Motion for Attorneys' Fees and Other Expenses, *United States v. Washington*, 66 F.R.D. 477 (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).

(23)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, QUINAULT TRIBE OF INDIANS on its own behalf and on the behalf of the QUEETS BAND OF INDIANS; MAKAH INDIAN TRIBE; HOH TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE; SQUAXIN ISLAND TRIBE OF INDIANS; SAUK-SUIATTLE INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; CONFEDERATED TRIBES AND BANDS OF THE YAKIMA [illegible] TRIBE; STILLAGUAMISH TRIBE OF INDIANS; and QUILEUTE INDIAN TRIBE, Intervenor-Plaintiffs, v. STATE OF WASHINGTON, Defendant, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, CARL CROUSE, Director, Washington Department of Game; and WASHINGTON STATE GAME COMMISSION; and WASHINGTON REEF NET OWNERS ASSOCIATION, Intervenor-Defendants	CIVIL NO. 9213

MOTION FOR ATTORNEYS' FEES
AND OTHER EXPENSES

Plaintiffs, Muckleshoot Indian Tribe, Skokomish Indian Tribe, Squaxin Island Tribe of Indians, Sauk-Suiattle Indian Tribe, and Stillaguamish Tribe of Indians, move this Court for an order awarding them their attorneys' fees and other expenses incurred in this litigation. Plaintiffs request that these fees and expenses be awarded in an amount to be determined by the Court based upon information submitted by counsel.

This motion is based upon the Memorandum In Support of Motion For Attorneys' Fees and Other Expenses submitted together with it, the Final Decision I, Findings of Fact and Conclusions of Law, and Declaratory Judgment and Decree dated February 12, 1974, and the record in this case.

DATED: February 22, 1974

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA, Plaintiff, QUINAULT TRIBE OF INDIANS on its own behalf and on the behalf of the QUEETS BAND OF INDIANS; MAKAH INDIAN TRIBE; LUMMI INDIAN TRIBE; HOH TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE; SQUAXIN ISLAND TRIBE OF INDIANS; SAUK-SUIATTLE INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION; UPPER SKAGIT RIVER TRIBE; STILLAGUAMISH TRIBE OF INDIANS; and QUILEUTE INDIAN TRIBE, Intervenor-Plaintiffs, v. STATE OF WASHINGTON, Defendant, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries; CARL CROUSE, Director, Washington Department of Game; and WASHINGTON STATE GAME COMMISSION; and WASHINGTON REEF NET OWNERS ASSOCIATION, Intervenor-Defendants.	CIVIL NO. 9213

MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND OTHER EXPENSES

I. THIS COURT HAS EQUITY POWERS TO GRANT PLAINTIFFS THEIR ATTORNEYS' FEES AND OTHER EXPENSES.

For nearly a century the United States Supreme Court has sanctioned the exercise of equitable power by district courts in awarding attorneys' fees. Trustees v. Greenough, 105 U.S. 527 (1881). Very recently the Supreme Court stated the controlling principle as follows:

> Although the traditional American rule ordinarily disfavors the allowance of attorney's fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorney's fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation." Sprague v. Ticonic National Bank, 307 US 161, 166, 83 L.Ed. 1184, 59 S.Ct. 777 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such recovery."

Hall v. Cole, 412 U.S. 1 (1973).

The early cases were generally those in which a common fund was produced as a result of the litigation. Because a large class would benefit, and it would be unjust to require a few members of the class who initiated the litigation to bear all of the costs, with the others bearing no cost, the Supreme Court approved the granting of fees against the unsuccessful party in such cases. In later years the great demands for private litigation to effectuate public policy, to remedy official behavior which is not in accordance with law, and to spread the burdens of costly litigation equitably have provoked considerable amount from legal writers and scholars.[1]

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[1]Ehrenzweig, "Reimbursement of Counsel Fees and the Great Society," 54 Calif. L.Rev. 792 (1966); Kuenzel, "The Attorney's Fee: Why Not a Cost of Litigation?", 49 Ohio L.Rev. 75 (1963); McCormick, "Counsel Fees and Other Expenses of Litigation as an Element of Damages," 15 Minn. L.Rev. 619 (1931); Nussbaum, "Attorney's Fees in Public Interest Litigation," 48 N.Y. Univ. L.Rev. 301 (1973); Stoebuck, "Counsel Fees Included in Costs: A Logical Development," 38 U. Colo. L.Rev. 202 (1966); Note, "The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.," 38 U. Chi. L.Rev. 316 (1971); Comment, "Allowance of Attorney's Fees in Civil Rights Actions," 7 Col. J. L. & Soc. Prob. 381 (1971); Note, "Allowance of Attorney's Fees in Civil Rights Litigation Where the Action Is

The trend of Supreme Court decisions has been to broaden approval of judicial awards of attorneys' fees so as to provide litigants with a means for being made whole in equitable cases. See Newman v. Piggie Park Enterprises Inc., 390 U.S. 400 (1968); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Hall v. Cole, supra; Northcross v. Board of Education, 412 U.S. 427 (1973). The inquiry now is merely whether or not the plaintiffs have demonstrated that equity supports the award of fees.

In the words of a federal district judge for the Northern District of California:

> Mills and Piggie Park touched responsive chords, and the federal judiciary responded in a myriad of decisions indicating that where a plaintiff seeks only equitable relief, that strict application of the American rule no longer makes sense as a policy to promote access to courts. Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); Northcross v. Memphis Board of Ed., 412 U.S. 427, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973); Sims v. Amos, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215, aff'g 340 F.Supp. 691 (M.D.Ala.1972); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1973); McIntoggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971); Gartner v. Soloner, 364 F.2d 348 (3rd Cir. 1967); Brown v. School Bd., 456 F.2d 943 (4th Cir. 1972), cert. denied, 406 U.S. 933, 92 S.Ct. 1778, 32 L.Ed.2d 136; Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Donahue v. Staunton, 471 F.2d 475, 482 (7th Cir. 1972); Yablonski v. United Mine Workers, 151 U.S.App.D.C. 253, 466 F.2d 424 (1972), cert. denied, 412 U.S. 918, 93 S.Ct. 2729, 37 L.Ed.2d 144 (1973); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D.Cal.1972); Johnson v. San Francisco Unified School District, Civ.No.70-1331 SAW (N.D.Cal., decided Sept. 12, 1972); Ross v. Goshi, 351 F.Supp. 949 (D.Haw.1972); Jinks v. Mays, 350 F.Supp. 1037 (N.D.Ga.1972); Newman v. Alabama, 349 F.Supp. 278 (M.D.Ala.1972); Wyatt v. Stickney, 344 F.Supp. 408 (M.D.Ala.1972); NAACP v. Allen, 340 F.Supp. 703 (M.D. Ala.1972); Shull v. Columbus Mun. Separate School Dist., 338 F.Supp. 1376 (N.D.Miss.1972); Local 4076 United Steelworkers v. United Steelworkers, 338 F.Supp. 1154 (W.D.Pa.1972); Moore v. Knowles, 333 F.Supp. 53 (N.D.Tex.1971); Brown v. Ballas, 331 F.Supp. 1033 (N.D.Tex.1971); Hammond v. Housing Authority and Urban Renewal Agency of Lane County, 328 F.Supp. 586 (D.Or.1971); Lyle v. Teresi, 327 F.Supp. 683 (D.Minn.1971).

Stanford Daily v. Zurcher, 366 F.Supp. 18 (N.D. Cal. 1973).

(footnote 1 continued)

Not Based On a Statute Providing for an Award of Attorney's Fees," 41 Cinn. L.Rev. 405 (1972); Note, "Attorney's Fees: Where Shall the Ultimate Burden Lie?", 20 Vand. L.Rev. 1216 (1967).

An important California decision categorized the situations in which courts have utilized their equitable powers to award attorneys' fees. LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). Because of the court's scholarly and helpful approach in that decision and its applicability to the facts of the case at hand, the following analysis closely parallels that used in LaRaza.

A. An Award Of Attorneys' Fees Is Justified Where The Behavior Of Defendants Is Obdurate.

Courts have often utilized their equitable powers in awarding attorneys' fees where the conduct of the adverse party has been obdurate or in bad faith. E.g., Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Gates v. Collier, ___ F.2d ___, No. 73-1790 (5th Cir. Dec. 5, 1973) (Copy of slip opinion attached). Kahan v. Rosenstiel, 424 F.2d 161, 167 (3rd Cir. 1970), cert. denied Glen Alden Corp. v. Kahan, 398 U.S. 950 (1970); Wyatt v. Stickney, 344 F.Supp. 387, 408 (M.D. Ala. 1972). But the courts do not require a showing of bad faith to establish obduracy. See, e.g., Lee v. Southern Home Sites Corp., 444 F.2d 143, 144 (5th Cir. 1971).

An extreme example of this type of case is Pyramid Lake Tribe of Indians v. Morton, 360 F.Supp 669 (D.D.C. 1973). There, the court previously had found that actions of the Secretary of Interior's representatives in managing a federal reclamation project had disposed of water which otherwise would have replenished Pyramid Lake -- virtually the only asset of the tribe. The federal officials "acted in an obdurate and intransigent manner, refusing in good faith to carry out the Court's directives, and as a consequence unnecessarily extended the litigation to the detriment of the Tribe." 360 F.Supp. at 670. The court awarded counsel fees and other expenses in spite of a general statutory policy denying litigants recovery of such costs against the federal government.

The reasons for this departure were the special circumstances and policies surrounding the relationship between Indians and the federal government. Accord, Edwardsen v. Morton, ___ F. Supp. ___, No. 2014-71 (D.D.C. Dec.21, 1973).

It may be that this is not a case which falls within the "obdurate behavior" category. In La Raza Unida v. Volpe, supra, the court found specifically that the state defendants had failed to comply with federal law "despite sincere efforts" and "good faith". Before this case was decided the law of Indian treaty fishing rights was far from clear. However, there were certain basic principles which had been established for several years but which the defendants consistently ignored. This was especially true of the Washington State Department of Game. Furthermore, while there has been a high degree of cooperation among counsel especially during the last year, the case has not been free of problems which could have been avoided by an observance of existing substantive law and adherence to the Federal Rules of Civil Procedure. Some of the examples and instances of behavior on the part of the defendants which could be characterized as "intransigent", or "obdurate", most of which are confirmed in the Court's Findings of Fact, follow:

1. The Game Department has continued to insist upon a lack of any special Indian treaty right to fish notwithstanding a line of United States and State Supreme Court cases stretching over 65 years.

2. The state has continued application and enforcement of state game fish regulations restricting off-reservation fishing by treaty tribes without a showing of necessity for conservation, even after decisions of the state supreme court placing the burden of establishing conservation necessity on the state. Department of Game v. Puyallup Tribe, 81 Wash. 2d

561, 497 P.2d 171 (1972); Department of Game v. Puyallup Tribe, 71 Wash.2d 245, 422 P.2d 754 (1967).

3. The Department of Game consciously has failed to obtain data and facts available to it in matters relative to Indian treaty fishing.

4. The Department of Game has failed to advise the Game Commission and the Legislature of relevant information in its files needed to determine the probable impact of Indian net fishing on the fishery.

5. Game has conveyed misleading and incorrect information to the Game Commission, the State Legislature and the public concerning the relevant data known to it about treaty tribal fishing. (See detailed enumeration in Plaintiffs Post Trial Brief, pages 59-64.)

6. Even after the decision in Puyallup II the Game Department promulgated regulations applicable to Indian treaty fishing without adequate supporting biological facts and data.

7. The Game Department has continued to engage in conduct discriminatory as to Indian treaty fishing even after prohibition of such conduct in Puyallup I.

8. Both the Game and Fisheries Departments have engaged in frequent, continued, and flagrant violations of plaintiff's rights to due process of law by seizing nets and other fishing gear and retaining them with no judicial declaration of forfeiture or confiscation.

9. Game has enacted regulations year after year without giving the tribes or the State Code Reviser advance notice of its intention to consider regulations which would result in the prohibition of Indian net fishing.

10. Game refused to place the treaty tribes in Western Washington on its list of persons who receive notice of Game Commission meetings in spite of a written request to do so from the United States Attorney.

11. The State Department of Fisheries, while purporting to allow Indians to take a fair share of the fishery, imposed regulations resulting in only a five percent share of the harvest.

12. The Department of Fisheries presented to the Court in this case misleading allegations concerning Indian mismanagement of the fisheries (see Plaintiffs' Post Trial Brief, pages 74-75).

13. While purporting to follow the decision in Sohappy v. Smith, 302 F.Supp. 899 (D. Ore. 1969), the Department of Game exercised its police power in a manner so as to deprive the plaintiff tribes of a reasonable opportunity to take the portion of the total harvest of anadromous fish in the state to which they are entitled.

14. The Department of Fisheries failed to implement dictates of the United States and State Supreme Courts fully, although purporting to do so, giving as their only excuse to the fact that this case has been in litigation for over three years.

15. Both the Departments of Fisheries and Game have dealt with fishing by members of the plaintiff tribes in a manner different from that expressly provided in their respective regulations.

16. The State and the Director of Fisheries have totally closed a substantial number of usual and accustomed fishing areas of the plaintiff tribes to

all forms of net fishing while permitting commercial net fishing for salmon elsewhere in the same runs of fish.

17. The Department of Game repeatedly raised issues that have been decided by United States Supreme Court and other courts. Some of them were urged not only once but at least three times in this case. (E.g., the so-called "equal footing doctrine" and the contention that exclusive jurisdiction in the case is in the Indian Claims Commission). It is submitted that such contentions are so totally lacking in merit as to be frivolous and interposed solely for the purposes of delay.

18. The Department of Game continually refused to supply answers to interrogatories propounded to them in good faith by plaintiffs. This required plaintiffs' counsel to bring on three motions at great expense and cause a delay of nearly eight months during the case's preparation. Of course during that period the practices and policies of the state which have now been found unlawful continued to the detriment of plaintiffs.

While plaintiffs believe that there are solid grounds for finding that the state defendants' conduct comes within the category of behavior which can by its nature form the basis of award of attorneys' fees, total reliance is not placed upon this basis. There are two other distinctive rationales for awarding a successful plaintiff his attorneys' fees and other expenses.

B. An Award of Attorneys' Fees is Justified When the Judgment Results in a "Common Fund" Benefiting a Class of Plaintiffs.

Where a plaintiff's efforts result in substantial benefits

to others who are not parties to the litigation, an award of attorneys' fees is a means of compensating the plaintiffs for the benefit that they have bestowed upon the entire class. The theory is that the court can use equitable powers to protect a few litigants who press an issue from having to absorb all the costs.

The common fund situation exists more frequently where a monetary award for an entire class is produced. See Sprague v. Nat'l Bank, supra. A good example of this type of case is a shareholders derivative suit. The United States Supreme Court recently upheld an award of attorneys' fees in such a case. Mills v. Electric Auto-Lite Co., supra. The court there pointed out, however, that no pecuniary benefit to the class need be demonstrated. 396 U.S. at 393. And although some courts have suggested that cases to remedy constitutional violations by states generally do not fall within the "fund" mold "without considerable cutting and trimming." Bradley v. School Board of the City of Richmond, 52 F.R.D. 28 (E.D. Va. 1971), the Fourth Circuit Court of Appeals sitting en banc has approved the awarding of attorneys' fees in such cases. Brewer v. School Board of the City of Norfolk, 456 F.2d 943 (4th Cir. 1972).

As discussed in the following section, this case is one of great public importance in which the beneficiaries include all treaty tribes of Western Washington and their members. Beyond Indians themselves, the citizens of the State of Washington (and, indeed, of the United States) are benefitted. Presumably, therefore, the common fund rationale for awarding attorneys' fees, especially in light of the great public issues which have been resolved by the case, would justify an award of attorneys' fees to the plaintiffs.

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C. Plaintiffs Are Entitled to Attorneys' Fees When They Act As "Private Attorneys General."

Where plaintiffs initiate a lawsuit to enforce a strong national policy, they often benefit a class of people far broader than those actually involved in the litigation. Such plaintiffs have been termed by the United States Supreme Court attorneys general." Newman v. Piggie Park Enterprises, Inc., supra. See also Northcross v. Board of Education, supra; Sims v. Amos, 336 F.Supp. 924, 340 F.Supp. 691 (M.D. Ala. 1972), aff'd 409 U.S. 942 (1972); NAACP v. Allen, 340 F.Supp. 793 (M.D. Ala. 1972); Wyatt v. Stickney, 344 F.Supp. 387, 408 (M.D. Ala. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); La Raza Unida v. Volpe, supra.

Indeed, in a case such as this, the award of attorneys' fees and other litigation expenses is not only permissible, but may be legally required to effectuate national policy. In Wyatt v. Stickney, supra, the court stated that

> in order to eliminate the impediments to pro bono publico litigation and to carry out congressional policy, an award of attorneys' fees not only is essential but also is legally required. . . . To burden only plaintiffs with these costs [attorneys' fees] not only is unfair but also is legally impermissible. . . . In this case, the most logical way to spread the burden among those benefitted is to grant attorneys' fees.

344 F.Supp. at 409. The same court, in NAACP v. Allen, supra at 709, stated: "The award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public minded suits and to carry out congressional policy." And in La Raza Unida v. Volpe, supra at 101, the court found that "to force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following congressional mandates."

Scrutiny of the circumstances in this case shows that it falls squarely within the "private attorney general" rationale for

awarding attorneys' fees. The rationale calls for the effectuation of strong public policies through the litigation, conferral of benefits (in various degrees) on a large number of persons as a result of plaintiffs' efforts, and a substantial need for, and financial burden upon, plaintiffs in attempting private enforcement. See, LaRaza Unida v. Volpe, supra.

1. Public Importance and Benefits of the Case

That upholding the treaty obligations of the United States to Indians is an important national policy is beyond doubt. It is confirmed first by the Supremacy Clause of the United State Constitution. Further, The United States Supreme Court has said on the subject:

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they are understood to have by the tribal representatives at the Council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. Washington, 315 U.S. 681, 684-685 (1942). Last year in deciding a landmark case brought by a Nevada tribe to protect its water and fishery rights, the District Court for the District of Columbia referred to a "vast body of case law" and a "detailed statutory scheme for Indian affairs" as evidence of the great importance of the national obligations to Indians. Pyramid Lake Painte Tribe of Indians v. Morton, 354 F.Supp 252, (D. D.C. 1973).

The President of the United States in outlining the Indian policy of this Administration in a Message to Congress dated July 7, 1970 stated,

> The special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government. Down through the years, through formal and informal agreements our government has made specific commitments to the Indian people...[T]he special relationship arising from these agreements continues to carry immense moral and legal force.

116 Cong. Rec. 23258 (1970).

The President then proceeded to outline his policy for Indian affairs emphasizing the great national importance of implementing it. Certainly the effectuation of Indian policies based on commitments in treaties with the United States is as important as the public policies involved in advancing labor union democracy, implementing relocation and highway policy, assuring fair and informed corporate sufferage, furthering environmental and many other of the statutory policies, the implementation of which courts have found should be encouraged by awarding counsel fees. As with protection of civil rights, effectuation of national policy in honoring treaties with Indian tribes has its basis in the United States Constitution.

The great public importance of this case was acknowledged by this Court in its final decision:

> This court is confident the vast majority of the residents of this state, whether of Indian heritage or otherwise, and regardless of personal interest in fishing, are fair, reasonable and law abiding people. They expect that kind of solution to all adjudicated controversies, including those pertaining to treaty right fishing, and they will accept and abide by those decisions even if adverse to interests of their occupation or recreational activities.
>
> More than a century of frequent and often violent controversy between Indians and Non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. . . .
>
> The ultimate objective of this decision is to determine every issue of fact and law presented and, at long last, thereby finally settle, either in this decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do.

Final Decision, pp 5-6. The declaratory judgment and decree in this case stated further that:

> It is the responsiblity of all citizens to see that the terms of the Stevens' treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the councils, and in a spirit which generously recognizes full obligation of this nation to protect the interests of a dependent people.

Declaratory Judgment and Decree, Page 5, Paragraph 12.

2. Role of Plaintiff Tribes

There can be no question that plaintiffs in this case seeking vindication of the tribes' treaty rights, acted to implement a strong public policy. A resolution of the disputes which have raged in this State for a century is unquestionably in the interest not only of the tribes and their members, but the state and all of its citizens. Society in general is better off when the legal obligations of citizens are understood and enforced according to law. The public policy expressed in many decisions of the highest court of this land, by the Executive and Congress, and in the treaties and the United States Constitution been defined and strengthened by this litigation.

It has been this Court's intention from the outset of the litigation that as many tribes as possible ought to be included as parties. Ultimately, after the commencement of the litigation, which was in large part due to the urging of the tribes over a period of many years, the tribes themselves intervened. It is no secret that the tribes did everything within their power to move the United States to bring a suit such as United States v. Washington for many years. A sharply worded, once confidential memorandum from Deputy Solicitor for the Department of the Interior George D.Dysart to his superiors dated several months before, was made public in Senate Subcommittee hearings. That memorandum chided the Departments of Justice and Interior for refusing to support the Indian tribes in their controversy with the state over off-reservation treaty fishing rights. Mr. Dysart stated, among other things, "The United States has dallied around with the Indian fishing problem in the State of Washington for too long without following through with a firm, meaningful, and constructive role." The memorandum was one in a series urging litigation on behalf of Washington State tribes. Not surprisingly, when this suit was finally filed in late 1970, there was considerable skepticism on

the part of Indians. Commencement of the long awaited litigation, which became known as United States v. Washington, brought expressions of fear by Indians that political pressure might impair the type of advocacy which the United States could afford to the tribes. Indeed, there was some doubt as to whether the case would ever go to trial.[2] From the outset, the tribes were critical of the manner in which the United States pressed the case, questioned the theories urged by the government, and were reluctant to entrust their rights entirely to government attorneys. Indeed, the cynicism of many Indians concerning United States representation continued until the eve of trial.

Although the plaintiff tribes were pleased with the excellent and zealous advocacy which the federal attorneys handling the case demonstrated at trial, there can be little question that private counsel for the Indian tribes made an immense contribution to the full and fair presentation of all claims and theories for relief as well as the preparation and presentation of the case. And it is obvious to those who have been connected with the case from the outset that the position of the government certainly was influenced by private counsel. At several points in the case, private counsel bore a large part of, and in some instances full, responsibility for preparation of motions, briefs, the conduct of discovery, argument on specific points, and several other matters.

Congress has been fully cognizant of the need for Indian tribes to have access to a federal forum and to litigate matters on their own behalf on the same footing as the United States Attorney

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[2] The extent of the pressures which can be exerted upon the Justice Department in the course of litigation initiated by it is exemplified in the case of Fulbrook Public Utility v. United States, 202 F. 2d 942 (9th Cir. 1953). In this complicated and lengthy water rights litigation, local sentiment was so strong against the lawsuit that Congress put a provision in the Justice Department appropriation act to prevent use of any of the funds for preparation or prosecution of the specific case.

litigates as their trustee. See, 28 U.S.C. 1362, [3] which is one of the bases for jurisdiction in this case. (Conclusion of Law 1(d)).

The fact that the United States is also a party to the case in no way diminishes the plaintiff tribes' rights to recover their attorneys' fees. Private plaintiffs regularly recover their attorneys' fees in antitrust actions in spite of the fact the Antitrust Division of the Department of Justice is engaged in a companion action or the same suit. Likewise, in a number of civil rights actions where the United States and private plaintiffs have joined in litigating against the same party on the same cause the courts have awarded fees. E.g., Gates v. Collier, supra.

3. Entitlement of Parties Represented by Non-Profit Law Firms.

Lest there be any question about the entitlement of plaintiffs to attorneys' fees because they are represented by Native American Rights Fund (NARF), a non-profit law firm, it deserves mention that the courts consistently have made awards to parties who are represented by such counsel. E.g. Newman v. Piggie Park Enterprises, supra, (plaintiffs represented by attorneys with NAACP Legal Defense and Educational Fund, Inc.). Miller v. Amusement Enterprises, Inc., 426 F.21 534, 538 (5th Cir. 1970); Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971); Clark v. American Marine Corp., 320 F. Supp 709 (E.D. La. 1970), Affirmed 437 F.2d 959 (5th Cir. 1971); La Raza Unida v. Volpe, supra, 57 F.R.D. at 98.

The courts considering the issue universally have held that parties represented by counsel supported by foundation grants and charitable contributions, as is NARF, are no less entitled to fees than are other litigants. For instance, in Clark v. American

[3] The legislative history of §1362 makes it clear that access to federal courts to litigate federal questions on the same basis as the United States Attorney -- without the requirement of a jurisdictional amount -- was intended by the act. See H.R. Rept. No. 2040, 89th Cong., 2d Sess. (1966); S. Rep. No. 1507, 89th Cong., 2d Sess., (1966).

Marine Inc., supra, the district court held that it was immaterial that "plaintiffs' counsel came from a lawyer who was on the staff of the NAACP Legal Defense & Educational Fund, Inc." The court added, "whether or not he agreed to pay a fee and in what amount is not decisive. The criterion for the court is not what the parties agreed, but what is reasonable." 320 F.Supp. at 711. The Court of Appeals for the Fifth Circuit has held that the refusal to accept fees by an attorney is not in conflict with an award of fees. Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968). The same court later held that:

> What is required is not an obligation to pay attorney fees. Rather what -- and all -- that is required is the existence of a relationship of attorney and client, a status which exists wholly independently of compensation...
>
> Congress did not intend that vindication of statutorily guaranteed rights would depend on the rare liklihood of economic resources in the private party (or class members) or the availability of legal assistance from charity -- individual, collective or organized.

Miller v. Amusement Enterprises, Inc., supra, 426 F.2d at 538-539.

The court in La Raza Unida v. Volpe, supra, suggested some policy reasons for granting fees to parties whose counsel do not regularly charge fees.

> The fact that attorneys in this action, Public Advocates, Inc., require no fees from their clients or that they receive tax-exempt foundation money is not germane to their status as private attorneys-general... We cannot presume Congress intended to rely on tax-exempt foundations to fund the costs of litigation in order to effectuate its policies, nor that such funding will continue in the future.

57 F.R.D. at 98 n.6. The court recognized that "responsible representatives of the public should be encouraged to sue, particularly where government entities are involved as defendants." But the court also took account of the fact that initiating such litigation is often beyond the reach of citizens.

> In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder at the thought of "taking on" an entity such as the California Department of Highways,

> with no prospect of financial compensation for efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle.

57 F.R.D. at 101. In a footnote, the court added that "absent foundation funding, it is simply not economically rational for any single individual or small group of individuals, to attempt to capture their minute portion of aggregate good by incurring large expense to enforce a widely held right." 57 F.R.D. at 101 n.10.

In this case, most of the tribes are impoverished and otherwise would be unable to retain counsel were it not for the availability of attorneys willing to undertake their cause without fee. NARF generally requires the payment of no fees by its clients other than those which are recovered as a result of court awards. Its clients have been awarded attorneys' fees and expenses by both federal[5] and state courts[6]. Reimbursement of such fees and out-of-pocket expenses makes it possible to continue the work of NARF on behalf of the same and other Native American clients throughout the country.

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[4] It should be recognized that many of the tribes not represented by NARF have retained counsel who have agreed to work for little or no fees.

[5] E.g., Pyramid Lake Paiute Tribe v. Morton, supra, 360 F.Supp 669

[6] E.g., Mobil Oil Corporation v. Local Boundary Commission of the State of Alaska, ___ P. 2d ___ (Alaska S.Ct. File no. 1947, January 16, 1974.)

II. AWARD OF ATTORNEYS' FEES AGAINST DEFENDANTS AS OFFICERS OF THE STATE OF WASHINGTON IS PROPER

In a number of cases against states and their elected and appointed officials, it has been contended that attorneys' fees are barred by sovereign immunity or by the Eleventh Amendment to the Constitution. These contentions regularly have been overruled by the courts considering them. The court in LaRaza Unida v. Volpe, supra, considered the argument carefully at 57 F.R.D. 101-02 n.11, holding that the power to tax such costs is a necessary incident to the court's jurisdiction and thus no statute is required to overcome the state's sovereign immunity in federal court. It was further pointed out, citing Sims v. Amos, supra, that individual officers of the state may be restrained by injunction and that a court's equitable power to enjoin them includes the power to require them to pay costs incident to obtaining the injunction. The court then cited several cases in which various state officials and regulatory bodies were held liable for the attorneys' fees of successful litigants.[7]

The only issue in Gates v. Collier, supra, was the question of whether attorneys' fees and expenses could be awarded against the State of Mississippi. The court held squarely that the trial court had power to assess attorneys' fees and expenses against the individual defendants and, furthermore, that the trial court's prescription that payment of such costs would be made from funds to

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[7] The courts have recognized that an award of attorneys' fees against an individual state official will not be his personal responsibility. In Gates v. Collier, the court stated, "[E]veryone knows that they would be 'bailed out' by the state." The court in LaRaza Unida v. Volpe, supra, pointed out that California state law made such costs reimbursable by the public entity employing the individual public officials and added "since the money will come from the state treasury the awarding of fees in the instant case will also serve the other objective of the Mills decision -- matching, to the extent that the Court's jurisdiction over the matter makes possible, the costs and benefits of litigation." 57 F.R.D. at 101.

be appropriated by the state legislature did not vitiate the award. The Fifth Circuit in Gates relied heavily upon Sims where the Supreme Court's affirmance of the three judge trial court's holding lays the contention of state immunity to rest.

III. THE AMOUNT OF ATTORNEYS' FEES

The plaintiff tribes submit to the discretion of the court the amount to be set as attorneys' fees. An affidavit by plaintiffs' counsel, David H. Getches, will be submitted detailing the hours devoted to this case over the past three and one-half years, along with a schedule of extraordinary expenses incurred in the prosecution of this case.[8] Plaintiffs suggest that it would be reasonable to award fees in this case based upon most recent minimum fee schedule for the Seattle-King County Bar date May, 1971, setting $35 per hour as a charge for attorneys' time in this area.[9]

Hours expended are, of course, only one of the factors considered by the courts in awarding fees. The pertinent factors that courts have considered in fixing the dollar value of attorneys' efforts appear generally to be the following:

(1) the time and labor required on the case;

(2) the benefit to the public of encouraging legitimate suits;

(3) the benefit to the public of the particular case;

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[8] The shortness of time for post-trial motions did not permit a complete canvassing of counsel's records and a computation of the hours spent on this case for submission simultaneously with this motion and memorandum. Preparation of appropriate documentation of services rendered and time expended is in progress and counsel will endeavor to have it completed before the hearing on this motion.

[9] The fact that attorneys employed by NARF are unable to show any customary time charge to be considered by the court has led one United States District Court to limit its award of attorneys fees to what it called the "bedrock minimums" of $30 an hour. Pyramid Lake Paiute Tribe of Indians v. Morton, supra, 360 F.Supp at 672.

(4) the skill demanded by the novelty, complexity and intricacy of the issues;

(5) the skill of the opposition;

(6) the skill actually demonstrated by the lawyers whose fees are being set;

(7) the standing of the attorneys involved in the legal community in which they practice and the prevailing rates of compensation.[10]

The Court's comments relative to the manner in which this case has been prepared and presented by counsel are set forth on pages 3 and 4 of the Final Decision and are relevant to these considerations.

CONCLUSION

It would be difficult to conceive of a situation in the State of Washington in which spreading the cost of peaceably resolving a public dispute through the legal system is more appropriate than the present case. The Indian tribes and the public have awaited this kind of definitive adjudication of Indian treaty fishing rights almost since the treaties were negotiated more than a century ago. To require defendants to bear the costs of this

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[10] See, e.g., Angoff v. Goldfine, 270 F.2d 185, 188-189 (1st Cir. 1959); Pergament v. Kaiser-Frazer Corp., 224 F.2d 80, 83 (6th Cir. 1955); Paolillo v. American Export Isbrandtsen Lines, Inc., 305 F.Supp. 250 (S.D.N.Y. 1969); Highway Truck Drivers v. Cohen, 220 F.Supp. 735, 736 (E.D. Pa. 1963); Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 166 F.Supp. 163 (E.D. Pa. 1958); affirmed 273 F.2d 218 (3d Cir. 1959), rev'd on other grounds 365 U.S. 127 (1961); Rogers v. Hill, 34 F.Supp. 358, 363 (S.D.N.Y. 1940); In re Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931).

See also Bakery and Confectionery Workers v. Ratner, 118 U.S.App. D.C. 269, 335 F.2d 691 (1964) (on remand sub nom., Moschetta v. Cross, 241 F.Supp. 347 (D.D.C. 1964)) (quantum meruit standard applied to allow attorneys' fees award of $129,073.13 in a class action judged to have protected over $1 million in union members' dues from dishonest management); Blankenship v. Boyle, 337 F.Supp. 296, 302-303 (D.D.C. 1972) (the court awarded attorneys' fees of $45 per hour plus an incremental $165,000 because of the complexity of the case ($225,000); Rosenfeld v. Southern Pac. Co., N.D. 4 FEP 72 (C.D. Cal., Dec. 2, 1971) (the court awarded attorneys' fees of $75 per hour ($30,000).

action is compelled by justice and is well-founded in contemporary case law. Both the actions of the defendants and their ability to diffuse the burden among all citizens of the state, Indian and non-Indian, underscore the fairness of requiring them to compensate plaintiffs for their attorneys' fees and expenses in this case. The equity of such an award is indisputable in view of the relative poverty of the plaintiff tribes and the tremendous public importance of litigating the case in which their full participation was valuable, if not indispensable.

DATED: February 22, 1974

Respectfully submitted,

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By _____
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John Sennhauser
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