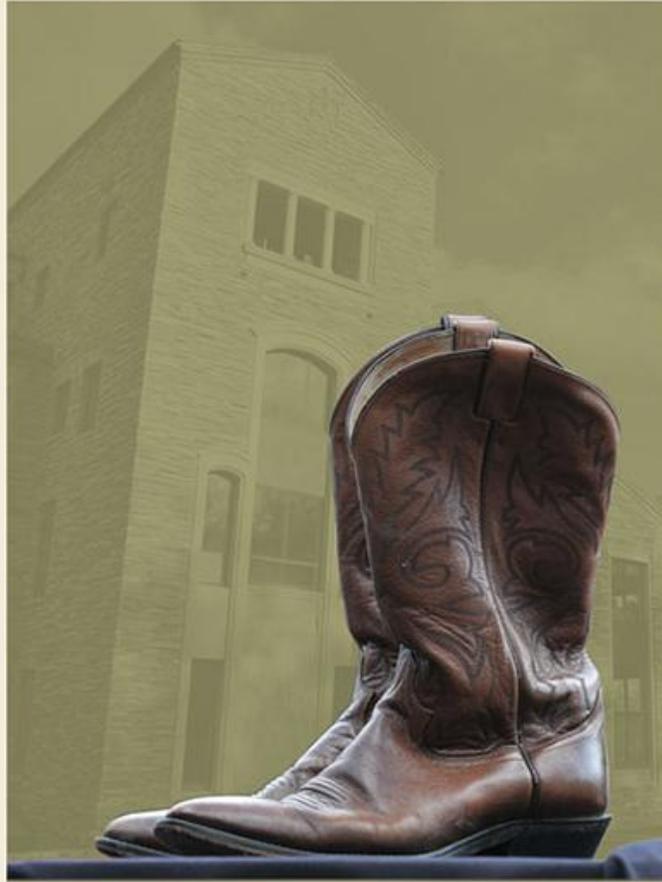


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Pretrial Brief, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (No. 9213) (David H. Getches and Douglas R. Nash, Native American Rights Fund; John Sennhauser, Legal Services Center, Attorneys for Plaintiffs Muckleshoot, Squaxin, Sauk-Siattle, Skokomish, and Stillaguamish Tribes).

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10 UNITED STATES DISTRICT COURT  
11 WESTERN DISTRICT OF WASHINGTON

13	UNITED STATES OF AMERICA,	)	
14	et al,	)	CIV. NO. 9213
		)	
15	Plaintiffs,	)	
		)	
16	vs.	)	
		)	
17	STATE OF WASHINGTON,	)	PRETRIAL BRIEF
18	et al,	)	
		)	
19	Defendants.	)	

20 I. INTRODUCTION

21  
22 This pretrial brief is filed on behalf of the Muckleshoot  
23 Indian Tribe, Squaxin Island Tribe of Indians, Sauk-Suiattle  
24 Indian Tribe, Skokomish Indian Tribe and Stillaguamish Tribe of  
25 Indians. Each of these tribes and their members have endured  
26 years of uncertainty while the full nature and extent of their  
27 off-reservation fishing rights secured by treaties with the  
28 federal government have gone unrecognized. This has been due in  
29 large part to the fact that no court has had before it factual  
30 and legal contentions that have enabled it to determine and  
31 articulate such matters fully. The legal system has failed to  
32 resolve these matters of critical importance to the parties in

1 this case and, indeed, to the citizenry generally. Presumably  
2 the failure has been one not inherent in the system but in the  
3 circumstances that neither the facts of cases which have been  
4 litigated nor the records made in the numerous cases involving  
5 Indian fishing rights have lent themselves to the kind of deter-  
6 mination that hopefully this case will produce.

7           The tribes now repose their confidence and trust in this  
8 United States District Court believing that the vast body of  
9 evidence which has been prepared and the factual and legal  
10 arguments that will be made on their behalf will be heard and  
11 considered objectively and a fair decision rendered consistent  
12 with the law.

13           These plaintiff tribes are substantially in agreement  
14 with the several points made in the Pretrial Brief of the  
15 United States. This separate pretrial brief is filed by them  
16 primarily to emphasize to the court the vital importance to  
17 them of this case which will turn upon an interpretation of a  
18 treaty made between them and their co-plaintiff, the United  
19 States of America. Furthermore, the tribes wish to emphasize  
20 to the Court their contentions, which differ slightly from  
21 those of the United States, and certain legal principles which  
22 deserve further emphasis at this time in order to assist the  
23 Court by providing background for this complicated case.

## 24           II. OUTLINE OF THE POSITION OF PLAINTIFF TRIBES

25           Necessary to a full understanding of this case is  
26 extensive evidence concerning the life habits of salmon. It is  
27 also important to understand the nature of the regulatory  
28 schemes of the Washington State Departments of Fisheries and  
29 Game and the fishing practices of the Indians. Of paramount  
30 importance, however, is evidence concerning negotiation and  
31 signing of the treaties. This is so because the case is,  
32

1 above all, not a fisheries management case, not a case which seeks  
2 accommodation between state, federal, and tribal governing power,  
3 not a civil rights case, but a case of treaty construction,  
4 application, and enforcement.

5         Once the meaning and effect of the treaties have been  
6 established the task is one of applying the law. If one principle  
7 is clear in this case it is that the law of the State of Washington  
8 must yield if it is in any way in conflict with a treaty of  
9 the United States of America. Article VI of the United States  
10 Constitution says in pertinent part "that all Treaties made, or  
11 which shall be made, under the Authority of the United States,  
12 shall be the supreme Law of the Land; and the Judges in every  
13 State shall be bound thereby, any Thing in the Constitution and  
14 Laws of any State to the Contrary notwithstanding." The supremacy  
15 clause is equally applicable to international treaties and Indian  
16 treaties. United States v. Forty-three Gallons of Whiskey, 39  
17 U.S. (3 Otto) 188 (1876); Worcester v. Georgia, 31 U.S. (6 Pet.)  
18 515 (1832). Thus, it is the first task of this Court to  
19 determine the meaning of the treaty language in this case and  
20 then to determine to what extent the law (statutes, regulations,  
21 policies and practices) of the State of Washington may conflict  
22 or interfere with those treaties. It is hoped that at that  
23 point the court will be able to fashion relief to provide full  
24 safeguards for the treaty rights which are found to exist while  
25 providing for the proper exercise of the state's power over  
26 activities of persons beyond the scope of the treaties' coverage.

27         Following is a brief discussion of some of the most  
28 important aspects of the law which is vital to the court's  
29 consideration of this case. First is a discussion of the rules  
30 of construction and interpretation applicable to Indian treaties,  
31 and second is a brief discussion of the principle of reserved  
32 rights which is regularly applied in situations where Indians

1 are found to have ceded certain rights or property and retained  
2 others. Finally, there is a short discussion of the position of  
3 these tribes concerning the application of the Supreme Court's  
4 requirement of a showing of necessity for conservation before  
5 a state can regulate Indian treaty fishing.

6  
7 A. Canons Of Indian Treaty Construction  
And Interpretation

8 Although the fundamental rules of Indian treaty construct-  
9 ion have been variously stated, there are essentially three well  
10 defined and well established rules.

11 The first fundamental rule is that "treaties with Indians  
12 must be interpreted as they would have understood them." Choctaw  
13 Nation v. Oklahoma, 397 U.S. 620, 630 (1970). The United States  
14 Supreme Court has stated the rationale of this principle as  
15 follows:

16 In construing any treaty between the United  
17 States and an Indian tribe, it must always  
18 ... be borne in mind that the negotiations  
19 for the treaty are conducted, on the part of  
20 the United States, an enlightened and power-  
21 ful nation, by representatives skilled in  
22 diplomacy, masters of a written language,  
23 understanding the modes and forms of creating  
24 the various technical estates known to their  
25 law, and assisted by an interpreter employed  
26 by themselves; and that the treaty is drawn up  
27 by them and in their own language; that the  
28 Indians, on the other hand, are a weak and  
29 dependent people, who have not written language  
30 and are wholly unfamiliar with all forms  
31 of legal expression, and whose only knowledge  
32 of the terms in which the treaty is framed  
is that imparted to them by the interpreter  
employed by the United States; and that the  
treaty must therefore be construed, not accord-  
ing to the technical meaning of its words to  
learned lawyers, but in the sense in which they  
would naturally be understood by the Indians.  
Jones v. Meehan, 175 U.S. 1, 10-11 (1899).

And in another Indian treaty case the court stated that:

[I]n treaties made with them the United States  
seeks no advantage for itself; friendly and  
dependent Indians are likely to accept without  
discriminating scrutiny the terms proposed.  
They are not to be interpreted narrowly, as

1 sometimes may be writings expressed in words  
2 or act employed by conveyancers, but are to  
3 be construed in the sense in which naturally  
4 the Indians would understand them.  
5 United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938).  
6 Accord, Worcester v. Georgia, 31 U.S. 515 (1832); Stan v. Long  
7 Jim, 227 U.S. 613 (1913); Choctaw Nation of Indians v. United States,  
8 318 U.S. 418, 431-432 (1943); State v. Tinno, 94 Ida. 759, 497  
9 P.2d 1386, 1391 (1972); People v. Jondreau, 304 Mich. 539, 185  
10 N.W.2d 375, 377-78 (1971). Cf., State v. Gurnoe, 53 Wis.2d 390,  
11 192 N.W.2d 892, 898 (1972).

12 In the context of Indian fishing rights, the Supreme  
13 Court long ago rejected contentions of the State of Washington  
14 that the very treaty language which is here the subject of  
15 controversy gave Indians no more rights than other citizens.  
16 The Court said of the contentions that Indians "acquired no  
17 rights but such as they would have without the treaty":

18 This is certainly an impotent outcome to  
19 negotiations and a convention which seemed  
20 to promise more, and give the word of the  
21 nation for more. And we have said we will  
22 construe a treaty with the Indians as "that  
23 unlettered people" understood it, and "as  
24 justice and reason demand, in all cases where  
25 power is exerted by the strong over those to  
26 whom they owe care and protection," and  
27 counterpoise the inequality by the superior  
28 justice which looks only to the substance of  
29 the right, without regard to technical rules.  
30 ...How the treaty in question was understood  
31 may be gathered from the circumstances.

32 United States v. Winans, 198 U.S. 370, 380-81.

33 In accordance with the principles enunciated in the portion of the  
34 Winans opinion quoted here, the Court turned to an examination of  
35 the importance to Indians of fishing at the time of the treaties  
36 and expansively interpreted the nature and extent of the off-  
37 reservation fishing right reserved in the treaties.

38 In holding that the State of Washington could not exact  
39 a fishing license fee from Indians fishing outside their reserva-  
40 tion because of the special off-reservation fishing rights secured  
41 to them by the same treaty language which this Court is called  
42

1 upon to construe, the Supreme Court followed the same approach.

2 It stated:

3 From the report set out in the record before  
4 us of the proceedings in the long council at  
5 which the treaty agreement was reached, we  
6 are impressed by the strong desire the Indians  
7 had to retain the right to hunt and fish in  
8 accordance with the immemorial customs of their  
9 tribe. It is our responsibility to see that the  
10 terms of the treaty are carried out, so far as  
11 possible, in accordance with the meaning they  
12 were understood to have by the tribal represen-  
13 tatives at the council and in a spirit which  
14 generously recognizes the full obligation of  
15 this nation to protect the interests of a  
16 dependent people.  
17 Tulee v. Washington, 315 U.S. 681, 684-85.

18 A second rule of Indian treaty construction is that doubt-  
19 ful expressions are to be resolved in favor of the Indian parties  
20 to the treaty. McClanahan v. State Tax Comm'n of Arizona, \_\_\_ U.S.  
21 \_\_\_, 36 L.Ed.2d 129, 137 (1973); Carpenter v. Shaw, 280 U.S. 363,  
22 367 (1930).

23 The rule of treaty interpretation that requires unclear  
24 phrases in treaties with Indians to be resolved in their favor was  
25 well stated in an important Indian water rights case.

26 [B]y a rule of interpretation of agreements  
27 and treaties with the Indians, ambiguities  
28 occurring will be resolved from the stand-  
29 point of the Indians. And the rule should  
30 certainly be applied to determine between  
31 two inferences, one of which would support  
32 the purpose of the agreement and the other  
33 impair or defeat it. On account of their  
34 relations to the government, it cannot be  
35 supposed that the Indians were alert to  
36 exclude by formal words every inference  
37 which might militate against or defeat the  
38 declared purpose of themselves and the  
39 government, even if it could be supposed  
40 that they had the intelligence to foresee  
41 the "double sense" which might sometime be  
42 urged against them.

43 Winters v. United States, 207 U.S. 564, 576-77 (1908).

44 See also, Standing Rock Sioux Tribe v. United States, 182 Ct. Cl.  
45 813 (1968).

46 A third important canon of Indian treaty construction is  
47 that Indian treaties are to be constructed in favor of the Indians.

1 This principle was stated by the United States Supreme Court in  
2 Choctaw Nation of Indians v. United States, supra, at 431-432:

3 [O]f course treaties are construed more  
4 liberally than private agreements, and to  
5 ascertain their meaning we may look beyond the  
6 the written words to the history of the  
7 treaty, and negotiations, and the practical  
8 construction adopted by the parties....  
9 Especially is this true in interpreting  
10 treaties and agreements with the Indians;  
11 they are to be construed, so far as possible,  
12 in the sense in which the Indians understood  
13 them, and "in a spirit which generously  
14 recognizes the full obligation of this nation  
15 to protect the interests of a dependent  
16 people."

17 Tulce v. Washington, supra; United States v. Shoshone Tribe, supra.

18 As the evidence in this case unfolds, it will be incumbent  
19 upon the court to determine just how the Indian parties to the  
20 treaties in question must have understood the provision with  
21 respect to the fishing rights they reserved. It is this meaning  
22 what the Indians must have intended -- that must be accorded to  
23 the treaty language. Any ambiguities which then remain must be  
24 resolved in favor of the Indians. And, throughout the process  
25 of treaty interpretation, the overall axiom that the treaties  
26 must be construed liberally in favor of Indians must be kept in  
27 mind. This has been the consistent approach of courts dealing  
28 with Indian treaty cases; the United States Supreme Court has  
29 insisted upon no less. It is entirely understandable that the  
30 Court should dictate such an approach when treaty making with  
31 Indians is placed in its proper context.

32 The Indian Nations did not seek out the  
United States and agree upon an exchange  
of lands in an arm's - length transaction.  
Rather, treaties were imposed upon them  
and they had no choice but to consent.  
Choctaw Nation v. Oklahoma, supra, 397 U.S. at 630-31.

#### 33 B. The Reserved Right Doctrine

34 When the treaties were made with the Indians, the govern-  
35 ment made certain promises and obligated itself to the Indians in  
36 return for cession of vast tracts of land and other rights. To

1 the extent rights were not expressly given up by the Indians, they  
2 were retained by them -- even if they were not expressly mentioned  
3 in the treaty. See, Menominee Tribe v. United States, 391 U.S.  
4 404 (1968). As the Pretrial Brief of the United States points  
5 out, the plaintiff tribes' treaty rights to fish are reserved  
6 rights.

7 The reserved right principle was first enunciated in  
8 the Supreme Court's decision in United States v. Winans, supra.  
9 The Court there said:

10 [T]he treaty was not a grant of rights  
11 to the Indians, but a grant of rights from  
12 them -- a reservation of those not granted.  
13 And the form of the instrument and its lan-  
14 guage was adapted to that purpose. Reserva-  
15 tions were not of particular parcels of land,  
16 and could not be expressed in deeds, as  
17 dealings between private individuals.....  
18 There was a right outside of those boundaries  
19 [of the retained lands] reserved "in common  
20 with citizens of the territory".  
21 198 U.S. at 381.

22 The United States Supreme Court has dealt with the extent  
23 of reserved rights. In Winters v. United States, supra, the  
24 leading case in the field, the Court held that Indian reserved  
25 water rights existed to the extent necessary to fulfill the  
26 purposes of the reservation. The Winters decision, which was  
27 authored by Justice McKenna, who wrote the Winans decision three  
28 years earlier, has been followed consistently for 65 years. It  
29 is especially instructive to look to the Indian reserved water  
30 rights cases in determining the extent to which the state may, if  
31 at all, regulate the exercise of the off-reservation fishing right.  
32 The purposes of reserving the right must be fulfilled, and state  
regulations cannot be allowed to interfere with its full exercise.<sup>1</sup>

---

30 <sup>1</sup>As will be discussed below, the courts have imposed a limitation  
31 on the fishing right in cases where its unbridled exercise would  
32 destroy the depletable fish resource. Thus, state regulatory  
authority has been recognized where its exercise is "necessary  
for conservation". Puyallup Tribe v. Department of Game, 391  
U.S. 392 (1968).

1           In determining the measure of water rights impliedly,  
2 reserved to the Indians along the Colorado River, the United  
3 States Supreme Court held that there is a right to sufficient  
4 waters to meet all of the present future needs of the Indians'  
5 lands, notwithstanding the serious needs of the non-Indian users  
6 of the states on either side of river. No less would fulfill the  
7 purpose of the reservations, which was found to be to enable  
8 agricultural development by the Indians. Arizona v. California,  
9 373 U.S. 546, 599-600 (1963). If this result leaves little or  
10 even no water for the white settlers, it is, nevertheless, the  
11 inevitable consequence of the treaty. See, United States v.  
12 Ahtanum Irrigation District, 236 F.2d 321, 327 (9th Cir. 1956),  
13 cert. denied 352 U.S. 988; 330 F.2d 897 (9th Cir. 1956); 338  
14 F.2d 307 (9th Cir. 1964), cert. denied 381 U.S. 924.

15           In Alaska Pacific Fisheries v. United States, 248 U.S.  
16 78 (1918), the Supreme Court found that:

17           The purpose of creating a reservation was to  
18 encourage, assist and protect the Indians in  
19 their effort to train themselves to habits  
20 of industry, become self-sustaining, and ad-  
21 vance to the ways of civilized life.  
22 248 U.S. at 89. Consistent with this purpose, the Indians were  
23 held to have rights not only to the lands specifically reserved  
24 to them, but to the adjacent fishing grounds. In so holding,  
25 the Court looked to the circumstances in which the reservation  
26 was created including "the power of Congress in the premises, the  
27 location and character of lands, the situation and needs of the  
28 Indians, and the object to be obtained." 248 U.S. at 87. Pur-  
29 suing a similar analysis, the Ninth Circuit Court of Appeals  
30 upheld a decision of this Court, stating with regard to the same  
31 treaty language that is the subject of this case, "it is clear  
32 that the reservation was intended only as a residence, and the  
Skokomish Indian Tribe v. France, 321 F.2d 205, 210 (9th Cir.

1 1963). Indeed, some tribes were left with no land base at all.

2 Numerous courts have concluded, based on historical evidence,  
3 that the Indians intended to reserve their right to fish as they  
4 had at the time of the treaties. The Supreme Court has stated  
5 "we are impressed by the strong desire the Indians had to retain  
6 the right to hunt and fish in accordance with the immemorial  
7 custom of their Tribes." Tulee v. Washington, supra at 684.  
8 See also, Sohappy v. Smith, 302 F.Supp. 899, 907 (D. Ore. 1969);  
9 State v. Tinno, supra, 94 Idaho at 766, 497 P.2d at 1393. As  
10 outlined in the Pretrial Brief of the United States, extensive  
11 evidence in this case will be offered concerning the importance  
12 of fishing to the Indians at the time of the treaties and the  
13 circumstances surrounding the treaty negotiations. The tribes  
14 submit that this evidence will lead to the inescapable con-  
15 clusion that they reserved the right to take sufficient fish to  
16 meet their subsistence and livelihood needs at their usual and  
17 accustomed places, outside their reservations.

18 Because the fishing right of the plaintiff tribes is a  
19 reserved right and because the reserved right extends so far as  
20 is necessary to fulfill the purposes of the reservation, it is  
21 the contention of the plaintiff tribes that the Department of  
22 Fisheries' arguments that the Indians' entitlement is to a "fair  
23 and equitable share" of the fishery must be rejected. Looking to  
24 the purposes of creating Indian reservations along the Colorado  
25 River, the United States Supreme Court rejected soundly the ap-  
26 plication of the doctrine of equitable apportionment for alloca-  
27 tion of water between the Indians and other people in Arizona.  
28 Arizona v. California, supra, 373 U.S. at 597.

29 Fairness and equity may govern where the issue concerns  
30 adjustment of rights between individuals whose position before  
31 the court is an equal one to begin with. In this case, however,  
32 the Indians have a reserved right protected by federal treaty,

1 while non-treaty fishermen in the State of Washington have merely  
2 a privilege which may be regulated by the state in the exercise  
3 of its sovereign power. See, Geer v. Connecticut, 161 U.S. 519,  
4 532 (1896). This distinction has been recognized recently by the  
5 Supreme Court in a fishing rights case in which it held that any  
6 state regulation of Indians exercising a treaty right to fish at  
7 their off-reservation usual and accustomed places must be not only  
8 reasonable (the standard applicable to state regulation of other  
9 citizens) but "necessary for conservation." Puyallup Tribe v.  
10 Department of Game, supra at 399 and 401. Thus, "the measure of  
11 the legal propriety of those kinds of conservation measures is  
12 distinct from the federal constitutional standard concerning the  
13 scope of the police power a State." 391 U.S. at 401, n.14. More  
14 severe regulation, even prohibition, of non-treaty fishing may be  
15 proper. Tulee v. Washington, supra at 685; Maison v. Confederated  
16 Tribes of the Umatilla Indian Reservation, 314 F.2d 169, 174 (9th  
17 Cir. 1963); Sohappy v. Smith, supra at 908 and 911. In acknow-  
18 ledgement of this principle, the United States District Court for  
19 the District of Oregon in Sohappy held at p. 908:

20           The state may regulate fishing by non-Indians to  
21 achieve a wide variety of management or "con-  
22 servation" objectives. Its selection of regulations  
23 to achieve these objectives is limited only by its  
24 own organic law and the standards of reasonableness  
25 required by the Fourteenth Amendment. But when it  
26 is regulating the federal right of Indians to take  
27 fish at their usual and accustomed places it does  
28 not have the same latitude in prescribing the  
29 management objectives and the regulatory means of  
30 achieving them. The state may not qualify the  
31 federal right by subordinating it to some other  
32 state objective or policy. It may use its police  
power only to the extent necessary to prevent the  
exercise of that right in a manner that will im-  
peril the continued existence of the fish resource.

          That the treaty secured right to fish is a reserved right  
is a matter of law. It will be the task of this Court to find,  
based upon the evidence in this case, the purpose of the Indians  
in making that reservation judged by the circumstances

1 at the time of the treaty and according to the canons of treaty  
2 construction discussed above. After the Court has made that find-  
3 ing, it will be in a position to determine whether or not the re-  
4 gulatory schemes of the State of Washington allow the exercise of  
5 such rights to the extent necessary to fulfill the treaty purpose.

6  
7 C. Standards For State Regulation

8 As discussed above, and as explicated in the Pretrial  
9 Brief of the United States, the Supreme Court has recognized a  
10 strict limitation of state regulatory power over Indian off-  
11 reservation fishing pursuant to treaty; only such regulation as  
12 conforms to the requirements set forth by the Court is permissible.

13 1. Necessity for Conservation

14 It has been noted that the touchstone requirement for  
15 state regulation is a finding that it is "necessary for conser-  
16 vation." These plaintiff tribes contend that until the effect  
17 of other applicable regulatory schemes - tribal or federal - which  
18 may operate upon the fishery is considered, a determination of  
19 necessity cannot be made intelligently. This proposition is  
20 rooted not only in common sense, but in established legal prin-  
21 ciples in the case of Indian fishing.

22 Regulation of Indian fishing is reposed in tribal and  
23 federal authority and the exercise of state power in the area  
24 must be seen as supplementary. Tribal enforcement, with prosecu-  
25 tions handled by tribal courts, is the appropriate way to handle  
26 most regulation of the exercise of treaty fishing rights.<sup>2</sup> No entities

27  
28  
29  
30  
31 <sup>2</sup>A defendant prosecuted in tribal court has recourse to the  
32 federal district courts by means of habeas corpus proceedings.  
25 U.S.C. §1303. See also, Settler v. Yakima Tribal Court, 419  
F.2d 486 (9th Cir. 1969).

1 have a greater interest in the proper regulation of such rights than  
2 do the tribes themselves. Fishing in violation of tribal regu-  
3 lations is considered to be outside the scope of the treaty right  
4 and thus subjects an Indian to prosecution for a state regulation  
5 he might be also violating. State v. Gowdy, 1 Ore.App. 424, 462  
6 P.2d 461 (1970); 60 I.D.68, 70 (1962).

7 More than half a century ago, the Supreme Court in Missouri  
8 v. Holland, 252 U.S. 416 (1920), held that the power of a state  
9 to manage game within its boundaries is not infringed by a federal  
10 treaty and regulations under it which regulate game within the state.  
11 The holding was based upon the basic principle under the supremacy  
12 clause that the sovereign power of a state must yield to paramount  
13 federal power. The same principle is applicable in this case.

14 Besides being a prerequisite for determining whether state  
15 regulation of Indian treaty fishing is proper, recognition of  
16 the effect tribal regulations is required to avoid an interference  
17 with the tribes' ability to govern themselves. An impairment of  
18 the tribes' right to govern their members is the result of con-  
19 fining to the state all regulatory power over the exercise of  
20 rights reserved by the tribes in their treaties with the United  
21 States.

22 It is well settled that a state may not establish its  
23 jurisdiction over Indians such that it "would undermine the  
24 authority of the tribal courts over Reservation affairs and hence  
25 would infringe on the right of the Indians to govern themselves."  
26 Williams v. Lee, 358 U.S. 217, 223 (1959); see also, Warren Trading  
27 Post v. Arizona Tax Commission, 380 U.S. 685 (1965); McClanahan v.  
28 Arizona State Tax Commission, *supra*. The Supreme Court has re-  
29 cently indicated in McClanahan that treaties must be read "with  
30 this tradition of sovereignty in mind." Consistent with that  
31 principle, the general rule that Indians are subject to the opera-  
32 tion of state law outside reservation boundaries is inapplicable

1 where "such application would interfere with reservation self-  
2 government or would impair a right granted or reserved by federal  
3 law." Mescalero Apache Tribe v. Jones, \_\_\_ U.S. \_\_\_, 36 L.Ed.2d  
4 114, 119 (1973). The failure of the state to afford the tribe the  
5 opportunity to make regulations applicable to Indians exercising  
6 treaty rights to fish and to consider the impact of those regu-  
7 lations before determining conservation necessity for imposing  
8 state regulation upon the exercise of those rights poses a threat  
9 to tribal sovereignty in that it would "infringe on the right of  
10 the Indians to govern themselves."

11 2. Regulation of Treaty Fishing Must Be A Last Resort

12 A further requirement which the plaintiff tribes urge  
13 must be met before necessity for conservation can be found is that  
14 the state exhaust other avenues designed to achieve its conserva-  
15 tion objectives. Thus, as the Court in Sohappy v. Smith, supra,  
16 found, state regulations applicable to Indians exercising treaty  
17 secured fishing rights must be the least restrictive which can be  
18 imposed consistent with assuring necessary escapement of fish  
19 for conservation purposes. Therefore, it is relevant for the  
20 Court to inquire in this case as to whether the state has imposed  
21 adequate restrictions and prohibitions on non-Indian fishermen  
22 before resorting to restriction and prohibition of Indian treaty  
23 fishing rights. Likewise, the Court must inquire into the extent  
24 to which the state has pursued remedies for rectifying or prevent-  
25 ing destruction or damage to the fishery resource from causes such  
26 as pollution, stream bed alterations, water diversion, and damming  
27 Until such possibilities are explored, the necessity of the state's  
28 regulation of Indians exercising treaty rights to fish at their  
29 usual and accustomed places as reserved by their tribes in treaties  
30 with the United States, for conservation cannot be determined.

31

32

1           3. Procedural Requirements For State Regulations

2           As the United States points out in its Pretrial Brief, any  
3 state authority to regulate Indian treaty fishing rights is limited  
4 to such regulations as (a) do not discriminate against the tribes'  
5 special rights, (b) meet appropriate standards, and (c) are shown  
6 by the state to be reasonable and necessary for conservation of  
7 the resource. If anything is clear from the requirements imposed  
8 upon the states by the treaties, as interpreted by the United States  
9 Supreme Court in Puyallup Tribe v. Department of Game, supra, it  
10 is that regulation of Indian treaty fishing may not be undertaken  
11 as a routine matter. Not only has the state attempted to impose  
12 its regulations upon Indians as a matter of course, but it has  
13 failed to show that its regulations measure up to the standards  
14 which the Supreme Court requires before imposition of state regu-  
15 lation. It is, therefore, submitted that a prior determination  
16 that a proposed state regulation of Indian treaty fishermen meets  
17 appropriate standards, is reasonable and necessary for conservation  
18 and does not discriminate against the Indians' treaty right to fish  
19 should be required.

20           As the Court is fully aware, and as the record will reflect,  
21 the enforcement of state laws upon Indians during protracted  
22 litigation creates a presumption that regulation of the treaty  
23 right to fish meets the standards which, if found inadequate by a  
24 court decision after a full hearing, comes too late to give relief  
25 to the Indian litigants. Typically, the fishing season is over  
26 sometimes several years past - and a favorable declaration of  
27 rights provides only academic satisfaction. This is true not only  
28 in criminal cases, but when injunctions are sought by the state  
29 such as in Puyallup Tribe v. Department of Game, which began ten  
30 years ago and is now before the United States Supreme Court for  
31 the second time. To avoid this effective denial of rights, plain-  
32 tiffs urge that this Court continue its jurisdiction in a manner

1 that will provide access to it for a prior review of any future  
2 fishing regulations proposed to be applicable to Indian fishermen  
3 before their attempted enforcement by the state.

4  
5 II. OUTLINE OF EXPECTED PROOF

6 The United States and the plaintiff tribes are cooperating  
7 in the preparation and presentation of their cases. The proof to  
8 be offered by these tribes will be essentially that outlined by  
9 the United States in its Pretrial Brief and, therefore, the United  
10 States' outline of expected proof is incorporated here.

11 III. OBJECTIONS TO ADMISABILITY OF DEFENDANTS'  
12 EVIDENCE

13 The plaintiff tribes anticipate interposing objections  
14 to admisability of portions of the written direct testimony sub-  
15 mitted by defendants as noted on the face of the exhibits in which  
16 the testimony is contained. These objections have been formulated  
17 in conjunction with counsel for the United States and the con-  
18 tentions regarding them as summarized in the United States' Pretrial  
19 Brief are incorporated here.

20 IV. SUMMARY OF RELIEF REQUESTED

21 A. Declaration of Rights

22 These plaintiff tribes seek an appropriate declaratory  
23 judgement that:

- 24 1. They hold a right distinct from other  
25 citizens of the state to take fish at  
26 their usual and accustomed places as  
27 reserved by them in treaties with the  
28 United States, which right entitles persons  
29 deriving rights from the tribes to  
30 take sufficient fish to fulfill the  
31 purposes of the treaty and, thus, to  
32 meet their subsistence and trading  
needs now and in the future;
2. The state may not qualify the right to  
fish reserved by the tribes in treaties  
with the United States in any way, and  
its exercise may be regulated only when  
such regulation is shown, prior to its  
enforcement, to be necessary for pre-

1           servation of the resource after a con-  
2           sideration of any and all applicable  
3           tribal and federal regulations, and ex-  
4           haustion of other methods available to  
5           the state for achieving such conservation  
6           objective; and

- 7           3. All state statutes, regulations, policies,  
8           and practices inconsistent with the rights  
9           of the tribes as declared by the Court are  
10          unlawful as applied to, or as they affect,  
11          individual Indians deriving rights from  
12          the plaintiff tribes.

13          B. Injunction

14          These plaintiff tribes seek injunctions:

- 15          1. Requiring the state provide full recognition  
16          for Indian treaty fishing rights at the  
17          tribes' usual and accustomed places outside  
18          their reservations as declared by this Court;  
19          and  
20          2. Restraining the state from enforcing or  
21          otherwise applying its statutes, regu-  
22          lations, practices, and policies in such  
23          a manner as to prevent the exercise of  
24          Indian off-reservation treaty fishing  
25          rights as they are declared to exist by  
26          this Court.

27          C. Appointment of Master

28          These plaintiff tribes seek the appointment of a special  
29          master pursuant to Rule 53 of the Federal Rules of Civil Procedure,  
30          who is acceptable to all parties. The special master shall:

- 31          1. Hold such hearings and make such orders  
32          as may be necessary to enforce the judge-  
33          ment of this Court;  
34          2. Meet with, assist, and coordinate the  
35          efforts of the tribal, federal, and  
36          state governments, (a) to assure that  
37          Indians with treaty secured fishing  
38          rights have an opportunity to take  
39          sufficient fish at their usual and  
40          accustomed places to meet their sub-  
41          sistence and trading needs and other-  
42          wise to fulfill the purposes of the  
43          treaties; and (b) to prevent destruction  
44          of or serious damage to the anadromous  
45          fish resource in the geographic area  
46          encompassed by this case in a manner  
47          consistent with the Court's declaration  
48          of rights; and  
49          3. Report annually to the Court on his  
50          activities.

1 D. Continuing Jurisdiction and Other Relief

2 The plaintiff tribes also ask that:

- 3 1. The Court retain continuing jurisdiction  
4 to assure full implementation of its  
5 orders, to review determinations and re-  
6 ports of the special master, and to  
7 resolve other related and correllary  
8 issues, the necessary resolution of  
9 which becomes apparent during trial; and
- 10 2. They be awarded their costs of suit,  
11 attorney fees and expenses, and such  
12 other relief the Court may find to be  
13 proper.

14 V. CONCLUSION

15 When the established law of Indian treaty construction is  
16 applied to the facts surrounding negotiation of the treaties in-  
17 volved in this case, these plaintiff tribes believe that the  
18 nature and extent of their rights will be perceived clearly. Those  
19 rights, as reserved rights, should be determined to be of sufficient  
20 scope to provide a means for perpetual maintenance of Indian  
21 subsistence and livelihood. The state's attempts to qualify or  
22 regulate such rights must fail as in conflict with the supremacy  
23 clause as well as an infringement of the tribes' rights. Past  
24 attempts of the State of Washington to regulate Indians claiming  
25 a fishing right at their off-reservation usual and accustomed  
26 fishing places will be shown to be unlawful as inconsistent with  
27 the United States Supreme Court mandate that they must be shown  
28 to be necessary for conservation.

29 Determining, at last, the tribe's full measure of treaty  
30 fishing rights and the invalidity of the state management and regu-  
31 latory schemes in the face of those rights, the Court should then  
32 turn to the future and provide guidance to the state in recognizing  
and accommodating the tribe's rights.

33 DATED: August 14, 1973.

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Respectfully submitted,

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