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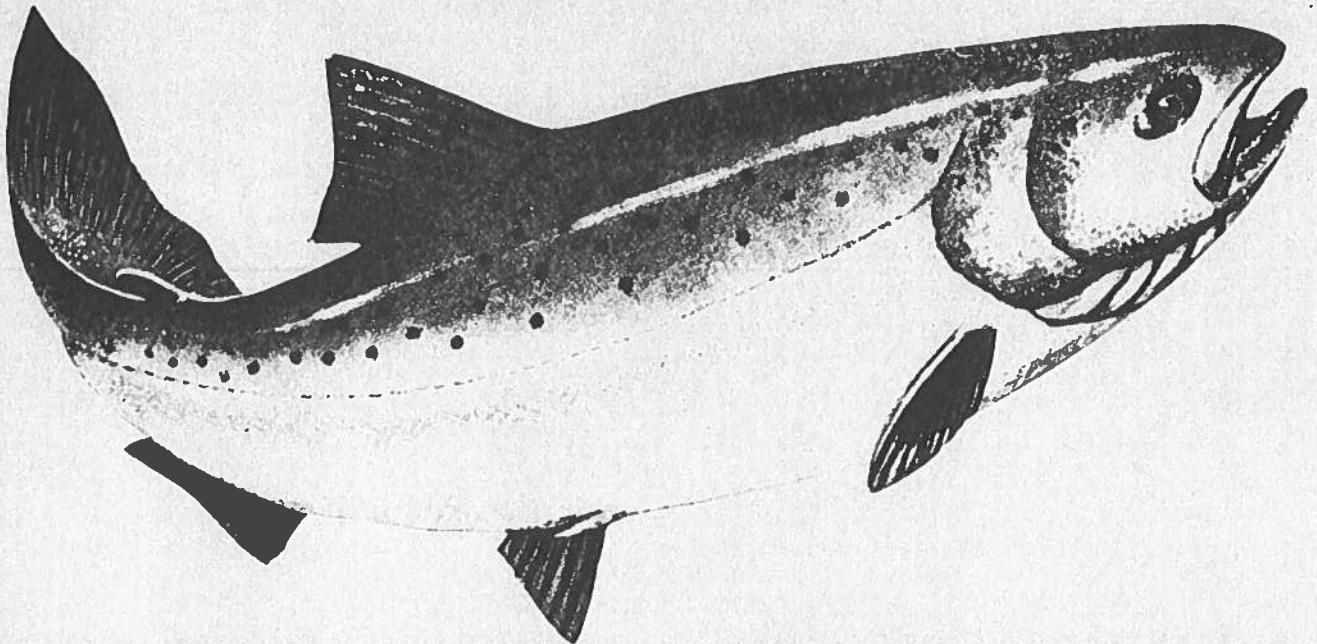


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INDIAN FISHING RIGHTS IN THE PACIFIC NORTHWEST



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INDIAN TREATY FISHING RIGHTS IN THE PACIFIC NORTHWEST

The question of off-reservation fishing rights of Treaty Indians in the Pacific Northwest and the degree - if any - to which those rights may be regulated by the State governments, has been a matter of deep and continuing controversy for over a century.

The major recent development in this longstanding dispute is the landmark decision of U.S. District Judge George H. Boldt in the case of United States v. Washington, 384 Fed. Supp. 312 (W.D. Wash, 1974) affd. 520 F 2d 676 (9th Cir, 1975) decided in Tacoma, Washington, on February 12, 1974, in a lawsuit filed more than three years earlier.

In the course of his 209-page decision, Judge Boldt noted that:

". . .More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. . ."

". . .in the past, root causes of treaty dissension have been an almost total lack of meaningful communication on problems of treaty right fishing between State, commercial and sport fishing officials and non-Indian fishermen on one side and tribal representatives and members on the other side, and the failure of many of them to speak to each other and act as fellow citizens of equal standing as far as treaty right fishing is concerned. . ."

Judge Boldt expressed confidence that "the vast majority of the residents of this State, whether of Indian heritage or otherwise, and regardless of personal interests in fishing, are fair, reasonable and law abiding people. . .and they will accept and abide by those (treaty rights) decisions even if adverse to interests of their occupation or recreation activities. "

Court decisions have consistently held that these rights became the supreme law of the land protected by Article Six of the United States Constitution, "and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." Therefore they could not be interfered with by States. Thus treaty Indians had a different status than non-Indians whose fishing activities are subject to whatever policies or reasonable restrictions the States see fit to impose.

Furthermore, the Indian treaties were not a grant of rights to the Indians, but rather a grant of rights from them to the non-Indians, with the Indians reserving to themselves those rights not granted. The treaties specifically protect those reserved rights. These basic principles of Federal law, which undergird the decisions in Indian treaty rights cases, have been the subject of much misunderstanding and some non-Indians have found them difficult to accept.

CHRONOLOGY OF RECENT LEGAL DEVELOPMENTS

There follows here a brief chronology of recent legal developments in the treaty fishing rights dispute involving cases in Washington, Oregon and Idaho.

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| Nov. 4, 1963 | Washington Departments of Fisheries and Game filed suit in State Court to establish state authority to prohibit net fishing by Indians in off-reservation river fisheries. Indians later appealed adverse rulings to U.S. Supreme Court. |
| May 27, 1968 | U.S. Supreme Court, in <u>Puyallup Tribe of Indians v. Department of Game</u> , held that State of Washington could restrict Indian net fishing when necessary for conservation of resource and returned case to State Court to determine if existing regulations were "necessary". (391 U.S. 392) |
| Sept. 13, 1968 | United States filed suit in Oregon U.S. District Court against State of Oregon seeking judgment and injunction to enforce Indian off-reservation fishing rights in the Columbia River watershed. |

- May 8, 1974 U.S. District Judge Belloni rendered supplemental decision in U.S. v. Oregon holding that Indian treaty fishermen are entitled to have the opportunity to take up to fifty percent of the harvest of the spring chinook destined to reach the tribes' usual and accustomed fishing places on the Columbia River. Washington and Oregon appealed the decision to the Ninth Circuit Court of Appeals.
- Nov. 26, 1974 U.S. Ninth Circuit Court of Appeals held that under the treaties the Indian tribes reserved the authority to regulate tribal fishing at all usual and accustomed places on or off the reservation. The State has limited authority to regulate in the interest of conservation but tribes have broader authority to prescribe conditions under which members may exercise the treaty right and may arrest and prosecute members for violation. Settler v. Lameer, 507 F 2d 231.
- Dec. 19, 1974 Pierce County Superior Court held that Puyallup Indian treaty right does not extend to steelhead artificially propagated by the Washington Department of Game and that the Tribe must allow these fish to pass through the Puyallup Reservation to fishing areas open to sportsmen. Tribe appealed to Washington Supreme Court.
- Jan. 14, 1975 Judge Boldt enjoined Washington from excluding hatchery-produced steelhead from the Indian treaty entitlement on rivers other than the Puyallup pending final determination of that question by a Federal Court.
- April 18, 1975 Judge Boldt expanded U.S. v. Washington decision to extend to herring fishing rights. Approved sac-roe herring fishery management plan for 1975 which allocated the off-reservation commercial catch in equal shares to Indians and non-Indians.
- June 4, 1975 U.S. Ninth Circuit Court of Appeals affirmed Judge Boldt's decision in U.S. v. Washington; rehearing denied July 23, 1975. (520 F 2d 676)
- July 19, 1975 U.S. State Department disapproved portion of International Pacific Salmon Fisheries Commission regulations which divided authorized U.S. fishing time among specific types of gear. Judge Boldt ordered State to permit Indians to fish with any type of gear during entire period open to U.S. fishermen under International Pacific Salmon Fisheries Commission regulations.

- 2/13/76 Judge Boldt approved an Interim Plan for Management of Herring Fisheries as agreed to by the parties.
- 4/8/76 Washington Supreme Court held that Indian rights did not extend to artificially propagated steelhead and that the state could restrain on-reservation fishing to enforce this holding in Puyallup Tribe v. Department of Game (Puyallup III).
- 6/15 and 6/22/76 Judge Belloni enjoined the State of Washington from permitting further non-Indian ocean commercial troll fishery until July 1, 1976, to ensure sufficient return to Columbia River for Indian fishery.
- 6/27/76 Criminal contempt charges were filed against 48 Washington trollers and buyers charging violation of above Injunctions.
- 8/13/76 Judge Boldt granted a preliminary injunction against exclusion of hatchery fish in determining Indian share. State's appeal subsequently dismissed on procedural grounds by Ninth Circuit Court of Appeals on April 5, 1977.
- 8/19/76 Judge Boldt ruled that the International Pacific Salmon Fisheries Commission allocation closure applied to Indians, but an equitable adjustment from other runs would be allowed to compensate Indians for the lost opportunity to catch fish.
- 11/27/76 U.S. Supreme Court agreed to review state court assumption of on-reservation jurisdiction in Puyallup III.
- 12/15/76 Judge Boldt approved a pretrial schedule for Phase II of U.S. v. Washington (Hatchery fish inclusion and habitat impairment); trial tentatively set for January 8, 1978.
- 12/22/76 Judge Boldt held that state prohibition against use in treaty Indian fishery of vessels acquired and resold under federally-funded state Buy-Back Program violated U.S. v. Washington. State appealed.
- 2/28/77 Judge Belloni approved a five-year management and allocation agreement regarding upper Columbia River fish runs reached by the parties to U.S. v. Oregon.
- 3/1/77 Federal Government assumed fishery management jurisdiction over off-shore 200-mile zone pursuant to Public Law 94-265. Pacific Fisheries Management Council is to develop a management plan subject to approval by Secretary of Commerce.
- 3/7/77 Judge Belloni granted U.S. Motion to dismiss contempt charges against those accused of violating his Injunctions of June 15 and June 22, 1976, supra.

UNITED STATES V. WASHINGTON

The suit was filed against the State of Washington on September 18, 1970, in the U.S. District Court, Western Washington District, Tacoma, by the U.S. Department of Justice at the request of the U.S. Department of the Interior, acting on behalf of the United States and as trustee for several Indian Tribes.

During the initial trial 14 Indian Tribes 1/ participated in the case as Plaintiff and the Washington Department of Fisheries and the Washington Game Commission, 2/ their respective directors, and the Washington Reef Net Owners Association were included as defendants. Following the initial decision 13 additional Tribes were granted intervention to participate in the continuing jurisdiction proceedings. 3/

Several other interests, including non-Indian commercial and sports fishermen's groups, also sought to intervene or participate. These interests were not admitted as parties, but were allowed to participate as friends of the court.

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- 1/ The tribes were Hoh, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, Skokomish, Lummi, Quinault, Sauk-Suiattle, Squaxin Island, Stillaguamish, Upper Skagit River and Yakima Nation.
- 2/ Under Washington State law, the Fisheries Department regulates all food fish, including salmon, while the anadromous steelhead trout is regulated by the Game Commission.
- 3/ These Tribes were Lower Elwha, Nooksack, Port Gamble, Suquamish, Swinomish Tribal Community, Tulalip, Duwamish, Jamestown Clallam, Samish, Snohomish, Snoqualmie, Steilacoom and Swinomish Tribe (Aboriginal). As of this writing determination of treaty rights has been made only for the first six of these. However, Judge Boldt has allowed four of the unrecognized Tribes to fish provisionally under regulations of recognized Tribes pending final determination of their treaty rights.

On June 4, 1975, the Ninth Circuit Court of Appeals affirmed all major aspects of Judge Boldt's decision. It held that in giving up their land the Indians had not given up their right to fish. That right was protected by the United States.

"They relinquished millions of acres of their lands, retiring to reservations carved out of these lands. But they expressly reserved their indispensable rights to fish at their traditional places. The United States obtained for the settlers and for the subsequently admitted state only the right of equal access to these fishing grounds. The treaty provision at issue grants the State's other citizens only a limited right to fish at treaty places; it thus is "express federal law" preempting all state regulation of Indian fishing at the treaty fishing grounds, except as hereafter stated."

The Appeals Court also affirmed the State's limited right to regulate for conservation, as well as the provisions of the District Court's decision allowing Tribal regulation where the appropriate conservation requirements were met.

One of the prime concerns of the State was that affirmance of the main decision would lead to the court acting as a super regulating body. The Court of Appeals felt, however, that this was a case justifying the continued intervention of the Court. The concurring opinion of Judge Burns said:

"The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal

The Court of Appeals pointed out that the treaties were entered into between the United States and Indian tribes "on the basis of formal equality." As a result "the State shares its rights in those fisheries with another party." "An attempt to partition equitably rights which these parties were to hold in common must reflect this initial equality." The Court further said that although the State's management program "may appear sound and commendable" the State "may not force treaty Indians to yield their own protected interests in order to promote the welfare of the State's other citizens."

The Indian tribes reserved a right to take fish. The State, in allowing non-Indians to fish, cannot act to diminish that right. It must curtail non-Indian fishing which interferes with that right.

Judge Boldt held that "in common with" means sharing equally the opportunity to take fish that would normally reach the off-reservation usual Indian fishing places. Thus each party--the Indians on the one hand and the non-Indians on the other--is entitled to the opportunity to harvest up to 50% of the harvestable numbers of such fish.

This has been one of the most widely discussed provisions of the Court's decision. Several features of it should be noted. First, the Court strictly limited the fishing right to those fish not needed for maintaining the runs. "Harvestable fish" are only those above the numbers needed to assure adequate escapement for spawning. Second, the fish to be shared include the fish that would reach the Indian usual fishing grounds if they hadn't been caught previously by fishermen who are subject to State control. This includes some

Belloni's order of May 1974. In August 1975 Judge Belloni ordered the two States, with the cooperation of the tribes, to promulgate a comprehensive plan to assure the treaty Tribes an opportunity to take up to 50% of the harvest of Columbia River salmon destined to reach the Indians' fishing grounds which the states permit to be taken by all users.

STATE REGULATION

As noted earlier, the Supreme Court in the Puyallup cases established the principle that the State has limited power to regulate off-reservation fishing by Indians "to the extent reasonable and necessary for conservation of the resource." Such regulations, however, cannot discriminate against the Indians, and the State is required to find "the least restrictive means" of regulating Indian fishing in the interests of conservation. "Conservation" in this context was defined by Judge Boldt as the perpetuation of a particular run or species.

In his decision, Judge Boldt said that because of the Supreme Court holdings he could not accept the Indians' claim to total immunity from state control. He also rejected the State's claim to sole determination of how the fishery resource shall be utilized. Instead, the decision strongly encourages the State and the tribes to work together as partners in the regulation of the harvest of this resource which, under the treaty, is to be shared "in common."

Judge Boldt, while upholding the State's right to regulate for conservation, pointed out that such regulation "is highly obnoxious to the

FRASER RIVER SOCKEYE AND PINK SALMON RUNS

One of the major fisheries in the case area is on the runs of sockeye and pink salmon destined for Canada's Fraser River, but first passing through United States waters. Harvest of these fish is regulated by the International Pacific Salmon Fisheries Commission set up under a treaty between the United States and Canada. This six-member commission consists of three members from the United States, appointed by the President, and three from Canada. It recommends initial regulations annually which, to the extent approved by each Government, are then adopted and enforced by domestic authorities of each country. In the United States the normal pattern is for the State of Washington to adopt the approved regulations as state regulations. The International Commission is charged only with assuring an adequate escapement and allocating the allowable catch of these two runs equally to each country. The international treaty is not concerned with how each country catches or divides its share.

Judge Boldt held that the treaty Indians are subject to regulatory restrictions required of the United States by the international treaties; but he also held that the international treaties did not appear to be inconsistent with the Indian treaties. The United States State Department (which supervises our commissioners' actions under the international treaty) said, and Judge Boldt agreed, that Washington could and should limit non-Indian fishing within the periods allowed by the International Commission so as to give Indians a more equal opportunity to catch their share of U.S. entitlement as prescribed by the Court's basic decision. In 1975 this view was disputed by the State and particularly by a lower State court which held that the Director of

In 1925, the Washington State Legislature declared steelhead a game fish, although commercial harvest of this species was not totally prohibited until 1933. Oregon also classifies the steelhead as a game fish, although until 1975 it permitted the sale of steelhead caught "incidentally" while fishing commercially for salmon.

Today steelhead are managed and propagated by the States exclusively for recreational fishing and the fishing occurs almost exclusively in the rivers. The popularity of the sport has mushroomed, especially since World War II.

The State management program is financed primarily from sport license fees, although Federal funds and certain mitigation funds are also used.

To the dedicated "steelheader" the taking of this anadromous trout by nets or traps borders on sacrilege. But to the Indian, to whom fishing is not a sport but a means of livelihood, net fishing for steelhead is a traditional expression of his cultural heritage that has strong economic and religious overtones. For a number of Western Washington tribes it provides a source of income and subsistence during winter months when few salmon are available.

Both Judge Boldt and Judge Belloni have applied the Supreme Court holding that treaty rights extend equally to steelhead and salmon and that both may be taken commercially by treaty Indians at "the usual and accustomed places."

- d. Readily available fisheries experts to advise on regulation.
- e. An officially approved membership roll.
- f. Membership certification and appropriate I.D. cards with photograph.

The conditions specified are:

- a. Adopt full and complete tribal fishing regulations, including reasonable and necessary conservation restrictions, after consultation with State agencies.
- b. Permit State monitoring of off-reservation Indian fishing.
- c. Provide on and off-reservation catch reports to State.

Judge Boldt found that the Yakima and Quinault Tribes are now qualified for self-regulation and that the achievement of this status is potentially within the capability of every Plaintiff Tribe.

The decision stressed that state regulation for non self-regulating Tribes is strictly limited to specific measures which have first been found, to the satisfaction of the affected Tribes or the Court, to be "reasonable and necessary to prevent demonstrable harm to the actual. . . perpetuation of a particular run or species of fish." (This provision has been suspended during the period of the Interim Plan discussed below.)

INDIAN MANAGEMENT OF THE FISHERY RESOURCE

Conservation of wildlife has been an important part of the Indians' religious and cultural heritage for centuries. In the past the Tribes' survival often depended upon preservation of the salmon runs. Today fishing still provides an important part of their livelihood and it is in their own economic self-interest to manage the resource wisely.

The Quinault National Fishery Hatchery, operated by the U.S. Fish and Wildlife Service, is now in full production on the reservation and will help build back the runs lost by destruction of spawning areas, to the benefit of both Indian and non-Indian fishermen. National Fish Hatcheries also are under construction on the Makah and Warm Springs Indian reservations.

Several Tribes, including the Tulalip, the Quinault and the Squaxin Island, have operated salmon rearing projects for years. The Lummi Indians in northern Puget Sound have helped re-establish runs in the Nooksack River through their aquaculture project which has been financed by tribal money, private funds and Federal grants.

In some cases, for example, the Yakima, Umatilla, Warm Springs, Quinault, and Skokomish Tribes, Indians have shared their reservation fishery resource with non-Indians through a permit system.

U.S. V. WASHINGTON INTERIM PLAN

On March 22, 1974, an Interim Plan that had been developed by both sides was approved by the court and placed into effect. The Interim Plan did not alter the rights declared by the court to belong to treaty Indians, but it did modify the duties of both the Indians and the State somewhat, in order that the rights of the Indians and the responsibilities of the State may eventually be fully realized. Tribes which are found to be self-regulating are not bound by the Interim Plan as long as they continue to meet the specifications and conditions established in the court's basic decision.

- 1) All parties were to prepare guideline principles for the regulation of the fishery;
- 2) Both the Tribes and the State agencies are to exchange data and proposed regulations on a fixed time schedule;
- 3) Closure of either the Indian or non-Indian fishery when such fishery had taken its share and such closure would benefit the other fishery and not result in a waste of harvestable fish;
- 4) Prompt and standardized catch reporting so as to improve both the timeliness and the accuracy of the available data;
- 5) An interim method allowing recently intervened tribes to fish after making a prime facie showing of treaty entitlement; and
- 6) An interim method for determining treaty entitlement to harvest non-anadromous fish pending final determination.

The providing for the sharing of data and for a schedule for the submission and discussion of proposed regulations among the affected parties were key elements to placing the Indian tribes near an equal footing with the State as each would have an opportunity to evaluate and comment on the other's regulations.

The key feature of the Boldt decision is its recognition that (in the words of the Court of Appeals) "the State shares its rights in those fisheries with another party." Because of this the Boldt decision prescribes for a scheme of co-management of the resource that is the subject of this shared right. Such a co-management concept is not new to the Pacific

together the Bureau of Indian Affairs, the U.S. Fish and Wildlife Service and the Indian Tribes have developed individual identification cards with the holder's picture and signature which have been issued to all authorized Indian fishermen in the case area. They have also developed and put into operation a uniform method of fishing vessel identification and identification tags for Indian fishing gear. Tribal membership rolls are being up-dated, a standardized fish receiving ticket has been developed by the Washington Department of Fisheries, the U.S. Fish and Wildlife Service and the tribes to record treaty Indian commercial catch data. In some instances joint enforcement patrols by State, Tribal and Federal fisheries or game officials have been undertaken.

NONANADROMOUS FISH

The original decision in U.S. v. Washington was limited to the treaty rights as they applied to salmon and steelhead. However, the Court recognized that Indian treaty rights are not limited to these species. In subsequent proceedings the Court approved a program for safeguarding the treaty rights as they apply to the herring fisheries. The joint and closely monitored program for the sac-roe herring fishery in northern Puget Sound was placed in operation in 1975 under an agreed-upon-set of joint management principles. The committee, consisting of the Court's Fisheries Technical Advisor, a biologist of the Washington Department of Fisheries and a biologist of the U.S. Fish and Wildlife Service, monitored this fishery on a daily basis and recommended necessary changes in the State and Tribal regulations to carry out the equal sharing principle.