WASHINGTON'S RESISTANCE TO TREATY INDIAN COMMERCIAL FISHING: THE NEED FOR JUDICIAL APPORTIONMENT

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WASHINGTON'S RESISTANCE TO TREATY INDIAN COMMERCIAL FISHING: THE NEED FOR JUDICIAL APPORTIONMENT

by Thomas P. Schlosser

A. INDIAN DOMINATION OF THE SALMON TRADE BEFORE THE STEVEN'S TREATIES

In the late eighteenth century European explorers discovered a large and complex native culture in the Pacific Northwest. The Indian population density was higher than almost anywhere else in native North America, north of Mexico.[1]Development over some 10,000 years had made the Indian culture diverse as well as strong. At the western extreme was the fierce Makah tribe; a seafaring people at the mouth of the Strait of Juan de Fuca. One hundred miles east, in the Cascade Mountains foothills which border Puget Sound, was a cultural contrast, the Sauk-Suiattle. The Sauk-Suiattle people spoke a different language and, unlike their neighbors, held no slaves. They placed a premium on maintaining peaceful relations; aggressiveness was regarded with disfavor. A common cultural characteristic of all of the Indian groups, however, was the paramount dependence on the products of an aquatic economy, especially anadromous fish.[2]

Anadromous fish, fish which ascend rivers from the sea for breeding, comprise many species. Five species of Pacific salmon and the steelhead trout are, like the Indian tribes, indigenous to the Pacific Northwest.

The relationship between the tribes and the anadromous fish had religious significance. One aspect of this was the First Salmon ceremony, designed to insure that the fish would perpetually return. The attitudes of respect, reverence, and concern for the salmon, reflected a profound conception of the interdependence and relatedness of all living things, which was a dominant feature of the native Indian world view.[3] Indian procedures insured that salmon were never wantonly wasted and that water pollution was not permitted. Refuse was never deposited in streams during the salmon season and the Skokomish even beached their canoes to bail them. So central to the Indian culture were these fish that the Nisqually, for example, projected their preoccupation with fisheries in their perception of the stars. The constellation Orion was identified as three Indians catching small fish in schools. The sword was said to represent the fish. The Pleiades was described as a species of fish with large heads and small tails. The aurora borealis was attributed to schools of herring turning up the whites of their bellies.[4]

Fish were the major element of Indian trade and economies; they were vital to the Indian diet.[5] Indian harvest and use of salmon and steelhead resources involved fishing equipment, food preservation techniques, storage facilities, and an exchange system.[6] Until the 19th century the fish exchange system was not measured in American dollars, but salmon had long been an important commercial item among Indian groups. Extensive trade, reaching far beyond Western Washington was carried on in order to acquire food stocks, raw materials, and manufactured goods not available locally. Tribes in the interior of Washington traded across the

mountains with tribes on Puget Sound, and vice-versa. The Makah Tribe, at the mouth of the Strait of Juan de Fuca, acted as middlemen in the trade from the west coast of Vancouver Island down to Astoria, Oregon and other trading posts on the Columbia River. They traded ocean-going canoes (used for hunting sea mammals), lumber, wooden chests, ceremonial masks, vermilion, slaves, blankets, and other items with tribes up and down the coast. They imported blankets, guns, and kettles from the Europeans which they paid for with dried halibut, smoked salmon, processed oil and other items.[7]

The salmon when taken were preserved by sun drying, wind drying, or smoking. The Indians also found markets for fresh fish among other tribal groups who desired fish of different species, (or fish from the same run caught in a different location), and among the growing number of white settlers. All were supplied with fish by the Indians.[8] The abundance of salmon coupled with adequate food preservation techniques, were important determinants of the relatively high standard of living and high population density of north coast Indians compared with the Indians located elsewhere in North America.

The trade of salmon had wide geographic distribution and high volume. It is believed that Northwest Coast Indians captured about 35 million pounds of salmon annually at the time of the first European contacts.[9] In short, commerce in salmon was the crux of the Indian economy in Western Washington. [10]

In 1790, Manuel Quimper commanded the first European expedition to venture into and explore the inland salt waters of Western Washington. From Clallam Bay Quimper claimed the area for Spain; title was based on prior discovery, exploration and formal acts of possession. Vancouver, sailing for Great Britain, conducted further exploration of the Strait of Juan de Fuca and Puget Sound in 1792. Both Quimper and Vancouver from the outset of their contacts with the Indian culture, reported trade with Indians for fish.[11] During their voyage down the Columbia River in 1805, Lewis and Clark found entire villages engaged in making salmon pemmican. This was traded with other tribes, including the Plains Indians, east of the Rocky Mountains.[12] Sadly, the Europeans brought with them measles and other diseases previously unknown to the tribes. Epidemics resulted which reduced the Indian population substantially.

By a treaty with Spain in 1819, the United States began the process of extinguishing the claim of other sovereigns to the wealth of the Pacific Northwest. An agreement was reached with Russia in 1824, followed by a treaty with Great Britain in 1846. These nations essentially quit-claimed the region to the United States. The first Europeans and Americans reached the rugged Northwest in awkward wooden sailing ships. Soon the overland expansion followed. White settlers began to reach the Western Washington area by land in the 1840 s, and in 1848, the United States created the Oregon Territory, of which the Puget Sound country was a part. The Territorial Act explicitly preserved rights of person or property now pertaining to the Indians. [13] The influx of white settlers brought with it a strong demand for prime agricultural lands. By law, the United States Government alone could obtain clear title from the Indians, and this the U.S. was anxious to do. The Federal Government wished to avoid friction between Indians and settlers over use of property rights. Therefore, Congress and the Executive authorized Issac Stevens to negotiate with the tribes treaties which would avoid hostilities, and the possibility of a prolonged and distant war. The Federal Government hoped to confine the Indians to small

residential reservations thus freeing land for settlement and enclosure by the white settlers. There was no intent to interfere with Indian commercial fishing; to do so would have been highly inconvenient since Indian fishermen caught most of the fish used by the whites.[14]

B. TREATY INDIAN FISHING FROM 1854 UNTIL THE PASSAGE OF INITIATIVE 77

1. Preservation of the fish-based Indian livelihood was guaranteed by treaty.

Although animal pelts were the most important trade item with the earliest European visitors, the coming of the settlers resulted in a substantial increase in the tribes' fishing activities. White residents relied on Indians for fish; the early non-Indian commercial fishing enterprises were rudimentary and largely unsuccessful. In addition to the growing market for fresh fish and the traditional trade with other Indian groups, large quantities of salmon, purchased from the Indians, were salted by the Northwest and Hudson Bay Companies for shipping to markets New York, San Francisco, China, South America, Hawaii, and Great Britain.[15] Thus, an initial effect of the influx of non-Indians into Western Washington was to increase the demand for fish both for local consumption and for export, and this demand relied upon the Indians for supply.

Non-Indians did not engage as fishing competitors on any scale until the late 1870 s. Instead the white man concentrated on agriculture and the exploitation of natural resources of the Pacific Northwest other than the salmon fishery. The white man wanted the right to the land, the Indian the guarantee of his right to the fisheries.[16] Thus, by the time the Stevens' treaties were negotiated Indians were deeply engaged with non-Indians in commerce in fish.[17] It was in this economic milieu that the treaties were consummated.

The U.S. delegation was clearly cognizant of the Indians' domination of the fishery when the treaties were negotiated. A December 30, 1854, letter from Isaac Stevens notes,

> The Indians on Puget Sound have been for a considerable time in contact with the whites . . . They form a very considerable proportion of the trade of the Sound . . . They catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it.[18]

The U.S. negotiators intended that the Indians should be self-sufficient, able to continue the trade of fish with non-Indians and other tribes.[19] For example, the members of the treaty commission at the treaty with the Makah, (Stevens, Gibbs, Shaw, and Simmons), were aware of the commercial nature and the value of the Makah marine economy and they promised the Makah that the United States would assist them in developing their maritime industry. By his promise of kettles and fishing apparatus to the Makah, Governor Stevens clearly indicated that there was no intent on the part of the treaty commissioners that the Indians be restricted to aboriginal equipment or technique.[20] A few years after the treaties, Indian Agent Simmons reported,

> The salmon run up the Qui-nai-elt river, in great numbers, are considered the fattest and best flavored of any taken on this coast, and the Indians should be encouraged to open a trade in them. I think they can be more profitably employed in this way than in agricultural pursuits, as it will be a more congenial employment for them.[21]

While the American signatories to the treaties may have understood the importance of fishing to the Indian communities and economies, language and cultural barriers between the parties likely prevented complete communication. The extent of Indian tenure and ownership rights of fish being asserted by the tribes were foreign or unknown to the whites. This is clearly illustrated in the negotiations with the Makah.[22] Nootkan culture, of which the Makah were a part, recognized in various individual members ownership rights to anything that the tides or waves deposited on the members' section of beach. It also recognized ownership of ocean tracts. In the official record of the treaty proceedings, on entry reads:

> Tse-Kaw-Wooth - he wanted the sea - that was his country.

Tse-Kaw-Wooth was the leading man of the Ozette Village and was acting as head chief for the Makah at the time of the treaty. From later reports we know that the Ozette owned important fishing rights on the halibut banks northwest of Tatoosh Island. It seems likely that these were what Tse-Kaw-Wooth was asserting rights to at the treaty.[23] The Nootkans recognized ownership not only rivers and fishing places close at hand, but the waters of the sea for miles off shore were all privately owned property.[24] These notions of off-shore rights, comprising privately owned sections of ocean extending many miles from land, or rights to certain species, were foreign concepts, ones which the whites did not comprehend at the treaty talks.[25]

In addition to conceptual barriers between the treaty parties there were serious linguistic barriers to full communication. The evidence indicates that there were no words in the Chinook jargon for common, usual, accustomed, citizens, steelhead, and many other of the phrases which have now become critical to interpretation of the treaties.[26] The vast majority of Indians at the treaty councils did not speak or understand English so the treaty provisions and the remarks of the commissioners were interpreted by Colonel Shaw to the Indians in Chinook jargon. Chinook was then translated into native language by Indian interpreters, as many of those present did not understand the Chinook jargon.[27] The communications barriers apparently did not greatly concern Isaac Stevens. Owen Bush of Governor Stevens staff is quoted as saying:

> I could talk the Indian languages, but Stevens did not seem to want anyone to interpret in their own tongue, and had that done in Chinook. Of course it was utterly impossible to explain the treaties to them in Chinook.[28]

Whether the U.S. Commissioners and the tribal representatives had the same understanding of the Ain common with language is unknown. The records of the treaty commission show that George Gibbs' outline draft of the treaty referred to fishing thus,

> The rights of fishing at common and accustomed places is further secured to them: Proviso against staked or fenced claims.[29]

Anthropologist Dr. Barbara Lane found that there is no evidence whether Ain common was intended to connote fishing at the same place, or on the same run, or something else.[30]

At a council between the tribes and Isaac Stevens shortly after the treaties, S. S. Ford, a participant in the negotiations, referred to the fishing provisions of the Medicine Creek treaty as,

> Offering you for fishing privileges of one half of the waters of the rivers and Sound.[31]

On the other hand anthropologist Dr. Carroll Riley testified that the treaty commissioners had no thought that the Indians ever would be restricted in their fishing.[32] This was consistent with Dr. Barbara Lane s testimony that the Indians believed they would never be controlled in their fishing by any non-Indian government and could go on fishing as they did before.[33] Evidently both the U.S. representatives and the Indians themselves, intended that Indian fishing would continue as it had before the treaties; non-Indian settlers would also be able to have access to the Indian fisheries, but without interfering with the continued pursuit of traditional Indian fishing.[34] As Isaac Stevens said in the negotiations of the Treaty of Point-No-Point, This paper secures your fish. [35] Elsewhere George Gibbs reported of the tribes' What is necessary for them, and just in itself, is, . . . the use of their customary fisheries. [36]

There was no intention of creating a class system society with the Indians on the bottom economic rung as a result of the treaties. There was no intent to prevent the Indians from using the fisheries for economic gain, rather the treaty commission clearly undertook to provide the Indians the means of participating and profiting in the economy of the territory.[37] Isaac Stevens transmitted the treaties to Washington, D.C. for ratification saying,

> The provisions as to reserves and as to taking fish, . . . had strict references to their condition as above, to their actual wants and to the part they play and ought hereafter to play in the labor and prosperity of the territory.[38]

The Court in United States v. Washington expressly found that there is no indication that the Indians intended or understood the language Ain common with all citizens of the territory to limit their right to fish in any way.[39] Indeed, consistent with this understanding, for many years following the treaties the Indians generally continued to fish in their customary manner.

Violence did break out between settlers and some Indian tribes in the Puget Sound country. In the first well known conflicts interference with Indian fishing was only a minor issue. The exact causes of the skirmishes are not certain, but a serious rift developed between the Governor of Washington Territory and the settlers on one hand, and General John E. Wool and the regular army on the other hand. Wool, Commandant of the Pacific Military District, with headquarters at San Francisco, agreed with many regular army men that in most instances settlers were responsible for troubles with the tribes; and that the army's duty was as much to protect the Indians as whites. Wool explicitly charged that the Northwest troubles in the 1850 s were fomented by whites who hoped to relieve their depressed economy in 1854-1855 with army

expenditures. Some of these troubles, he believed, stemmed from the failure of Governor Isaac Stevens to prohibit settlers from entering ceded lands before the treaties were ratified.[40]

2. 1870-1900: Exclusion of Indians from accustomed fishing places and overfishing by settlers diminishes the tribal fishing right.

Before Washington was admitted to the Union in 1889, most interference with treaty Indian fishing stemmed not from acts of the legislature, but from settlers' attempts to monopolize traditional Indian fishing spots. In the 1870 s one farmer is reported to have speared 400 salmon in two hours to be used for fertilizer for his fields. Others put out nets blocking the Skagit River to make their task of taking spawning fish easier. The Indians naturally objected to the waste of the fish which they had traditionally used and tore out the nets, but after the settlers threatened violence to them they sullenly withdrew.[41] The first reported litigation regarding the treaty-protected livelihood arose in United States v. Taylor, 3 Wash. Terr. 88 (1887). There the Supreme Court of the Territory ruled in favor of the United States and Yakima Indians who complained of being prevented from reaching a traditional site on the Columbia River because of the fences of a landowner. The Court stated:

> [I]t seems to us that the Indians in making the treaty would have been more likely to have intended to grant only such rights as they were part with, rather than to have conveyed all, with the understanding that certain rights were to be at once reconveyed to them. What did the Indians intend to reserve to themselves by the words as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory?
>
> It will be seen by the statement of facts above set out that at the time this treaty was made there existed within the Territory which was the subject matter of the treaty certain ancient fisheries which had for generations been used as such by said Indians, who had certain well defined habits and methods connected with such use.[42]

Preemption of the Indian fisheries by settlers did not widely occur in the two decades following the treaties, in part because white settlement came later to Western Washington than it did to the lands along the Columbia and Willamette Rivers. With the initial settlers in the Puget Sound area came an initial concentration on agriculture.[43] The early returns to the farmers were extremely high in part because clearing the land allowed them to supply the early timber industry. Overland transportation facilities were initially rather poorly developed. Even following the completion of Northern Pacific's transcontinental railroad line in 1883, the market for salmon in the eastern United States grew slowly.

The development of the canning process greatly increased the interest of investors and non-Indian fishermen in the commercial potential of Washington anadromous fish runs. Canning of salmon on the Columbia River was introduced in 1866, and by 1883, the number of canneries had reached 39 with a total pack of 629,000 cases. Overfished, the salmon runs there soon began to decline.

The first salmon cannery was built on Puget Sound in 1877, but production was minimal until the middle 1890's. Although the economic and ecological disasters attendant to the canning industry came to Puget Sound later than to the Columbia River, they came nonetheless. It soon became apparent, even to the scientifically unsophisticated minds of the day, that fish could not be harvested recklessly without doing damage to the runs. The resulting fishing restrictions principally impacted Indian fisheries. In 1871, the Territorial Legislature prohibited use of most types of fishing gear in lakes.[44] This preempted important fisheries of the Muckleshoot, Nisqually and Skagit Rivers tribes in Lake Washington, Baker Lake and other waters.[45] No limitation was placed on fishing elsewhere along the migration paths of the runs, in part because the settlers knew little of spawning requirements or the cyclical migrations of the salmon.

Legislative restriction of Indian commercial fishing began in earnest almost as soon as Washington was admitted to the Union on November 11, 1889. In 1890, the legislature outlawed salmon fishing in most of northern Puget Sound during the months of March, April and May. This halted traditional Indian salt water harvest of spring chinook salmon runs.[46] It can accurately be said that statehood, the influx of settlers, and the introduction of the canneries created the governmental mechanism, the political power, and an economic incentive for the non-Indian majority to exclude the Indian tribes from their domination of the commercial salmon fishery.

As non-Indians began to imitate the use of Indian fish traps for harvesting salmon, regulation by the State Legislature increased. Most of these regulations bore no actual relation to conservation but represented as one writer said, The net outcome of one or another of the endless struggles among owners of different kinds of gear, fishermen in different geographic areas, among resident and non-resident fishermen . . . . [47] As early as 1892, state law required traps to be physically removed from the water during a part of each year.[48] Depth, length, spacing and mesh standards also guaranteed escapement by reducing the efficiency of individual traps.[49] Each session a new legislature would retain, amend, or repeal the previous laws, largely depending upon the effectiveness of special interest lobbies. Between sessions, no changes could be made in the regulations. Unfortunately, the legislators knew little of salmon biology.

The first State Fish Commissioner, James Crawford, believed that the legislature should restrict only stream fishing, and that there was little need to have restrictions on salt water fishing.[50] This was a practice which discriminated against the Indians who generally fished on the salmon runs in rivers, rather than in the open water.

At the time the treaties were signed the tribes monopolized the harvest of salmon through their large scale fisheries on rivers and streams. Since the anadromous fish which hatch and rear in a river return to the same spot in the river when they reach maturity, the Indian nets, traps, weirs, and other fishing gear could efficiently harvest as much or as little of the run in rivers or nearby bays without interfering with other tribes' harvest of other fish runs. Preservation of the tribal livelihood which was based on these cyclical fisheries would have required the state to recognize property rights in traps sites and to protect trap site owners, Indian and non-Indian,

from the preemption of their productive fisheries by marine fishing farther downstream along the migration path. Nevertheless, the development of marine fisheries was tolerated.

As Professor Barsh has pointed out[51] all marine fisheries suffer from a diseconomy usually referred as the common goods problem. The common good is something of value that cannot be reduced to private ownership, either because individual control is prohibited or because it is prohibitively costly. Anadromous fish cannot be economically processed throughout their life cycle. Thus, the rule of capture vests individuals with property rights in the fish caught. If the quarry must simply be pursued until caught many people bear search and pursuit costs, but only one eventually benefits. Furthermore, the capturer must either kill the fish or sustain its life at some cost; the fish cannot remain at large until the best opportunity to market it.

Traditional tribal fisheries minimized these diseconomies by minimizing search and pursuit costs and maximizing fish growth prior to capture. At full growth the fish returned to natal streams where they were easily harvested in traps and nets. The settlers, unrestrained, could and did capture returning fish before they reached their fresh water destinations. An advantage was thus obtained by intercepting the resource farther downstream. Following the treaties, unlimited entry and competition among marine fishermen led to a struggle for the fish ever farther from fresh water terminal areas. Since the settlers captured spawning fish which would otherwise be available for propagation or harvest in the rivers and streams of origin, they were inconsistent with the preservation of tribal fisheries and preempted the fisheries which the tribes sought to preserve.

In the 1890's increasing calls for hatchery construction signaled the decline of Washington salmon runs due to overfishing and spawning area destruction. In 1891, and again in 1893, the legislature authorized the Fish Commissioner to collect license fees for fish wheels, traps, and certain nets; it ordered all such money to be used to build fish hatcheries.[52] Non-Indian commercial fisheries grew by leaps and bounds in the 1890 s. From three canneries in 1894, the industry expanded to 24 canneries in 1905. Investment syndicates formed companies to operate canneries. In the Sixth Annual Report (1895), Commissioner Crawford noted, the people of this portion of the State are just awakening to the value of the fish of Puget Sound and industry has almost doubled since my last report. Particularly this is so of the salmon industry.

In 1897, the legislature closed to fishing all tributaries of Puget Sound and salt waters within three miles of the mouths of the tributaries. Although by its terms the restrictions did not originally apply to Washington Indians taking fish, by any means at any time for the use of himself and family [53] it, of course interfered severely with traditional Indian fishing for trade or sale.

The public held an almost idolatrous belief in the ability of hatcheries to restore over-fished salmon runs. In the 1930's, this belief was shown to have been far too optimistic. Even the Washington Fish Commissioners, who advocated hatcheries, began to make periodic warnings against indiscriminate and unregulated fishing. One said, AIn the history of the salmon fisheries of the Atlantic Coast there is a warning against the extravagant manner in which our Pacific Coast salmon fisheries have been carried on for many years past. [54]

In 1898, the Lummi Indian traditional practice of going to Semiahmoo Spit and to Point Roberts to catch and dry fish during the bountiful runs of Frazier River salmon was frustrated when white men claimed the shores beside the Indian fishing site. Native reefnetters trying to erect temporary fish-drying houses on the shore were driven away by the whites with threats of violence and a show of arms. The canneries in nearby Blaine quickly bought fishing rights from the local landowners in front of the Indian fishing sites. The United States, on behalf of the Indians, brought suit to halt the interference. The case was heard by Judge Hanford, who, while conceding that some injustices had been done to the Indians, ruled that there were other sites on which the Indians could fish and that the treaty did not guarantee fisheries at all usual and accustomed places or imply an easement to use privately owned land.[55] Judge Hanford based his decision on his construction of the treaties in United States v. Winans, a decision later reversed by the United States Supreme Court.[56] An appeal from Judge Hanford s ruling regarding the Lummi fisheries was dismissed in the Supreme Court by stipulation of the parties.[57]Meanwhile, non-Indian monopolization and preemption of the most productive traditional Indian fishing sites continued.

In 1899, the Pacific American Fish Company of Chicago spent one million dollars to acquire control of inner Sound trap sites. Individual sites sold for between $5,000 and $55,000 with an average of almost $20,000; by 1917, many sites were valued at over $100,000.[58] To reduce the effectiveness of all fisheries at these productive locations, the Washington State Legislature, also in 1899 modified and expanded its closure of fresh water. It closed all rivers and streams to salmon fishing for two of the most productive months of the year, and also totally closed six rivers to salmon fishing.[59] All of these rivers were usual and accustomed grounds for a number of the treaty tribes.

As early as 1900, fisheries officials argued that tribal traps threatened to destroy the state's "hatchery runs," and complained that tribal fishermen were asserting treaty rights in their defense. However, there are reports of only eight prosecutions of Indians for fishing violations between 1891 and 1901, less than one percent of all fisheries prosecutions.[60]

While crews hired by the cannery companies and investment syndicates built larger and stronger fish traps in the deep waters outside the mouths of rivers and along major migration pathways, some traditional Indian net, trap, and weir fishing continued. By 1897, huge traps, mostly owned or controlled by cannery interests because they were the only ones with enough resources to construct them, dominated the industry south of the 49th parallel. The traps at Pt. Roberts ruined the Indians traditional reefnet fishery there.[61] With the state legislature at the helm enacting and repealing conservation regulations, non-Indian fishing companies were, by the turn of the century, effectively preempting the fish runs that formed the Indian tribes' livelihood.

Preemption of the fish runs came before the United States Supreme Court in 1905, in the context of a settler along the Columbia River. Winans had placed four fish wheels along 1-1/2 miles of the river bank; he sought to exclude tribal fishermen from their usual and accustomed fishing place. The Court found that the right to resort to the fishing places was not much less necessary to the existence of the Indians than the atmosphere they breathed.[62] The settlers urged an argument based on the different capacities of white men and Indians to devise and use fishing gear to enjoy the common right. The Court replied,

> It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common.[63]

The attempt to monopolize the fishery was struck down.

3. 1910-1934: State interest groups vie for the salmon harvest - the Indians are excluded.

The traditional Indian tribal fishery was a highly efficient one. Tribes trapped and netted salmon primarily in the bays, channels, and falls of rivers and tributaries. These locations were highly productive ones; they took full advantage of the growth of the salmon as the maturing fish migrated through the ocean and the open waters of Puget Sound. As early settlers imitated the Indians' approach the fish trap industry grew to a position of economic domination. The mouths of the many small, short river systems emptying directly into the salt water of Puget Sound provided perfect sites for the erection of fish traps.

The rapid growth of the industry in Washington and elsewhere convinced the State Fish Commissioner that restrictions were necessary if the fish runs were to be preserved. Following the conventional wisdom of the day these regulations typically restricted the most efficient harvesters of salmon: the Indians and non-Indian fish trap operators. As has been the pattern ever since, the fishing regulations maximized inefficiency to reduce harvests. State law regulated the spacing, acquisition, abandonment of trap sites. It provided for the size and depth of the traps and the width of their mesh. The State limited individuals to ownership of three traps.[64]

Because Indian and non-Indian fish traps were stationery, they were also the easiest to regulate. The annual reports of all State Fish Commissioners in the years following 1890, were filled with complaints of their inability to get enough staff and enough money to do the job they were expected to do. One Fish Commissioner said, if it is the intent of the legislature that these laws should be enforced, certainly they should provide sufficient appropriations to pay for the expenses of the same. [65] The brunt of both regulation and enforcement naturally enough fell upon the location-oriented fisheries. The Fish Commissioner s Annual Report for 1899-1900, included a discussion entitled, Trouble With Indians on Our Hatchery Streams, which announced,

> The general fisheries laws passed by the last legislature provide that any Indian residing in this state may take salmon or other fish by any means at any time for himself and family. The Attorney General has advised us that . . . this clause . . . does not allow the Indians to violate the general fishing laws.

Even the non-Indian fish trap operators complained that traps were closed and remained closed but that the growing number of fishermen in marine waters using gillnets worked any time they wished without being arrested.[66]

In 1904, the Fish Commissioner closed a state hatchery on the Skokomish River because he felt that only the Indians of the area would benefit from it.[67] The big blow to Indian fisheries, however, came in 1907, when the legislature again closed all Puget Sound tributaries above the tide line to the taking of salmon except by hook and line. Fishing on the salmon runs elsewhere was permitted. The legislation also implemented general weekly closures of all commercial fisheries.[68]

State laws, typically, were not extended to Indian reservations since the federal government had retained exclusive control over those lands. A number of reports, however, indicate that the State made early efforts to control Indian fishing on reservations just as it controlled fishing elsewhere. The agent for the Tulalip reservation reported that in 1913, two Lummi Indians were arrested while fishing within the boundaries of their reservation. The State Fish Commissioner, when the case resulted in an acquittal, threatened to rearrest Indians again and again for the same offense.[69]

The increase in canning of Puget Sound Salmon for export to American and European markets was not a steady one. In 1894 and 1895, years of economic depression, sockeye taken in reefnets brought 10 to 15 cents apiece for white fishermen, and 5 to 8 cents apiece for Indians. Other species could be purchased by the canners for as little as 2 cents apiece.[70] However, lack of demand cannot be considered a factor in the demise of the fish trap industry. One factor was the discriminatory tax charged to trap operators equal to $1.00 per every 1,000 fish or about 1%. Other fishermen paid only the license fees.[71] When wholesale salmon prices were low trapmen consistently undersold marine fishermen, demonstrating superior economic efficiency of fixed gear.[72] The most significant factor in the decline of traps and other location-oriented fisheries was the rise of marine (salt water) fishing technology, principally the purse seine boat.

By fishing Ain front of traps, purse seines robbed traps of their superior locational advantage and reduced the number of fish reaching the trap sites. Even as early as 1903, American purse seiners had become a significant factor in the profitable sockeye fishery when their mobility was greatly increased with the advent of gasoline powered boats. By 1910, each of the three major types of fishing gear extant today was well established in Puget Sound; the respective catch characteristics tended to delineate areas of most efficient use: (1) gillnets in streams and murky estuaries in the day, at night spread throughout the Sound; (2) traps in shallow water, especially in estuaries; and (3) purse seines in deep water on the approaches to river mouths and the Strait of Juan de Fuca. Until they were restricted by the State, traps and seines were taking an increasingly large share of the catch.[73] As these non-Indian marine fishermen began to intercept larger and larger numbers of fish before they reached the rivers the Indians found their livelihood dwindling. With the 1907 closure of fresh water areas, what had begun with the Indians' agreement that whites could fish with them at the traditional grounds had become an exclusion of Indians from those grounds for the benefit of non-Indian harvesters elsewhere.

In addition to frustration of Indian livelihood there were substantial economic and social costs associated with the shift to the marine fishery. As early as 1915, the Fish Commissioner recognized that purse seine fishing resulted in an increasingly heavy harvest of small, immature fish, at higher unit cost. During the First World War motorized trolling boats appeared

explosively because they could operate on the high seas in front of purse seines and other nets. These were even less efficient than purse seiners.[74] The number of cans of salmon packed continued to rise to great peaks in the period of 1913-1919. During this time span there was an average of 34 canneries active with an average total production of approximately 1.4 million cases. The heavy demand for high protein food such as salmon for combatants in World War I, was a primary reason, just as the Armistice may explain part of the decline in the 1920's.

High salmon prices during and following World War I attracted an increasing number of boats into the marine fishery, intercepting a growing proportion of the fish bound for trap sites. This decreased the physical harvest of traps and thereby increased their unit cost. As prices increased and trap yields declined canneries that had always supported and owned traps began to back purse seiners' resistance to state regulation.[75] The Washington Fish Commissioner reported, It is safe to say that the capacity of the appliances for the taking of fish in 1913 was at least twice, if not four times, as great as 12 years previous.[76] The rapid growth of fishing effort, spurred on by high prices, persistently threatened preservation of the fish runs. Fish Commissioner, Darwin, noted that the growing number of licenses and increased efficiency of fishing gear (meaning the widespread use of diesel motors on the purse seiner) can only hasten the depletion of the fisheries until they cease to be of economic importance.[77]

Destruction of salmon spawning areas closely rivaled non-Indian overfishing as the cause of preemption of Indian fish harvesting. Settlers coming to the rugged Northwest had a deep-seated belief that the resources of the frontier were inexhaustible. Calvinists were impelled to go forth, multiply, and subdue the earth. The Duwamish River system was one of the first subdued in Western Washington. A canal was constructed linking Lake Washington to Puget Sound, lowering the level of the lake nine feet. The Black River dried up as the salmon returned to spawn in 1916.[78] The White River was changed from a tributary of the Duwamish River to that of the Puyallup River in 1906.[79] A large number of productive Muckleshoot, Duwamish, and Snoqualmie fishing sites were eliminated.[80]

In addition to legislative preferences for non-Indian fisheries and the outright seizure or destruction of many productive Indian fishing locations, three court decisions in 1916 suggested that Indians no longer had a lawful right to fish outside of reservations except as permitted by state law. These were State v. Towessnute, 154 P. 805; State v. Alexis, 154 P. 810; and Kennedy v. Becker, 241 U.S. 556. The State Court in Towessnute could scarcely conceal its scorn of the Indian culture and economy:

> The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could be had from them was always disdained. . . . only that title was esteemed that came from white men.
>
> The Indian was a child, and a dangerous child of nature to be both protected and restrained. In his nomadic life he was to be left, so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence.

> These arrangements were but the announcement of our benevolence which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes.

89 Wash. at 78, 154 P. at 805 (1916).

In the wake of such decisions even treaty fishing in the isolated corners of the state came under attack. The Department of Fisheries told the Quileute Indians that they had to obtain commercial licenses if they sold salmon. The Indians objected, asserting their treaty rights, but at least some complied. In a letter to the State Board of Fisheries, the Quileute Indian Council noted that after they took out licenses, White fishermen came and B taking out licenses the same as we B began to use the Quileute River as a fishing ground. In so doing they have and are pushing us away from our fishing grounds and are thus cutting us off from a very liberal portion of our existence. [81] In response, the Fisheries Board declared most of the tribe's fishing ground on the Quileute River off-limits. Whites threatened tribal members with physical violence if they fished beyond the reservation line; this effectively ended the Indian fishery.

In 1915, the legislature also specifically prohibited a number of traditional Indian means of harvesting fish: spearing, gaffing, snagging, and snaring.[82] The legislature recognized an exception for Indians fishing for personal use on reservations and within specified nearby areas, but nowhere else.[83]

The widespread belief that federal laws regarding fishing should have no force within Washington is perhaps best illustrated by the controversy regarding a proposed United States Canadian treaty to governing harvest of the bountiful Fraser River salmon runs. These runs pass through American waters before entering the Fraser River, just inside British Columbia. American fishermen had always taken a substantial portion of the harvest in northern Puget Sound. Informed citizens on both sides of the boundary had, for years, argued that proper management of the fish runs and equitable division of the harvest had to be based upon a formal agreement between the two countries. Nevertheless, Washington resisted the efforts to reach a treaty and in 1911, Washington State Legislature drew up resolution which it sent to the United States Congress:

> Be it resolved by the House, the Senate concurring, THAT the people of the State of Washington through the legislature now assembled, most emphatically and earnestly protest against the Federal Government of the United States assuming or attempting to assume the jurisdiction and control of any of the fisheries within the territorial limits of the State of Washington, and we particularly protest against the joint control of any part of said fisheries by the United States Federal Government and the Dominion of Canada as proposed by a treaty convention between the United States and Great Britain.

> The State of Washington hereby affirms its title to all the public fisheries within its territorial limits, and insists that it has the exclusive right, by virtue of its sovereignty, to keep control and regulate all the fisheries-within its borders without federal interference.
>
> Be it resolved further, THAT a copy of this resolution be forthwith transmitted to the United States senators and representatives from the State of Washington, and that they hereby be requested to use all honorable means within their power to prevent any action of the Congress tending to ratify or make said treaty effective.[84]

This may, in part, be explained as a backlash from the famous Ballinger-Pinchot controversy over timber and mineral conservation, issues that had affected national and Washington State politics in the years 1909-1910. The politicians in power, largely supported by the voters, thoroughly disapproved of national conservation legislation in favor of State's rights and development of natural resources. Washington's Governor Marion E. Hay, was a leader in the State's rights group. Whatever the origin of the sentiments it is clear that they did little but obstruct federal efforts to protect the Indians' right to livelihood, guaranteed by the Stevens' treaties.

Until 1921, fishing was regulated by the enactments of each legislature. There was no fisheries' technical staff to guide the legislature during this period, and regulations could not be changed between legislative sessions to cope more precisely with run conditions.[85] A reorganization in 1921, led to establishment of a Department of Fisheries headed by a Director, with a Fisheries Board, a Division of Fisheries, and a Division of Game and Game Fish.[86] The Governor was authorized to appoint a three-person non-salaried State Fisheries Board, which would oversee the director and the departmental employees. The Fisheries Board, for the first time, had power to make policy and to issue regulations governing fisheries of the state, rather than depending upon the legislature to rule the industry.

The creation of the Fisheries Board decreased the influence of political special interest on the management of fisheries. The actions of the Board were not perfect, however, because the Board itself was made up largely of men who had vested interests in the harvesting and canning of fish. Nevertheless, it may have been an improvement over the former system where political appointees were responsible for the enforcement of laws that citizens did not want enforced; and citizens could put pressure on governors to appoint men who would not rock the boat too much.

More importantly, for the first time, there was official recognition that salmon conservation required use and extension of scientific data. The collection of such data was stymied, however, by the lack of adequate appropriation to hire fisheries biologists or engage in research. The frustrations surrounding lack of adequate funding for the Fisheries Board and inadequate scientific knowledge culminated in 1927, following disagreement over purse seine regulation when commission members either resigned or were removed depending on the source consulted.[87] Although regulatory authority still rested with the Board it was never again staffed. In 1929, it was abolished and its authority given to the Director of Fish and Game.

Serious research finally became possible during the Great Depression due to funding from the Work Progress Administration. Under the administration of B. N. Brennan, who was appointed Director of Fisheries in 1933, the Minter Creek biological station was built and put into operation. The research done there quickly proved the inefficiency of established hatchery systems and convinced experts that artificially propagated fish must be reared in hatchery ponds for a much longer period than had been formerly believed necessary. The old belief, that hatcheries were a panacea for the fisheries, was destroyed. It is now recognized that reliable fisheries statistics for Washington State date from about 1935.[88]

In 1924, Congress made most members of Northwest tribes citizens, thus giving them the right to vote. The legislation provided:

> That all non-citizens Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: provided, that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

8 U.S.C. 3.

The number of fishermen increased faster than both the catch of salmon and salmon prices during the mid-1920 s. Per capita income among commercial fishermen decreased. Thus, began political battles between gillnetters, trollers, purse seiners, and trap owners, designed to secure for themselves a larger piece of a shrinking pie. The expanding marine fishery also reduced the number of fish passing through trap sites to go up rivers to fresh water sport fishing locations. Enraged sportsmen turned on the trap men who fished immediately Ain front of them and were, therefore, their most visible competition. Among the commercial groups, gillnetters were clearly the most inefficient operators, yet they were also by far the most numerous. In 1924, proponents of gillnets and trollers circulated a petition that would have outlawed all forms of catching fish except for gillnetters and trollers. It did not get enough signatures to make the ballot that November.

As the salmon harvest continued a steady decline from 1921 to 1945, some fisheries managers became as concerned about the unlimited growth of sport fishermen as they were about the expanding, motorized, commercial fleet. The 1931 Annual Report of the Washington Department of Fisheries identified the growth of sport fisheries as a serious management problem,

> Sport fishing activities in salt water areas, growing by leaps and bounds through the natural call of the outdoors, easy access to fishing grounds, and goaded on by advertising propaganda, have developed to the point where it is conservatively estimated for one instance, that the total number of young chinook salmon, each one pound or under, taken every year exceeded the total number of mature chinooks, weighing 20 pounds or more when caught by commercial fishermen. . . . The enormous difference in commercial value to the state as a whole from the catch of mature salmon as compared to the catch of the immature fish taken is very obvious.[89]

Nevertheless, area closures to protect salmon, with few exceptions, were inapplicable to the hook and line fishery.[90]

In an effort to protect the declining production of salmon in Puget Sound the Department of Fisheries between 1921 and 1934 created a series of salmon preserves - areas in which all commercial salmon fishing was prohibited. This outlawed Indian marine fishing in most of the usual and accustomed grounds of the Makah, Lower Elwha, Skokomish, Squaxin Island, Nisqually, Puyallup, Tulalip, Stillaguamish, Swinomish, Upper Skagit, and Sauk-Suiattle Indian Tribes.[91]

In 1925, the State Legislature declared that steelhead trout, upon reaching fresh waters, were a game fish and could not be captured with nets. Prior to that time steelhead had not been distinguished from other salmonids.[92] For two years the Act[93] contained an exception for steelhead caught within or on border streams of Indian reservations. The narrow exception for Indian fisheries was eliminated in 1925, and in 1929, the legislature prohibited the sale of steelhead trout in fresh fish markets. This allocation of an entire species to hook and line fisheries, in response to political pressure from sport groups, imposed a particular hardship upon Indian tribes and their members. Steelhead are available for harvest primarily during the winter months and have traditionally been relied upon as a crucial source of winter food and income.

To make matters worse, in 1933, sport fishing interests obtained passage of Initiative 62 which established a separate Game Department vested with philosophy of legally enforced decreasing efficiency, accompanied by submergence of Indian tribes as a dominant fishing group.

C. 1934-1974: STATE REGULATIONS ALLOCATE FISH ON THE BASIS OF POLITICAL PRESSURE

1. Passage of Initiative Measure No. 77

In 1934, Initiative 77 prohibited the use of fixed nets, traps, and ownership of fishing stations. The redistribution of harvestable salmon, following Initiative 77, attracted new fishermen. The increasing aggregate take of the troll fishery presented the State with the choices of curtailing the troll season or curtailing one or both of the net fisheries Abehind it. It chose to curtail purse seining, the most efficient of the three remaining gear types. The combined effects of unlimited entry and redistribution among user groups are seen in annual harvest per license. Entry into the favored user groups, trolling and gillnetting, accelerated, but the purse seine fleet began to decline. As Professor Barsh has pointed out, if state law limited only the aggregate harvest of all types of gear without interfering with the distribution of the harvest among gear types most fishermen would have become trollers, especially new enterers with no capital sunk in other types of gear. This did not occur.[94] Instead, the ratio between troll, gillnet, and purse seine licenses has remained relatively constant since 1935,[95] although the number of

fishermen has increased substantially; sports fishermen have increased five-fold. The total salmon catch, and the number of cases of salmon canned, have declined.

The distribution of salmon harvest prior to federal court intervention in 1974, is best understood as the product of the balance of power among competing user groups, i.e., their respective potential impact on the resource and on state politics. This balance of political power is clearly seen in the forces responsible for the passage of Initiative 77. The Initiative was sponsored by Western Washington's Sportsmen's Associations and supported by the net fishermen of the Columbia River and Puget Sound. It resulted from the belief on the part of sportsmen, purse seiners, and the public at large that a few dominant cannery corporations were responsible for the continuous decline in numbers of fish caught. A previous measure, Initiative 62, had finally forbidden all taking of steelhead for commercial purposes. But when that did not increase the number of fish available to sportsmen, the recreational fishermen determined to set aside what amounted to fishing reservations, where commercial operations were to be excluded. This was the effect of the Initiative 77 line.

Several factors led to passage of the Initiative. First, the increase of population which took place during and immediately following the World War increased the importance of recreational fishing. Second, the prolonged competition between various types of gear played a role. Third, the failure of the legislature to take effective steps to preserve the fishery. Fourth, the need for more jobs and the growing public resentment against properties wealth and monopoly, which had existed in the northwest from Populist times.[96]

Passage of Initiative 77 solved little. Capital freed by the elimination of fish traps was promptly reinvested in building up the marine fleet; this further reduced the return of fish to spawning areas.[97] Because of their greater ability to take fish, Commissioner Darwin explained of the trapmen, prejudice had naturally been aroused against them. But the use of the purse seine . . . stole upon us like a thief in the night. [98] It was Almost impossible . . . to make the average person understand the real nature of the problem. Thus, while Initiative 77 redistributed fish income away from tribal and other fixed-location fishermen, it did little to address the urgent need to conserve. In 1937, the Washington Director of Fisheries stated regarding chinook and coho salmon:

> While depletion may have been temporarily checked, it is evident that the trollers and purse seine fishermen are still taking a serious toll of the fish outside the jurisdiction of the state [i.e., in the ocean], and that they, together with the sportsmen are more responsible for the depletion of this species than were the fish traps.[99]

The State's toleration of unlimited entry into the marine fishery has reduced fishermen's income both by distributing the available harvest more thinly and by depleting the stocks. Barsh has said,

> State tolerance of industrial projects such as mills and dams, which are detrimental to salmon spawning habitats, has reduced salmon stocks and fishermen's income. Rather than compensating the fishing industry directly out of

> taxes on these competing industries, Washington restores the fish themselves by reclaiming injured habitat and expanding habitat artificially out of general funds. Industries benefitting from consumption of riparian habitats do not bear directly that cost of production. Income is redistributed from fishermen to mill and dam owners, and . . . , there is no reason to believe that this redistribution has been accompanied by allocational benefits. The value of lost habitat may exceed the added value to habitat-consuming industries.[100]

The Washington Department of Fisheries has reported that extensive loss of salmon spawning habitat caused by contamination or destruction of spawning beds has resulted in a serious decline or elimination of many stocks of fish in the state.[101]Dams block the passage of fish upstream; gravel is removed for construction; logging operations denude the stream banks and cause soil erosion and log jams; and excessive diversion of water makes fish migration or salmon egg incubation impossible. Urban and industrial expansion is causing increasingly greater impact on the stream environment and as a result, the salmon production habitat is being lost at an accelerating rate. [102]

By its own terms Initiative 77 did not apply to Indians fishing under federal regulations, but from the very first there was an uncertainty whether Indians could continue to use traditional fish weirs, traps and set nets. Both the state and the white citizens attempted to prevent continuation of these activities. Finally, when the fisheries laws were recodified in 1949, the exemption for Indians was eliminated.[103] There is no legislative history for this change, and it appears to have originated with the code reviser rather than with the legislature.

Despite an Attorney General's opinion that Indians had a right to fish for personal use on reservation and within specified areas around reservations, in 1936 the Washington state Game Department ruled that Indians might no longer fish with gillnets in these areas. The Department publicly threatened to arrest young bucks fishing off-reservation, asserting that the current controversy hinges on the point that Indians are infringing on state rights. The state is not infringing on the privileges of Indians. [104]

Following its view that Indian fishing was subject to plenary control, in May 1939, Washington arrested a Yakima Indian, Sampson Tulee. Tulee was tried and convicted of netting and selling salmon without having obtained a license to fish as required by a 1937 enactment of the legislature. He unsuccessfully sought habeas corpus relief from the federal courts, was retried, and his conviction was upheld by the state Supreme Court.[105] The Supreme Court of the United States reversed his conviction, stating,

> From the report . . . of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. 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 were understood to have by the tribal representatives at the council and in the spirit, which generously recognizes the full obligation of this nation to protect the interests of a dependent people. . . . [The] exaction of fees as a prerequisite to the enjoyment of

fishing in the >usual and accustomed places' cannot be reconciled with the fair construction of the treaty.[106]

Although not directly related to treaty Indian commercial fisheries another development in Washington demonstrated the need for increasing the sophistication of state fisheries management and openly confessing the allocation of harvest that results from fishing regulations. In 1946, the first International Pacific Salmon Fisheries Commission regulations were enacted to govern the harvest of sockeye salmon by American and Canadian fishermen. The IPSFC itself was an unexpected result of Initiative 77. Prior to passage of the initiative American fishermen had harvested a large portion of the Fraser River runs, but the banning of fish traps and other fixed gear turned the tables and Canadians began taking the majority of the harvest. Despite lingering states' rights concerns over a federal treaty with the Dominion of Canada, Washington fishermen decided that, on balance, a treaty was preferable to the status quo. The treaty provided for a 50-50 division of the catch between U.S. and Canadian citizens; it was ratified in 1937.[107]

2. 1947-1969: The struggle for recognition of Indian fisheries.

The years since World War II have been marked by protest and growing tension over the continued exclusion of Indians from a meaningful share of the fish harvest. During the war itself the fishing industry as a whole generally marked time. The Indian tribes were fiercely patriotic; their men were at war. Would-be Indian fishermen fought bravely for the United States, but like many black American soldiers, returned home to an America still marked by its prejudices and discrimination.

Anadromous fish were still an integral part of Indian life in the Northwest. The continuing state policy of permitting most of the spawning salmon to be harvested in salt water prior to reaching the rivers and streams imposed a heavy restraint on Indian fishing at usual and accustomed grounds and stations. In 1947, for example, the White, Snohomish, Dungeness, and Elwha Rivers were closed to all salmon fishing.[108] The State of Washington's continued closure of all fresh water rivers and streams posed a very heavy-handed restraint on the Indian way of life. Nevertheless, perhaps because some aspects of traditional Northwest Indian life had disappeared, the role of fish and fishing assumed greater status, both economic and symbolic. Fishing is the heritage of thousands of years of use and development. It remains a stronghold of the Indian person's sense of identity as an Indian. People already poor do not deliberately risk expensive equipment and their own imprisonment solely for the hope of financial gain. Fishing is the Indian's life in a much more profound sense than making a living. The tribes, therefore, continued to assert treaty fishing rights.

In 1950, hurt by the closure of the Hoko River to Indian net fisheries throughout the coho salmon run, the Makah Tribe brought suit against the Washington Director of Fisheries. The District Court dismissed the tribe's complaint, but the Court of Appeals reversed, upholding the tribe's position, because the state had not shown that closure of the river was necessary for conservation. State regulations permitted fishing on the river with hook and line; further, it was clear that the coho run could be preserved by closures during portions of the run. Nevertheless,

the state refused to permit Indian net fisheries on the ground that the cost of patrolling to enforce openings and closures was too great. The Court of Appeal rejected the argument saying,

> Aside from the absurdity of this contention we hold that where a treaty gives the Indians a right to fish, the state cannot deny that right because of the cost of preventing their taking of fish in excess of that right.[109]

Elsewhere on Puget Sound, Indians drew attention to the denial of their rights by engaging in civil disobedience. A member of the Puyallup Indian Tribe, Bob Satiacum, initiated a test case by net fishing in the Puyallup River, another river closed to traditional Indian fisheries by state regulations since 1907. The trial court dismissed charges against him because the state failed to produce any evidence that the regulations prohibiting net fishing on the Puyallup were reasonable and necessary for the conservation of fish. The dismissal was upheld by a 4-4 vote of the State Supreme Court.[110]

Although it had been clear since at least 1905 that the treaty permitted tribal fishermen to cross private lands in order to fish at their usual and accustomed places, the actual practice led to hostile and unpleasant relationships with non-Indian landowners and in many cases the Indians were disinclined to push the matter. Furthermore, the State continued to assert that the tribes had fishing rights only on reservations, and that, off-reservation, the broad exercises of state police power applied equally to treaty and non-treaty citizens. Under this view, commercial fisheries and net fisheries of any kind were forbidden in rivers, estuaries, and streams B the major usual and accustomed places of the tribes. The decision in State v. Satiacum proved little comfort when the Washington Supreme Court upheld the conviction of the Swinomish tribal member who was fishing near the Skagit River, in waters closed by the State. The opinion upheld the right of the state to subject Indians to reasonable and necessary regulations and held that the treaties did not impair state police power.[111] The ruling in the Satiacum case was dismissed in a footnote.

Washington's settlers were not alone in their dissatisfaction with the unique relationship between the federal government and Indian tribes. During the Eisenhower administration recognition and federal services for several Indian tribes were terminated by Congress. Public Law 83-280 brought crimes and civil causes of action arising on Indian reservations within the jurisdiction of state courts for the first time. In 1959, the State of Washington memorialized Congress asking for complete control of fisheries statewide.[112] The anti-treaty movement in Washington gained impetus from federal court decisions involving similar Indian treaty rights in Oregon. There, regulations of the State Game Commission prohibited fishing on Columbia and Snake Rivers' tributaries during the salmon runs. In 1958, Oregon arrested three members of the Confederated Tribes of the Umatilla Indian Reservation for subsistence fishing in the Blue Mountains. Again, the Court of Appeals ruled that the state had not shown that the regulations were necessary for conservation. The testimony of officials of the Oregon game Commission showed that conservation was only a label for regulations which sought only to protect commercial and sport fisheries. The regulations were promulgated with No regard for the welfare of Indians, the Court found, since they provided that all of the harvest would be taken by non-treaty commercial fisheries in the lower part of the river or by sportsmen on the tributaries. Clearly, any conservation measures needed to protect the runs could be accomplished

without restriction of the Indian fisheries.[113] For the first time a court had examined the overall pattern of state regulation of anadromous fisheries and found that conservation meant reserving catches for non-Indian sport and commercial fisheries.

As an historical matter it is probable that neither the State's view of treaty rights, nor the Indian fisheries themselves, changed basically during the 1980 s. The state showed varying degrees of tolerance, but it never viewed Indian fisheries as part of the total fisheries of the state, except as a threat to non-treaty fishing. In the State's view the non-Indian commercial and sport fisheries are real fisheries. Indians were depicted as a menace, sportsmen as examples of progress.[114]

Tension between sportsmen and treaty tribes continued to precipitate controversy over fishing rights during the 1960's. Years later the Washington Department of Game admitted that, as a result of a violent unrest among non-Indians, the Department reinstituted enforcement of its regulations prohibiting Indian net fishing for steelhead on the Puyallup River, notwithstanding the decision of the State Supreme Court in State v. Satiacum. More Indian tribal fishermen were arrested as a result.[115] The stress heightened.

A new intertribal organization, the Survival of the American Indian Association, was founded, and dedicated to the assertion and preservation of fishing rights. Early in 1964, protest fish-ins were staged on the Nisqually River at an Indian allotment called Frank's Landing. The National Indian Youth Council organized another demonstration in Olympia, the State Capitol. Following the fish-ins at Frank's Landing, Washington's Senator, Warren G. Magnuson, took two measures to Congress. Senate Joint Resolution 170 would have recognized treaty rights but provided that state regulation would apply off reservation. Senate Joint Resolution 171 would have extinguished, by purchase, off-reservation fishing rights. The State of Washington supported both measures and Oregon and Idaho supported SJR 171. Hearings began in 1964. Representatives of many Indian tribes and intertribal organizations testified. The Yakimas declared that Indian fishing was not endangering the fish, but that other fishermen were encroaching on the Indian fishing right. Along with representatives of the Makah Tribe they emphasized the dependence of Indian people on fishing as a livelihood. Tribal fishing regulations were made part of the record. The vice-chairman of the Puyallup Tribe declared, During the fishing seasons, the Indians dare not leave the river because the sportsmen smash our boats and rip our nets, steal our motors, in order to get revenge on the Indians. [116]

Historically, as shown by the bountiful fish runs, Indian fishing practices allowed for adequate escapement; yet, they were attacked in the name of conservation. The Department of Fisheries repeatedly stated in its annual reports and in the 1964 hearings that the Indian catch takes a disproportionately high percentage of the spawning runs. But the fallacy in the argument was apparent. All salmon, whatever their location, are potential spawners. Whoever fishes works on the seed stock of the future. In 1964 hearings showed that the crucial question is whether enough fish get to the spawning grounds and spawn, not where the fish are caught. Each returning mature salmon must pass each fishery B all of the fisheries in the sea and Puget Sound as well as the Indian and sport fisheries in the rivers. The Indian fishery could not be blamed for overfishing.[117] The two proposed Senate Joint Resolutions were allowed to die in committee.

During and following Congressional hearings, litigation regarding treaty rights seemed to burst out everywhere in King and Pierce Counties, the most populous areas of Washington State. In September of 1964, a Pierce County Superior Court upheld Puyallup net fishing on reservation. That same fall, a King County Superior Court granted a permanent injunction against Muckleshoot Tribal fishing on the ground that they were not a treaty tribe. More militant Indian demonstrations took place. The Department of Game sued the Puyallup Tribal Government and its members seeking an injunction against continued fishing. In May of 1965, a Pierce County Superior Court ruled that the Puyallup Tribe no longer existed and issued a permanent injunction.

That summer, in an effort to cool the controversy, the Department of the Interior proposed federal regulation of off-reservation Indian treaty fishing. The tribes, however, feared that the regulations opened the way for total state regulation, and Washington violently opposed federal interference with state's rights. In October of 1965, violent confrontations broke out between state officers and Indian tribal fishermen along the Nisqually River. The arrests were well publicized and many charged that the State had used undue force.[118]

In the spring of 1966, Dick Gregory, a well-known black entertainer, participated in a series of fish-ins, was arrested, convicted, and served a 40-day term. Earlier, Marlon Brando, a white actor, was arrested for participating in a similar Indian fish-in. He, however, was released on a technicality, and was not tried. Additional demonstrations took place on the Green River and on the Columbia River.

In December 1966, the Washington Supreme Court decided Department of Game v. Puyallup Tribe. The State had urged that the tribe was defunct, that its members were without rights under a treaty, and that the treaty itself was but a scrap of paper entered into without consideration from Aa conquered people without right or title to anything. [119] The State Supreme Court affirmed in part and reversed in part. The court chastised the Game and Fisheries Departments for arguing what has been called the menagerie theory of Indian title,

> [T]hat Indians are less than human and that their relation to their lands is not the human relation of ownership, but rather something similar to the relation that animals bear to areas in which they may be temporarily confined.[120]

Nevertheless, the State Supreme Court concluded that if the regulations were reasonable and necessary to conservation of fish[121] they could be applied to treaty fisheries. The case was remanded to trial court. Meanwhile, a King County Superior Court ruled, after hearing anthropological evidence, that the Muckleshoot Tribe was indeed a treaty tribe, contrary to its previous rulings.

As rumors and confusion over conflicting court decisions mounted, state, tribal, and federal officials came to see the need for a clearer judicial statement of the tribes' rights under the treaties, whatever the outcome. A public statement by the Director of Fisheries in 1958, and a working paper prepared by the Department of Fisheries for the 1965 State Legislature, called for a definition of what the Indians fishing right is and urged that it was the responsibility of the federal government to verify and establish it. The 1965 working paper stated, the guarantee of

the Indian right must be determined and defined. Once their rights and responsibilities are determined, the state agencies involved will manage accordingly. [122]

To a small degree, a definition of the right was provided by the United States Supreme Court in 1968, but many uncertainties persisted and litigation on remand went on and on. In the fall of 1968, renewed demonstrations took place on the lower Nisqually River, this time with support from numerous students and out-of-state Indians. The Governor's Advisory Committee on Indian Affairs investigated. In the fall of 1969, the Department of Fisheries allowed an off-reservation Nisqually net fishery but excluded the part of the river customarily fished by those involved in Frank's Landing actions.[123]

In 1969, a Federal District Court in Oregon did much to illuminate the questions and to set the stage for resolution of the salmon conflict in Western Washington. In the consolidated cases of the Sohappy v. Smith and United States v. Oregon,[124] the Court examined the conflict, between Indian tribal fisheries and the State of Oregon, which had resulted from Oregon's 1901 closure of most of the Columbia River to fishing except by hook-and-line. Of the State's argument that the Ain-common language of the treaties required only that each law or regulation must be equally applicable to Indian and non-Indian fishermen, the Court said, A[It would only have plausibility] if all history, anthropology, biology, and prior case law, and the intention of the parties to the treaty were to be ignored. [125]

The court found that Oregon conservation policies were concerned with allocation and use of the fish resources as well as with their perpetuation. State authority had been divided between two agencies; one concerned with the protection and promotion of fisheries for sportsmen and the other with protection and promotion of commercial fisheries. The State had given no consideration to the treaty rights of Indians as an interest to be recognized or a fishery to be promoted in the State's regulatory and developmental program. Judge Belloni reasoned that the U.S. Supreme Court in Puyallup I,

> Was undoubtedly speaking of conservation in a sense of perpetuation or improvement of the size and reliability of the fish runs. It was not endorsing any particular state management program which is based not only upon that factor but also on allocation of fish among particular user groups or harvest areas or classification of fish to particular uses or modes of taking.[126]

The state policy kept the Indians out of the fishery because all the fish harvest was taken before the runs reached most Indian usual and accustomed fishing places. Judge Belloni concluded,

> If Oregon intends to maintain a separate status for commercial and sport fisheries it is obvious a third must be added, the Indian fishery. The treaty Indians, having an absolute right to that fishery, are entitled to a fair share of the fish produced by the Columbia River system.[127]

In Western Washington, fishery scientists were coming to realize that the pattern of regulations which, whether deliberately or inadvertently, was precluding most traditional Indian fisheries, served the interests of the non-Indian fisheries no better. To one economist the most

disturbing feature of the period from 1963 to 1973, was the increasingly larger number of fishermen going after an increasingly smaller stock of salmon.

> Rising prices partly account for this, but they alone cannot account for the current level of fishing effort. Cannery operators, concerned over potential under-utilization of their facilities, have provided the cash bonuses and new equipment that have allowed fishermen to subsist. Without this, Dr. Crutchfield estimates, the rate of return to purse seining would approach zero while antiquated gillnet fishing, already a part-time operation, would virtually cease to exist.[128]

Over the years, scholars had called for limiting the number of fishermen who could engage in fishing. They reasoned that under the State's regulatory pattern an individual fisherman has no incentive to conserve the resource, knowing that any fish which escapes his net will likely be taken by another fisherman elsewhere along the migratory path. Reducing the harvest of existing fishermen through regulation by inefficiency had actually attracted more fishermen into the industry. Thus state regulation, coupled with the necessity of perpetuating the species, resulted in a downward spiral of increasing numbers of fishermen, increasingly restrictive gear limitations, and increasingly high prices.[129] In 1959, a bill to limit the entry of new fishermen into the industry was introduced in the state legislature, but was defeated.[130] Two special task forces also recommended limiting entry in 1962 and 1968, and the Washington Department of Fisheries concurred in this principle.[131]

Professor Brown's analysis of the industry created under state regulation is similar. He concludes,

> The most striking fact is that during the decade of the 1960 s, only purse seining made any money in an economic sense. After expenditures for repairs, gear and labor, etc., there was no money left over to pay a return on capital invested in boats for the troll and gillnet fishermen and only $38,000 was available to the estimated 116 purse seining units as a return on investment, despite the fact that their total revenue was about 3.5 million dollars . . . .
>
> The net revenue per pound of all non-Indian gear is zero . . . .
>
> In short, the Puget Sound fishery, as it has been managed for the past 10 years, is an uneconomic enterprise producing an overall economic loss to the economy of the State of Washington.[132]

Despite the unanimous opinion of economists and fisheries managers that entry into salmon fishing should be limited, as a means of preserving the fish runs and the commercial viability of the fishery, it was not until 1974 that Washington took legislative steps to do so.[133]

3. 1970-1973: Filing and Trial of United States v. Washington.

The decision in Sohappy v. Smith marked significant progress in accommodating the fishing rights of treaty and non-treaty citizens on the Columbia River. No party appealed the decision. The Columbia River example gave hope to Indian tribes and responsible government officials that a solution to the Washington fishing rights controversy could be reached. The administrative assistant to Governor Dan Evans declared,

> I can state categorically that the State of Washington will be guided by the wording and spirit of the Belloni decision. Governor Evans, the Director of Game, and Director of Fisheries have met together, and this is to be the policy of the State.[134]

Unfortunately, as recently noted by the Office of Program Research of the Washington House of Representatives,

> Washington does not have a policy to govern its relationship with Indian tribes. Rather, it has a number of policies reflecting interests of the various state agencies having relationships with the tribes.[135]

In actual practice therefore, each state agency represented its own interests in dealing with the tribes; this resulted in inconsistent state policies.

Despite the Governor's statement of policy, the members of the 30 treaty Indian tribes of Western Washington continued to suffer arrests and seizures of property for alleged violations of state regulations. The most serious conflicts involved the Washington Department of Game and the steelhead trout.[136] The Director of Game believed it would be an abdication of his responsibilities to allow any off-reservation net fishing for steelhead by Indians.[137] The Game Department asserted that the treaties did not grant any Indian tribe any privileges or immunities greater than those which the Department recognized as being held by non-Indian citizens.[138] In short, the most virulent opponent of any recognition of, or accommodation with, treaty Indian fishing was the Department of Game.

The Game Department refused to try to regulate fishing so as to give the Indian tribe an opportunity to take an equitable portion of the steelhead runs at their usual and accustomed places by any means, or for any purposes, other than sport fishing.[139] In addition, the Game Department vigorously and successfully lobbied the Washington Legislature and the public to maintain these sport sanctuaries for steelhead.[140] It would be an understatement to say that the Game Department gave no consideration to the claimed treaty fishing rights of any of the tribes in the Department's regulatory, management, and propagation program.[141]

The Game Department was party to some of the civil and criminal litigation proceedings in the state courts, but it paid little regard to decisions. After the decision of the United States Supreme Court in Puyallup I[142] the Department's suit against the Puyallup Tribe was remanded for trial in State Superior Court. Appeals were taken; in 1972, the Washington State Supreme Court held,

> [I]t is incumbent upon the Department of Game to provide, annually, regulations for a Puyallup Indian net fishery of steelhead when it is determined by the department, upon supporting facts and data, that an Indian net fishery would not be inconsistent with the necessary conservation of the steelhead fishery.[143]

Notwithstanding the decisions of the Supreme Court of the United States and the Supreme Court of Washington the Department of Game continued to take the position that state enactments prohibiting commercial and net fisheries for steelhead need not be shown to be reasonable and necessary for conservation in order to be binding on treaty Indians at usual and accustomed places.[144]

None of the pending cases provided an apt vehicle for resolution of the treaty fishing issue. Many criminal prosecutions of Indian fishermen were in progress, but the tribes and the United States could not be party to them and were thus precluded from fully asserting the reserved trial fishing rights. Several civil cases were also pending in the lower state court, notably the Puyallup litigation, but aside from Game's disregard of the courts' orders in that case, the suit involved only one tribe, a unique river, a reservation of uncertain existence and unknown dimension, and only one of the relevant treaties. The circumstances of other Indian tribes, the Washington fishery as a whole, and the five other treaties signed between the United states and the tribes in Washington, could not effectively be raised in these multiplicitous proceedings.[145] In September of 1970, therefore, the United States, on behalf of itself and seven Indian Tribal Governments, filed a new action against the State. This was U.S. v. Washington, Civ. No. 9213.

Three years of pretrial preparation followed the filing of United States v. Washington. The case was assigned to several District Judges. On August 24, 1973, an extensive final pretrial order was filed; shortly thereafter, trial commenced before the Honorable George H. Boldt. The parties agreed that the Hoh, Lummi, Makah, Nisqually, Puyallup, Quileute, Quinault, Skokomish, Squaxin Island, and Yakima tribal governments, with respect to treaty fishing right issues, are the political successors in interest to some of the Indian tribes or Bands which were partes to the treaties.[146] There was some controversy regarding the treaty status of the Muckleshoot, Sauk-Suiattle, Stillaguamish, and Upper Skagit Tribes.

The conflicting policies of the Departments of Fisheries and Game continued throughout the trial. The Washington State Game Commission apparently neither held meetings nor corresponded with the Bureau of Indian Affairs regarding claimed treaty fishing rights. The continuing purpose of the Department of Game's policies and regulations managing the steelhead fisheries was the maximum recreational experience for sport fishermen only.[147] The Game Department claimed inability to authorize the Indian off-reservation net fishing because of a lack of information with which to predict harvest effort and run size. Yet the evidence revealed that the Department of Game failed to contact more than two of the Indian tribes for such information.[148] Furthermore, the Department failed to advise the Washington state Game Commission and the legislature of the information which it had in its files but simply estimated what it thought the tribes would want and recommended that such a fishery be barred because of lack of information.[149]

The Department of Fisheries was somewhat more accommodating. It believed that the best standard for achieving a fair and equitable regulation of treaty Indian fishing was to provide

an opportunity for the tribes to take a fair percentage of the harvestable fish. [150] Fisheries acknowledged that the Puyallup decisions required the State to give treaty Indians an equitable opportunity to take a portion of the salmon runs at usual and accustomed places, since the fishing right would be an empty right if there were no fish which the Indians can harvest at those places consistent with preservation of the resource.[151] As a member of the International Pacific Salmon Fisheries Commission the Director of Fisheries attempted to obtain Canadian agreement to a greater number of fishing days for the Makah Tribe, and when the Canadians refused the Director took unilateral action to provide more days.[152] The Department of Fisheries also set several special seasons for treaty tribes, to permit fishing at some usual and accustomed places. Those regulations, however, benefitted only seven of the tribes in Western Washington.[153]

After hearing all the evidence and considering proposed finding of facts and conclusions of law submitted by all parties, the District Court rendered its decision on February 12, 1974. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974). The Court found that, notwithstanding indications that the Department of Fisheries was considering treaty tribes to some extent in formulating its regulations, the regulations of the Department in many instances allowed,

> [a]ll or a 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.[154]

Furthermore, the State, by statute and regulation, had totally closed a substantial number of the usual and accustomed fishing areas of the tribes to all forms of net fishing, while permitting commercial net fishing for salmon elsewhere on the same runs of fish. [155] The Court found that, in violation of their regulations, both the Department of Game and the Department of Fisheries had seized nets, confiscated fish, and retained valuable Indian property for long periods of time without notice to Indian tribes or their members, and without institution of judicial forfeiture proceedings.[156]

Enforcement of the state fishing laws and regulations had, the District Court found, been responsible for loss of income to treaty Indians and inhibition of cultural practices.[157] This is amply confirmed by recent findings of the Office of Program Research of the Washington state Legislature,

> While the number of Washington's Indians may have increased in the past 100 or so years, it is a fact that the Indians living in Washington today suffer from a standard of living far inferior to that of the state's non-Indian population. Task Force Reports prepared under the auspices of the Governor's Indian Advisory Council show that in terms of health care, life expectancy, education level achieved, unemployment, alcoholism, suicides, and a host of other indicators of standards of living, the state's Indian population lags far behind its non-Indian population.[158]

The data compiled for the state legislature included unemployed and low-income tribal members living on or adjacent to reservations of 17 of the treaty Indian tribes involved in the United States

v. Washington litigation. These figures show an average unemployment rate among the tribes' potential labor force of 40.3 percent or 4,217 tribal members out of a potential labor force of 10,457. An additional 23.9 percent of the potential labor force, some 2,499 tribal members, is employed but earns less than $5,000 per year. Although these figures were not available to the District Court, evidence adduced at trial revealed that during a 6-year period studied by the state's biometrician, of the total number of salmon which were harvested within the tribes' usual and accustomed off-reservation fishing places, the Indian fisheries took only a 5 percent share of the harvest.[159]

Simply stated, state fishing regulations have been catastrophic to Indian well-being; they have seriously hampered pursuit of the traditional Indian way of life. One tribal witness, for example, stated that, The Indian fisherman has been driven out of the economy and the State of Washington has undertaken to close down the entire Indian fishing business.[160]

Dr. Barbara Lane found that:

> As non-Indians began to compete in fisheries, laws and regulations were promulgated which made it increasingly difficult for Indians to participate as entrepreneurs or even as fishermen. As they have been forced out of the fisheries, fewer Indians and smaller quantities of fish are involved.[161]

These effects on Indians resulted not only because of the passage of restrictive fishing regulations, but because of the severe policy of enforcement and harassment by the state. This can be seen in the testimony of many of the Indian witnesses who recounted not only the bitter experiences of their elders, but also their own personal encounters of being run off the rivers, notwithstanding their treaty rights to fish, and the effect this had on them.

Mrs. Lena Smith, a Stillaguamish, recounted how members of her tribe stopped fishing because they were afraid to go to jail and that, as a consequence, they lost their ambition to fish.[162] Mrs. Esther Ross, another Stillaguamish, stated when asked if she fished, that she would if she were allowed, but that she would not pay any big fine to the State.[163]

Mr. Calvin Peters, a Squaxin, told how the State has harassed his people and said, AI think it would be fair to say that a lot of Indians feel now that rather than have to go through this type of harassment, they don't ever go fishing in what we consider our usual and accustomed way. [164]

Mr. Calvin Joseph Andrews, a Skokomish, stated that the reason he stopped fishing was that the state stopped him when he fished off the reservation where there are better fish.[165]

Mrs. Bernice White, a Muckleshoot, graphically told how when she was a child, she and her people used to fish in the rivers and divide up the fish, but that this was all ended when the state came in and made mass arrests and put a stop to it. She went on to explain how current attempts of her tribe to fish off the reservation are thwarted by the State.[166]

Mr. Hillary Irving, a Makah, succinctly stated in response to a question as to why his people did not fish any more on certain rivers that they stopped because of state regulation.[167]

Mr. Bill Frank, Jr., a Nisqually, told of how his fishing gear had been confiscated several years ago and was still being held by the Department of Game.[168] He also recalled that the Department of Game would tear nets out of the river with grappling hooks and use knives to cut up nets to remove them.[169] In addition, the State also has taken boats and motors from him.[170] Mr. Frank explained that he never has been notified of any judicial proceedings in which any of the property that had been seized from him was to be declared confiscated or forfeited.[171]

Mr. Forrest Kinley, unqualifiedly told of how the State has dealt with Indians claiming treaty fishing rights:

> I think that the State of Washington has deprived our people of a livelihood through harassment and restrictions in our accustomed fishing grounds to where that we could not compete with non-Indians in commercial fisheries.
>
> There was no financing, no nothing for us. I think that our way of fishing in the rivers you just take a good look at the State of Washington. On every river that we tried to reserve these rivers for our people, we have been harassed. We have been fished out in front.
>
> There has been overfisheries in front of every one of these rivers. This type of harassment has gone on all through my life.[172]

Mr. Chris Penn, a Quileute, was asked if the State ever interfered with the shipment of steelhead which the Indians caught. He responded, it is all the time. [173] He also explained that the Game Department still has nets that it has taken from him.[174]

Mr. Lawrence Boome, an Upper Skagit, testified that whenever they get close to the river they are watched, and if they set a net, they are immediately arrested.[175] He also said that fishing regulations made by the tribe were never put into effect because the Indians were not allowed by the State to fish in accordance with the regulations.[176]

The testimony of James Enick, a Sauk-Suiattle, perhaps best explicates the effect the state's regulatory activity had on Indian fishermen:

> Q. Do you feel that the Department of Fisheries or the Department of Game has interfered with your ability to take fish for your personal use?
>
> A. I think they have.
>
> Q. Could you tell me how?
>
> A. Well, they stopped us from fishing.[177]

The evidence presented to the District Court clearly established that the salmon available for harvest by Washington fisheries are not sufficient to meet all demands. It is, therefore, necessary for the fishing activities of Indians and non-Indians to be regulated in order to assure that conservation of the fishery resources is achieved.[178]

The Department of Fisheries requested the Court to, Quantify the treaty right by reference to an objective, definite standard which 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. [179] In its Post Trial Brief[180] and in argument with the District Court, Fisheries proposed, one-third of the runs originating in the rivers where Indians fish as a fair share for the tribes.[181] The tribes, on the other hand, argued that the treaties were intended to preserve the Indian livelihood in an amount sufficient to satisfy their needs. The test therefore should not be a percentage of the harvest but should be the full extent of tribal needs, an analogy to water rights in Winters v. United States, 207 U.S. 564 (1908).[182]

Faced with these arguments, the District Court declared that non-treaty fishermen and treaty Indian fishermen, should each collectively be given an opportunity to harvest up to 50 percent of the available resource, after deducting number of fish actually caught on Indian reservations or used in the Indian diet or tribal ceremony. This, the Appellate Court felt, would best effectuate the intention of the parties to the treaty had a partition of the Ain-common fishing right been necessary at that time.[183]

D. POST-DECISION REMEDIES OF THE U.S. DISTRICT COURT

The District Court's efforts to make a fair accommodation between treaty and non-treaty fisheries can be divided into two categories, (1) assuring recognition of the interests of treaty Indian fisheries in the State's regulatory and promotional programs, and (2) providing a fair division of opportunities to enjoy fish harvesting. The first may accurately be described as a strategy to achieve cooperation.

1. Cooperative strategies.

In 1974, the District Court noted that the evidence revealed a root cause of the long dissension between treaty Indians and settlers; an almost total lack of meaningful communication on the problems.[184] The Court set about remedying that from the outset, seeking to bring into the case, either as parties or as amicus curiae, all organizations having or claiming any justiciable interests in treaty fishing rights in the Western District of Washington. Non-Indian commercial fishermen exhibited little interest in participating. Two loosely-organized associates of sportsmen[185] moved to intervene, as did the Washington Reefnet Owner's Association.[186] Meanwhile, pursuant to stipulations,[187] the District Court granted the intervention motions of the Departments of Fisheries and Game, and a number of treaty tribal governments.

Under state law, fishing privileges of non-treaty organizations and individuals are granted or withheld by the State, so the Court denied intervention by the assorted sportsmen's clubs. The unique position of the Reefnet Owners, whose acquisition and transfer of reefnet locations is not regulated by the State, was held to warrant limited intervention.[188] All interested organizations were invited to participate as amicus curiae, and many, including the Purse Seine Vessel Owner's Association, did so.[189] The Puget Sound Gillnetters Association made no effort to intervene[190] but did request that its attorney be included on the mailing list for service of pleadings; this was done.

A procedure to promote cooperation on fishing issues was established immediately after judgment in 1974. The court obtained the services of a technical advisor in fisheries biology, Dr. Richard R. Whitney. Parties were required to notify Dr. Whitney of fisheries disputes and attempt settlement without litigation.[191]

An Interim Plan,[192] (which remains in effect), requires state and tribal biologists to formulate fisheries management principles and to exchange data. On October 8, 1974, the Court entered the Order for Program to Implement the Interim Plan,[193] a schedule for exchanging information and resolving new issues. These ground rules were further refined by briefing, hearings, and orders in 1975 and 1976, leading to establishment of a highly effective Fisheries Advisory Board.[194]The Advisory Board consists of a state representative (usually a delegate of the Director, Washington Department of Fisheries), an Indian tribal representative, and the non-voting Technical Advisor, Dr. Richard R. Whitney. The Advisory Board acts only by unanimous vote, and only on issues relating to the fish resource. Agreements reached are reported to the district court, and the matter is concluded. When agreement is impossible the aggrieved party may invoke the district court's continuing jurisdiction to seek redress.

The Fisheries Advisory Board has been successful in resolving many technical disputes which arise during the salmon fishery. Although fisheries biology is a specialized field it is an inexact science, so experts may disagree. Yet, of the 51 times the Board met in 1977, full agreement was reached on 33 occasions. Partial agreement was reached 14 times and the Board was unable to agree only 10 times. Of the first 100 meetings in 1978, the Board reached full agreement in 57 cases and partial agreement in 13. Eliminating multiple meetings on the same issue, the Board was unable to reach agreement in only 18 cases.

The Order On Certain Questions Re: Fisheries Management[195] aided the parties and the Board in the determining the fishing opportunity to be allocated between treaty and non-treaty fisheries, and in determining whether the parties have sufficient numbers of fishermen and fishing gear to be able to harvest the salmon made available to them. This order reduced the complexity of implementing the District Court's previous ruling dividing fishing opportunity. The Fisheries Advisory Board has also been able to identify and resolve questions regarding computing and recording salmon catches, and managing herring and steelhead trout fisheries.[196]

The District Court was not content to promote communication and agreement in narrow areas. Instead, Judge Boldt ordered the Fisheries Advisory Board to consider long range solutions, and required the State and the tribes to submit plans for resolution of persistent

disputes.[197] The parties' efforts to comply were not immediately successful, and some of the plans proposed were deferred for later consideration.[198]

By the end of 1976, the parties' agreements, through the Fisheries Advisory Board, and the Court's orders had covered many of the key areas for effecting a fair allocation of fishing opportunity, but had left unresolved some disputes over salmon spawning escapement goals, prediction of run sizes, and providing equitable adjustment when one party or the other was denied the opportunity to take up to 50 percent of the fish resource. These issues caused repeated motions for supplementary relief. Consequently, the District Court ordered the parties to submit further proposed remedial plans.[199]

After the parties and the Court's Technical Advisor had labored over alternate plans[200] for eight months, the State's authorized delegate to the Board, approved a rough draft of the management plan on July 13, 1977.[201] The agreement was refined in additional discussions. A report of the Court's Technical Advisor attached a copy of the agreed management plan, and this was adopted without material change by the District Court on August 31, 1977.[202] Dr. Whitney reported:

> The attached report . . . states the points now agreed upon by the Fisheries Advisory Board. I believe that this statement, which represents a lot of hard work on the part of many people, is as far as the parties can go this year in reaching agreement on the technical aspects of the salmon management plan. Naturally there are many points which both sides would like to see further refined. I recommend that the court adopt these agreed upon statements and order that they be implemented and encourage the parties to continue work to refine issues that may still be in dispute.[203]

At the hearing on adoption of the Management Plan the State raised no significant objection to the plan agreed upon by its representative in the Fisheries Advisory Board.[204] The State did, however, suggest that the court should adopt the parties' agreement as a means of avoiding possible collateral attacks in state court.

The Fisheries Advisory Board has continued to operate as a communications and negotiations mechanism. A technical team created by the Board has recently achieved agreement on nearly every aspect of the anticipated 1978 salmon harvest. In short, the district court has, with great success, remedied a root cause of the dissension which has plagued Washington fisheries.

2. Judicial apportionment of the opportunity to take fish.

Communication between Indian tribal governments and Washington state, and elimination of technical disagreements, have not ipso facto led to a fair division of the opportunity to take salmon. In 1974, the district court ruled that the State must provide tribes the opportunity to harvest up to one-half of the salmon runs which pass through traditional fishing areas. This clearly cannot be done unless one-half of the anadromous fish remain unharvested

and thus reach the usual and accustomed places. As the Court of Appeals said, Preserving the tribal opportunity requires limiting the non-tribal opportunity. [205] Both the district and appellate courts found that Washington's regulations typically permit most or all of the salmon runs to be harvested by non-treaty fishermen prior to the run's return to tribal fishing places, which are near the end of the salmon migration paths. Thus a key element of the apportionment was the requirement that the State of Washington,

> make significant reductions in the non-Indian fishery, as necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision, but . . . consistent with the concept of permitting the full harvest of fish.[206]

Despite the high degree of cooperation which has been achieved between the parties in other areas, defining the required reductions has often been beyond the capability of the Fisheries Advisory Board. Public and private resistance to reductions, and collusive state court proceedings, (initiated by non-treaty trade associations to obstruct the federal court proceedings), are the clear cause. Conflict over these reductions began the moment the district court's decision was entered in 1974; it persists to the present day.

The 1974 fishery is illustrative. In its Memorandum Decision on Plaintiff's Request for Determination and Injunction[207] the court found that the State of Washington had been unable to reduce the non-treaty fishery because of state court orders in Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, Washington Kelper's Association v. Tollefson, and Puget Sound Gillnetters Association v. Tollefson. The federal court noted that none of the state suits involved a full-scale evidentiary hearing. Affidavits of the litigants provided the only evidence and these were not subjected to cross-examination.[208]

The court further found that the treaty tribes had taken fewer fish both in terms of numbers, and in percentage of harvest, up to that point in the 1974 season than they had during the years preceding the judicial apportionment[209] in Final Decision No. 1. Presented with no other alternative by the State the district court enjoined the Superior Court of Thurston County from enforcing the temporary injunction issued in Puget Sound Gillnetter's Association v. Tollefson. This appeared to be the only means to prevent the carefully wrought decision of the federal court from being undone by a series of proceedings hardly resembling contested cases. [210]

The events of the 1974 season were an accurate portent. During the 1975 salmon fishing season the Department of Fisheries was again unable (or unwilling) to make adequate reductions to insure the treaty tribes a fair opportunity. The 1975 Joint Salmon Catch Report[211] shows that the tribes took 32 percent of Puget Sound origin runs (333,900 fish) while the non-treaty fishers took 64 percent (722,200 fish).[212] During the season a series of injunctive orders were issued because of the State of Washington's refusal to manage the steelhead, chinook, pink, sockeye, coho, and chum salmon runs in accordance with the 1974 federal decision.[213] The Game Department, in violation of the Washington Administrative Procedures Act and applicable federal orders, seized Muckleshoot Indian fish and nets on the Duwamish River. The federal court rejected the State's explanation that it was merely applying a preliminary state court order involving a different river and different parties.[214]

Chinook, pink, and sockeye salmon runs became the subject of several hearings when the Department of Fisheries refused to increase treaty Indian fishing opportunities on runs affected by the International Pacific Salmon Fisheries Commission.[215] The Purse Seine Vessel Owner's Association participated amicus in the federal litigation,[216] then sued in state court to forbid the Director of Fisheries from complying with the federal decision. As in the 1974, the district court was forced to enjoin the state court order.[217]

Stymied in the courts, the non-treaty fishermen simply chose to engage Ain a substantial fishery on the 1975 coho salmon run in direct violation of regulations issued by the State of Washington and order of [the] court. [218] The State of Washington did little to prevent these recurring violations. Citations were ordered thrown out by county prosecutors and local judges[219] and out of 300 citations issued to non-treaty fishermen, only one led to a penalty.[220]

During the 1976 salmon season the State of Washington again failed to adequately restrict its non-treaty fishermen as required by the Interim Plan of 1974, and it again attempted unilaterally to remove hatchery fish from tribal sharing.[221]The court responded to the state regulatory noncompliance in the Order Re: 1976 Coho Fishery.[222] The court also attempted to deter the widespread illegal non-treaty fishing by including a penalty provision in the order. Nevertheless, the illegal fishing continued and the State of Washington publicly announced its inability to control it.[223]

Although non-treaty fishermen took over 135,000 fish in violation of state regulations during the 1976 season,[224] and in spite of collateral attacks in state court, the district court's efforts to attain a fair division of fishing opportunity between the two parties moved a step forward in 1976 with the treaty tribes being allowed to harvest approximately 37 percent of the Puget Sound origin salmon runs[225] some 423,600 fish.

Throughout the 1974, 1975, and 1976 seasons, the district court relied on the State of Washington to adopt and enforce regulations enabling tribes to take a fair share of the salmon. Although the State and its administrative agencies were extremely uncooperative, and occasionally defied the district court's orders, they usually promulgated appropriate regulations in the end. By the beginning of the 1977 fishing season, however, it became clear that even grudging cooperation would no longer be forthcoming.

In June 1977, the Washington State Supreme Court decided Puget Sound Gillnetters Association v. Moos.[226] In this, and subsequent rulings,[227] the Supreme Court opined that neither state statutes nor the Equal Protection Clause permitted Washington to restrict non-treaty fishing in order to make fish available at Ausual and accustomed grounds and stations. Thus the State Supreme Court decisions gave the Department of Fisheries a basis for its refusal to provide the tribes with additional fishing opportunities.

In advance of the 1977 fishing season Washington adopted regulations with Amade no allowance [and] no exceptions for the Indian opportunity to harvest. [228] Furthermore, the State began enforcing general state fishing laws against treaty Indians in circumstances admittedly not based on conservation.[229] Under these circumstances the district court had little choice;[230] it

ceased its reliance upon the Department of Fisheries to obtain compliance with its previous rulings. Instead, the district court itself made the allocations of fishing opportunity between treaty and non-treaty citizens; it was actually a simple task.

The court applied the fundamental sharing principles previously affirmed by the Court of Appeals, to the agreed-upon run sizes of salmon of each river system. The number of fish which fishermen of each regulatory entity the State and the tribes would be given an opportunity catch was based on the unanimous report of a technical committee composed of fisheries biologists of all parties. The technical committee's report was approved by the designated representatives to the Fisheries Advisory Board.[231]

The court's task was further simplified as both treaty and non-treaty groups possessed the ability to harvest a full 50 percent of the chinook, coho, and chum salmon runs expected to return to usual and accustomed fishing grounds in Puget Sound. The allocation order, therefore, simply expressed the fishing opportunity to be accorded to each side in terms of the number of fish of each species in each region which the treaty and non-treaty fisheries could undertake to harvest. On the basis of the order, management biologists of the treaty tribes and the State of Washington could, and each did, design fishing regulations so that neither fishery would preempt the other.

Recognizing that Washington State Courts would probably refuse to enforce the restrictions[232] on non-treaty fishing which were implicit in the allocation, the district court, at the request of the tribes and the attorney for the State of Washington, entered a Temporary Restraining Order against all state-licensed fishermen, to prevent them from interfering with achievement of the court's order. The court required non-treaty fishermen to call the Fisheries hot-line, (a toll-free recorded message which has been operated by the Washington Department of Fisheries for several years), to ascertain whether or not the area in which they intended to fish was open to them. State licensees found fishing after having received actual notice of the court's orders were ordered to show cause why they should not be held in contempt of court. Several fishermen were convicted, but most eluded the federal enforcement officers. Although attorneys for several non-treaty fishing associations received copies of the pleadings requesting entry and implementation of an allocation order, they did not appear at any of the proceedings to protest the district court's actions.

After entry of the court's Temporary Restraining Order on August 31, 1977, the government moved for a ten-day extension. These pleadings were also served upon the attorneys for the State of Washington, the Puget Sound Gillnetters Association, and the Purse Seine Vessel Owners Association, in the usual manner.[233] But at the hearing on the preliminary injunction, representatives of the non-treaty fishing associations again failed to appear. The State of Washington opposed entry of the preliminary injunction, although the evidence clearly indicated that the State did not intend to make any reductions in non-treaty fishing in order to provide fishing opportunities to the treaty Indians.[234] State enforcement officers showed full knowledge, but little concern, over the fact that many of the state's licensed non-treaty fishermen were engaging in illegal fishing.[235]

After consideration of the evidence, U.S. District Judge Morrell Sharp, on September 22, 1977, entered a preliminary injunction against continued non-treaty fishing in violation of the allocation order, and ordered that a hearing be held to consider extension of the preliminary injunction on September 27th. Judge Sharp's injunction was served on the presidents of the Purse Seine Vessel Owners Association and the Puget Sound Gillnetters Association, on September 23, 1977.[236]

In addition, notice of the hearing to be held on September 27, 1977, was personally served on over 220 non-treaty commercial fishermen either by handing a copy to the individual or affixing a copy to the fishing vessel with which the fisherman might violate the order. Repeated radio voice broadcasts were made by the Coast Guard and others regarding the substance of the preliminary injunction, the events received widespread coverage in the major newspapers of Western Washington, and Federal official personally attended fishermen's meetings to read, explain, and distribute copies of the September 22nd order which set the hearing that was to follow.[237]

Despite the unprecedented publicity of the September 27th hearing, no non-treaty fishermen or representatives of the petitioner associations appeared to contest renewal of the preliminary injunction. Instead, the associations petitioned for a Writ of Prohibition or Mandamus from the U.S. Court of Appeals for the Ninth Circuit. After full briefing and hearing argument on two occasions, that court denied the writ.[238]

In argument before the Court of Appeals the non-treaty fishing associations were repeatedly asked by the judges whether they had attempted to intervene in the federal litigation. The attorneys for the Puget Sound Gillnetters Association candidly admitted that they had not attempted to intervene and made it clear that they did not wish to subject themselves to the power of the federal court.

Despite this stormy set of events, and a catch of some 183,000 illegal salmon by the non-treaty fishermen,[239] the district court's allocation order essentially accomplished its purpose. The treaty tribes harvested nearly 41 percent of the Puget Sound origin runs, some 682,800 fish.

During the 1978 season, the district court again allocated fishing opportunity, again based upon statistics agreed upon in the Fisheries Advisory Board.[240] After full hearings, at which non-treaty fishing associations and individuals participated, the court again entered orders requiring fishermen to call a hot-line to ascertain legal seasons.[241] Again, despite illegal fishing, the treaty tribes have obtained significant additional fishing opportunities. If the history of Washington's interference with Indian commercial fishing is a guide, the pattern is likely to continue.

[1] Ex. USA-20, Joint App. at 363.

[2] FF 3, Joint App. at 100.

[3] FF 6, Joint App. at 101; Final Pre-Trial Order (hereinafter FPTO), Sec. 3-33.

[4] Ex. USA 25, Joint App. at 356-57.

[5] FF 3, Joint App. at 100.

[6] FPTO Sec. 3-32.

[7] Ex. USA 20, Joint App. at 364, 370; Ex. USA 21, Joint App. at 399-404.

[8] Ex. MLQ-1 at 33; FF 7, Joint App. at 102.

[9] Ex. MLQ-1, Joint App. at 335, citing G. Hewes, Aboriginal Use of Fishery Resources in Northwestern North America (Unpublished Ph.D. Dissertation, Univ. of Calif., Berkeley, 1947) 127.

[10] Ex. JX-2a, Joint App. at 341-42.

[11] R. Whitebrook, Coastal Exploration of Washington 58 (1959).

[12] A. Pruter, Commercial Fisheries of the Columbia River and Adjacent Ocean Waters, in 3 Fishery Industrial Research, #3, U.S. Dept. of Interior, Bur. of Commercial Fisheries 17, 22 (1966).

[13] FF15, Joint App. at 106-07.

[14] FF 19, 17, 7, Joint App. at 108, 107, 102.

[15] FF8, Joint App. at 102-03; A. Pruter, Commercial Fisheries of the Columbia River and Adjacent Ocean Waters, supra n.12 at 27.

[16] Ex. MLQ-1 at 14; USA-20, Joint App. at 372.

[17] Tr. 1778-84.

[18] Ex. PL-11, Joint App. at 329.

[19] Ex. USA-20, Joint App. at 382.

[20] FF 62, Joint App. at 124-25.

[21] Ex. PL-41, Joint App. at 333.

[22] Ex. USA-21, Joint App. at 410.

[23] Id., at 413.

[24] P. Druker, The Northern and Central Nootkan Tribes, 247 (1951).

[25] Ex. USA-20, Joint App. at 376-77.

[26] See, Dictionary of the Chinook Jargon, Ex. G-29(a).

[27] FF 22, Joint App. at 110.

[28] Meeker, Pioneer Reminiscences, 208 (1905).

[29] Records of the Proceeding of the Commission to hold treaties with the Indian tribes in Washington territory and in the Blackfoot Country, Dec. 10, 1854.

[30] Ex. USA-20, Joint App. at 383.

[31] Fox Island Council, Aug. 4, 1856.

[32] Tr. 2381.

[33] Tr. 1963, 1875; see FF 20, 21, Joint App. at 109.

[34] Ex. USA-20, Joint App. at 383; see FF 26, 20, Joint App. at 112, 109.

[35] Ex. PL-15, Joint App. at 331.

[36] Ex. PL-9, Joint App. at 326.

[37] Ex. USA-20, Joint App. at 396; see also FF 21, Joint App. at 10.

[38] Ex. PL-11, Joint App. at 329. Stevens went on to make certain hearty observations regarding Indian fishing methods. These were erroneous. See Ex. USA-20, Joint App. at 383.

[39] 384 F. Supp. 312, 333, Joint App. at 71-72.

[40] D. Johansen, Empire of the Columbia 256-257 (1967).

[41] W. Lyman, ad., An Illustrated History of Skagit and Snohomish Counties, 121; 469 (1906).

[42] U.S. v. Taylor, 3 Wash. Terr. 88, 96-97.

[43] Argus Magazine (Dec. 22, 1900).

[44] Ex. JX-2a at 60; see FF 8, Joint App. at 102-03.

[45] See FF 76-76, 86, 131, Joint App. at 130-31, 134, 148.

[46] Laws of 1890, Sec. 4; see Ex. JX-2a, Table 25.

[47] A. Ziontz, History of Treaty Fishing Rights in the Northwest, 12 (Smithsonian Institute, 1977).

[48] First Annual Report of the Wash. State Fish Commissioner 18-22 (1890) hereinafter Commissioner's Report.

[49] See Ex. JX-2a, Table 25.

[50] Third Commissioner's Report 18-21.

[51] R. Barsh, The Washington Fishing Rights Controversy: An Economic Critique, 2, 42-43 (Univ. of Wash. 1977)

[52] Washington Sess. Laws, 266 (1891); Washington Sess. Laws, Ch. IX pp. 15-18 (1893).

[53] Wash. Sess. Laws, Ch. CXVII, Sec. 1 (1899).

[54] Ninth Commissioner's Report, 25, see also 26, 33-40 (1898).

[55] United States v. Alaska Packers Association, 79 F. 152 (D. Wash. 1897).

[56] United States v. Winans, 198 U.S. 317 (1905).

[57] 43 L. Ed. 1188 (1899).

[58] Teck, How Onffroy Made Princes, Bagley Notebook in No. 186, Univ. of Wash. Northwest Collection (Feb. 21, 1903).

[59] Wash. Sess. Laws Ch. CXVII, Sec. 8.

[60] 24-25 Fish Commissioner's Report 95, 171 (1914-1915); 26-27 Fish Commissioner's Report 83-84 (1915-1917); 28-29 Fish Commissioner's Report 163-4 (1917-1919).

[61] R. Rathbun, AA Review of the Fisheries in the Contiguous Waters of the State of Washington and British Columbia, Part XXV of Report of the Commissioner, U.S. Comm. of Fish and Fisheries, Year Ending 1899, 300-303.

[62] U.S. v. Winans, 198 U.S. 371, 381 (1905).

[63] Id., at 382.

[64] Ballinger's Annotated Codes and Statutes of Washington, Sec. 3349, 3351, 3353, 7382 (1897); Remington and Ballinger's Annotated Codes and Statutes of Washington, Sec. 5212, 5214 (1910).

[65] 10-11 Commissioner's Report (1899-1900).

[66] Letter, McGlinn to E. Sims (State Fisheries Board), Sept. 8, 1924. Board Correspondence, Washington state Archives Box 2 Bul. L-1.

[67] Letter, Governor Albert Mead to John Riseland, (Commissioner of Fisheries) May 19, 1906, and reply Crawford to Riseland, May 22, 1906. Mead Papers, Washington State Archives.

[68] Wash. Sess. Laws Ch. 247, Sec. 2 (1907). The legislation was modified in 1909, but with few exceptions the closure of fresh water fisheries was extended again and again and became a standard means of placing the burden of conservation on the last fishing groups, until 1974.

[69] C. Buchanan, Rights of the Puget Sound Indians to Game Fish, Washington Historical Quarterly, VI (Apr. 1915), 110.

[70] R. Rathbun, AA Review of the Fisheries in the Contiguous Waters of the State of Washington and British Columbia, Part XXV of Report of the Commissioner, U.S. Comm. of Fish and Fisheries, Year Ending 1899, P. 321.

[71] Mahan's Supplement to Ballinger's Annotated Codes and Statutes of Washing, Sec. 3351(d) (1903), see also 24-25 Commissioner's Report 18; (1913-1915); 26-27 Commissioner's Report 34-5, 37 (1915-1917); 30-31 Commissioner's Report 45 (1919-1921).

[72] 32-33 Report of the Washington State Department of Fisheries 10 (1921-1923), hereinafter Fisheries' Report.

[73] Ex. MLQ-1 at 21-22.

[74] 24-25 Fisheries Report 14-15, 35 (1914-1915); 28-29 Fisheries Report 3-6, 9-10 (1917-1919); 30-31 Fisheries Report 38-76 (1919-1921).

[75] 28-29 Fisheries Report 10-12, 15-16 (1917-1919).

[76] 24-25 Fisheries Report 7-9 (1913-1915).

[77] 28-29 Fisheries Report (1917-1919).

[78] Ex. USA-27b at 9-12.

[79] Id., at 12.

[80] Id., at 13-16; see Ex. USA 102, 103.

[81] Letter, Quileute Indian Council to State Fisheries Board, Jan. 22, 1927. Board Correspondence Washington State Archives, Box 3, Vol. L-21.

[82] Wash. Sess. Laws Ch. 31, Sec. 72 (1915).

[83] Wash. Sess. Laws Ch. 31, Sec. 42 (1915).

[84] Sess. Laws of Washington 656 (1911).

[85] Ex. JX-2a at 60.

[86] Wash. Sess. Laws Ch. 7 (1921).

[87] Pacific Fisherman's Yearbook 62 (1927).

[88] Annual Bulletin No. 40, Dec., 1940.

[89] 40-41 Fisheries Report (1929-1931).

[90] Ex. JX-2a at 63.

[91] See Ex. JX-2a at 64; Fig. 18.

[92] See FF 168, Joint App. at 161-62.

[93] Ch. 178, Wash. Laws, Ex. Sess. 1925.

[94] R. Barsh, The Washington Fishing Rights Controversy, supra, at 26.

[95] State of Washington, Department of Fisheries, Fisheries Statistical Report, 86 (1974).

[96] Crutchfield and Pontecorvo, The Pacific Salmon Fisheries: A Study of Irrational Conservation, 139-40 (1969).

[97] Dr. L. W. Whitlow, State's Sportsmens' Council, quoted in ANo Fish Traps 3(1) Washington's Sportsman 5 (1937).

[98] 28-29 Commissioner's Report 10 (1917-1919).

[99] Brennan, Confidential Report, Martin Papers.

[100] R. Barsh, supra at 38.

[101] State of Washington, 1973 Annual Report, Natural Resources and Recreational Agencies 20.

[102] State of Washington, Department of Fisheries, A catalogue of Washington Streams And Salmon Utilization, Vol. I, Puget Sound Introduction-01 (1975).

[103] Wash. Sess. Laws, Ch. 112, Sec. 31 (1949).

[104] Game Department Views the Indian Problem, 2(2) Washington Sportsman 11 (1936).

[105] State v. Tulee, 7 Wn.2d 124 (1941). The Court relief on State v. Towessnute, supra, and two later cases which rejected the Indian treaty right defense, State v. Meninock, 115 Wash. 528, 197 P. 641 (1921) and State v. Wallahee, 143 Wash. 117, 255 P. 94 (1927).

[106] Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

[107] Ex. JX-2a at 65.

[108] Washington Sess. Laws Ch. 183, 193, Sec. 5,15 (1947).

[109] Makah Tribe v. Schoettler, 192 F.2d 224, 225 (9th Cir. 1951).

[110] State v. Satiacum, 50 Wn. 2d 513, 314 P.2d 400 (1957).

[111] State v. McCoy, 63 Wn. 2d 421, 387 P.2d 942 (1963).

[112] AIndians on Warpath to Safe Fishing, Seattle Times (Feb. 10, 1959), p. 19.

[113] Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir.) cert. denied, 375 U.S. 829 (1963).

[114] This propaganda persists, see, eg. H. Williams and W. Neubrech, Indian Treaties B American Nightmare (Outdoor Empire 1977). The authors place part of the responsibility for non recognition of Indian rights on in-breeding and occasionally incest among tribal members. They explain that in aboriginal days there was a great deal of cross breeding among bands and tribes and that as a result, some Indians have treaty rights and many do not. Id at 47-48. (Neubrech, the author, was Chief of Enforcement for the Washington State Game Department for 25 years.)

[115] FPTO, Sec. 3-480.

[116] Hearings, Sub. Comm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 88 Cong. 2d Sess. 50-61; 76-84; 100-105.

[117] Years later the U.S. District Court reiterated this conclusion:

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. U.S. v. Washington, 384 F. Supp. 312, 338-39 n.26 (W.D. Wash. 1974), Joint App. at 81.

[118] American Friends Service Committee, Uncommon Controversy 110 (Univ. of Wash. 1970).

[119] Dept. of Game v. Puyallup Tribe, 70 Wn. 2d 245, 249 (1966) (hereafter, Game I).

[120] Id., at 249 n.3.

[121] This conclusion was later affirmed by the United States Supreme Court. The Court reiterated that the power of the State was to be measured by whether it was necessary for the conservation of fish citing Tulee v. Washington, 315 U.S. 681, 684 (1942). The U.S. Supreme Court was careful to point out that the right to fish outside the reservation was a treaty right that could not be qualified or conditioned by the State and that the measure of the legal propriety of regulations that could be applied to treaty fisheries in the name of conservation was distinct from the federal constitutional standard concerning the scope of the police power of the State. Puyallup Tribe v. Department of Game, 391 U.S. 392, 401 n.14 (1968).

[122] Washington State Department of Fisheries, The Off-Reservation Indian Fishery, in Working Draft: Ingredients of a 10-Year Plan (Olympia, 1965).

[123] Uncommon Controversy, supra, at 108-112.

[124] 302 F. Supp. 899 (D. Or. 1969).

[125] Id., at 905.

[126] Id., at 908.

[127] Id, at 911.

[128] R. Thomas, A History of the Salmon Fishing and Canning Industry on Puget Sound, Ex. MLQ-1, at 29.

[129] R. Barsh, Washington Fishing Rights Controversy and Economic Critique, supra, at 5.

[130] Bill Would Limit Number of Fishermen, Seattle Times (Feb. 21, 1959), 11.

[131] Patty, Washington Has Too Many Fishermen, Seattle Times (July 14, 1963) p. 32.

[132] G. Brown, Jr., Economic Implications of An Indian Fishery (1973) Ex. MS-1.

[133] R.C.W. 75.28.450 et seq.

[134] James Dolliver speaking to the Governor's Advisory Committee on Indian Affairs, July 10, 1969.

[135] The Legal Relationship Between Washington State and Its Reservation Based Indian Tribes, 1 (Olympia, Wn., Mar. 15, 1978).

[136] Steelhead, a species indigenous to the Pacific Northwest, had traditionally been harvested and relied upon by tribes as a major part of their diet and trade during the winter months. Until 1925, steelhead were not distinguished from other salmonids species, but since that time they have been set aside entirely for the hook and line sport fishery.

[137] FF 219, Joint App. at 180.

[138] FF 222, Joint App. at 181.

[139] FF 222, Joint App. at 181.

[140] FPTO, Sec. 3-428, 3-431, 3-436; Ex. USA-42; G-14, 10; Tr. 313, 331-332, 263, 288-89, 304-05.

[141] FPTO, Sec. 3-486.

[142] The Puyallup Tribe v. Dept. of Game of Wash., 391 U.S. 392 (1968).

[143] Department of Game v. Puyallup Tribe, 80 Wn. 2d 561, 571 (1972).

[144] FPTO, Sec. 3-485; FF 225, 226, 229-232, Joint App. at 183, 194-86.

[145] CL 46, Joint App. at 201.

[146] FPTO, Sec. 3-11, 3-12, 3-13, 3-15, 3-16, 3-17, 3-18, 3-20, 3-21, 3-24.

[147] FPTO, Sec. 3-427.

[148] Ex. USA-14, Tr. 430-38.

[149] FPTO, Sec. 3-440; Tr. 538-39, 553-56; Ex. JX-2(a) 238; PL-37; PL-78; G-18.

[150] FPTO 3-586.

[151] FPTO 3-598.

[152] FF 216, Joint App. at 179.

[153] FF 209, Joint App. at 175-176.

[154] FF 217, Joint App. at 179-80.

[155] FF 218, Joint App. at 180.

[156] FF 194-195, Joint App. at 170-171.

[157] FF 193, Joint App. at 170.

[158] The Legal Relationship Between Washington State and Its Reservation-Based Indian Tribes 12 (Olympia, Wn. 1977).

[159] Ex. PL-74; F-6; F-26; F-31; Tr. 4082-83.

[160] Tr. 3053; 2066-7.

[161] Ex. USA-20, p. 40, 42, Joint App. at 393.

[162] Tr. 2704.

[163] Ex. MS-7, p. 3.

[164] Ex. MS-1, p. 4.

[165] Ex. MS-3, p. 2.

[166] Ex. MS-8, p. 2.

[167] Tr. 2522.

[168] Tr. 2629.

[169] Tr. 2630.

[170] Tr. 2631.

[171] Tr. 2628.

[172] Tr. 3068-69.

[173] Tr. 3194.

[174] Tr. 3198.

[175] Tr. 3252.

[176] Tr. 3269.

[177] Ex. MS-10, p. 3.

[178] FF 181, Joint App. at 166.

[179] Fisheries Pretrial Brief, (docket No. 348), pp. 8, 22; see also p. 2.

[180] Post-trial Brief of Fisheries, (docket No. 399), p. 36.

[181] Tr. 4384.

[182] See, e.g., Muckleshoot, et al., Pretrial Brief, (docket No. 327), pp. 8-11.

[183] U.S. v. Washington, 520 F2d 676, 688, Joint App. at 52.

[184] 384 F. Supp. at 329, Joint App. at 66.

[185] Washington Sportsmen's Council, (docket No. 25) and Committee to Save Our Fish (docket No. 34).

[186] Docket No. 39.

[187] Stipulation for Intervention, Feb. 17, 1970, docket No. 37; Stipulation, July 26, 1970, docket No. 79; Stipulation, May 21, 1974, docket No. 568.

[188] Hearing, May 25, 1972.

[189] Eg. docket No. 172.

[190] On March 15, 1974, after entry of the District Court's judgment, the Purse Seine Vessel Owner's Association moved to intervene (docket #495); this was denied. The Washington State Commercial Passenger Fishing Vessel Association also, on May 31, 1974, sought intervention. This was denied on July 18, 1974, without prejudice to a renewed motion if relief could not be obtained in state court, Joint App. at 426-27. Neither group appealed.

[191] Docket #869.

[192] 384 F. Supp. at 420, Joint App. at 229-31.

[193] Joint App. at 437.

[194] See, eg. Transcript of hearing 10/25/75 (R. Vol. 20, p. 2-3); Order Establishing Fisheries Advisory Board (R. 809); Order Re Revising Fisheries Advisory Board (R. 888); United State Memorandum re: Rules of Procedure for Fisheries Advisory Board (R. 890); Memorandum Re: Court Advisory Board (R. 899); Affidavit of Phil Rodger Re: Rules of Procedure of Fisheries Advisory Board (R. 916); and Order Re: Rules of Procedure Fisheries Advisory Board and Resolution of Disputes (R. 1015). (Citations are to the Court of Appeals record in 77-3654).

[195] Joint App. at 456.

[196] See, Court of Appeals Record in No. 77-3654, R. 778, 816, 928, 942, 943, and 950.

[197] See eg., in record of Court of Appeals No. 77-3654, Order Re: Submission of Long Range Plan (R. 824); Notice of Fisheries Advisory Board Meeting (R. 826); Order Re: Hearing on Long Range Plan (R. 827); Minute Order Re: Hearing on Long Range Plan (R. 829); Report on Joint Responses to Questions Re:Salmon Management (R. 830); United States Memorandum re: Answers to Questions on Fisheries Management (R. 836); and Order on certain Questions Re: Fisheries Management (R. 843).

[198] See in record of Court of Appeals No. 77-3654, Report on Long Range Plan (R. 851); State Management Guidelines for Puget Sound and Coastal Area (R. 857); STOWW Request for Determination Re: Long Range Plan (R. 866); Motion of Tribes to Defer Consideration of Management Plan (R. 878); Affidavit of Alan Stay Re: Long Range Plan (R. 879); Letter Re: June 28 Meeting Re: Management Plan for Salmon (R. 915).

[199] R. 1013, 1021 In record of Court of Appeals No. 77-3654.

[200] See, in Record of Court of Appeals No. 77-3654, Outline of Unified Indian Salmon Harvest Management, 1977 (R. 1022); Joint Harvest Management Plan (R. 1030); Joint Management Plan, 1977 (R. 1031); Report of Meeting Convened by Chairman Re: Joint Salmon management Plan (R. 1041); 1975 Joint Salmon Catch Report for Case Area (R. 1042); Letter to Court from Dr. Whitney Re: 1975 Joint Catch Report (R. 1055); Draft Proposal for 1977 Catch

Monitoring (R. 1056); Progress Report on Development of Salmon Management Plan (R. 1059); Report of Fisheries Advisory Board Meeting (R. 1065); Puget Sound Tribes' Draft Proposal 1977 Joint Management Plan (R. 1067).

[201] R. 1216 in Record of Court of Appeals No. 77-3654.

[202] Memorandum Order Adopting Salmon Management Plan, A-61 in Petition No. 78-119.

[203] R. 1232 in Record of Court of Appeals No. 77-3654.

[204] Hearing August 30, 1977 at 25.

[205] A-13, Petition in No. 78-119.

[206] 384 F. Supp. at 420, paragraph 5, Joint App. at 230.

[207] Joint App. at 427.

[208] Joint App. at 431.

[209] Joint App. at 430.

[210] R. 671 in Record of Court of Appeals No. 77-3654. The district court did not interfere with the state court action Commercial Passenger Fishing Vessel Assn. v. State, (now before the Supreme Court in No. 77-983) finding that the State's action there would not make additional fish available to treaty tribes and noting that some tribes had opposed the State's action from the outset. Although the State effectively prevailed when the case was dismissed as moot, it moved for rehearing, leading to the second decision of the Washington Supreme Court.

[211] R. 1042 in Record of Court of Appeals No. 77-3654.

[212] This excludes the much larger Canadian-origin runs which also pass through the usual and accustomed places of some 9 tribes. On these runs the tribes took merely 1.7% (62,300 fish) which non-treaty fishers harvested 98.3% (3,537,200 fish). However, the tribes did not then, nor do they now, assert that they have sufficient fishing Apower (boats, gear, experience) to harvest 50% of the Canadian origin runs.

Technically, these aggregate percentages are not a correct measure of compliance with the court's orders. The off-reservation fishing opportunities on each separate run must be equally divided, so catch aggregation obscures minor allocation inequities.

[213] See Hearings Jan. 9, 14, 1975, R. 745; 752, 756, 770, 775, 782, 790, 797, 799, and 806 in Court of Appeals Record No. 77-3654.

[214] Joint App. at 444.

[215] See 573 F.2d 1118, A-29 in Petition No. 78-119.

[216] See R. 756 in Court of Appeals Record in No. 77-3654.

[217] R. 772 in Court of Appeals Record in No. 77-3654.

[218] Joint App. at 450, paragraph 2.

[219] Joint App. at 521, 524-25 (Sgt. Lyle Nelson).

[220] Joint App. at 499 (Hon. George H. Boldt).

[221] See Memorandum Decision Granting Preliminary Injunction, Aug. 13, 1976, docket No. 2344.

[222] Joint App. at 466.

[223] See docket entries summarized in Joint App. at 602-03 paragraphs 4-9.

[224] Finding of Fact 26, App. C-9 in Petition No. 78-139.

[225] This excludes the larger Canadian origin runs where the tribes did not have the ability to take 50% of the harvest. Even on these runs the treaty harvest increased to 151,100 fish, 7.3% of the American harvest.

[226] 88 Wn.2d 677, 565 P.2d 1151 (1977), App. C in Petition No. 77-983.

[227] Purse Seine Vessel Owners Association v. Moos, 88 Wn.2d 799, 567 P.2d 205 (1977); Washington Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wn.2d 276, ___ P.2d ___ (1977), App. B in Petition No. 77-983.

[228] Joint App. at 507 (Phillip R. Mundy), see Joint App. at 500-10.

[229] Joint App. at 512 (Gordon Sandison), see Joint App. at 510-14.

[230] See FF 1-5 in Memorandum order and Preliminary Injunction, Aug. 31, 1977, App. A-36 et seq. in Petition No. 78-119.

[231] Memorandum Order and Preliminary Injunction at p. 7, App. A-42-43 in Petition No. 78-119.

[232] See Joint App. at 514-15 (James M. Johnson).

[233] R. 1167 in Court of Appeals Record in No. 77-3654.

[234] See, Joint App. at 519 (Winfield Miller, Chief of Fisheries Patrol).

[235] See, eg., Joint App. at 599 (A. Dennis Austin).

[236] R. 1160-61 in Court of Appeals Record No. 77-3654.

[237] See affidavits attached as Ex. D, E, F, G, H, I to Supplemental Memorandum of Respondent Puget Sound Indian Tribes, Oct. 13, 1977, Court of Appeals No. 77-3129.

[238] Puget Sound Gillnetters v. U.S. District Court, 573 F.2d 1123, App. A-1 in Petition No. 78-119.

[239] FF 26, June 6, 1978, App. C-9 in Petition No. 78-139.

[240] See, Joint App. at 610.

[241] Preliminary Injunction Re: Enforcement of Limitations on Non-treaty Salmon Fisheries for 1978 and Subsequent Seasons, June 6, 1978, App. C-1 in Petition No. 78-139.